



Training Key® # 573

Investigating Sexual Assaults Part III: Investigative Strategy & Prosecution

This *Training Key* is designed to help officers and investigators determine what "type" of sexual assault case they are handling, predict which defense is most likely to be raised, and guide an investigative strategy toward overcoming that particular defense. This is the third of a three part series.

The Sexual Assault Forensic Examination for the Suspect

Although the recent trend toward specialized forensic examiners has focused on improving medical care for the victims of sexual assault, the issues surrounding the forensic examination for the suspects are often overlooked. Law enforcement agencies must therefore work with other agencies and community organizations to establish protocols regarding where the forensic examination of the suspect will take place, who will pay for it, and what steps will be involved. As with the forensic examination of the victim, the suspect forensic examination is evidentiary and should be considered an additional expense associated with the investigation. Costs may therefore be recovered from victim compensation programs, from the suspect himself upon conviction, or from the investigating law enforcement or prosecuting agency.

Protocol for Suspect Examination. Immediately following the preliminary suspect interview, the investigating officer must determine whether a forensic sexual assault examination should be obtained for the suspect. Factors to consider in that decision are the length of time since the assault occurred, the nature of the assault, whether the victim believes that he or she injured the suspect, and the likelihood that cells, fluid or other types of biological or trace evidence were transferred from the victim to the suspect. Depending on the specific acts, the suspect could be the best source of probative evidence.

Based on state laws and department policies, a search warrant may be needed to collect any evidence from the body of the suspect or even to collect his clothing. Search warrant templates for such evidence collection should therefore be developed by each law enforcement agency and be readily available

to officers with the responsibility for investigating sexual assault crimes.

However, even without probable cause or a warrant, most jurisdictions also recognize that an officer can obtain consent from a suspect for an examination. At the beginning of the forensic examination, the examiner should first ask the investigating officer for a summary of the assault, including the acts reported, the location, any physical identifying information provided by the victim or witness(s), and any potential injuries that the victim described inflicting on the suspect. The examiner should then obtain a medical history from the suspect if he is willing. This history should include recent information on any anal or genital injuries, surgeries, diagnostic procedures, or medical procedures that may affect the interpretation of the current findings. Such information can help to avoid confusing pre-existing lesions with current injuries or findings.¹ However, because the forensic examiner is an agent of the investigating officer, a *Miranda* warning must be provided to any suspect who is questioned while in custody. This includes questioning the suspect about his medical history since the information will be used to evaluate any possible findings. If the suspect invokes his right to remain silent, the examiner should bypass the medical history and continue the examination. If the suspect is not in custody, the investigator must clearly demonstrate that the suspect was free to decline any part of the examination and to leave at any time.

Evidence Collection. If a full forensic examination is conducted with a sexual assault suspect, the kit used to collect evidence should be essentially the same as the one used for the victim, with a few differences. First, the kit should not include the tools for conducting an anal or rectal examination of the victim. External examination of the anal area is routine with

sexual assault suspects, but anoscopy and rectum sampling are typically not needed. Second, chest and/or facial hair reference samples are also added, as are penile and scrotal swabs. These latter swabs are especially critical. However, urethral swabs and cultures are generally considered unnecessary.

In addition to the collection of such biological and trace evidence, the forensic examiner should also record the suspect's vital signs and document any signs of visible injury or complaint of pain, including body diagrams and photographs.² Depending on the case history, urine and blood samples may be needed for toxicology or to counter a potential defense that might be raised by the suspect. DNA reference samples, blood, and/or saliva should also be obtained.

During the forensic examination, all physical findings must also be carefully documented, including any observable or palpable tissue injuries, physiologic changes or foreign material (e.g., grass, sand, stains, dried or moist secretions). Unlike the forensic examination with the victim, there should be no conclusion as to whether the findings are consistent with the history provided by the suspect. However, both the examiner and attending officer should be prepared to document any spontaneous statements made by the suspect regardless of whether or not he is in custody and whether or not he was provided with a *Miranda* warning.

Location of the Suspect Examination. It is critically important to note, even if apparent, that the victim and suspect examination must take place in different locations. From a forensic evidence standpoint, it is also important that every effort be made to avoid cross-contamination of evidence from the victim and suspect. This is an area that can be vulnerable to attack by the defense.

One possible solution is to have the suspect examined at the police department or other non-medical facility, in cases where the suspect is not injured and does not require medical care. The examiner³ can then respond directly to the police department, because the equipment and space needed to conduct the suspect examination are minimal. Although there may be some added costs initially for those police departments that host suspect examinations, they will likely benefit from a more efficient response and an increased likelihood that the examination will provide probative evidence that can be used to prosecute the suspect.

