

Expert Testimony on Victim Behavior

AnnMarie Howard

Deputy Juab County Attorney

annmarie@co.juab.ut.us

Follow Notice Requirements

77-17-13 - Expert testimony generally

- (1)(a) Give notice to the defense “as soon as practicable but not less than 30 days before trial or ten days before the hearing.”
- (1)(b) The notice shall include the name and address of the expert, the expert’s curriculum vitae, and one of the following a copy of the experts report; or a written explanation of the expert’s testimony sufficient to give “adequate notice to prepare to meet the testimony;” and a notice that the expert is available to “cooperatively consult” with the defense on reasonable notice.
- Best case – meet with expert earlier to prepare motion in limine.

Rule 702

Testimony by Experts

- (a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by **knowledge, skill, experience, training, or education** may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will **help the trier of fact to understand the evidence or to determine a fact in issue**.
- (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
- (1) are reliable,
 - (2) are based upon sufficient facts or data, and
 - (3) have been reliably applied to the facts.
- (c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

State v. Clayton, 646 P.2d 723 (Utah 1982), and following cases clarify our burden with non-technical testimony.

Facts to Address

- Victim was raped twice by family friend over six month period.
- Victim did not fight, scream, or call for help.
- Victim delayed reporting by approximately six months from first act and one month from second.
- No medical results for rape: victim did have wrist injury and hernia surgery which she attributed to rape at a later date.
- Victim at times had flat affect when describing rape but showed emotion at other times.
- First person she reported to encouraged reporting.
- Jury had not returned a conviction in a number of sexual assault/domestic violence cases recently in our community.
- Victim was on board with experimenting with some different tactics; including using an expert.

Finding an Expert

- Ask people for references and ideas
 - Victim's Advocates
 - Therapists
 - Other prosecutors
 - Victims (Was there a professional who seemed to "get it?")
 - Presenters at trainings
 - Case law: special education teacher allowed to testify on rape victim's understanding of sexual relations, even though not licensed therapist; trained police officer who had made hundreds of field observations was allowed to testify about intoxication; detective's testimony that abuse victims often delay reporting reflects a fact already recognized by Utah courts that delayed discovery and reporting are common in child sexual abuse cases and did not invade the province of the jury; and social worker's testimony which did not offer any opinion as to the credibility of the victim's account of the attack, or whether the victim was actually raped, and did not introduce anecdotal statistical evidence designed to bolster witness credibility was admissible.
- Location: I was looking for someone nearby who could testify in future cases.
- Depth of clinical experience: I wanted someone who could testify about women and children based on actual face-to-face experience.
- Budget
- The definition of an expert is pretty open. Brainstorm ideas.

Initial Interview of Expert

- Get the expert's CV prior to meeting with the expert and become familiar with it.
- Emailed expert a list of questions I wanted to ask at interview (compiled from NDAA materials and preliminary research). Those steps helped our meeting to be informative and efficient.
 - Sample General questions about qualifications:
 1. Occupation--How long so employed? Describe your position? What services does your program offer? Do you train/supervise staff?
 2. Rape Crisis Center--How many contacts do you receive yearly from victims identifying selves as being abused? How many in the past? How many in career?
 3. Counseling Services -- Are your services solely for victims of sexual assault/domestic violence? Do you provide services for women only? How many persons served yearly?
 4. Do you have direct contact with victims of sexual/domestic violence? How many victims do you directly come in contact with yearly?
 5. Previous Occupation: Have you had any relevant job experience with sexual/DV victims?
 6. Education
 7. Professional Affiliations
 8. Trainings – attended and/or presented
 9. Conferences – attended and/or presented
 10. Previous Expert Testimony

Expert Interview - Victim Behavior

Questions Sample

These questions came from NDAA materials but also preliminary research based on the particular facts of my case.

1. Myths about sexual abuse/domestic violence held by the public--Do you give presentations to public about myths? Have you found misconceptions? Are you familiar with articles or books discussing the myths versus the realities? What are they?
2. Victim Behaviors--What are some common victim behaviors/reactions to assault? Have you gathered insight into the reasons why a victim may behave a certain way?
3. Delayed report-- In your experience do victims of sexual assault generally report that they have been sexually assaulted? Do some never report or report later?
4. Minimization-- Is it common for a victim to minimize level of violence? Why?
5. Flat Affect or Angry victims--Does every victim react to the trauma of rape in the same way? Is it uncommon to show little emotion or even inappropriate emotions?
6. Continued contact with assailant--Are you aware of victims who have maintained contact with the individual who assaulted them? What are the reasons for keeping in contact?
7. Fight or Flight--Do victims during rape fight off assailant or scream or run?
8. Multiple rapes--How common is it for victim to be raped twice by same perpetrator? What would be in place for victim to do that?

