

Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases

BY
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When a victim alleges a domestic or sexual assault, the prevalence of myths surrounding domestic and sexual violence causes the public to search for a reason to doubt the allegation rather than to search for the truth. The public often looks to victim behavior, either during or after an assault, to determine if that behavior is consistent with its expectation of how a 'real' victim of domestic violence or sexual assault would behave. Members of the public who are uneducated about victim responses to trauma may view a victim's counterintuitive behavior as evidence of her lack of credibility. Experienced prosecutors and others familiar with victim behavior, however, understand that victims have individual responses to trauma that are often counterintuitive to public expectations.

Defense attorneys are eager to capitalize on the public's lack of knowledge about victim behavior and often fuel the public's suspicion of domestic and sexual violence victims by presenting arguments—in the media as well as in the courtroom—that reinforce the popular myth that counterintuitive victim behavior is indicative of a victim's lack of credibility. Prosecutors can counter defense attorneys' mischaracterizations of counterintuitive victim behavior by educating jurors and judges about victim responses to trauma. Depending upon the laws of a particular jurisdiction as well as the specific circumstances of each case, prosecutors can address and explain counterintuitive victim behavior either through a victim's direct examination or through

the introduction of expert testimony.²

When deciding whether to present expert testimony, prosecutors should first find out if the victim can effectively articulate a reasonable explanation for her counterintuitive behaviors. If so, an expert may not be needed. Next, prosecutors should determine whether their jurors or judges will be receptive to expert testimony explaining victim behavior.³ Finally, prosecutors who choose to present expert testimony on victim counterintuitive behavior should (1) identify the counterintuitive victim behavior to be explained; (2) articulate the relevance and admissibility of expert testimony on counterintuitive victim behavior; and (3) choose the appropriate expert to explain counterintuitive victim behavior to the jury.

IDENTIFYING AND EXPLAINING COUNTERINTUITIVE BEHAVIOR

The first step in presenting expert testimony to explain counterintuitive behavior is to identify the counterintuitive behavior in your case. When preparing a case, prosecutors should review all evidence, including police and medical reports and witness statements for descriptions of victim behavior that may appear counterintuitive to the jury. Although each domestic violence or sexual assault case presents unique facts, there are common victim behaviors which, if present in a case, may cause jurors or judges to disbelieve the victim.

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Domestic Violence Victims

There are common counterintuitive reactions to domestic violence that can be explained with expert testimony. For example, many people expect domestic violence victims to leave their abusers, report the abuse and testify on behalf of the state in the prosecution of their abusers, following the first battering incident. The actual behavior of many domestic violence victims, however, is quite different from the public's expectations. Specifically, victims often stay with their abusers, regularly minimize their abuse, recant, request the dismissal of charges against their batterers, refuse to testify for the prosecution, or testify on behalf of their batterers. Because of their experience, experts can help explain a victim's seemingly irrational behavior to the jury as a reasonable response to trauma.

Specifically, experts can explain that this behavior commonly results from victims' sense of loyalty towards their abusers; their shame or feeling of responsibility for their abuse; their belief that they can change their abusers' behaviors, or their inability to reach out for help due to isolation and fear of disbelief. Other victims may remain with their abusers out of fear for their own safety⁴ or the safety of friends, family or pets.⁵ Still others stay with their abusers in an attempt to gain control over the severity or frequency of their abuse.

Sexual Assault Victims

The behaviors of sexual assault victims—particularly nonstranger sexual assault victims—also frequently conflict with the behavior the public expects. Certain behaviors are particularly counterintuitive to the type of behavior the public would expect from a “real victim” and, without explanation, are easily transformed into reasons to doubt a victim's account of her assault. Specifically, the public expects sexual assault victims to scream during their rape or forcefully resist their attackers; to report their rapes immediately; and to remain vigilant following their

attacks. Victims, however, often do not scream or resist during a rape; they frequently delay in reporting their rape; and they often do not remain hypervigilant.

