"I was pummeled with narrowed, pointed questions that dissected my personal life, love life, past life, family life, inane questions, accumulating trivial details to try and find an excuse for this guy who had me half naked before even bothering to ask for my name."  

- Stanford Rape Victim 2016

In rape and domestic violence cases, the defense often exploits misconceptions about victim’s behavior to create reasonable doubt. A “real victim” would behave differently is a usual argument. The strategy is often effective when the only witness to the crime is victim and the defendant. The defense links the victim’s “unorthodox” behavior to the victim’s credibility. If the victim behavior is left unexplained, this strategy can be effective. Prosecutors must address victim behavior, and provide an accurate context for the jury.

Provide Accurate Context for Jury

Jurors may believe a “real, genuine rape” is only forcible rape: a case of assault, where a woman has been violated against her will, through the use of physical force where it is physically traumatic for her. The defense may perpetuate myths such as “only strangers rape,” “she wanted it,” “she is asking for it,” and “it only happens to some type of women” to play to the jurors preconceived notions. According to the theory, any victim who is not a “real victim” is at fault.

In cases of domestic violence, the defense may attack allegations by attacking the victim’s actions. A victim who stays with her abuser, recants testimony, requests dismissal of charges, refuses to testify or testifies on behalf of batterers could not possibly be telling the truth about life threatening injury. Rather the defense would argue, the behavior shows the victim is lying. Juries often assume domestic violence victims have the full range of financial resources and emotional resources to leave the abuser. The defense strategy plays into perceived biases.

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1 Senior Staff Attorney, National Center for Prosecution of Violence Against Women; This current newsletter is intended to be an update to NDAA’s prior monograph on victim behavior. See Jennifer G. Long, Introducing Expert Testimony to Explain Victim Behavior in Sexual Assault and Domestic Violence Prosecutions, National District Attorneys Association (2007); Jennifer G. Long, Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases, National District Attorneys Association (2006).

Counterintuitive behavior is the failure of the victim’s behavior to match the layperson’s expectations of how a victim “should behave.” The prosecutor is responsible for presenting evidence to help the jury understand why and how the victim’s behavior is logical given the circumstances. For example, studies suggest that 80–85% of battered women will recant truthful statements against her abuser. A witness knowledgeable in the area of intimate partner violence can explain that a victim who telephones the police in immediate fear for her life will likely later recant due to control tactics used by the abuser.

A witness can be qualified as an expert by knowledge, skill, experience, or education. Witnesses who can provide insight to the jury on victim behavior include physiologists, social workers, victim advocates, victim witness coordinators, shelter directors, state coalition directors, emergency room doctors, sexual assault nurse examiners, and law enforcement personnel. Furthermore, when deciding how to explain counterintuitive behavior, the victim’s testimony as well as those of friends and family may also be powerful.

**NDAA Recommended Practices**

First, identify behavior that the jury may find counterintuitive by reviewing all evidence including police reports, medical reports, and witness statements. Second, determine how to explain the behavior with expert or lay testimony. Third, determine admissibility of testimony, and possible objections.

(1) **Identify Counterintuitive Behavior**

A victim reacts to trauma in an individual manner based on personal history, and intervening psychological, social, cultural, and economic factors. Often these behaviors do not match jurors preconceived notions on how victims behave during and after trauma. In cases of domestic violence, jurors may not understand why a victim may stay with her abuser, minimize abuse, request dismissal of charges against the batterer, refuse to testify in court case, or other actions. In cases of rape, jurors often expect “real” victims to scream during the assault, resist attack, and report rape immediately. In most cases, these expectations are unrealistic.

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4 See Fed. R. of Evid. 702.
6 *Eg.* Id.; Simmons v. State, 504 N.E. 2d 575 (Ind. 1987).
11 *Id.*
14 *Eg.* Id.
(2) Explaining Behavior

In cases of battery, fear of violent retaliation combined with threats and knowledge of previous attempted homicide, sexual violence, child abuse, animal torture and other heinous actions may prevent a victim from leaving. Fear of homelessness, poverty, or living on significantly reduced means without the batterer’s income may also influence the decision to leave. Other reasons for counterintuitive behavior could be concern for the children, emotional attachment to an abusive partner, past trauma induced vulnerabilities, perceived lack of social support, or culturally based values or beliefs. In order to understand victim’s responses to trauma and explain behavior to a jury, a prosecutor must understand the context in which the victim lives. A prosecutor may explain the victim’s counterintuitive responses to trauma by calling the victim, friends, family, other lay witnesses or a witness with special expertise in the field of violence against women.