Expert Interview Information

Sample of the depth of information I learned in that one hour:

- Mindy Woodhouse worked for the Rape Crisis Center, member of UCASA and current co-chair of Utah Sexual Violence Council, 1,500 personal interactions with self-reporting sexual assault victims, and no one had attempted to qualify her as an expert in court.
- Responses during trauma: fight, flight or freeze. Freeze is very common – tonic immobility.
- Only 1-3 women in her memory who fought assailant, and one was seriously harmed and was raped anyway.
- After sexual assault-- Intense shame – want to hide (all of her victims process shame). Fear is overwhelming.
- “Rape in Utah Study” in 2007, phone survey: 12% go in for medical help, 88% never report. National statistics 80-85%.
- Watch “Neurobiology of the Brain” by Rebecca Campbell webinar.
- Her recommendation: Have her talk about trauma and how victims respond to rape.
- She has personally provided services to around 1,500 women since 1997.
- 80-90% of sexual assaults are acquaintances – sent me studies to back that up.
- Commonly shared factors for delay: shame, trauma, fear. Add in confusion because don’t know what to do, people won’t believe them, and self-blame.
- Factors which occur and cause victim to eventually tell: mind has had time to put pieces together, support system now in place, it leaks into every part of their life and they don’t want to pretend/ignore it any more, and prevent others from getting hurt.
- Articles about victim maintaining contact with rapist.
- Public misconceptions based on trainings and out-reach programs: no delay in reporting, must scream/yell and fight, rapes are caused by strangers, and public believes they can pick a rapist out of a room of people.
- Most report years later. She is surprised if they report within one year. Usually 5, 10, 15 years later.
- Process after shock: (1) crisis phase (don’t sleep, numb, lay in bed or stay in house all day); (2) surviving mode (back to work, get out of bed more, going through the motions); (3) engages (something clues them in).
- Not rare that raped twice, but not majority – risk taking behavior is a lot higher afterward.

Understanding the Dynamics of Victim Behavior

- “The Use of Expert Witnesses in Cases Involving Sexual Assault” by Kimberly A. Lonsway, Ph.D., commissioned by Violence Against Women Online resources.
- “Mental Health Services for Rape Survivors” by Rebecca Campbell, Dr., commissioned by Violence against Women Online resources.
- U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, “Victimizations Not Reported to the Police (2006-2010),” available at <http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf>.
- U.S. Department of Justice, Office of Justice programs, Bureau of Justice Statistics, “Sex Differences in Violent Victimization, 1994,” available at <http://www.bjs.gov/content/pub/pdf/SDVV.PDF>.
- US Department of Justice, Office of Justice Programs, National Institute of Justice, “The Neurobiology of Sexual Assault” Webinar by Dr. Rebecca Campbell, available at <http://nij.gov/multimedia/presenter/presenter-campbell/pages/welcome.aspx>.
 - Tonic immobility (aka “Rape Induced Paralysis) – three reactions are fight, flight, or freeze. The hormonal action by the HPA axis can trigger a shut down of the entire body.
 - Memory fragmentation –while the memory is fragmented and out of order, research shows it is accurate. Victim’s need time to think through questions and piece things together.
 - Flat affect and strange emotions or mood swings are common

Sample Questions for Expert Hearing

Emailed early so she could provide feedback.

- Education, Occupation (set up to ask how many victims assisted and personal knowledge of victim behavior), Previous Occupation (rape crisis)
- Professional Affiliations
- Is it well known with those who interact with victims that there are common reactions which influence victims of sexual assault?
- Is it your experience that there are common factors which influence victims of sexual assault (even though not any one person will feel all of them)? (fear, shame, shock).
- Have you had experience and training assisting victims as they work through things?
- Based on your experience and training with victims, is there a common reaction right after an assault, how about months after, or years after?
- Through your numerous experiences with sexual assault victims, have you gathered insight into the reasons why a victim may behave a certain way?
- Have you noticed whether victims of sexual assault report to police right away? Do some never report or report years later? Why is that?
- Generally, is there something that occurs which finally convinces a person to talk about it with professionals?
- Based on training and experience, is it common for victims to be sexually assaulted by people they know? How about people they thought were friends and had given their trust to?
- Are you aware of victims who have maintain contact with those who have sexually assaulted them? What are some of the reasons for this behavior? Does that influence delayed reporting?
- (If allowed to talk about more than delay.) As victims talk about their experiences, do they show the same emotions as all other victims? What have you observed as far as their emotions? Do you know why they are varied?