An experienced expert can explain behaviors that jurors often find baffling. Specifically, an expert can explain that a victim's failure to scream out or resist during her attack may result from her shock and subsequent inability to focus. Experts can also explain that rape victims seldom report their assaults immediately because of their confusion, guilt or shock about the assault. Some may not identify the traumatic experience they just endured as rape, especially if their attacker did not use a weapon. It is also common for victims to blame themselves for their rapes if they were drunk, engaged in some consensual sexual behavior with their offenders or traveled to an isolated area with them. Victims may also fail to report immediately out of a fear that they will not be believed, particularly if their rapist is a “respected” member of the community. Victims may also become reckless and promiscuous after a sexual assault in an attempt to regain control over their lives. Finally, although the public would not expect rape victims to come into contact with their perpetrators after an assault, it is not uncommon for victims to seek out their assailants in an attempt to master their situations or to regain control over their lives.

THE RELEVANCE AND ADMISSIBILITY OF EXPERT TESTIMONY ON COUNTERINTUITIVE VICTIM BEHAVIOR

The jury's ability to understand a victim's behavior is intertwined with its ability to judge a victim's credibility.⁶ The behaviors described above, if left unexplained, can cause judges and jurors to disbelieve a victim's allegations. For example, the public often mischaracterizes a domestic violence victim's coping mechanisms as evidence of her complicity in or responsi-

bility for her abuse. As a result, victims who recant are viewed as liars whose original reports to police were baseless accusations concocted to manipulate the system, or, in the alternative, they are perceived as pathological women with low self-esteem who enjoy or perhaps deserve their abuse. Either interpretation has equally devastating consequences as both often result in a not guilty verdict in a criminal prosecution.

Expert testimony on the general dynamics of domestic violence and common behaviors of domestic violence victims has been ruled relevant in order to explain a victim's conduct or testimony.⁷ Significantly, some courts have recognized that the public holds beliefs and attitudes about abused women which are at odds with experts' studies.⁸ Expert testimony that it is not uncommon for victims to later deny or minimize their abusers' conduct, therefore, is relevant to explain the possible reasons for any inconsistencies between a victim's testimony on the stand as compared with her statements to police and prosecutors.⁹ Some courts have recognized that although witness credibility is routinely judged by the “consistency [of a witness' statements], willingness to aid the prosecution and straightforward rendition of the facts”, these elements are often lacking in abuse victims for good reason.¹⁰ Indeed courts have recognized that this behavior is often attributed to inaccuracy or deception¹¹ because of “widely held misconceptions . . . and popular myths.”¹²

The rationale for the admission of expert testimony on counterintuitive victim behavior in sexual assault cases is also based upon the negative impact of prevailing sexual assault myths on a jury's assessment of victim credibility. Specifically, the reactions of rape victims, when contrary to the public expectation, are often exploited by the defense to demonstrate a victim's lack of credibility. As a result, the jury requires expert testimony to explain how a victim's fear, shame and guilt, commonly result in her failure to speak of or report her rape.¹³

CHOOSING AN EXPERT

The prosecutor's decision to use an expert to explain counterintuitive victim behavior depends on the law of his or her jurisdiction, facts of the case and victim's behavior. It also depends on the prosecutor's assessment that an expert can address and explain a victim's counterintuitive behavior to a jury more effectively than the victim.

Once a prosecutor has determined that expert testimony is admissible and necessary, he or she must choose the appropriate expert. In domestic violence and sexual assault cases, the most qualified and effective experts in explaining counterintuitive victim behavior are individuals with clinical or hands-on experience working with victims. Allied professionals who frequently fall into this category are victim advocates, Sexual Assault or Forensic Nurse Examiners (SANEs and FNEs) and law enforcement officers. In order to protect a victim's confidentiality, it is critical that prosecutors not select individuals from these categories who have any involvement with the case. An individual from one of these categories may then be qualified as an expert based upon his or her training and experience in working with vic-



tims.¹⁴ Once qualified, these experts may testify to the general dynamics of domestic violence as well as domestic violence and sexual assault victims' common and counterintuitive responses to trauma.

