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Trauma-Informed Interviewing and the Criminal Sexual Assault Case: Where Investigative Technique Meets Evidentiary Value

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Please Note

This training bulletin is the second in a series addressing a variety of topics related to trauma-informed interviewing, including: a description of specific interviewing strategies such as the Forensic Experiential Interview (FETI), and an exploration of research on how to effectively elicit information during an investigative interview, whether it is conducted with a victim, witness or suspect in a criminal investigation, as well as recommendations for best practice.

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Introduction

When it comes to interviewing sexual assault victims, it's clear we've benefitted from advancing research on psychological trauma, including the neurobiological processes and responses involved.[1] These developments provide practitioners with a scientifically defensible underpinning for interviewing techniques, including many that professionals already used because experience taught them what worked, and treating victims compassionately felt like the right thing to do.[2]

This is all good news, but we are concerned that some practitioners – and even survivors – have come to view the "neurobiology of trauma" as a silver bullet for proving sexual assault cases. We have heard this notion expressed by professionals and laypeople alike, including survivors who have read or heard about trauma-informed interviewing, and place disproportionate faith in its ability to overcome all the challenges that might come up during a sexual assault investigation and prosecution, including at trial. We believe this level of faith is misplaced, and ultimately damaging for survivors as well as professionals. It is unrealistic to think that testimony regarding the neurobiology of trauma – *or any other single type or piece of evidence* – will secure a conviction on its own.

This training bulletin was written to explore what the evidence produced from a trauma-informed interview of a sexual assault victim can (and cannot) accomplish within the US legal system, and how this evidence should (and should not) be used in a sexual assault investigation and prosecution. Various possibilities are illustrated with hypothetical courtroom exchanges. We hope this is helpful for investigators and prosecutors seeking to understand this field of knowledge and appropriately utilize these techniques. But first, some basics.

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[1] While this training bulletin focuses on sexual assault, many of the same conclusions apply equally well to cases involving intimate partner violence or other traumatic victimization.

[2] Abbe, A. & Brandon, S.E. (2014). Building and maintaining rapport in investigative interviews. *Police Practice and Research, 15 (3),* 207-220; Brandon, S.E. & Wells, S. (2018). *Science-based interviewing.* Published by authors; Diamond, D., Campbell, A., Park, C., Halonen, J., & Zoladz, P. (2007). The temporal dynamics model of emotional memory processing: A synthesis on the neurobiological basis of stress-induced amnesia, flashbulb and traumatic memories, and the Yerkes-Dodson law. *Neural Plasticity,* 60803, 1-33; Meissner, C.A., Surmon-Böhr, F., Oleszkiewicz, S., & Alison, L.J. (2017). Developing an evidence-based perspective on interrogation: A review of the U.S. government's high-value detainee interrogation group research program. *Psychology, Public Policy, and Law, 23* (4), 438-457; Schwabe, L. (2017). Memory under stress: From single systems to network changes. *European Journal of Neuroscience*, 45 (4), 478-489; Vrij, A., Meissner, C.A., Fisher, R.P., Kassin, S.M., Morgan, C.A., & Kleinman, S.M. (2017). Psychological perspectives on interrogation. *Perspectives on Psychological Science, 12 (6),* 927-955; Wells, S. & Brandon, S.E. (2019). Interviewing in criminal and intelligence-gathering contexts: Applying science. *International Journal of Forensic Mental Health, 18, (1),* 50-65.

What is Trauma-Informed Interviewing?

What do we mean by "trauma-informed interviewing?" A basic definition is offered in the first training bulletin in this series, *Becoming Trauma Informed: Learning and Appropriately Applying the Neurobiology of Trauma to Victim Interviews.*

Specifically, we use the term to describe techniques based on an accurate understanding of trauma, informed by the relevant research on neurobiology and memory. Often referred to as *the neurobiology of trauma*, this work explores: (1) How brains and bodies respond to acutely stressful and traumatic events such as a sexual assault *as they are happening*, and (2) How these experiences of extreme stress are encoded, stored, and potentially retrieved from memory afterward.

