CAMPUS SEX ASSAULT

WHAT PROSECUTORS NEED TO KNOW

DISCLAIMER

OUTLINE

- Dynamics of Campus Sex Assaults
- Investigations
- Title IX and Co-occurring Investigations
- Trial
- Sentencing

DYNAMICS OF CAMPUS SEX ASSAULT

PREVALENCE

1 IN 5
WOMEN WILL BE SEXUALLY ASSAULTED
BY THE TIME THEY FINISH COLLEGE

WHY ARE THESE HARD CASES?

WHY ARE THESE HARD CASES?

What do sex offenders look like?

WHY ARE THESE HARD CASES?

Where do sex assaults occur?

Ep 60 CREEPY PHOTO ALERT: old man with axe on ship

3:24 PM · Mar 16, 2017 · Twitter for iPhone

DREAM UNTIL...
your dream comes true
HELLO LOVE

REPORTING

- Drinking
- Drugs
- Sex
- Questions about how this will impact college experience.
- Society blaming the victim.
- Victim blaming the victim.

MYTHS

THESE ARE YOUR JURORS

- "I would hate to be the young man in these situations, the cards are always stacked in favor of the girl."
- "It could happen to any boy having just a normal college experience, doesn't that scare you having a son?"
- "How many of the cases do you see that you think are really just regret sex?"
- "Are you seeing a ton of false reports because of the 'me too' movement?"

INVESTIGATIONS

PRISON OFFERS + PROBATION ELIGIBLE CHARGES + MYTHS SURROUNDING CAMPUS SEX ASSAULT

=

???????

PRISON OFFERS + PROBATION ELIGILBLE CHARGES + MYTHS SURROUNDING CAMPUS SEX ASSAULT

=

TRIAL CASES

INVESTIGATIONS

- Not a detective.
- Coming from the prosecution point of view.
  - What we can do to help.
  - Recommendations we can provide.

EVIDENCE?

- What does evidence in campus sex assault cases look like?

EVIDENCE?

- Not a lot of physical evidence in these cases.
- Testimony will be our main source of evidence.
- But – juries like to see corroboration even over minor points.

WHAT CAN WE COLLECT?

- Small things that we can collect and ultimately show the jury.
- Text messages
  - And every other messaging app out there
- Uber/Lyft Receipts
  - Another potential witness
- Pictures
  - House, dorm, car, bar, etc.
- Pictures and video that was taken that night
  - CASE STUDY (People v. B)

PRACTICE POINT: PRESERVATION LETTERS

- Snapchat
  - General Rules:
    - Snaps – unopened snaps are deleted after 30 days (once every recipient views a snap it is deleted from servers)
    - Stories – deleted 24 hours after post (a user can delete them sooner)
    - Our Story – "may be saved for longer periods of time"
    - Memories – will remain until deleted by user
      - "My Eyes Only" files cannot be unencrypted, but they can provide the data file
    - Chat (one on one) – deleted after 30 days – chats can also be saved by a user
    - Group Chat – deleted after 24 hours (opened or not)
    - Location data – varies and can be deleted by the user
    - Once an account is deleted by the user everything is gone.
    - A preservation will hold onto everything for 90 days
  - https://storage.googleapis.com/snap-inc/privacy/lawenforcement.pdf

OTHER INVESTIGATION IDEAS

- Uber/Lyft Drivers
  - Talk to them
  - Receipts
  - Video?
- Interview Defendant's Friends
  - EARLY
  - Before they know the charges/elements
  - Lock them into their stories

CASE STUDIES: INTERVIEWING DEFENDANT'S FRIENDS

- PEOPLE V. W
  - Interview Defendant's friend
  - Makes Defendant out to be the nicest guy in the world
    - How much W helped the victim
    - How drunk the victim was
    - How sober W was

PEOPLE V. W

- How much W helped the victim
- How drunk the victim was
- How sober W was

PEOPLE V. W

- How much W helped the victim
  - Such a nice guy
  - ISOLATING THE VICTIM

PEOPLE V. W

- How drunk the victim was
  - She isn't credible
  - VULNERABILITY
  - INCAPABLE OF APPRAISING

