

OVERCOMING THE CONSENT DEFENSE

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AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

SUPPORT

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VICTIMS

- Strengthen
- Support
- Corroborate
- Prepare
- Heal

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911 CALL

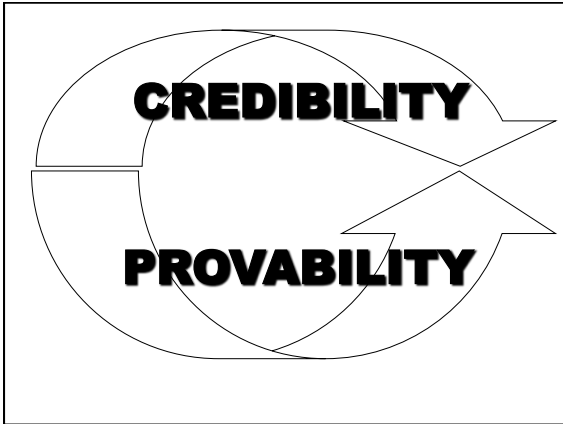
- This is a recording of a 911 call from a rape case
- Identifying information has been redacted

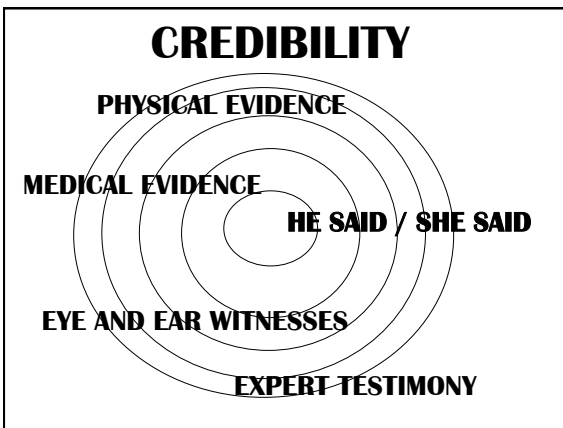
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QUESTIONS

- As a result of this call, what investigative steps should occur?
- At trial, would this recording be more helpful to the prosecution or defense?

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PREPARATION

**You must devote extra
time to these cases**

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KEYS TO SUCCESS

- Obtain and document the truth
- Corroboration
- Jury selection
- Jury education

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MAIN PRINCIPLES

- Honesty is key!!!
- Explain all "bad facts" – there is power in the truth!!!
- Admit weaknesses but do not apologize for them

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INCONSISTENCIES

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

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"PAINT" THE REALITY OF THE CRIME

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BUILD YOUR CASE; DON'T DEFEND IT

- Define the issues in your own way
- Use theme and arguments to rebut defense but remember it's all about the elements
- Do not let the defense define the jury questions
- Remember OJ!!!

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PREPARE THE VICTIM

- Instruct victim
 - To "TELL THE TRUTH"
 - Of the importance of accuracy
 - Not to volunteer information
- Address inconsistencies
- Prepare for cross
- It's okay to say, "I don't know."

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PROTECT THE VICTIM

- Address attempts to intimidate in and out of court
- Be sympathetic but professional at trial

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MYTH BUSTING

- Rape is a horrific crime
- Jurors are not horrified by cases that do not fit their idea of what constitutes rape

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OFFENDER FOCUSED

- It's not:
 - What did the victim do?
- It is:
 - What did the accused do?

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ACCUSED AS PREDATOR

•Focus on the defendant as:

- Predator
- Manipulator
- Planner
- Strategist

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ACCUSED AS PREDATOR

- Victim selection process
- Exit strategy
- Importance of defendant's fantasy
- Playing to the audience

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PROVE THAT SHE SAID NO!

- How did she say it?
- How did she show it?

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THE TRUTH ABOUT RAPE

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

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GENERAL STRATEGIES FOR OVERCOMING RAPE MYTHS

- Begin to educate the jury and dispel myths in voir dire and continue throughout the trial
- Tell the "whole story"
- Corroborate everything possible
- Argue the importance of the truth

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DEPERSONALIZE THE ACCUSED

- Refer to him as "the defendant" or "the accused"
 - Not Mr. _____, or Dr. _____
 - Not by his first name
- Refer to the victim by her name
- Expect the defense to do the reverse

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THE VICTIM

- Personalize the victim
 - Jury must understand who she is in order to understand her choices and behavior
 - Introduce the victim to the jury with sufficient foundation questions

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DEFINING RAPE

Almost 1/2 of the women who were characterized as victims of a completed rape by the National College Women Sexual Victimization Survey did not consider themselves to be victims of rape.

Fisher, Cullen, & Turner (2000)

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WEAPONS OF THE NONSTRANGER RAPEST

- Premeditation
- Planning
- Victim selection
- Manipulation
- Deceit
- Betrayal of trust

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UNDETECTED RAPISTS

- 120 of 1,882 men whose self-reported sexual acts met legal definitions of rape or attempted rape but went undetected by the criminal justice system
- 76 were recidivists, and reported committing additional rapes, either against multiple victims or the same victim, averaging 5.8 rapes per person.