In a trauma-informed interview, questions are asked in ways that are consistent with how traumatic memories are often encoded, stored, and retrieved. Interviewers also understand, listen for, and gather information about common brain-based impacts of trauma on attention, cognition, and behavior (e.g., narrowed attention, impaired reasoning capacities, freezing, habit behaviors, dissociation, and tonic immobility). These strategies can help interviewers elicit more complete and accurate information from sexual assault victims, which can, in turn, lead to more thorough evidence-based investigations. Specific techniques include the following:

- Sincere efforts to establish trust, rapport and comfort for the victim.
- Acknowledgment of the victim's trauma and/or pain.
- Creating an environment that feels physically and emotionally safe for victims.
- Communicating in language victims understand and are comfortable with.
- Understanding that no one can remember "everything," at any particular time, so victims are encouraged to relay all the information they are able to at that time.
- Use of non-leading questions and other open-ended prompts (e.g., "Tell me more about that," or "What if anything can you recall thinking/feeling at that point?").
- Encouragement of narrative responses with pauses, and without interruptions.
- Focus on what victims can recall thinking and feeling throughout the experience.
- Particular emphasis on emotional and sensory experiences (five traditional senses of sight, hearing, touch, taste, and smell, plus internal body sensations).
- Documenting brain-based impacts of trauma on the victim's attention, cognition, and behavior during the sexual assault, and potentially during the interview.
- Expressions of patience, empathy, and understanding throughout the interview.

- No necessity for information to be provided in a sequential or "logical" order.
- Instruction not to guess at answers, and to say "I don't know" when needed.
- Not asking victims "why" they did or did not do something during the assault, but rather inquiring in ways that convey a non-judgmental desire to understand their experiences, reactions, and (often unconscious, automatic) decisions.
- Acknowledgement that the victim may recall additional information as time passes and this does not indicate deception, nor does it necessarily mean that the victim was intentionally withholding information during a previous interview.[3]

(For more information on trauma-informed interviewing, including specific techniques, please watch for future installments in this training bulletin series).

So, What Do We Mean by "Evidence?"

The dictionary defines *evidence* as "that which tends to prove or disprove something" or "ground for belief; proof.[4] Alternatively, "something which furnishes proof."[5]

In every criminal trial in the US, the prosecution has the burden of producing admissible evidence (testimony, objects, photographs, reports, etc.), that contribute to proving the elements of each crime beyond a reasonable doubt. To illustrate, the Model Criminal Jury Instructions for the District Courts of the Ninth Circuit[6] outlines three types of evidence to be considered when deciding what the facts are:

1) Sworn testimony of any witness
2) Exhibits that are received in evidence
3) Any facts to which the parties agree

The defense has no such burden to produce evidence; they need not prove anything. Rather, their job is to challenge the prosecution's case, by refuting evidence or testimony, so the judge or jury concludes there is reasonable doubt about whether the crime was committed and/or whether the defendant was the person who committed it.

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[3] Of course, victims do sometimes deliberately withhold certain information, including details about the sexual assault that are particularly shameful or humiliating, or information the victim does not want the investigator to know about (like underage drinking, drug use, or involvement in sex trade). For more information on addressing these challenges, please see EVAWI's OnLine Training Institute (OLTI) module on *Effective Victim Interviewing*: *Helping Victims Retrieve and Disclose Memories of Sexual Assault.*

[4] Dictionary.com: https://www.dictionary.com/browse/evidence

[5] Merriam-Webster online: https://www.merriam-webster.com/dictionary/evidence

[6] *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2010 Edition, Last Updated 12/2019), Section 1.3, "What is Evidence," p. 5.

Every crime has specific elements that must be proven for a defendant to be convicted on the charge. All defendants are presumed to be innocent (on each charge) until proven guilty in the US criminal justice system.

Case Illustration

At its simplest, imagine a case where a prosecutor must prove that a defendant ran a red light, causing an accident. As evidence, the prosecutor might use:

(1) Testimony of witnesses, including the driver of the car that was struck, who actually saw the defendant's car pass through the intersection against the light;

(2) Admissions of the defendant, if any statements were made to the police officer or other witnesses at the scene of the accident;

(3) Video footage or photographs, if any existed, which captured the accident as it happened; and/or

(4) Accident reports and diagrams reconstructing the accident based on any skid marks and/or the point of impact.