PEOPLE V. W

- How sober W was
  - He is so responsible
  - KNEW WHAT HE WAS DOING

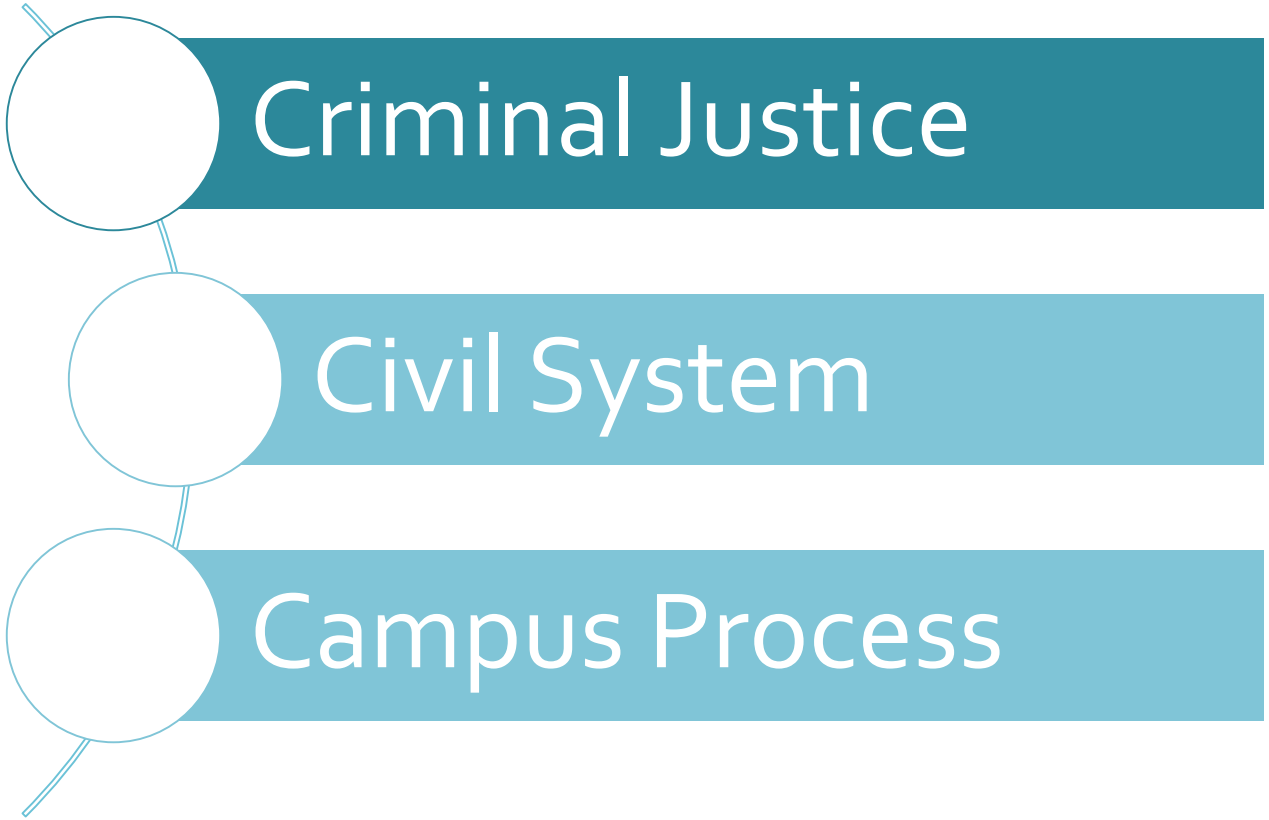
CASE STUDIES: INTERVIEWING DEFENDANT'S FRIENDS

- PEOPLE V. S
  - Interview Defendant's friend – S had told his friend:
    - That he (S) was the "Sober Bro"
    - That he was doing his job
    - Went into detail about how intoxicated V was
  - What we found out?
    - D was not the "Sober Bro"
  - In the end –
    - Great evidence that S was lying to his friends and isolated a victim he knew to be extremely intoxicated.

