

Overcoming the Consent Defense

BY
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Many Americans believe that rape² is only committed by strangers who use lethal force or the threat of it, and that victims always suffer from serious physical injury. As a result, many jurors rush to the judgment that a rape victim who does not fit the stereotype of a “real” rape victim is not credible and must have consented to intercourse, especially when the defendant does not fit the stereotype of a “real” rapist. The reality of rape is often quite different from the myth of “real rape,”³ and frequently involves an acquaintance of the victim claiming consent by the victim as a defense to the charge of rape. The prosecutor can overcome the consent defense with a two-pronged strategy. First, the prosecutor must show the jury why the victim is credible, and therefore, a “real” victim. Second, he or she should show the jury why the defendant is a “real” rapist.

PROVING VICTIM CREDIBILITY

Jurors’ negative perceptions of victims’ credibility can be a significant barrier to success. In rape cases, credibility of the victim and provability of the case are inherently intertwined, in large part because rape is a crime of secrecy. There are almost never eyewitnesses to a rape. Moreover, rape cases rarely have physical evidence that conclusively proves that a rape occurred. Prosecutors are left with the victim’s word, which means that jurors must find the victim credible before they will convict the defendant.⁴ To be found credible, a victim must testify well in the eyes of the jury. Prosecutors can

do three things to assist the victim in testifying in a competent and credible manner: (1) support, (2) protect, and (3) prepare the victim. Additional strategies that will corroborate the victim’s testimony and therefore bolster her credibility include: (4) present witnesses in an order that builds a victim’s credibility; (5) explain any injuries or lack thereof; (6) explain any counterintuitive behavior exhibited by the victim; and (7) explain any inconsistencies in the victim’s testimony. These strategies are discussed ad seriatim.

Support the Victim

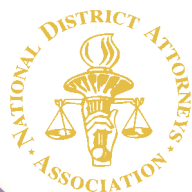
Support can be provided in a number of ways. For example, a multidisciplinary Sexual Assault Response Team (SART)⁵ can support and comfort the victim, especially when the team includes victim advocates who can work with prosecutors to ensure that the victim is comfortable on the witness stand. A SART can empower the victim and give her the support she⁶ needs to make it through the investigation and trial process. If a SART does not exist in your community, consider starting one. Other ways to support the victim include: creating a Sexual Assault Nurse Examiner (SANE)⁷ program, working with victim advocates, and providing a safe and comfortable place for the victim to wait to testify. A victim who feels supported is more likely to feel comfortable on the witness stand, which will enable the jury to focus on her credibility.

Protect the Victim

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ability. A victim who feels protected through the process is less likely to become defensive or angry on the witness stand. When a victim becomes angry or defensive, jurors are likely to believe that she has something to hide, rather than recognizing these reactions as normal human behavior.

- *Utilize pretrial motions to protect the victim's physical safety and privacy.*

For example, file a motion to revoke bond if the defendant contacts the victim or file a motion to clear the courtroom of individuals who might threaten or attempt to intimidate the victim. You may not always succeed, but the victim will see that you are fighting to protect her.

- *Do your best to protect the victim's identity.*

If possible, use her initials and date of birth in court documents as opposed to her full name.

- *Oppose frivolous defense motions intended to harass and intimidate the victim.*

For example, oppose motions requesting a psychological examination of the victim or asking for the victim's counseling records.

- *Oppose attempts to pierce the rape shield law in your jurisdiction.⁸*

- *Finally, if the victim is afraid for her physical safety, do your best to protect her.*

For example, request extra deputies for the courtroom or arrange for a deputy or police officer to escort her between her car and the courthouse before and after any hearings. The defendant or his friends or family frequently take these opportunities to intimidate the victim.

Prepare the Victim

Testifying in court can be as traumatic as the original rape because the victim is forced to relive the rape mentally.⁹ Prepare victims not only for direct examination but also for the harsh reality of cross-examination. To prepare a victim, discuss her substantive testimony as well as basic rules for testifying. Tell the victim that the most important rule for her to follow in the courtroom

is to be truthful. Tell her to be honest about all details of the event, even if the details are embarrassing. Explain to the victim that if she attempts to hide or exaggerate small details, the defense will probably be able to show this on cross-examination. The defense will then argue in closing that the victim is a liar and cannot be believed about the rape if she cannot be believed about the small details. Instruct the victim on the importance of accuracy. For example, a victim may be inclined to say that the defendant "ripped" her panties off, when in fact, he pulled them off, but did not rip them. The slightest imprecision opens the door for cross-examination and may call the victim's credibility into question. Ask her to try to stay calm, since a victim who becomes angry will be unable to think clearly. Working with victim advocates can make the preparation for testifying more comfortable for the victim and thus, more productive for the prosecutor.