All four of these would constitute evidence and based on various state and federal rules and laws, all four would also generally be admissible to prove the criminal case against the defendant. It would then be the factfinder's job (the judge or jury) to evaluate how *credible* and *probative* this evidence is, in terms of meeting the prosecutor's burden. Does it help prove the defendant's guilt? If so, how persuasive is it? This analysis will involve issues such as determining witness credibility, authenticating certain pieces of evidence (such as video footage, photos, skid mark diagrams, etc.), and anything else that will assist the judge or jury in determining how much weight to give each piece of evidence.

Admissibility

There are other forms of evidence (beyond those described above) that prosecutors might want to use, but they aren't allowed to, no matter how compelling they think it might be for proving their case. This is based on the many rules and laws governing *admissibility* of evidence in a criminal trial.

"Prior Bad Acts"

For instance, let's say the prosecutor in our red-light case discovers that the defendant has been convicted for running red lights ten previous times. That certainly seems compelling; if the defendant has disregarded red lights on so many previous occasions, can't that evidence be used to show she probably disregarded one on this occasion?

The answer, in our criminal justice system, is usually "no." Evidence of a defendant's past behavior (often called *prior bad acts*) will usually not be admitted, even if it seems logical for the case.[7]

Exceptions to "Prior Bad Acts"

Evidence regarding past behavior or proclivity is not usually admissible in a sexual assault case, but there are some exceptions. These are outlined in the *Model Response to Sexual Violence for Prosecutors (RSVP),* by the Urban Institute, The Justice Management Institute, and AEquitas: The Prosecutors' Resource on Violence Against Women (2017).

For example, such evidence cannot be introduced "to prove a person's character" or to "show that that the person acted in conformity with that character trait on a particular occasion" (p. 82). However, it *can* potentially be introduced to prove matters other than propensity, "such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (pp. 82-83). It can also be admitted when defendants attempt to disclaim knowledge of prior bad acts or maintain that they have "never been through this before" (for example in the case of the defendant who has been ticketed for such behavior several times). The prior bad acts then become admissible to impeach the defendant´s testimony. This is often referred to as a defendant "opening the door" to evidence of prior conduct through presenting a false image of good citizenship and law-abiding behavior. Finally, it is worth noting that some jurisdictions "explicitly *do allow* propensity evidence in sexual violence cases" (p. 83, emphasis added). For more information and recommendations on how to identify and introduce such evidence, please see the *RSVP* document.

Hearsay Evidence

When a person testifies in a criminal trial – not to what they saw or heard themselves – but instead to what another person said, this is called *hearsay evidence,* and it is usually not admissible in a criminal case (unless it falls within one of the enumerated exceptions), no matter how logical or compelling the testimony might seem to the average layperson. The rationale for excluding hearsay is that this second-hand evidence, even when coming from a highly respected source, is not reliable enough to be introduced in court. [8]

[7] See Federal Rule of Evidence (404(b).

[8] One exception to the hearsay rule relates to *outcry witnesses*, the first person (or people) someone tells about their victimization. In sexual assault cases (as well as other crimes such as child abuse and domestic violence), outcry witnesses are often called to testify, not only regarding *what the victim said* when they first disclosed their sexual assault, but also h*ow they behaved or appeared* during the disclosure.

Relevance

One key question for the admissibility of any evidence pertains to its relevance. In general, evidence is admissible in a criminal trial if it is *relevant.* This seems intuitive, but what exactly does it mean? In this context, relevance basically means the subject of the testimony (or type of evidence) is not only reliable, but it also has a connection to the case; it tends to prove or disprove a legal element.[9]

Case Illustration

To illustrate, imagine that a woman reports being sexually assaulted by a man who wore a black wool cap, and a suspect is detained just a few minutes later at a nearby location wearing a black wool cap. Further investigation produces probable cause to arrest the suspect for the sexual assault, and he is taken into custody. This testimony by the victim is almost certainly relevant, because it matters if the suspect was found wearing a black wool cap matching the description provided by the victim during the preliminary response.

