Providing Context:
Introducing Expert Testimony in Sexual Assault Cases

What We Do

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<td>Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices</td>
<td>Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions</td>
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<th>Training Events</th>
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<td>Develop curricula and facilitate a wide range of specialized in-person and web-based trainings designed to empower prosecutors and allied professionals</td>
<td>Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training</td>
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Support
This project was supported by Grant No. 2017-TA-AX-K043 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions, findings, conclusions, and recommendations expressed in this presentation are those of the authors and do not necessarily reflect the views of OVW.

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Objectives

- Recognize responses to trauma that may require explanation at trial.
- Effectively present expert medical testimony.
- Identify and work with experts to prepare a case for trial.
- Educate judges and juries by properly admitting fact and expert witness testimony.

Questions

- Does victim behavior/responses to trauma impact the fact finder’s evaluation of credibility?
- Does victim behavior impact OUR decisions — law enforcement and prosecution?

Questions Cont’d

- What kinds of victim behavior/responses to trauma have proven most challenging in your past cases?
- Was victim able to explain responses to trauma?
- Was expert testimony offered?
Juror Expectations

Reality

Expert Testimony

Prevalence of Drugs in Sexual Assault Cases

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Proving Rape Allegations

- Rape by force or threat of force
- Unconscious victim
- Too drunk to consent

Type of Allegation

Difficulty

Reality of Sexual Violence Cases

- Lack of earnest resistance
  - Not screaming, yelling, fighting back, or shouting “no” during rape, etc.
- Delayed or piecemeal reporting
- Continued contact with offender
- Subsequent sexual activity

Intimate Partner Sexual Violence

The victim may...

- Stay with abuser
- Minimize abuse or self-blame
- Be unable / reluctant to report abuse
- Be unable to participate in investigation / prosecution
- Request dismissal of charges
- Recant
- Testify for abuser
Deciding Whether to Use Expert Testimony

Identify Behavior / Response to Trauma

- Talk to Victim
- Review Discovery
- Victim Response to Trauma
- Anticipate Defenses
- Work With Investigators
- Talk to Secondary Witnesses

- Work With Expert

- Will it be a feature of trial/defense?
- Can victim articulate?
- Does other evidence help explain?

- Can expert adequately explain?
- Common sense

- Cost?
- Effective?
- Necessary?
- Report
- Testimony
Expert Qualifications

- Clinical experience
- Direct victim service
- Education
- Knowledge of relevant articles
- Authorship of articles
- Prior qualification

Possible Experts

- Victim advocate
- Forensic psychiatrist / psychologist
- Sexual Assault Nurse Examiner (SANE)
- Shelter director
- Law enforcement
- Emergency room clinician
- Scholar / researcher

Selecting an Expert

At trial, avoid using advocates from your jurisdiction or who worked with your victim

- Conflicts of interest
- Confidentiality
- Bias
General Expert

- Has not met victim
- Is not diagnosing victim as rape victim
- Is not offering an opinion on credibility
- Knows little of case facts
- Only educating fact finder on victim behavior / responses to trauma

Pretrial Expert Consult

- Consider using different experts for pretrial prep / consults and trial
- Pretrial expert can review discovery and help “connect the dots”
  - Trial expert should **not** review discovery but should be provided appropriate information

Expert Testimony

- **Provides Context**
  - Places victim’s behavior in context of history and events
- **Supports Victim Credibility**
  - Enables jury to understand victim’s perceptions/response
- **Dispels Misconceptions**
  - Left unexplained, jurors may rely on myths/misconceptions
Qualify the Expert

- Do not accept stipulation offer
  - Let jury hear qualifications
- After cross and re-direct, offer witness as expert on specific subject
- Have court give instruction

Relevance

- Jurors’ beliefs in myths recognized in legal and social science literature
- Subject matter is beyond ken and understanding of average juror
- Need to dispel misconceptions
- Unaddressed, jurors do not have proper context to judge victim behavior

Testimony by Experts

**KRE 702**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

1) The testimony is based upon sufficient facts or data;
2) The testimony is the product of reliable principles and methods; and
3) The witness has applied the principles and methods reliably to the facts of the case.
Opinion Testimony by Lay Witnesses
KRE Rule 701

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

a) Rationally based on the perception of the witness;

b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and

c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Hunt v. Commonwealth
304 S.W.3d 15 (Ky. 2009)

“If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is nevertheless admissible as long as it is limited to those opinions or inferences which are:

(a) rationally based on the perception of the witness,

(b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and

(c) not based on scientific, technical, or other specialized knowledge within expert testimony’s scope.”