In cases where the consent defense is used, cross-examination may be particularly harsh. Victims who are prepared in advance for the challenge of the experience will be better witnesses when they testify. It will also be easier for them to endure the trial process if they understand that they are not being asked difficult questions because they are a bad person or because they did something wrong. Instead, if they are being cross-examined harshly, it is because the defense attorney is protecting his or her client. An advocate may be extremely helpful to the victim and to the prosecutor by being present during preparation for cross-examination and during the trial itself.

Think Carefully About Witness Order

Witnesses do not necessarily need to be presented in chronological order. If there is a witness who supports the victim's testimony in a way that makes the victim appear more credible, present that witness before the victim. With this approach, when the jury hears the victim's testimony, they will already be inclined to find her credible.

For example, consider starting with a witness who saw the victim immediately after the incident in a highly emotional state or a medical witness who treated an injury.¹⁰

Explain Any Injuries or Lack Thereof

Many jurors believe that all women who are raped sustain serious physical injuries. They do not understand how a rape can occur without injury. The reality is that very few rape victims sustain any physical injuries other than the rape itself.¹¹ When a medical examination is done, it is important to present it thoroughly, even if it shows that no injury occurred. If a sexual assault forensic examination was done, do not stipulate to testimony about the exam. Have the nurse or doctor who performed it explain it in as much detail as possible. The procedure is long and very invasive. Jurors who understand what the victim had to endure in order to prosecute the case will be more likely to find her credible. If the jurisdiction allows, corroborate the victim's statement about her reaction to the rape by having the nurse or doctor testify to the victim's demeanor throughout the exam. The nurse or doctor will have spent hours with the patient in many cases, due to the length of the exam.

In addition to explaining the details of the examination, it is important to present expert testimony explaining any injury or lack thereof.¹² When injury exists, use an expert to explain that the victim's description of how the injury occurred is consistent with the examiner's findings. If there is no injury, use the expert to explain how it is possible that a woman could be raped but have no physical injuries. Have the expert testify that in his/her training, practice and experience, significant physical injury from a rape is extremely rare.

It must be remembered that rape victims who do not suffer immediately apparent injury may still suffer severe long-term consequences. "A number of long-lasting symptoms and illnesses

have been associated with sexual victimization including chronic pelvic pain; premenstrual syndrome; gastrointestinal disorders; and a variety of chronic pain disorders, including headache, back pain, and facial pain.”¹³ If any of these symptoms or illnesses are present by the time the case goes to trial, evidence of them may be presented.

Explain Any Counterintuitive Behavior¹⁴

Victims often behave in ways that are counterintuitive to jurors’ expectations. Jurors expect “real” rape victims to resist their attackers to the utmost of their ability, report the rape immediately and be hysterical in court. In reality, victims behave in any number of ways, many of them counterintuitive.¹⁵ When victims do not behave in ways that are consistent with jurors’ expectations, jurors tend to assume that the victims are lying.

To explain a victim’s counterintuitive response to rape to a jury, the prosecutor must first understand it. Identify any behaviors that appear counterintuitive, such as not screaming during the rape, failing to immediately report the rape, or continuing to socialize with the rapist. Work with the victim and any of her counselors or advocates to understand these behaviors. For example, if a victim delayed in reporting the rape to the police, ask her why.

Remember that it is not uncommon for victims to recognize that something horrible happened to them without labeling it as rape.¹⁶ Often, a victim may not acknowledge the traumatic experience as rape until after a discussion with a friend, law enforcement officer or medical personnel.

When explaining any counterintuitive behavior to a jury, a prosecutor must present the jury with enough evidence of the victim’s background to enable them to understand that her reaction, while counterintuitive to them, was absolutely natural to many rape victims. Consider the example of a college student who was using cocaine on the night she was raped

and who delayed in reporting because she knew she would lose her scholarship if her college found out that she was using cocaine. Before explaining the cocaine use to the jury, explain that the victim was the first in her family to attend college and that, without her scholarship, she would have been unable to afford to continue her schooling. When the jurors appreciate the impact of losing the scholarship,



they will be more likely to understand why she did not report a rape.