TITLE IX

WHY INVOLVE CAMPUSES?

Increased victim options, rights and forms of relief/justice



WHERE DO I START?

- Know the differences in procedure and goals.
- Know the timeframes.
- Know how and what to ask for.

WHAT IS TITLE IX?

- Title IX of the Education Amendments of 1972 (Title IX) is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, districts, colleges, and universities receiving any federal assistance must comply with Title IX. (**20 U.S.C. § 1681 et. seq.)**
- "Dear Colleagues Letter" issued by Dept. of Education's Office for Civil Rights – "The sexual harassment or students, including sexual offenses, interferes with students' rights to receive an education free from discrimination and, in the case of sexual violence, is a crime." April 2011

WHAT IS SEXUAL VIOLENCE?

Sexual violence refers to physical sexual acts perpetrated by school employees, other students or third parties against a person's will or where a person is incapable of giving consent (e.g., due to the student's age or use of drugs or alcohol or intellectual or other disability). Qualifying acts include rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.

PROHIBITED CONDUCT

1. **Discriminating and/or Harassing** on the basis of one or more protected classes of race, color, national origin, sex, age, disability, creed, religion, sexual orientation, gender identity, gender expression, pregnancy, veteran status, political affiliation and/or political philosophy.

2. **Engaging in Sexual Misconduct which includes:**

- Sexual Assault – Non-Consensual Intercourse
- Sexual Assault – Non-Consensual Contact
- Sexual Exploitation
- Sexual Harassment
- Intimate Partner Abuse (domestic/dating violence)
- Gender/Sex Based Stalking

3. **Retaliation**

4. **Stalking**

PROCEDURAL REQUIREMENTS

Three Key Procedural Requirements for schools to prevent and resolve sexual violence complaints:

1) Disseminate a notice of non-discrimination.

2) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX.

3) Adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints.