Hunt, cont’d
304 S.W.3d 15 (Ky. 2009)

“The degree to which a witness may give an opinion... is predicated in part upon whether and the extent to which the witness has sufficient life experiences that would permit making a judgment as to the matter involved.”
“Daubert and Mitchell use the catch phrases “expert scientific testimony”, “theory”, “technology”, and “methodology”. Dr. Bates’s testimony, on the other hand, concerned basic female anatomical findings. Her examinations did not involve any novel scientific techniques or theories.”

“Likewise, the research that Dr. Bates referred to involved the study of a female physical characteristic. Dr. Bates testified that the studies she relied upon were compilations of statistics derived from pelvic examinations of young females in various age groups. We discern nothing of a scientific nature to trigger the necessity of applying the Daubert analysis.”
Collins, cont’d
951 S.W.2d 569 (Ky. 1997)

In accordance with KRE 702, Dr. Bates was qualified as an expert based upon her knowledge, experience and training. Her testimony clearly assisted the trier of fact to understand a fact in issue, i.e., the presence of a hymen in a female who has been sexually active. The trial court did not abuse its discretion in allowing Dr. Bates's expert testimony.

Stringer v. Commonwealth
956 S.W.2d 883 (Ky. 1997)

Defendant appealed from convictions of sodomy and sexual abuse. The trial court allowed a gynecologist to testify that his findings in an examination of the victim were consistent with her related history of sexual abuse. Defendant appealed, claiming that allowing this expert to testify was an error.

Stringer, cont’d
956 S.W.2d 883 (Ky. 1997)

The statements to the treating psychologist were admissible under Ky. R. Evid. 803(4). The court resolved a line of conflicting decisions as to whether opinions by experts could touch upon ultimate issues by judicially adopting the equivalent of Fed. R. Evid. 704.
Edmonds v. Commonwealth
433 S.W.3d 309 (Ky. 2014)

“Appellant's argument assumes because Edlin [a SANE nurse] repeated statements consistent with victim’s testimony, their admissibility is only controlled by the prior-consistent-statement rule. For example, Edlin repeated the victim’s statement about the source of her neck injuries (manual strangulation), which was consistent with her trial testimony — and thus potentially implicated KRE 801A(a)(2). But that statement was independently admissible under KRE 803(4), the exception for statements for the purpose of medical diagnosis or treatment.”

Edmonds, cont’d
433 S.W.3d 309 (Ky. 2014)

“While ‘a witness cannot be corroborated by proof that on prior occasions he made the same statement as made in his testimony,’ without complying with KRE 801A(a)(2), the rule (and the rule barring hearsay) has no effect on a witness’s independent observation that corroborates the other person's testimony. KRE 801A(a)(2) is only applicable to prior consistent statements, not additional consistent testimony based on personal knowledge. Thus, to the extent Edlin's testimony was based on her independent examination, Appellant's argument is not applicable.”

Edmonds, cont’d
433 S.W.3d 309 (Ky. 2014)

“There is little doubt a statement about recent anal sexual activity is relevant to the 'inception or... cause' of an injury due to anal rape, and may be relied upon by a physician in treatment or diagnosis. This information is critical in discerning the source of a victim's injuries by excluding other possible causes of injury. Further, this Court is satisfied a victim's motive in making a statement excluding a possible source of her injuries is consistent with promoting her treatment for those injuries.”
Defining the Parameters of Admissible Expert Testimony

Jackson v. Com.

Facts: Defendant was convicted of first-degree sodomy, first-degree sex abuse, and misdemeanor sexual abuse. Defendant appealed, contending in part that the admission of expert testimony regarding victim behavior was reversible error.