Now imagine that the investigator offers the victim coffee during the follow-up interview, and she mentions casually that there are no good coffeeshops in her neighborhood. This fact may be true, but it's not relevant to the case, because it doesn't prove or disprove a legal element establishing that she was sexually assaulted, and by whom. In other words, it's not evidence in this case.

These two examples might seem obvious, but it gets more complicated when the statement *seems* to be related to the case yet isn't actually relevant to proving the legal elements of the crime. For example, many people assume that a victim's prior sexual history is automatically relevant in a sexual assault case, but this is only true if it speaks to a legal element or other fact at issue (which may then speak to the victim's credibility as a testifying witness). We do not intend to address the complex issues relating to a victim's prior sexual history and the history of rape shield laws in the U.S. We simply want to highlight that relevance requires that the evidence or testimony prove or disprove a legal element, not simply that it is somehow *related,* or relevant to the issues in the case.

Direct vs. Circumstantial Evidence

One final legal concept worth clarifying is that evidence may be categorized as either *direct* or *circumstantial*. Either type of evidence can be used to prove any fact. This is spelled out in the model jury instructions for the District Courts of the Ninth Circuit, which also notes that juries determine how to weigh the value of such evidence:

[9] One exception to relevance is when evidence is introduced to personalize and humanize a witness. Although such evidence cannot be used to vouch for witness credibility, background information such as where a witness works or lives, or how a witness is employed, may be admissible even if it is not relevant to any of the elements of the charged crimes.

> *The law makes no distinction between the weight to be given to either direct or circumstantial [evidence]. It is for you* [the juror] *to decide how much weight to give to any evidence.*[10]

The manual then goes on to provide a real-world example to illustrate this point:

> *By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide an explanation for the water on the sidewalk. Therefore, before you decide that a fact has been proven by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.*[10]

Direct Evidence

Direct evidence is direct proof of a fact, such as testimony by a witness about what this witness personally saw or heard or did. Such evidence serves to prove (or disprove) a legal element without requiring any inference. This is true whatever form the evidence takes (witness testimony, forensics, photographs, etc.).

For example, if semen is recovered from a victim's vagina, and the source is identified through forensic testing as belonging to the defendant, this speaks *directly* to the question of whether a sexual act took place between the two people. Of course, the defense may argue that the identification was wrong, based on faulty procedures or contamination during evidence collection, storage, or testing. Or, they may acknowledge that the direct evidence establishes that sexual contact took place between the defendant and the victim, but argue that it says nothing at all about whether that sexual contact was *consensual*. This aspect of the case- *consent*- may be the most crucial given the circumstances. Nonetheless, the evidence speaks directly to a legal element in the case. The sexual act must be proven beyond a reasonable doubt for the judge or jury to convict someone on a sexual assault charge.

Circumstantial Evidence

On the other hand, circumstantial evidence does not directly prove or disprove a legal element or other fact in the case, it simply supports an *inference* that a fact may be true or not. Examples include the wool cap highlighted in the previous illustration. Without additional facts, the cap does not directly prove that a crime was committed, or that the defendant is the person who committed it. It just offers one piece of support for the inference that the defendant *might* be the person who committed the crime. There would need to be an accumulation of additional direct and/or circumstantial evidence to establish probable cause for an arrest, and then proof of his guilt beyond a reasonable doubt.[11]

[10] *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2010 Edition, Last Updated 12/2019), Section 1.5, "Direct and Circumstantial Evidence," p. 7.

Circumstantial evidence is often used to prove the mental element for criminal offenses that require what's called *specific intent* in the law. For example, some sex crimes (e.g., contact crimes like attempted sexual assault or sexual battery), require that an act be committed *for the purpose of the defendant's sexual gratification*. Direct evidence of this intent might include statements made by the suspect during the act, or physical evidence such as ejaculate. Such direct evidence (like ejaculate) can establish what defendants *did* during the act, but circumstantial evidence is especially helpful to prove *what they were thinking* when they acted.