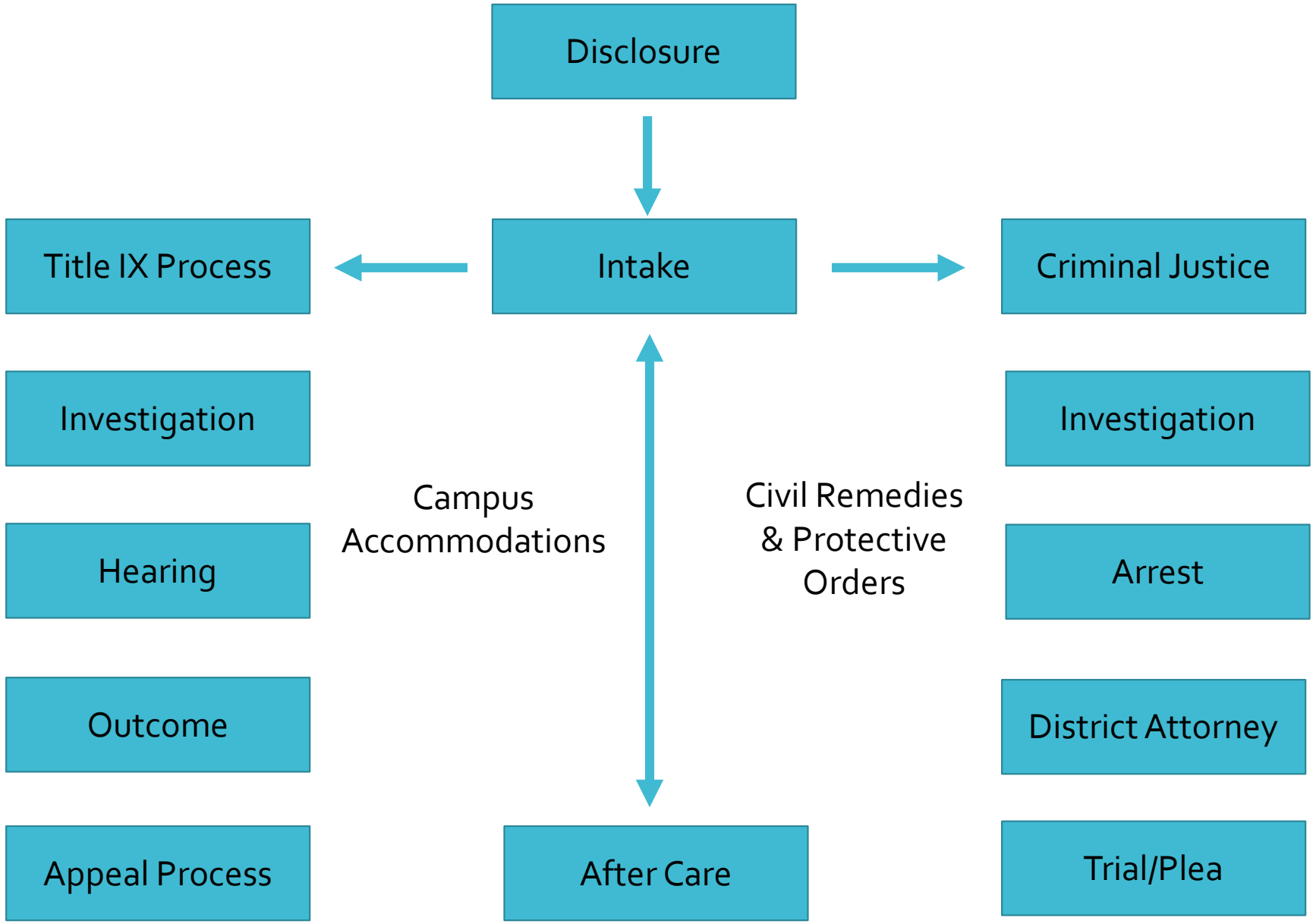
SIMULTANEOUS INVESTIGATIONS

- Students may pursue a criminal investigation simultaneous to a Title IX investigation
- Institutions are obligated to inform students of their right to report to law enforcement
- A criminal investigation does not mitigate a school's federal obligation to conduct their own investigation

DOESN'T HAVE TO OCCUR ON-CAMPUS

A school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

What does this mean?


Disclosure
Intake
Title IX Process
Investigation
Hearing
Outcome
Appeal Process
Campus Accommodations
After Care
Criminal Justice
Investigation
Arrest
District Attorney
Trial/Plea
Civil Remedies & Protective Orders

PLAN AHEAD

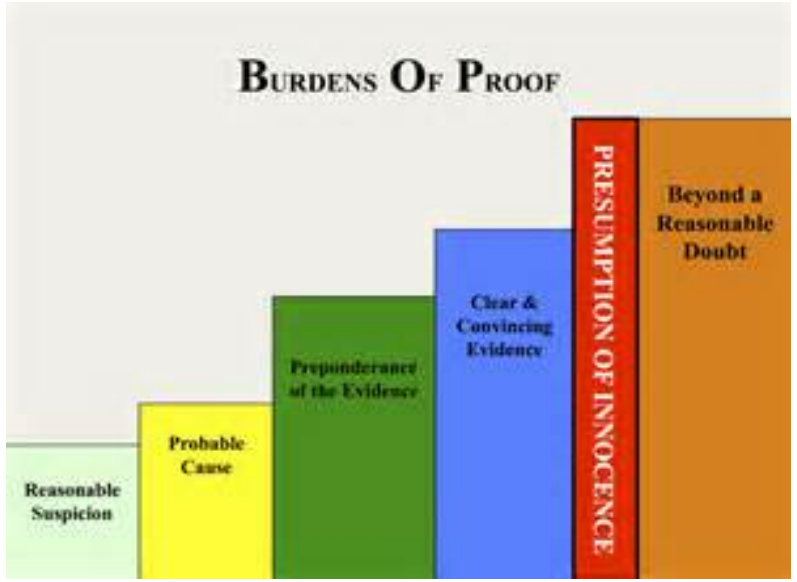
- This section outlines different challenges and advantages to simultaneous investigations
- Think of questions that this raises for your agency
- Having a plan before a case involves both systems is best practice
- MOUs and other forms of agreements between LE and schools