Developing an Investigative Strategy

Each department must be aware of their own state penal codes in order to adapt an investigative strategy that fits their particular guidelines. This kind of investigative strategy can help to:

- Define what issues are likely to be raised in court
- Prioritize the probative value of evidence and its impact on the investigation
- Determine the probative value of statements made by the victim, witness, or offender

Developing an investigative strategy is a key component in successful prosecutions of sexual assault cases. The investigative strategy should be developed prior to the interview by the investigator based on the nature of the assault and the possible defenses available to the suspect (e.g., denial, identity, or consent). Investigators should then seek strategies to address the key issues and consult with the prosecuting attorney as necessary or appropriate. Because most defenses are based on con-

sent, the victim should always be asked whether—and for how long—he or she has been acquainted with the offender. If the two were acquainted prior to the assault, the circumstances of their meeting and the extent of any previous relationship should be explored, particularly with respect to any prior sexual contact. Although previous sexual acts with the accused will not necessarily absolve the offender, knowledge of them helps to establish the nature of the relationship with the offender and to prepare for possible prosecution problems.

Once an investigative strategy is developed, this will guide the interview questions and other evidence collection efforts to corroborate the victim, witness, and suspect statements and to note any discrepancies that are discovered. For example, the investigator should seek to:

- Verify any statements obtained from witnesses by the first responding officer(s).
- Obtain statements from witnesses not interviewed in the preliminary investigation.
- Re-photograph any non-genital injuries to document changes in visible injuries.
- Determine whether a search warrant is needed for any aspect of the investigation.
- Identify and contact others who may have been victimized by the suspect.
- Evaluate whether a pretext phone call is appropriate.

The determination of whether a pretext phone call is appropriate will be based on the applicable laws for the state where the crime occurred as well as the location of the victim and suspect who may reside in different states and jurisdictions at the time of the investigation.

Denial, Consent, and Identity Defenses

There are three types of defenses used in sexual assault cases:

Denial Defense. When a suspect is charged with a sex crime, one primary element of the offense will always be the sexual act involved (whether sexual penetration or contact). Because the sexual activity constitutes an element of the offense, it therefore provides the grounds for one particular defense strategy—denial. If the suspect denies that the sexual activity took place, and he⁴ can create reasonable doubt to that effect, it is likely that he will be acquitted of the charge(s). For this reason, the investigative strategy in every sexual assault case must first focus on establishing whether or not the sexual activity took place. When the sexual activity is stipulated or proven (and is alleged to have been committed using force or threat), however, there are two additional defenses available to suspects.

Identity Defense. This defense is primarily used in cases where the suspect is a stranger to the victim. This defense can thus be characterized as: "You've got the wrong guy. Someone else might have raped her, but it wasn't me." In these cases, the investigative strategy is not that different from other crimes (such as burglary or robbery) because it focuses on a complete physical description of the suspect provided by the victim or other witnesses, as well as any DNA or trace evidence linking the suspect to the victim and/or the crime scene. In any case, where an identity defense might ultimately be raised, it is important for the investigator to first determine whether the suspect denies engaging in sexual activity with the victim. A sus-

pect who initially denies the sexual contact may later switch to an identity defense, and this change should be documented.

Consent Defense. The consent defense has historically been used when the victim and suspect know each other to some degree. This defense usually stipulates that the sexual activity took place but argues that it did not involve force or threat. However, with the state of DNA and forensics, the majority of people charged with a sex offense now claim a consent defense because identity can typically be established with a great deal of certainty. This defense can therefore be characterized as, "Yeah, I had sex with her, but she wanted it and it was great. I didn't force her to do anything."

When a consent defense is raised, the investigation should focus primarily on evidence to establish that consent was absent and force or fear was present, including:

- Evidence of physical and/or verbal resistance on the part of the victim
- Evidence of genital and/or non-genital injury
- A detailed account of the victim's thoughts and feelings during the assault
- Information regarding the suspect's size and strength, in comparison with the victim's
- Information regarding the environment in which the assault took place (e.g., isolation)
- Information regarding the victim's post-assault behavior, including post-traumatic stress

Evidence of injury or physical resistance on the part of the victim can be useful in establishing that force or threat was present in the situation. On the other hand, the absence of injury or resistance cannot be used as proof of consent. In such cases, it can be particularly useful for investigators to document any information about the event that is inconsistent with the character of a consensual sexual act. For example, there are cases where the victim is unable to use a contraceptive or remove her tampon before the suspect forces his penis inside her vagina. This type of behavior would not be typical of a consensual sexual encounter.