Finally, consider presenting expert testimony to explain the victim’s counterintuitive reactions. An experienced expert can explain behaviors a jury might otherwise not understand. An expert need not be expensive. For example, a community-based victim advocate who has worked with many victims and can articulate the various behaviors victims commonly engage in, including those that are counterintuitive, would be a competent expert who might not charge a large fee for testifying.¹⁷

Explain Any Inconsistencies in the Victim’s Testimony

In rape cases, inconsistencies in the victim’s statements and testimony tend to take on gigantic proportions. Members of the public who are unwilling to admit that they believe that women lie about rape will often freely admit that they would hesitate to convict a defendant of rape without some form of corroboration, even though this is not required for a conviction. Prosecutors must review all victim statements, identify any inconsistencies or partial revelations and address them with the victim and other witnesses prior to trial. Prepare the victim to answer the defense’s inevitable questions about the inconsistencies. When the jurors understand that the inconsistencies were not deliberate lies on the part of the victim, they will be more likely to find her credible.

SHOWING THE JURY THE DEFENDANT IS A “REAL RAPIST”

To overcome the consent defense, the prosecutor must not only convince the jury that the rape victim is a “real” victim, he/she also must convince the jury that the defendant is a “real” rapist. To do so, the prosecutor must prove to the jury that the behavior attributed to the defendant was not normal sexual behavior; rather, it was rape.¹⁸ The prosecutor should begin by (1) conducting an offender-focused investigation and prosecution. Next, the prosecutor should (2) introduce prior bad acts whenever possible. Finally, the prosecutor can (3) show the jury how the defendant became a stranger to the victim. These strategies are discussed ad seriatim.

Conduct an Offender-focused Investigation and Prosecution

Utilizing an offender-focused investigation and prosecution can show a jury why the defendant before them is a predator as opposed to a nice guy

caught through no fault of his own in a bad predicament.¹⁹ Although prosecutors generally focus on the offender when trying any other criminal case, they tend to focus on the victim and any of the victim's flaws or vulnerabilities in rape cases. Rape cases must be tried in the same way that other criminal cases are tried—with a focus on the offender. Instead of viewing a victim's vulnerabilities as weaknesses, show the jury why a predator would target a person with those vulnerabilities. Generally, the worse a victim initially appears to be as a witness, the better a target the victim probably was for the predator who raped her. For example, an offender might select a victim voluntarily under the influence of drugs because the offender recognizes that drug users are going to be less credible in the criminal justice system. Remind the jury that defendants select their victims with the intention of not getting caught.

Using an offender-focused approach to the investigation and prosecution of sex crimes can overcome a number of common challenges in rape cases. For example, a prosecutor may be able to explain how a defendant was able to rape a victim without using a traditional weapon. Jurors generally expect that a rapist will use a weapon, or at least use some form of excessive force. However, in 2004, only 8% of rapes involved the use of a knife or other weapon.²⁰ Nonstranger rapists generally use only the force necessary to overcome the victim's resistance. In many cases, this may equate to nothing more than lying on top of the victim and pinning her arms down. Nonstranger rapists are also far more likely to gain control of their victims through the use of deception, manipulation, planning, premeditation, and betraying their trust. One of the most common tools used by nonstranger rapists is alcohol.²¹ Look for evidence of all of these tools. Did the defendant lie to the victim by promising her a safe ride home and then driving her to a field where he raped her? Did he trick her by asking to come inside her home to use the bathroom? Did he buy her drinks, or

convince her to keep drinking when she wanted to stop?

Another challenge that can be overcome with an offender-focused prosecution is delayed reporting by the victim. Rather than viewing the delayed report as vulnerability on the part of the victim, consider whether the defendant played a role in delaying the report. Did the defendant do something as part of his "exit strategy"²² to keep the victim quiet? Did he threaten her, either with force or blackmail (by threatening to get her into trouble for any bad decisions she made that he took advantage of)? Did he make her question her own judgment by telling her she had led him on, thereby causing him to rape her? If so, explain the delayed report in terms of the defendant's exit strategy and how it was almost successful in keeping the victim quiet. In these kinds of situations, the prosecutor could argue, "He tried to shame her into silence."