CHALLENGES

- Burden of Proof /Charges
- Notification of respondent
- Pretext phone calls
- Multiple interviews
- Timing
- Access to Title IX report
- Evolving area of the law

BURDENS OF PROOF

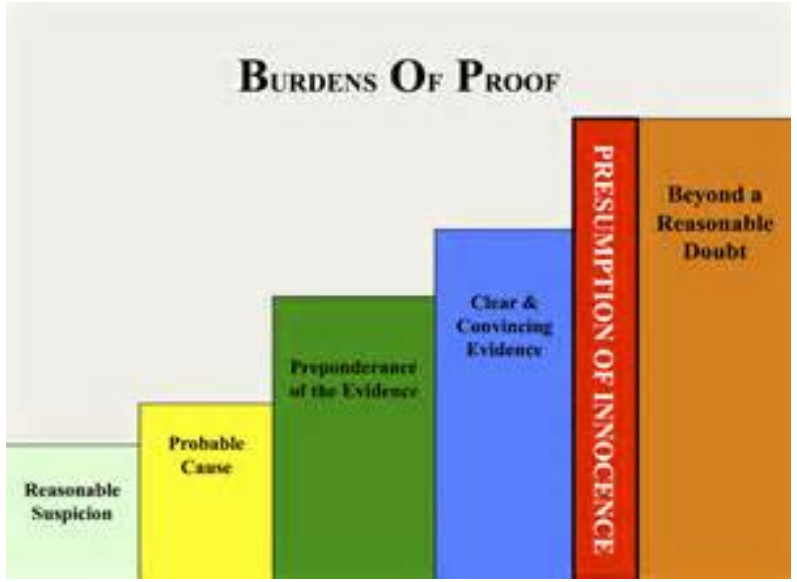
- **Title IX Investigations**
  - Preponderance of the Evidence
- **Criminal Investigations**
  - Probable Cause/Beyond a Reasonable Doubt



Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

BURDENS OF PROOF

- **Title IX Investigations**
  - Preponderance of the Evidence
- **Criminal Investigations**
  - Probable Cause/Beyond a Reasonable Doubt



CHARGES

- Language and elements don’t fit criminal charges exactly
- Make sure you know what the policy at the school says compared to the state law.

NOTIFICATION

- Schools have an obligation to notify both the victim and respondent when an investigation is initiated on campus
- Notification must be prompt
  - Usually the school will notify law enforcement that they are going to notify respondent
- LE request for delay of notification to respondent
  - Delays in notification must be documented – explain why the delay is needed so that schools can better document
  - Very rarely done

PRETEXT PHONE CALLS AND TEXT MESSAGES

- Law enforcement can ask that schools delay notification of investigation until pretext phone call completed
- Delay must be reasonable
- Allow for school to be present or access copy of recording
- Pretext phone calls conducted by law enforcement may be used as evidence in Title IX investigation

INTERVIEWS

- Title IX investigators will conduct interviews with the complainant, respondent, and victim
- Allowing for campus investigators to be present during LE interview limits how many times the victim and other parties are interviewed
- Interviews conducted by campus investigators won't be shared without a court order– FERPA (student privacy)
- Establishing agreements to have LE conduct interview with campus investigator present prevents interviews from occurring that LE doesn't have access to

SUMMARY OF FINDINGS

- Most documents and evidence created and collected through the Title IX investigation is protected by student privacy law
- Even if victim waives their right to privacy, most of the report will still be withheld – the report is not only the victim's student record, but also respondent's, witness's, etc.
- Victim and defendant have right to access their report and review it

DISCOVERY PITFALLS!

- Summary reports distributed to victim and offender upon *conclusion* of investigation.
- Investigation may have occurred and been completed before you even file the case.
- Full report also generated, which contains:
  - Witness statements
  - Notes from interviews
  - Email log of communication with complainant and respondent
- Typically not recorded
- You won't get unless you ASK!