Expert Testimony Motion in Limine

-Sample Arguments/Citations-

- Utah Rules of Evidence 702, 703, 704, and 705.
- An expert witness “who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” Utah R. Evid. 702(a). The “specialized knowledge” may be testified to “of the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.” Utah R. Evid. 702(b).
- Ms. Woodhouse is able to testify based upon her training and experience regarding delayed reporting by providing information which is helpful to the jury but without stating “an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.” Utah R. Evid. 704(b). She will testify to experience and training that is “generally accepted by the relevant expert community.” Utah R. Evid. 702(c).
- “The critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it.” *Patey v. Lainhart*, 1999 UT at P15, 977 P.2d 1193,1196 (no error to let dentist who does endodonty part time to testify as an expert in endodonty).
- The testimony of Ms. Woodhouse is an expert on the behavior and actions of rape victims. She has had formal training and obtained certification and degrees. She has also interacted in a professional capacity with between 1,000 to 1,500 sexual assault victims.
- This evidence is probative of a fact at issue—the issue of consent. Outlined in police interview he said she consented, and at preliminary hearing she was grilled on consent. Victim’s delay in reporting the rape, lack of medical report, as well as her lack of fighting or calling for help may be used by the defendant to fortify his claim that she consented. Further, their relationship of being friends and having other interactions may be raised by the defense to indicate consent.
- The myths that victims immediately report, should immediately seek medical attention, are raped by strangers, and fight off their attackers to the point of other injuries (see Footnote 2) which may be used by the defense, may be confusing to the jury and mislead them into drawing conclusions that these issues must be indicators of consent.
- “An expert’s testimony will not assist the trier of fact if the evidence is cumulative or more prejudicial than probative. See Gallegos, 2009 UT 42, PP 35-38, 220 P.3d 136. We have held that expert testimony assists the trier of fact when the expertise is ‘beyond the common knowledge of ordinary jurors and usually cannot be effectively elicited through cross-examination alone.’ *State v. Clopten*, 2009 UT 84, P32, 223 P.3d 1103.” *Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59 (Utah 2010).

Rule 703 and State v. Kelly

- In State v. Kelley, the defendant urged the court to blend the inherent reliability standard from State v. Rimmasch, 775 P.2d 388 (Utah 1988), with rule 703 to determine whether that expert could use his experience and mental assessments to form his opinion. The court discussed the applicability of Rimmasch to non-scientific expert testimony as follows:
 - We held in Rimmasch that while rule 703 is the general rule for the admission of all expert testimony, where expert testimony is based upon *novel* scientific principles or techniques, courts should apply the inherent reliability standard. See Rimmasch, 775 P.2d at 396. Here, there is no plausible claim that the type of expert testimony offered by the prosecution was based on novel scientific principles or techniques. [. . .] Thus, reliance on Rimmasch is misplaced.
 - The appropriate standard is set forth in State v. Clayton, 646 P.2d 723 (Utah 1982):

Once the expert is qualified by the court, the witness may base his opinion on reports, writings or observations not in evidence which were made or compiled by others, so long as they are *of a type reasonably relied upon by experts in that particular field*. The opposing party may challenge the suitability or reliability of such materials on cross-examination, but such challenge goes to the weight to be given the testimony, not to its admissibility.

Id. at 726 (emphasis added); see also Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 839 (Utah 1984).
State v. Kelly, 2000 UT 41, ¶¶19-20 (emphasis in original).

- One of the distinguishing factors between Rimmasch and Kelly is that the expert in the former case was not only asked about the characteristics of abused children, but was asked one question too many and testified about the truthfulness of the witness which was impermissible. See Rimmasch, 755 P.2d at 406.
- “Aspects of the Rimmasch test continue to be applicable under amended rule 702. For example, rule 702(b), like Rimmasch, requires a determination to determine whether a party has met its threshold burden to show the reliability of the principles that form the basis for the expert’s testimony and the reliability of applying those principles to the facts of the case. And, similar to the Rimmasch standard, rule 702(c) allows the court to take judicial notice of principles that have been accepted by the relevant expert community.” Eskelson v. Davis Hosp. & Med. Ctr., 2010 UT 59, ¶11 (Utah 2010).