Jackson, cont’d

Holding: The court agreed with the defendant, likening the expert’s testimony to impermissible CSAAS testimony...stating “CSAAS testimony is generally that in which a seasoned sexual abuse investigator testifies that it is common for sexually abused victims to delay reporting of the abuse or to initially deny the abuse, only later to disclose it. The testimony also frequently includes testimony about various 'symptoms' associated with CSAAS, and the investigator’s statement that the child victim’s behavior was consistent with CSAAS.”

Jackson, cont’d

“At its worst, CSAAS testimony functions as a sort of quasi-medical or psychological bolstering of the child witness, since it effectively places the imprimatur of science on the child’s behavior and testimony. While Terry never described his observations as CSAAS or used similar terminology, his testimony was nevertheless similar in substance to other CSAAS testimony.”


Jackson, cont’d

“Ultimately, the problem with CSAAS-style testimony is that it allows an authority figure, usually a police officer, physician, or social worker with expertise in child abuse, to vouch for a child. As in Miller, the testimony either shows that the child victim is part of a class of abused children who all behave similarly or it opposes an inference that the child fabricated the evidence. Either way, such testimony tends to affect how a jury views the evidence.”


Other Approaches
KRE 801A(a)(2)
Rebutting Claim of Prior Inconsistency

Chames v. Commonwealth
405 S.W.3d 519 (Ky. Ct. App. 2012)
“KRE 801A(a)(2) provides that a prior out-of-court statement of a witness is inadmissible unless offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Chames introduced evidence that S.S. made statements during her testimony that were inconsistent with statements made during her interview with the Center. During Det. Rigney's testimony, evidence was elicited that S.S. made some consistent statements in her testimony with those made in her interview by the Center."

Chames, cont’d
405 S.W.3d 519 (Ky. Ct. App. 2012)
“Chames' defense throughout trial focused on S.S.'s inconsistencies and inability to remember or recite specific details regarding the alleged crimes. Under these circumstances, Det. Rigney's testimony confirmed S.S. had been consistent even though Chames charged her with fabricating the allegations. We find Det. Rigney's testimony rebutted a charge of fabrication or improper motive and was properly admitted.”
Jenkins v. Commonwealth  
308 S.W.3d 704 (Ky. 2010)

- Issue of first impression: expert testimony on improper interviewing techniques is admissible.
- “Credibility refers to whether a witness is being truthful or untruthful. The proffered expert testimony did not run afoul of this rule. Similar to expert testimony involving eyewitness identification, expert testimony that a witness was subjected to suggestive interview techniques pertains to the reliability or accuracy of the witness's belief or recollection, not to the truthfulness or untruthfulness of the witness.”

Jenkins, cont’d  
308 S.W.3d 704 (Ky. 2010)

“To the contrary, such evidence assumes the witness is testifying truthfully — but may be mistaken in his or her belief. Accordingly, the trial court erred in ruling the evidence was inadmissible as a matter of law.”

KRE 404  
Res Gestae
Yarnell v. Commonwealth
833 S.W.2d 834 (Ky. 1992)

Actual physical force is not needed to prove forcible compulsion. In determining whether the victim submitted because of an implied threat which placed her in fear, a subjective rather than an objective standard must be applied.


Yarnell, cont’d
833 S.W.2d 834 (Ky. 1992)

“The evidence indicates that the two children were subject to constant emotional, verbal and physical duress. They lived in continued fear of what Yarnell might do to them or their mother. They testified that they went along with the deviate sexual behavior only because of this fear”

Yarnell, cont’d
833 S.W.2d 834 (Ky. 1992)

“Under the evidence as a whole, it was not clearly unreasonable for the jury to find that Yarnell engaged in sexual intercourse with the children by means of forcible compulsion. Accordingly, he was not entitled to a directed verdict of acquittal.”
Luna v. Commonwealth
460 S.W.3d 851 (Ky. 2015)

“KRE 404(b) excludes ‘[e]vidence of other crimes, wrongs, or acts’ which is admitted in an attempt ‘to prove the character of a person in order to show action in conformity therewith.’ This evidence can be highly prejudicial, effectively convicting the defendant because of who he is rather than what he is charged with doing.”

Luna, cont’d
460 S.W.3d 851 (Ky. 2015)

“Our rules recognize a narrow set of circumstances where prior-bad-acts evidence is admissible:
1) when offered for ‘some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident’; or
2) if the prior-bad-acts evidence is ‘so inextricably intertwined with other evidence essential to the case that the separation of the two [] could not be accomplished without serious adverse effect on the offering party.’”