Although much of the evidence collected in a sexual assault case, such as biological and trace evidence, is traditionally used to identify an assailant, some of it can also be used to establish force and overcome a consent defense. For example, both the victim's and suspect's clothing should be examined for biological and trace evidence, as well as tears, missing buttons, or other signs of force. Similarly, blood can be analyzed to identify the donor, but it can also be used to corroborate the use of force as a result of injury. Photographs and/or video are especially critical to establish the context of force if they depict the crime scene as seen by the first responding officer, including the condition of the site and the location of recovered evidence.

To illustrate, evidence might document signs of a forced entry or a disturbance, such as an overturned table or broken glass. If the victim called for help, there may be evidence regarding why no one heard the pleas (e.g., loud music playing at a certain decibel level). If there was an obstacle preventing witnesses from seeing the assault, this needs to be documented as well.

In a consent case, the issues at trial will likely focus on the victim and suspect's behavior, as well as perception of events. They will also center on challenges to the victim's credibility and the amount of risk-taking on the part of the victim.⁵ Therefore, any evidence to corroborate the victim's account can be

useful, as well as any information that demonstrates consistencies between the victim and suspect's description of events. These consistencies can be particularly persuasive in addressing a consent defense, especially when both the victim's and suspect's account of events are entirely consistent up to the point of the sexual assault.

Forcible Sexual Assault vs. No Force Required

The investigative strategy in cases of forcible sexual assault centers on the determination of whether the sexual activity in question was committed using force or threat, or to identify whether the situation was one in which no force is required for sexual activity to constitute a criminal offense. Successful sex crimes investigators need to recognize common theories of sexual assault offenses, but they must also maintain a flexible orientation in case an alternative charge is preferred or the defense strategy is something other than expected.

Forcible Sexual Assault. If force or threat is used to commit a sexual act, the elements of the offense are: (1) Sexual Penetration/Contact and (2) Force or Threat. What is not included in most states is any reference to the presence or absence of consent by the victim. Although some states retain language that the sexual act must be "against the will" of the victim, most states have recognized that a lack of consent is implied by the presence of force or threat. In other words, when force or threat is present, it is assumed that the victim does not consent to the sexual activity in question. At this point, only two states require that a lack of consent be proven by demonstrating that a victim "resists to the utmost" with resistance that is "overcome by force." Consent is therefore generally defined as positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act and transaction involved.⁶

Despite this general recognition that sexual activity is illegal when committed using force or threat, there remains no clear standard as to what exactly constitutes force or threat. Rather, the presence of force or threat must be determined by considering the entire context of the event, with evidence of the type reviewed in the section above on the consent defense.

No Force Required. On the other hand, there are situations in which sexual activity is criminal in the absence of force or threat. These include situations where the victim is legally viewed as unable to consent, either due to age or some type of incapacitation (e.g., disability, lack of consciousness, drug use). In these situations, a consent defense is precluded and so the investigative strategy should not focus on issues of force. Rather, the defense is limited to denying the sexual activity, disputing the status of the victim that renders them unable to consent, or claiming that the suspect did not know and could not reasonably have known about the status of the victim.

Although many states have added sections to their criminal statutes to clearly state that force is not required as an element of drug facilitated sexual assault, prosecuting attorneys have argued in some situations that drugging a person is chemical restraint and therefore, force. In that case, the prosecuting attorney may consider filing complaints on both charges.

Unconscious Victim. Clearly, a victim who is unconscious cannot legally consent to sexual activity. When a victim is unconscious, the elements of a sexual assault offense are thus: (1) Sexual Penetration/Contact and (2) an Unconscious Victim.

A suspect can defend against this type of sexual assault charge by denying either that the sexual activity took place or that the victim was unconscious. In either case, the investigative strategy should focus on establishing each of these two elements. The investigation does not need to focus on the issue of force, however, because the victim's lack of consciousness renders him or her unable to legally consent to sexual activity.

Incapacitated Victim. Somewhat more difficult is the case in which the victim was incapacitated during the sexual act. Incapacitation in this sense is typically due to alcohol or drug use, whether caused by voluntary consumption or covert administration by the suspect. However, it could also be due to some other cause creating physical or mental incapacitation. The elements of this type of sexual assault are thus: (1) Sexual Penetration/Contact and (2) an Incapacitated Victim. What makes this issue difficult is that there is no clear legal standard for incapacitation, so it is a matter of contention between the prosecution and defense. For example, many states require that the perpetrator administer the drug himself for the sexual act to constitute forcible rape or aggravated sexual assault.⁷ Regardless of whether this requirement is present or not, the investigator must show that the perpetrator knew that the victim was intoxicated and therefore unable to give informed consent.