Sample of Details in Footnotes

- “2 in 3 (65%) rape or sexual assault victimizations were not reported to police from 2006 to 2010. From 2006 to 2010, the two highest percentages of unreported crime were among household theft (67%) and rape or sexual assault (65%) victimizations, and the lowest percentage was among motor vehicle theft (17%) victimizations (table 1). About 46% of serious violent victimizations were not reported to police. In general, the percentage of unreported victimizations was lower for serious violent crime than simple assault (simple assault does not involve an injury or a weapon). However, a higher percentage of rape or sexual assault victimizations (65%) compared to simple assault victimizations (56%) went unreported during the five-year period.” See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, “Victimizations Not Reported to the Police (2006-2010),” available at <http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf>.
- “Injury sustained by females during rapes and/or sexual assaults also affected whether law enforcement was notified. Females who suffered injury from rapes and sexual assaults, other than the rape or sexual assault itself, reported 37% of those victimizations a statistically significant increase from 22% of rapes and sexual assaults without an additional physical injury (not shown in a table).” U.S. Department of Justice, Office of Justice programs, Bureau of Justice Statistics, “Sex Differences in Violent Victimization, 1994,” available at <http://www.bjs.gov/content/pub/pdf/SDVV.PDF>.
- Department of Justice study found the following: “Females and males were victims of specific types of crimes in varying degrees. Among female victims, friends or acquaintances committed 40% of the rapes and sexual assaults; strangers, 32%; and intimates, 24%. The intimate offender was more likely a boy/girlfriend or ex-boy/girlfriend (14.3%) than a spouse (7.3%), a difference that may be due in part to spouses' reluctance to disclose violence by their partners.” U.S. Department of Justice, Office of Justice programs, Bureau of Justice Statistics, “Sex Differences in Violent Victimization, 1994,” available at <http://www.bjs.gov/content/pub/pdf/SDVV.PDF>

Judge's Ruling

- Woodhouse's testimony is relevant.
- Delay in reporting is common in rape.
- Factors for delay may be addressed in the event the state can tie the factors to the delay in this case. Factors allowed:
 - Shame – now believe victim is a bad person
 - Support system – victim now has support structure so ready to tell
 - Time had transpired to make sense of what happened – takes time for victims to sort it out
 - Not allowed to talk about victim's affect, use of weapons, and identity of rapist (jurors think they can pick one out of a room) because not facts in evidence.
- Misconceptions that she may testify to:
 - Delay is common
 - Screaming, yelling, and fighting are not required in a rape.
 - Rapes are caused by acquaintances, but the expert may not give any percentages in any way to back up that idea.
 - Cannot just list why people might delay.

Voir Dire

Helpful for juror's to be taught my theory, and helpful for the judge to see their responses to the myths – some of it was verbal, some of it was watching their body language. Set the stage for me to be able to argue commonly held myths when defense renewed objection to expert during trial.

- 1. Do you think someone who has been raped would report it immediately? Why or why not?
- 2. Do you think a woman would fight, kick, and scream if she were suddenly being raped?
- 3. Can a woman be raped by someone she thought was a friend?
- 4. Have you ever had your trust betrayed by someone you were friends with? What did you do?
- 5. If you have been betrayed, has it happened more than once before you determined what to do? Is it possible that would happen to someone else?

During Trial

-Sample Questions-

- Education, training, and employment
- Issues Relevant to sexual assault/domestic violence: What are some common issues associated with victims of sexual assault/domestic violence?
- Myths: Do you give presentations to civic groups, schools, and other public forums on issues associated with sexual assault/DV or other opportunities to talk with the public? Have you found the public to be well informed? Does the public have misconceptions? Are you familiar with any article or books or trainings discussing the myths verses the realities of sexual/DV?
- Victim Behaviors: What are some common victim behaviors/reactions to assault? Do all victims behave the same way? Have you gathered insight into the reasons why a victim may behave a certain way? What is it?
- Delayed Report: In your experience, do victims of sexual assault generally report right away? Do some never report or report years later? Why is that?
- Does every victim react to trauma of rape the same way?
- Continued contact with assailant: Based upon your experience, are you aware of victims who have maintained contact with the individual who assaulted them? What are reasons for this behavior?
- Knowledge of Present Case: Have you interviewed the victim in this case? Have you interviewed any witnesses connected with this case? Are you familiar with the facts of this case?
- Is your testimony today based on your experience, training, education, and work with victims of sexual/domestic assault?

Defense

- Did not really challenge that she was an expert.
- Challenged that an expert's experience with victim behavior was not relevant to this particular case.
- Challenged that there are no commonly held myths about victim behavior.
- Argued that the victim is perfectly capable of describing what happened and her mindset without the assistance of an expert.
- Challenged that this victim did not fit the mold of other victims.
- Argued that the jurors would not be helped by the expert in understanding the case.
- Said that voir dire was enough to show our jurors had no misconceptions.
- Challenged that my expert did not meet the victim so could not inform the jurors about my victim because she had no particularized information.
- In closing argument said the expert did not actually help the jurors. That the expert did not explain anything new to the jury. [This was what I was hoping to do, explain it in such a way that they felt they already knew it.]

Jury Result

- Hung jury
- Defense told me: “The only reason we are where we are is because you willed it. This should have been an acquittal.”
- Regrouping for round two.

Conclusion

- Mindy Woodhouse was an excellent witness because she had a lot of practical experience. She was confident because of her experience, not because she had just read studies, but she had actual face-to-face interactions with victims.
- Interacting with the expert early on is helpful for motions, questions, and other trial prep work.
- Difficult to discern how impactful she was on jury, we know of some jurors who were definitely influenced by her testimony.
- Judge used some of her phraseology in rulings during her testimony.