A prosecutor should rarely if ever call the mental health expert or victim advocate who dealt directly with the victim to testify. Breach of privacy and trust, and the possibility of introducing a victim’s mental health records into discovery could result from this action. Instead, the prosecutor should choose an expert who has knowledge based in literature and research, field experience, or a combination of the two. The expert should opine about general circumstances documented in studies, journals, or personal knowledge of counterintuitive behavior clinically witnessed, but should not diagnosis the witness in the case at hand. Diagnosing this particular victim with a syndrome opens the door to the defense calling an expert to contest the victim’s diagnosis. Whereas, a credible defense expert will generally agree regarding literature on how victims of trauma may behave counterintuitively.

Other more unconventional tools such as voir dire questions, and pretrial motions can be used to educate both the judge and jury. Voir dire questions can be tailored to inoculate the jury to counterintuitive behaviors. Drafting and arguing pretrial motions to allow other in acts evidence can also educate the judge.

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17 Id.
18 Id.
19 See Generally State v. Rizzo, 2002 WI 20, P51 (Wis. 2002).
21 DeMotte v. State, 555 N.E.2d 1336, 1338 (Ind. Ct. App. 1990)(“that it would be fundamentally unfair to permit the State to present evidence an alleged victim suffered from rape trauma syndrome, but deny a defendant an opportunity to present evidence showing the victim’s behavior showed no evidence the victim suffered from the syndrome.”)
(2) Determine Admissibility of Testimony

A lay witness may testify regarding personal knowledge received with his or her own personal senses.\(^{24}\) Most relevant evidence is admissible unless it is unfairly prejudice, confuses the issue, misleads the jury, causes undue delay, or wastes the jury’s time.\(^{25}\) An expert witness may testify based on education and or experience, but the testimony must encompass the proper subject matter: scientific, or specialized knowledge, based on a reasonable degree of probability, and reliable through testing, rate of error, acceptance by other experts or peer review.\(^{26}\) An explanation regarding the victim’s counterintuitive behavior is relevant, because it helps the jury accurately judge the credibility of the victim’s statements.\(^{27}\) In most jurisdictions, courts allow testimony to explain victim behavior either by statute or case law.\(^{28}\)

### Admitting Expert Testimony: Sample Questions

The questions below can be used to educate the court and jury about sexual or domestic violence as well as to explain victim behavior. For a more in-depth analysis, refer to NDAA’s monograph: *Introducing Expert Testimony to Explain Victim Behavior in Sexual Assault and Domestic Violence Prosecutions*.\(^{29}\)

<table>
<thead>
<tr>
<th>Qualifying the Expert</th>
<th>A. Occupation</th>
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<tbody>
<tr>
<td>1. What is your occupation?</td>
<td></td>
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<tr>
<td>• How long have you been employed in that capacity?</td>
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<tr>
<td>• Describe the responsibilities of your position.</td>
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<tr>
<td>• How long has the program been in existence?</td>
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<tr>
<td>• What services does your program offer?</td>
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<tr>
<td>• Do you supervise?</td>
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<tr>
<td>• Do you train staff?</td>
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<tr>
<td>• What is the total number of staff?</td>
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<tr>
<td>2. Shelter Employment/Rape Crisis Center/Other</td>
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<tr>
<td>• How many contacts do you receive yearly from victims identifying themselves as having experienced abuse?</td>
<td></td>
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\(^{25}\) Fed. R. Evid. 402; Fed. R. Evid. 403 (Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.)
\(^{26}\) See Fed. R. Evid. 702.
• How many crisis calls do you receive yearly?
• How many residents in your shelter at one time?
• How many residents yearly? Adults? Children?
• How long can residents stay?
• Does your program offer any other services?

3. Counseling/Support Services
   • Are your services solely for victims of sexual assault/domestic violence?
   • Are your services solely for women?
   • How many persons are served by this program yearly?

4. Do you have direct contact with victims of sexual/domestic violence?
   • How many victims do you directly come in contact with yearly?
   • What is the approximate period of time you have contact with an individual victim?
   • What is the nature of your contact with victims?

5. Do you or your program conduct interviews with victims?
   • What is the purpose of the interviews?
   • Are interviews conducted with both crisis calls and clients?
   • How long do the interviews last?
   • What kind of information do you maintain?
     • Type of assault?
     • Age of victim and assailant?
     • Length of relationship?

   B. Previous Occupation (if relevant)

1. What was your previous occupation?
   • How long did you perform those duties?
   • What were your responsibilities?
   • Did you have direct contact with victims of sexual/domestic violence?
   • What was the nature of the contact?