In these cases, the defense is likely to focus on denying that the victim was incapacitated to the degree alleged by the prosecution, thereby denying the second element. Because the victim was not incapacitated, the defense will argue that the victim was able to consent to the sexual activity in question. Based on the victim's account, toxicology evidence, and interviews with witnesses, the investigator must therefore demonstrate that the victim was so incapacitated that he or she could not legally consent to sexual activity. Yet even in cases where the prosecution has framed the case as one involving an incapacitated victim, the defense is likely to challenge this characterization and raise a more traditional consent defense. When a consent defense is raised, the victim's intoxication is usually used as a means of challenging the victim's credibility.⁸

Victims with a Disability. As with other forms of incapacitation, there is often no clear legal standard for when a disability affecting cognition or communication renders an individual unable to legally consent to sexual activity. Therefore, a determination must first be made as to whether the individual is capable of understanding and giving consent to sexual activity. As part of this process, the investigating officer will typically need to determine whether the victim has the ability to carry out normal activities or to protect his or her rights. If the individual is determined to be able to legally consent to sexual activity, the behavior would only constitute a criminal offense if force or threat was present, or if the victim was unable to legally consent to sexual activity for some other reason (e.g., incapacitation, age).

However, if the individual is deemed to be unable to legally consent to sexual activity due to a disability affecting cognition or communication, the elements of the sexual assault offense are: (1) Sexual Penetration/Contact and (2) Evidence of Disability. As with the incapacitated victim discussed above, issues of force and consent are not part of the elements of the offense and should not be part of the defense. Rather, the investigative strategy must focus on establishing that the sexual activity took place and the individual has a disability affecting cognition or communication to a degree that he or she is un-

able to legally consent. There is also a possibility that an affirmative defense will be raised if the defense asserts that the suspect did not know of the victim's disability. However, the availability of this defense and the statutes governing its use vary by state.

Other Crimes with No Force Required. Another major category of sexual assault offenses with no force required includes those involving victims who are unable to consent because of their age. All states have established an age before which an individual is not recognized as able to consent to sexual activity. The age of consent varies generally from 15-18 years throughout the United States. Most states also have additional statutes that constitute offenses on the basis of age combinations between the victim and suspect or due to the position of trust, authority, or supervision held by the suspect (e.g., teachers, coaches, clergy, counselors).

Many states additionally specify a number of situations in which no force is required for sexual activity to constitute criminal behavior. For example, some states prohibit specified sexual activity between patients and their doctors, psychotherapists, and other service providers, between inmates and correctional officers, and between caretakers and their dependents. Other statutes outlaw sexual activity perpetrated using a false representation of identity. Of course, states also prohibit sexual activity between family members, and these relations are typically spelled out in the code of criminal offenses.

Polygraphs and Other Interrogation Techniques

Based on the misperception that a significant percentage of sexual assault reports are false, some law enforcement agencies use polygraphs or other interrogation techniques when interviewing victims. For example, some investigators use polygraphs, voice stress analyzers, and other tactics such as SCAN (Scientific Content Analysis) with sexual assault victims during the course of an investigation. As already discussed in detail, victims often feel confused and ashamed because of something they did or did not do in relation to the sexual assault. This makes the results of such interrogation techniques particularly unreliable. In fact, some states have even enacted laws prohibiting the police from offering a polygraph examination to sexual assault victims or using the results to determine whether criminal charges will be filed. A competent, evidence based investigation will most likely reveal the truth much more effectively than these interrogation tactics. Law enforcement agencies should establish policies to clearly state that officers should not require, offer, or suggest that a victim take a polygraph examination or submit to SCAN or voice stress analysis during the investigation stage.

On the other hand, there are some states and jurisdictions where the polygraph examination is used strategically with sexual assault victims during the courtroom proceedings. This tactic can be particularly useful in the case of a non-stranger sexual assault resulting in a consent defense, but it should only be used in the phase of courtroom proceedings and not during the investigation. To illustrate, many defendants state that they will only take a polygraph examination if the victim will also take one at the same time. In addition, many defense attorneys will not allow the defendant to take a stipulated polygraph if the victim has already passed a polygraph or voice stress test. In this type of situation, it can sometimes be strategically beneficial to offer a polygraph examination of the victim, in

court and in front of the defendant's wife, girlfriend or mother. This strategy must be used only if the situation is discussed with the victim in advance, in the presence of a victim advocate or other knowledgeable support person.