HOW TO OBTAIN RECORDS

- No SDT!
  - FERPA Exception
  - Balancing Test
  - Notice/standing
- Search Warrant preferred
- Specificity in the warrant
- Pre-file = Search warrant with seal
- Post filing = Not under seal

EVOLVING AREA OF LAW

- Where we were.
- Where we are.
- Where we are going.

EVOLVING AREA OF LAW

- Timing
- Cross-examination
- Attorneys/representatives
- Burden of Proof
- Restraining order

THE GOOD, THE BAD, AND THE UGLY

The Good:

- Additional witness names
- Defendant statements/admissions
- Reports often make a conclusion that assist in framing the issues
- Informs charging decisions
- Preview of defenses/defense witnesses/approach at trial

The Bad:

- Disadvantage in timing of access to information
- Defense knowledge of witnesses/statements/victim's statements before you do

The Ugly:

- Timing of interviews
- If not working together what can happen – multiple interviews, defense having information the prosecution doesn't, and victim frustration.

MOU's

- Help develop MOU with school around simultaneous investigations
- Set expectations for who the contact people will be
- Establish a protocol for law enforcement requests for delays in campus investigation
- Establish scope and jurisdiction

TRIAL

PREPARATION

- Start early finding witnesses
  - Moving while in school and after graduation
  - Study abroad
  - Findable, but start early
- Know where your victim is at
  - Range of reactions
  - CASE STUDY (People v. R)

FRAMING THE ISSUE

“Well it just came down to our belief that this was a girl who regretted having drunk sex with that young boy. Sure he made some bad decisions, but boys will be boys we can’t ruin his life over this. We weren’t there, we don’t know what really happened. I mean she didn’t fight back and she just couldn’t give us a timeline of what happened. I just wish she hadn’t put herself in that situation, she should have known better.” – Juror

https://www.youtube.com/watch?v=51-hepLP8J4

FRAMING THE ISSUE

- Getting the jury to focus on the Defendant's behavior.
- BUT –
  - We cannot forget that the victim's decisions/behavior will play a role in the jury's verdict.
  - Prior relations with the Defendant, risky behaviors, drug use, no physical resistance, when they decided to report, inconsistent statements
  - We cannot ignore these in trying to get the jury to focus on the Defendant's behavior.

TRAUMA EXPERTS

- Use one in almost every case
  - Pick and chose what is relevant for the jury to hear
- Blind experts

MEMORY

- *What jurors think –*
  - *There should be a full chronological recitation of the events that occurred.*
  - *This was really traumatic so he/she would remember it.*
  - *Any forgotten details must means she is lying or filling in the gaps.*
  - *He/she just couldn't tell us what happened?!*

MEMORY

- Intoxication
  - Should be common sense
  - CASE STUDY (DUI Trial)
- Trauma
  - How memory is stored during a traumatic event
    - Not chronological
    - Sensory memories
    - Why it is stored that way.
  - Not subject to voluntary recall
    - Can come back in flashes
    - Can come back based on triggers
  - Not always able to convey a complex narrative

LACK OF PHYSICAL RESISTANCE

- *What jurors think –*
  - *She would absolutely fight back if what he/she said happened actually happened.*
  - *I would fight back.*
  - *I taught my daughter/son to fight back.*

LACK OF PHYSICAL RESISTANCE

- Physically helpless
  - Common sense?!
- Trauma
  - Fight, flight, or freeze
  - Freezing is the most common
  - CASE STUDY (People v. L)
    - Trained in martial arts

INCONSISTENCIES

- *What jurors think –*
  - *The victim will be completely consistent with everything she reports.*
  - *If it really happened she will be able to tell us exactly what happened*

INCONSISTENCIES

- Trauma Memory
  - How memories are stored
  - Not subject to voluntary recall
  - When memories come back
  - Processing
  - Normalization

DELAYED REPORTING

- *What jurors think –*
  - *If he/she was really raped she would immediately call the police*
  - *As soon as she was safe she would call the police.*