6th Circuit Authority
LaVictor, cont’d
848 F.3d 428 (6th Cir. 2017)

“FRE 702 does not limit expert testimony subject matter to scientific or technical evidence. It is the district court’s duty to ensure all expert evidence is based ‘on a reliable foundation.’ And while Daubert identifies a number of considerations for determining reliability, this Circuit has previously recognized that a district court operates with wide latitude in ‘deciding how to test an expert’s reliability,’ and must be afforded ‘considerable leeway in deciding... how to go about determining whether particular expert testimony is reliable.’”
**SANE Expert Testimony**

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**Collins v. Commonwealth**

951 S.W.2d 569 (Ky. 1997)

“Since Kentucky follows the Daubert analysis, we conclude that such analysis is not, in fact, triggered in this case. *Daubert* and *Mitchell* Daubert and Mitchell use the catch phrases ‘expert scientific testimony’, ‘theory’, ‘technology’, and ‘methodology’. Dr. Bates's testimony, on the other hand, concerned basic female anatomical findings. Her examinations did not involve any novel scientific techniques or theories. Likewise, the research that Dr. Bates referred to involved the study of a female physical characteristic.”

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**Collins, cont’d**

951 S.W.2d 569 (Ky. 1997)

“Dr. Bates testified that the studies she relied upon were compilations of statistics derived from pelvic examinations of young females in various age groups. **We discern nothing of a scientific nature to trigger the necessity of applying the Daubert analysis.**

In accordance with KRE 702, Dr. Bates was qualified as an expert. Her testimony clearly assisted the trier of fact to understand a fact in issue, i.e., the presence of a hymen in a female who has been sexually active. The trial court did not abuse discretion in allowing this testimony.”
Caution...
Expect inconsistencies between what is reported to the SANE and law enforcement!

Role of SANEs

“The practice of nursing globally when health and legal systems intersect”


The Medical-Forensic Exam

Medical History
Assault History
Physical Examination
Discharge Planning
Step 1: Medical History
Should include chronic and acute healthcare problems, current medications, pregnancy history, and drug allergies
• Includes last consensual sexual encounter

Step 2: Assault History
• Helps guide medical-forensic exam
• Areas of penetration, types of penetration, and weapons used
• Includes information about assailant’s identity
  o Crucial for discharge

Step 3: Physical Exam
External physical inspection
Physical evidence collection
Photography
Genital inspection
Photography

- Photos of any body injuries, with and without scale
- External genital photos
  - Taken before and after use of any special techniques
- Vaginal and cervical photos with colposcope or digital camera with magnification

Injury is Not the Holy Grail

- Presence of genital injury may mean recent sexual contact has occurred, not that forcible sexual contact has occurred
- Presence of genital injury ranges from 5-87% depending on visualization techniques, age of patient, and prior sexual intercourse


The Exam Can NOT Tell You

- If patient was raped
- If victim consented
- If non-specific genital injuries are from assault or consensual sex
Step 4: Discharge Planning

Patients
• Individualized plans
• Dependent on health, crisis, safety needs

Healthcare Providers
• Need info about assault to complete exam
• Need info about assailant

Consequences of untreated sexual assault
• Chronic pain
• PTSD
• Reproductive issues
• Suicidal ideation
• Potentially homicidal

In General

• Think about what points you want to make with SANE
• Customize direct to specific SANE and her program
• Explain common presentations, significance of clinical findings, and consistency between exam findings and patient history

*Ask about any indicators of trauma*

Trial

• Discuss clinical background at length
• Draw out lack of “typical” in sexual assault patients
• Discuss victim behavior/response to trauma
• Avoid statistics, ask about frequency in a SANE’s clinical experience instead of:
  o Is it common to...?
  o Is it your experience that...?
Philosophy

• Can expert articulate practice philosophy?
  • I.e., health care focused vs. arm of law enforcement
• Does expert take patient’s word as truth?
  • Or believe that part of their job is determining whether patient is telling the truth?