In some states like Ohio, the results of a stipulated polygraph are admissible because the person administering the polygraph can be called as a witness by the prosecutor to testify at trial as an expert regarding all aspects of the test administered, and "such testimony shall be offered and received as evidence in the trial without objections of any kind by any party to the agreement except as to the weight of the evidence." Of course, it is critically important to ensure that this practice is not abused by having policies that clearly state that law enforcement should not require, offer, or suggest that a victim take a polygraph or voice stress during the investigation stage. Using such tactics during the investigation is not recommended because they are not generally reliable under such conditions, they may contribute to a sense of revictimization, and they may eliminate the proper use of a court stipulated polygraph after indictment and during the pre-trial stages.

Sources of Law Enforcement Training on Sexual Assault

American Prosecutors Research Institute (APRI)
703-549-4253. www.ndaa-apri.org
CALCASA Campus Program
916-446-2520. www.calcasa.org
Center for Sex Offender Management (CSOM)
301-589-9383. www.csom.org
End Violence Against Women (EVAW) International
509-684-9800. www.evawinc.com
International Association of Forensic Nurses (IAFN)
856-256-2425 www.forensicnurse.org
National Center on Domestic and Sexual Violence
512-407-9020. www.ncdsv.org
Sexual Assault Training & Investigations (SATI), Inc.,
509-684-9800. www.mysati.com

Acknowledgement

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Endnotes

¹ Green, W., Kauffhold, M. & Schulman, E. *Sexual Assault Evidentiary Exam Training for Health Care Providers*. California Medical Training Center, University of California at Davis, Module 7, Page 63.

² The California Office of Criminal Justice Planning has a state-approved forensic medical report for the suspect examination. The report is available on line at <http://www.ocjp.ca.gov/medforms2/950.pdf>.

³ Because of a severe shortage of nurses throughout the country and cost, some forensic examiner programs and police departments use Licensed Vocational Nurses (LVN's) and Emergency Medical Services personnel to conduct the suspect examination reducing the cost of the suspect forensic examination.

⁴ For the purposes of this *Training Key*, the suspect in a sexual assault case will typically be referred to as male. While this terminology is problematic

in excluding female sex offenders, it is used for simplicity in recognition of the fact that the vast majority of sexual assault perpetrators are men.

⁵ Horney, J. & Spohn, C. (1996). The influence of blame and believability factors on the processing simple versus aggravated rape cases. *Criminology*, Vol. 34, No. 2, pp. 13-162.

⁶ Dripps, D.A. (1992). Beyond rape: An essay on the difference between the presence of force and the absence of consent. *Columbia Law Review*, Vol. 92, No. 7, pp. 1780-1809.

⁷ Falk, P.J. (2002). Rape by drugs: A statutory overview and proposals for reform. *Arizona Law Review*, Vol. 44, No. 1, pp. 131-212.

⁸ Hammock, G.S. (1997). Perceptions of rape: The influence of closeness of relationship, intoxication, and sex of participant. *Violence and Victims*, Vol. 12, No. 3, pp. 237-246.

questions

The following questions are based on information in this *Training Key*. Select the one best answer for each question.

1. Which of the following statements is *false*?
 - (a) *A consent defense is typically used when the victim and suspect do not know each other.*
 - (b) *An identity defense is used primarily in cases where the suspect is a stranger to the victim.*
 - (c) *A denial defense is used when the suspect says that sexual activity did not take place between himself and the victim.*
 - (d) *All of the above.*
2. When a consent defense is raised, the investigation should focus primarily on evidence to establish that consent was absent and force or fear was present, including which of the following?
 - (a) *Evidence of physical and/or verbal resistance on the part of the victim*
 - (b) *Evidence of genital and/or non-genital injury*
 - (c) *A detailed account of the victim's thoughts and feelings during the assault*
 - (d) *All of the above.*
3. What is the defense that changes most often?
 - (a) *Denial to Consent*
 - (b) *Consent to Identity*
 - (c) *Identity to Consent*
 - (d) *None of the above*

answers.....

1. (a) A consent defense is typically used when the victim and suspect do not know each other.
2. (b) All of the above
3. (c) Identity to Consent

have you read ...?

"What Every Law Enforcement Officer Should Know About DNA Evidence. Best Practices for Identification, Preservation and Collection of DNA Evidence at the Crime Scene." Washington, DC: US Dept of Justice; 1999. NCJ 182992. Available at: <http://www.ojp.usdoj.gov/nij/pubs-sum/000614.htm>

The National Institute of Justice in cooperation with the National Commission on the Future of DNA developed this brochure and two CDs including a beginning level module and an advanced level module.