Lisak & Miller, Repeat Rape and Multiple Offending Among Undetected Rapists, Violence and Victims, Vol. 17, No. 1, 2002

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UNDETECTED RAPISTS

- 70 admitted to other acts of interpersonal violence, including battery, sexual assault short of rape or attempted rape, child physical abuse, and child sexual abuse
- 97 admitted to committing rapes against women who were intoxicated because of alcohol or drugs
- 120 people admitted to 483 acts of rape or attempted rape

Lisak and Miller, 2002

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THE UNDETECTED RAPIST

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MEDICAL EXPERTS

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LACK OF INJURY

- Address this in voir dire
- Argument
- Call an expert

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LACK OF INJURY

67% of rape victims reported no physical injuries in addition to the rape. Only 6% sustained severe physical injuries.

"Injuries from Violent Crime", National Crime Victimization Survey, OJP (June 2001)

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LACK OF INJURY

Over 70% of rape victims reported no physical injuries in addition to the rape. Only 4% sustained serious physical injuries.

Rape in America: A Report to the Nation, National Victims Center & Crime Victims Research & Treatment Center (April 23, 1992)

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EXPERTS

- Do NOT stipulate to expert testimony
- If there is no injury, have an expert explain this
- Explain the SANE exam in as much detail as possible

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EXPERTS

- The absence of physical trauma is not inconsistent with rape.
- Expert medical testimony regarding the absence of physical injury is admissible in the prosecution's case in chief.

See e.g., Commonwealth v. Minerd, 562 Pa. 46, 753 A.2d 225 (2002)

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ADDRESSING VICTIM BEHAVIOR

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JURORS BELIEVE THAT A "REAL" RAPE VICTIM WILL

- Resist
- Complain promptly
- Be upset at trial

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THE VICTIM - BEFORE AND AFTER

- | | |
|---|---|
| <ul style="list-style-type: none">• Before<ul style="list-style-type: none">• Good choices/
good discretion• Bad choices/
bad discretion | <ul style="list-style-type: none">• After<ul style="list-style-type: none">• Effects of rape• Life changes• Trial process |
|---|---|

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THE ACCUSED BECAME A STRANGER

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OLD LAW

- ◉ Required
 - Prompt complaint to authorities
 - Corroboration
- ◉ Some jurors might still expect these

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PROMPT COMPLAINT

- ◉ If there IS a prompt complaint:
 - Use it to corroborate victim
- ◉ If there is NOT a prompt complaint:
 - Address in voir dire
 - Ask victim to explain why not
 - Consider using an expert

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NO CORROBORATION

Utah had a corroboration requirement in its law until 1963

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NO CORROBORATION

The victim's testimony need not be corroborated to establish proof beyond a reasonable doubt.

U.S. v. Howard, 218 F.3d 556 (6th Cir. 2000)
Compare, U.S. v. Wiley, 492 F.2d 547 (10th Cir. 1973)

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EXPERT TESTIMONY

- Victim Behavior
- Post Traumatic Stress Disorder
- Neurobiology of trauma

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CREDIBILITY

- It's not "she said, he said" – It's "the State said, he said"
- So tell them why she's credible!
- Use stories to explain the difficult issues
- Go legal: focus on the elements

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DIRECT EXAMINATION IS KEY

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SEGMENTS OF THE DIRECT

- Introduction
- The Crime Reaction
- Double Direct
- Triple Direct
- Follow the Trauma
- Anticipate the Cross

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SENSORY AND PERIPHERAL DETAILS

- Proves credibility
- Enhances comprehension

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CORROBORATION

Visit the crime scene and document it with photographs, videotapes, and search warrants when possible

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NO MOTIVE TO LIE

Compare lack of motive to lie with agony of rape kit, testifying, police interviews, etc.

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PREVENT VICTIM BASHING

- ◉ Must insure that the focus of the case is the accused and his actions
 - Victim protection motions
 - Prepare with other bad acts
 - ◉ Show behavior that proves consciousness of guilt
 - ◉ Show changes in accused's behavior

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WITNESS ORDER

- ◉ Best witnesses first and last
 - Witness to victim's trauma
 - Medical witness if injury
 - Witness to defendant's confession

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CROSS EXAMINATION

- ◉ Prepare the victim
- ◉ Jury wants to hear the answers to the defense attorney's questions

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OPENING

- Tell the “story” of the case
- Deal with challenging facts head on
 - The victim told the truth about it even though it could hurt the case
- Keep focus on the offender

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CLOSING

- Tell the jury why you have proven the elements of each of the crimes
 - How does your evidence fit the elements?
 - Why is the defendant guilty?
- Closing comes first
- Discuss credibility
- Address reasonable doubt

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ANTICIPATE DEFENSE ARGUMENTS AND ADDRESS THEM

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DEFENSE CLOSING

- Should the victim be present?
- Victim support
 - Advocate
 - Family
 - Friend
- Motions in limine to prevent improper arguments

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DEFENSES

- Play into the myths about “good” girls vs. “bad” girls and that risky behavior invites the rape
- Character assassination

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