DELAYED REPORTING

- Processing – takes time to get to the point where some can report
  - Might not consider it a crime right away
    - With college-aged victims this happens extremely often
    - "I was so drunk, I might have consented."
    - "He only used his fingers so I wasn't raped."
- Concern about how friends will react
- Concern about how parents will react
- Concern about how it will impact their school, social life, college experience
- Concern about who will believe them
- Self-blame

SELF-BLAME

- I see this in almost every college-aged victim case.
- Real quotes from college-aged victims:
  - "I can't believe I did this"
  - "I drank too much"
  - "I was high"
  - "I went out with the wrong person"
    - "I trusted that person"
  - "I left my group of friends"
  - "My parents told me this could happen"
  - "My parents told me to not put myself in this situation"

DEFENDANT'S BEHAVIORS

- Myths are what we need to deal with and take on
- But we need to be constantly thinking about framing the issue focusing on the Defendant's behaviors
- Defendant's actions/comments what do they mean in relation to the crime
- CASE STUDY (People v. W and People v. S)
  - Defendant's friends interviews
  - How are we characterizing/explaining Defendant's behaviors?
- Cross-examination
  - Everything a nice guy would do…
- Trauma Expert

TRAUMA EXPERT – OFFENDER BEHAVIOR

- Grooming
  - Not just for kids
  - Environmental Grooming
    - "Safe with me"
    - "I will take her home"
    - "Go have a good time – I will make sure she gets home ok"
- Deciding on who to victimize?
  - Vulnerable or can be made so.
    - Drugs, alcohol, lost, young, etc.
  - Accessible or can be made so.
    - Getting the friend group to trust the Defendant.
  - Lacking credibility or can be made to seem so.
    - Alcohol, drugs, boyfriend, etc.

JURY SELECTION

- Must frame the issues throughout, but jury selection is the most important part of these trials.
- Start framing the issues by getting the jury to discuss:
  - Focusing on the Defendant's behavior
  - Fairness throughout the process
  - Start tackling the myths
    - Whatever the issues are in your case start talking about them NOW

JURY SELECTION EXAMPLES – MEMORY

- Get jury talking about major life event
- Really important
- Lots of emotions
- Trying to take it all in
- Wanted to remember every detail
- Could they give you every single detail in chronological order?
  - If they say YES – get rid of them

JURY SELECTION EXAMPLES – CONSENT

- CASE STUDY (People v. L)
  - Mid-consensual sex withdraw of consent due to a herpes outbreak
- I take consent head on
- Get them talking about:
  - What is consent?
  - How many people need to consent to have a consensual sexual encounter?
  - What does consent look like?
  - What does withdrawing consent look like?
  - Once consent is withdrawn what does that mean?
  - Does a prior relationship constitute consent?
- Hypotheticals
  - Massage therapist

JURY SELECTION EXAMPLES – PRIOR SEXUAL RELATIONSHIP

- Hypothetical
  - Friend asked for $5 in the past and you gave it to him
  - Friend asked for $20 in the past and you gave it to him
  - Friend asks for $20 and you say no
  - Friend then takes the $20 out of your wallet
  - Did you consent to giving your friend $20?
  - Friend asks for $20 and you say ok to only $10
  - Friend takes $20 anyway
  - Did you consent to giving your friend $20?

JURY SELECTION EXAMPLES – NO PHYSICAL RESISTANCE

- Right after you discuss consent
- Take it head on

JURY SELECTION EXAMPLES – VICTIM BLAMING AND FOCUSING ON DEFENDANT'S BEHAVIOR

- Hypothetical
  - Victim was walking on the bad part of town at night, alone, and wearing clearly expensive clothes
  - He/she is robbed
  - Is it the victim's fault?
  - Whose actions do we look at?
  - Even when the victim made choices we don't agree with, who caused the robbery?

JURY SELECTION EXAMPLES – DELAYED REPORTING

- Take it head on
- Ask your jury why people wouldn't report a crime right away, especially if it involved sexuality
- Getting them talking about everything we have discussed a victim going through
  - Embarrassment, processing, parents, drugs, alcohol, etc.