Prosecutors should also be aware of a potential conflict which may arise in domestic violence prosecutions when the victim is not cooperating in the prosecution of her abuser. Specifically, a non-participating victim may view an advocate's participation as a state's witness in the trial of her abuser as a betrayal, even though the advocate has not worked with her and is not affiliated with the community advocacy organization from which she may have received assistance. Therefore, prosecutors should consider the impact of this conflict when deciding whether to present expert testimony in a particular case.

CONCLUSION

Expert testimony on counterintuitive victim behavior helps juries navigate through the confusing maze of myths and misinformation constructed by defense attorneys prior to and during domestic violence and sexual assault trials. Although the admissibility of this evidence varies among jurisdictions, wherever possible, prosecutors should consider that offering expert testimony to address and explain counterintuitive victim behavior to a jury is often the only way to procure a fair and just disposition.

FOOTNOTES

¹ Jennifer Long is a Senior Attorney in APRI's National Center for the Prosecution of Violence Against Women (NCPVAVW). The author wishes to give special thanks to Ana Maria Hernandez, a third-year law student at American University, who provided invaluable research on this article.

² See, 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 (October 2005); Gregory G. Sarno, *Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome*, 42 A.L.R. 4th 879 (July 2005). Confusion exists because the term Battered Woman Syndrome (BWS) is often incorrectly used interchangeably with counterintuitive reactions to domestic violence. The same is true with respect to Rape Trauma Syndrome (RTS). The similarities and distinctions will be explained more fully in *Working with Experts to Explain Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases* (anticipated release December 2006).

³ It is important to remember that even when a prosecutor decides not to use an expert at trial, it may be useful to use an expert during case preparation to identify and explain counterintuitive victim behavior.

⁴ See Margo Wilson and Martin Daly, *Spousal Homicide Risk and Estrangement, Violence and Victims*, Vol. 8, No. 1 (1993); Neil Websdale, *Lethality Assessment Tools: A Critical Analysis* (1999) available at http://www.vawnet.org/DomesticViolence/Research/VAVnetDocs/AR_l lethality.php (discussing the significance of a separation or attempt to separate by the female party in a domestic homicide).

⁵ See Allie Phillips, "The Dynamics Between Animal Abuse, Child Abuse and Domestic

Violence: How Pets Help Children". *THE PROSECUTOR*, Vol. 38, No. 5 (September-October 2004) (discussing the interrelationship between domestic violence and pet abuse).

⁶ The admissibility of expert testimony on counterintuitive victim behaviors is dependent upon the laws of a particular jurisdiction. In addition to the articles previously cited, prosecutors should also refer to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 US 137 (1999); and *In re Paoli R.R. yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994) (interpreting the test under *Daubert* as incorporating 7 factors); see also Kenneth Winchester Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 American Journal of Trial Advocacy 227 (1996-1997).

⁷ *Id.*

⁸ *State v. Borelli*, 629 A.2d 1105, 1112 (1993) (discussing jurors' potentials to believe in domestic violence myths); See also, *State v. Townsend* (2006 N.J. Lexis 644) at 33-34 (stating "[w]e have no doubt that the ramifications of a battering relationship is still a subject that is beyond the ken of the average juror:").

⁹ See Barnes, *supra* n. 2, at Sec. 3a (discussing abuse victims' common recantations).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Sarno, *supra* note 2, at 3 (citing *Delia S. v. Torres* (1982, 2d Dist.) 134 Cal App 3d 471, 184 Cal Rptr 787) (finding that expert testimony on victim behavior "provided a background against which the jury could assess the relevance of the defense theory that the victim's conduct was not typical or expected of rape victims:").

¹⁴ See Barnes, *supra* note 2, at Sec. 8; see Sarno, *supra* n. 2, at Sec. 6.

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(in collaboration with the Battered Women's Justice Project)

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September 12–15, 2006

San Diego, CA

December 5–8, 2006

Charleston, SC

National Institute on the Prosecution of Sexual Violence

(in collaboration with the Pennsylvania Coalition Against Rape)

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