Look for Prior Bad Acts

All too often, in nonstranger rape cases, the investigation looks only at the current case and does not look for prior rapes. When possible, ask police officers to interview the defendant's friends, prior girlfriends, and others who might know about prior acts. Although these people may have a reason to lie, they may also be willing to assist. If the defendant has any prior cases, review those cases, even if they were dismissed. Further investigation might be warranted. Do not only look for completed rapes; also look for evidence that can be used to demonstrate the defendant's pattern of behavior towards women. Prior bad acts stopping short of actual rape may support the argument that he deceived the victim, manipulated her, or planned and premeditated the rape.²³

Show the Jury How the Defendant Became a Stranger to the Victim

The myth of "real rape" portrays the rapist as a stranger to the victim. However, in reality, most victims know

their rapists.²⁴ As a result, it is common for a victim of nonstranger rape to be with the defendant voluntarily at the time of the rape. Prior to the rape, the defendant was not a stranger, so it was not unreasonable to trust him. Because she trusted the defendant, the victim did not recognize the danger until it was too late. Prosecutors must show the jury why the victim initially trusted the defendant and how he was able to trick her and take advantage of her trust. At what moment did the victim recognize that she was in danger? Very often, victims do not recognize the danger until it is too late because they perceive the defendant to be safe.

At trial, first have the victim explain who the defendant appeared to be, and then explain who he really was. Ask her to describe for the jury the moment she realized that she was in danger and that he was going to rape her. Ask her to describe any changes in his demeanor, speech or behavior. The contrast will show the jurors that although the defendant did not initially fit their stereotype of a "real" rapist, he is, nevertheless, guilty. Show the jury that it was the defendant who tricked the victim into believing that he was someone who would not hurt her. Argue that the defendant became a stranger to the victim when he raped her.

CONCLUSION

Overcoming the consent defense is extremely difficult, especially when the jury believes in the myth of "real rape." The two-pronged strategy provided in this article will allow the prosecutor to rebut the myth and show jurors that the defendant is guilty of rape, regardless of whether the victim fits their stereotype of a "real" victim or the defendant fits their stereotype of a "real" rapist. As a result, the prosecutor will be able to overcome the consent defense and move the jury from searching for doubt to believing the victim. ■