Trial Preparation

Expert’s Report

• Summarize anticipated testimony
• Attach CV
• Reference articles routinely relied on regarding victim behavior
• Report will be provided to defense
Prepare with Expert

- Review qualification questions
- Determine most effective direct examination questions
- Discuss expected areas of cross-examination and possible responses
- Review hypotheticals and foundation for opinion
- Discuss any relevant pre-trial rulings

Terms to Avoid

- Post-Traumatic Stress Disorder (PTSD)
- Rape Trauma Syndrome
- Battered Woman (or Person) Syndrome (BWS)
- Neurobiology of trauma

Why We Don’t Use “PTSD”

- Specific diagnosis in the DSM-5
- Victim may not meet diagnostic criteria
- PTSD may not explain all behaviors
- May open door for defense to obtain victim’s counseling records or have victim examined by defense expert
Why We Don’t Use “BWS”

- Not in DSM-5 as a diagnosis
- Suggests victim is ill
- Expert has not examined victim
  - Insufficient information to opine on “syndrome”
- Many behaviors may be caused by other factors

Limits of Expertise

- Experts should explain common victim behaviors without going beyond area of expertise
- E.g., advocates should not testify about:
  - Psychiatry/medicine
  - Anatomy/physiology
  - Neurology

Avoid the Danger Zone

**An expert CANNOT:**

- Testify about a particular witness’s credibility
- Be a human lie detector
- Testify as to whether an assault did or did not happen
The best testimony is...

- Clearly worded
- Direct
- Concise
- Acceptable to peers in relevant community

Voir Dire

- Sexual violence victims may be on panel
  - Protect privacy
  - Make advocate available to talk
- Jurors who have experience with sexual violence victims can help educate other jurors about common victim behaviors

Expert’s Direct Testimony

- Answer ONLY questions asked
- Ask for question to be repeated and reworded if necessary
- OK to say, “I don't know”
- Don’t exceed area of expertise
- Don’t argue/defend
- Make eye contact and speak to judge and jury when natural
Prepare Expert for Cross

- Bias/objectivity
- Opinions
  - Don’t some victims also . . . ?
- Truth does not change depending on who asks questions

Commonwealth v. Cosby

2017 trial

- Expert among last witnesses to testify
- Licensed psychologist (PhD)
  - Worked with victims and offenders

Cosby 2017

Defense challenges to prosecution’s expert included claims:
- Expert was “biased” because of Facebook post
- Expert was not “blind” (as claimed) after following media coverage
Cosby 2017
Cont'd

• Court found basis for cross, but not to preclude testimony
• Prosecution elicits during voir dire of expert
  o Preceded retention as expert
• Hypothetical about “Board of Trustees” was “too close” to facts of case

Cosby 2018

• Expert was first witness to testify
  o Forensic psychiatrist
• Expert’s voir dire covered knowledge and experience with victims and offenders
• Among first questions after voir dire: “Can you just describe why it is important to educate a jury in this day and age about ... the misconceptions, the rape myths?”

Cosby 2018
Expert Testimony—Direct

“[I]n the United States we have been educated and come a long enough way to know that victims of sexual assault haven’t brought it on themselves. What we have done less well and what is still part of the U.S. rape myth is we blame victims for not being the kind of victim that we think that they should be.”
"[If an athlete, a football player, gets hit very hard on the field and then gets back up again or if a skier has a huge fall and gets back up again, you applaud them. But if . . . a victim of sexual assault moves on with their life and gets back up again, the common response is, well, then nothing happened."

Q: Okay. But you wouldn't doubt that a very logical and rational response to being sexually assaulted would be one of revulsion, never wanting to have any contact with that person whatsoever?

A: That's the whole point of the rape myth. You just articulated it.

**Cosby Transcript Excerpts**

- Generously donated by court reporter Ginny Womelsdorf to AEquitas, for training/educational purposes ONLY
- Available from AEquitas upon request (not to be distributed outside your office)
Closing Argument

- Support victim’s disclosure with evidence
- Offer expert testimony to undercut defense attacks on victim’s credibility
- Explain how expert testimony reinforces victim’s credibility and is supported by evidence

Going Forward

- Identify victim responses to trauma that may raise an issue at trial
- Strategize how to address victim responses to trauma throughout trial
- Offer expert testimony to explain victim responses and provide context

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