2. Have you had any other relevant job experience with sexual/domestic violence victims?

   C. Education (if relevant)

1. What is the highest degree you have obtained?
2. What was your area of concentration?
3. Did you conduct any field work related to sexual/domestic violence?
4. Have you conducted any research in this area?
5. Were the results of your study developed into a paper? Were they published?
6. Are you familiar with articles or studies related to sexual/domestic violence? Please discuss.
**D. Professional Affiliations**

1. Do you belong to any professional organizations or associations? Any related to sexual/domestic violence?
2. What is the nature and purpose of those organizations?
3. Do you belong to any county, state, or national organizations which specifically address sexual domestic violence issues?
4. What is the purpose of those organizations?
5. Are you involved with any committee work of these organizations?
6. What is that nature of that committee work?

**E. Training**

1. When you began your work at your program, did you receive any training in the issues of sexual/domestic violence?
   - Please describe that training.
   - Have you received any additional training in sexual/domestic violence issues?
   - Please describe that training.
2. Have you conducted any trainings yourself?
   - What were the topics of the trainings?
   - For whom did you conduct the trainings?
   - For what purpose were the trainings designed?
   - How many attended the trainings?
   - How often do you conduct such trainings?

**F. Conferences**

1. Have you attended state or national sexual/domestic violence conferences?
2. Who sponsored the conference?
3. What was the purpose of the conference?
4. When and where was the conference?
5. Did you attend any workshops relevant to domestic violence issues?
6. Have you conducted any workshops or presentations at these conferences?

**G. Previous Expert Testimony**

1. Have you testified previously in court?
2. Was it a criminal or civil case?
3. How many times?
4. For the defense or the prosecution?
5. Has the defense ever asked you to testify as an expert?
6. If asked, would you do so?
Questions to Explain Victim Behavior

A. Issues Relevant to Sexual/Domestic Violence

• Based upon your experience, training, education and work with victims of sexual assault/domestic violence, what are some common issues associated with victims of sexual assault/domestic violence?
• Common theories related to sexual assault or domestic violence (focus on only those relevant to the case).
• Collateral consequences victims face because of assault (domestic violence).
• Common nature of non-stranger sexual assault (if permissible).
• Lethality (if permissible).

B. Myths About Sexual/Domestic Violence Held by the Public

• Do you give presentations to civic groups, schools, and other public forums on issues associated with sexual assault/domestic violence, or have other opportunities to talk with members of the public about those issues?
• Have you found the public to be well informed about sexual assault/domestic violence, how it happens, and how victims react?
• Does the public have misconceptions about sexual assault/domestic violence?
• From your experience, how do most people develop these misconceptions?
• Are you familiar with any articles or books (or have your attended any trainings) discussing the myths versus the realities of sexual/domestic violence?

C. Victim Behaviors

• Based upon your experience, training, education, and work with victims of sexual assault/domestic violence, what are some common victim behaviors/reactions to assault?
• Do all victims behave the same way?
• Through your numerous experiences with sexual assault/domestic victims, have you gathered insight into the reasons why a victim may behave a certain way?
• Based upon your experience, please explain the reasons.

Delayed Report

• In your experience, do victims of sexual assault generally report that they have been sexually assaulted right away?
• Do some never report or report only years later? Why is that?
Minimization

Based upon your experience, is it common for a sexual assault victim to minimize the level of violence she has endured?

• Based upon your knowledge and experience, why does that happen?

Recantation or Reluctance to Testify

• Based upon your experience, is it common for a sexual assault victim to deny violence has occurred as the incident passes in time? Why?
• From your experiences with sexual assault/domestic violence victims, is it common for victims to be reluctant to testify by the time the trial occurs? Why?

Flat Affect or Angry Victims

• Does every victim react to the trauma of rape in the same way?
• Is it uncommon for a victim to show little emotion, or even exhibit seemingly inappropriate emotions, when asked to recount the trauma of rape?
• Do some victims even react angrily?
• What are some of the reasons you have discovered for this behavior?

Continued Contact with Assailant

• Based upon your experience, are you aware of victims who have maintained contact with the individual who allegedly assaulted them?
• What are some of the reasons for this behavior?

D. Knowledge of Present Case

• Have you interviewed the victim in this case? Have you interviewed any witness connected with this case? Are you familiar with the facts of the case?
• Is your testimony today based on your experience, training, education, and work with victims of sexual/domestic assault?

As the Stanford rape victim case that made headlines across the country for a “gentle” sentence of six months shows, judges and juries must be educated on pervasive myths that perpetuate society, in order for justice to be served. Prosecutors serve a special role, speaking on behalf of the victim. Prosecutors must ensure that victims have a voice to explain victim behaviors that the jury may not understand.