JURY SELECTION EXAMPLES – JUDGING CREDIBILITY

- People push back on this one (Boulder)
- Get people talking about how they do this on a daily basis
  - Easy hypo to get it started – two children telling two different stories and you have to decide who is telling the truth.
  - What do you do?
  - What do you look at?
    - Body language, demeanor, motive, story, corroboration, etc.

JURY SELECTION EXAMPLES – TALKING ABOUT SEX

- This is important in any sex case
- Get them talking about whether or not they will be comfortable deliberating about sex/sexual assault
- Use that to talk about how the victim might feel talking about what happened.
  - To the jury, to detectives, to his/her family, etc.
- Juror X I am going to come back to you in 2 minutes, but at that time I want you to give me every detail of your last sexual experience?
  - Get them talking about how awkward that would be.
  - Get them talking about how difficult that would be.

JURY SELECTION EXAMPLES – BRD

- Every prosecutor has their own way of doing this.
  - Do whatever you feel comfortable with.
- I take it head on.
- Read the instructions.
- Ask them about how it is not beyond all doubt.
  - Make sure they are comfortable with that.
- Ask them about a lack of percentage.
  - Make sure they are comfortable with that.

BACK TO FRAMING THE ISSUE

- Language
  - Throughout the trial be careful what language you use
  - Language of consent v. assault
    - "They had sex"
  - Even when asking questions
    - Can be difficult – want to revert back to using the terms "sex" and "oral sex"
    - Use instead:
      - Assault
      - Abuse
      - Digital penetration
      - Penetrated her vagina with his penis
      - Forced her to put his mouth on his penis
    - Might make the jury uncomfortable – that is OK!

FRAMING THE ISSUE

- Argument
  - We have to deal with the victim's behaviors
  - But always frame the issues going back to the Defendant and the choices the DEFENDANT made
- LANGUAGE OF CONSENT
  - She was drunk, he took her back to his place alone, and when they arrived home they had sex.
- LANGUAGE OF ASSAULT
  - She was extremely intoxicated and the Defendant knew that, he isolated her from her friends, and when they arrived home he penetrated her vagina with his penis.

SENTENCING

SENTENCING

- Victim withstands an investigation
- Victim waits for 18 months to 2.5 years to get to the start of the trial
- Testifies at trial
- Waits for a verdict
- Get the right verdict
- Victim waits for sentencing while the Defendant is out of custody (usually)
- Victim comes into sentencing
  - Victim talks about the impact this has had in front of her family, friends, and the Defendant
  - Hears her family talk about the impact this has had on her and them.
- …probation

SENTENCING

- Many young offenders are not getting prison.
  - Why?
  - Sometimes appropriate; sometimes not.
- What can we do to help get just sentences?
  - Pull from your trauma expert to educate the judge.
    - Try to show the judge how predatory these behaviors were
  - Know the risk assessment tools and how they evaluate young offenders.
    - Likely low risk
    - Be able to point to stability/risk factors that are inherently present/not present in younger individuals

RISK FACTORS

- Employment Problems
- Current Substance Use
- History of Substance Abuse
- Prior Terms of Incarceration
- Prior Periods of Supervision
- Not Motivated to Change
- Boredom
- Education
- Unstable Residence
- High Risk Peers/Family
- Emotional/Psychological Problems
- Minimizes Responsibly for Offense
- High Risk Relapse/Recidivism
  - PSE
- Depression

STRENGTH FACTORS

- Can Solve Problems
- Job Training
- Stable Housing
- Financial Stability
- Motivated to Change
- Pro-Social Family
- Community Involvement
- Pro-Social Friends
- Physically Active
- Positive Significant Relationship
- Education
- Stable Job
- Health
- Sobriety
- Current Treatment

SENTENCING

- Educate the judge
- Make your argument for a just sentence
- Show the impact this has had on the victim
- Be confident in the job you did!

THANK YOU!

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