FOOTNOTES

- ¹ Ms. Scalzo is the director of APRI's National Center for the Prosecution of Violence Against Women. Previously, she served as an assistant district attorney in Northampton County, Pennsylvania, where she was the chief of the Sexual Assault Unit. The author would like to thank Erin Gaddy and Kate Moriarty Ryan of NCPVAW, Jenifer Markowitz, ND, of the DOVE Program of Akron, Ohio, Diane Moyer, legal director of the Pennsylvania Coalition Against Rape, M. Elaine Nugent-Borakove, director of APRI's Office of Research and Evaluation, Veronique Valliere, PsyD, and Paula Wulff, director of APRI's DNA and Forensics Program for their insightful comments and suggestions.
- ² In this article, the terms rape and sexual assault are used interchangeably.
- ³ The term "real rape" was originally defined by Susan Estrich as the stereotype of an assault committed by an armed stranger with a great deal of force. Susan Estrich, *Real Rape* (1988).
- ⁴ Note that a victim's word need not be corroborated in a rape case before the defendant can be convicted.
- ⁵ A multidisciplinary SART should include prosecutors, police officers, victim advocates, and Sexual Assault Nurse/Forensic Examiners, among others. These allied professionals must be involved from the beginning of the case.
- ⁶ From 1992 to 2000, females accounted for 94% of the victims of all completed rapes, 91% of the victims of all attempted rapes, and 89% of the victims of all completed and attempted sexual assaults. In single-offender rapes and sexual assaults, the percentage of male offenders is nearly 99%. Lawrence A. Greenfeld, U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders 4* (1997). For this reason, the pronoun *she* is used when referring to a victim and the pronoun *he* is used to refer to the perpetrator; however, the principles discussed apply regardless of the sex of the victim or the perpetrator.
- ⁷ SANE programs have different names, including Sexual Assault Forensic Examiner Program. For the purpose of this article, the abbreviation SANE is used.
- ⁸ Prosecutors are encouraged to be proactive in filing motions to preclude information barred by rape shield laws. A sample motion can be obtained from NCPVAW's Prosecution Toolkit at http://www.ndaa.org/phpdocs/prosecution_toolkit.html.
- ⁹ The public setting, the presence of the offender and the difficulty of cross-examination may be very stressful and can return a victim to a state of crisis. Robert R. Hazelwood & Ann Wolbert Burgess, *Practical Aspects of Rape Investigation: A Multidisciplinary Approach* 39 (3rd ed. 2001). Looking at the perpetrator may remind a sexual assault victim of the circumstances underlying the crime and may thereby produce psychological trauma. Richard P. Wiebe, *The Mental Health Implications of Crime Victims' Rights, in Law in a Therapeutic Key: Developments of Therapeutic Jurisprudence* 216 (David B. Wexler & Bruce J. Winnick eds., 1996).
- ¹⁰ If the prosecutor intends to introduce any statements through this witness, he or she should be prepared to overcome potential hearsay objections.
- ¹¹ From 1992–2000, approximately 67% of victims of completed rapes sustained no physical injury other than the rape itself, and only 5% sustained severe physical injuries. Callie Marie Rennison, U.S. Dep't of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault: Reporting to the Police and Medical Attention, 1992–2000* (2002).
- ¹² If the court will not accept the medical person who performed the exam as an expert, bring in a separate medical expert to explain the victim's injuries or lack thereof.
- ¹³ National Research Council, *Understanding Violence Against Women* 77 (Nancy A. Crowell & Ann W. Burgess eds., 1997).
- ¹⁴ See, Jennifer Long, *Working with Experts to Explain Counterintuitive Behavior in Domestic Violence and Sexual Assault Cases*, *The Voice*, Vol. 1, Issue 4 (APRI, Alexandria, VA); *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, APRI (anticipated release date December 2006). To request a copy, please contact APRI's National Center for the Prosecution of Violence Against Women at ncpvaw@ndaa.org or 703.549.4253.
- ¹⁵ 16% of rape victims report being raped to the police. Approximately 25% of the rapes reported were reported over 24 hours after the assault. National Victims Center & Crime Victims Research & Treatment Center, *Rape in America: A Report to the Nation* (1992).
- ¹⁶ The National College Women Sexual Victimization Survey showed that almost half of the women who were characterized as victims of a completed rape did not consider themselves to be victims of rape. Michael Rand & Callie Rennison, U.S. Dep't of Justice, Nat'l Inst. of Justice, *How Much Violence Against Women is There? 8* (NCJ 199701) (Bonnie S. Fisher ed., 2004).
- ¹⁷ Do not use an advocate who has worked with the victim. Instead, consider calling an advocate from the state coalition or another local rape crisis center.
- ¹⁸ Note that although the focus of the investigation and trial should be on the offender's actions, the response to sexual assault must remain victim-centered.
- ¹⁹ To ensure that the evidence enables them to conduct an offender-focused prosecution, prosecutors should train police to conduct offender-focused investigations in rape cases.
- ²⁰ Shannan M. Catalano, U.S. Dep't of Justice, Bureau of Justice Statistics, *Crime Victimization, 2004 4* (2005).
- ²¹ In a study that assessed 1,882 men for acts of interpersonal violence, 120 of the men self-reported acts that met the legal definitions of rape or attempted rape but were not prosecuted by criminal justice authorities. "A majority of these men, 80.8%, reported committing rapes of women who were incapacitated because of drugs or alcohol; 17.5% reported using threats or overt force in attempted rapes; 9.2% reported using threats or overt force to coerce sexual intercourse and 10% reported using threats or overt force to coerce oral sex." David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists, 17 Violence and Victims, No. 1, 78* (2002).
- ²² "Exit strategy" refers to the defendant's plan for getting away with the crime. It includes steps he takes to keep the victim quiet and to destroy evidence, as well as anything else done to preclude getting caught.
- ²³ "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of the evidence it intends to introduce at trial." Fed. R. Evid. 404(b).
- ²⁴ In 2004, 67% of rapes/sexual assaults against women were perpetrated by someone known to the victim. Catalano, *supra* note 20. 90% of college women who are victims of rape or attempted rape know their assailant. Bonnie S. Fisher & Francis T. Cullen & Michael G. Turner, U.S. Dep't of Justice, Nat'l Inst. of Justice, *The Sexual Victimization of College Women 17* (2000).

NCPVAW can provide additional resources to assist prosecutors in overcoming the consent defense, including the following:

- Sample voir dire questions
- Tips for testifying
- Sample direct examinations of victims and experts
- Sample pretrial motions

Please check our online prosecution toolkit for a complete listing at http://www.ndaa.org/phpdocs/prosecution_toolkit.html or contact NCPVAW at ncpvaw@ndaa.org or call 703.549.4253.

Look for NCPVAW's Sexual Assault Prosecution Trial Manual (*expected release date December 2006*). To request a copy, contact NCPVAW at ncpvaw@ndaa.org or call 703.549.4253.

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