The classic example is an attempted sexual assault where the suspect drags the victim into a dark area and pulls down her pants, but the attack is interrupted when witnesses respond to the victim's cries for help. For the defendant to be found guilty, the prosecution must unequivocally prove that the defendant did something that was a substantial step toward committing the crime (not just preparing), and that the crime would have taken place unless interrupted by independent circumstances.[12] In this scenario, the suspect's actions (pulling down the victim's pants rather than grabbing her purse), corroborate the specific intent to commit a sexual assault rather than a robbery.

In another scenario, where the suspect meets the victim in a bar, the suspect's intention *to engage in sexual activity* might be inferred from the fact that he repeatedly bought the woman shots, isolated her from her friends, persuaded her to join him at a private table, and searched his phone for inexpensive hotel rooms nearby. Maybe the suspect then insisted on driving the victim home, even though she repeatedly declined his offer, and she had several girlfriends at the bar who could have helped her get home. But what evidence might indicate that he intended to *sexually assault* her (i.e., without her consent)? Maybe the suspect used a false name when he reserved the hotel room. Or, maybe he drove the victim to a remote location, such as a parking lot or field, where no one could hear her scream. None of these is a "silver bullet" that proves the legal element on its own, but together they can help to build a circumstantial case.

Sexual Assault Cases

Sexual assault cases may have little or no direct evidence. However, an accumulation of circumstantial evidence can still build a powerful case for the prosecution. This is described in EVAWI's training module on *Crime Scene Processing and Recovery of*

[11] In their book, Brandon and Wells (2018) distinguish between verified *facts,* and *information* (including hearsay), as well as *inferences,* which can be characterized as: "What do we think based on the facts and information available?" The book goes on to describe a process for tracking and utilizing each for the purpose of planning and conducting investigative interviews. See Brandon, S.E. & Wells, S. (2018). *Science-Based Interviewing.* Published by authors.

[12] *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2010 Edition, Last Updated 12/2019), Section 5.3, "Attempt," p. 91.

Physical Evidence from Sexual Assault Scenes:

> *Generally, sexual assault scenes don't include the elusive 'smoking gun.' Sometimes, despite our best efforts, we are left with two versions of a story, and the only choice we have is to build a circumstantial case. Investigators must recover the evidence available and allow it to support or refute each person's account of what happened* (Ware, 2017, p. 19).

Next, we will use these concepts and terminology when we examine the types of evidence that might be produced with a trauma-informed interview, and explore how each kind may prove useful to the prosecution of a sexual assault case.

Interviewing and Evidence: What's the Connection?

There is no question that trauma-informed interviews can potentially yield evidence. That is one of the main goals. But *what kind of evidence* can these interviews produce? The answer is three-fold: They can potentially yield (1) victim statements, (2) investigator observations of victim behaviors, and (3) additional corroborative evidence (often identified on the basis of victim statements).

(1) Victim Statements

Perhaps the most obvious conclusion is that trauma-informed interviews can produce statements, which may ultimately be admitted at trial as *testimonial evidence.* To illustrate, a sexual assault victim may first tell an investigator (and then later, a prosecutor) what they remember experiencing before, during, and after a sexual assault, and the prosecutor may build on this information to craft a direct examination of the victim in court. The victim's testimony in court will help meet the prosecution's burden of proof if it contributes toward proving the legal elements of the specific offense(s) being charged. Cross-examination will also produce evidence, when the victim testifies in response to defense questioning.

As long as it meets certain legal standards (e.g., relevance), sworn testimony becomes a part of the lawyer's case who has put it forward (either the prosecutor or defense attorney). It is therefore important to note that trauma-informed interviewing techniques can be used both by the investigator who conducts the detailed interview, *and* by the prosecutor who crafts a direct examination for the victim based on the victim's recollection of events and other corroborative evidence. Trauma-informed techniques may achieve this goal more effectively than traditional interviewing approaches (and even science-based approaches that are not necessarily "trauma-informed"), because they take into account common trauma responses and the implications for victims' memories, behaviors, and ultimately their statements and testimony regarding their sexual assault.[13]

Now, testimony may not be as innately compelling as physical or scientific forms of evidence (like fingerprints or DNA), but it is still very powerful, and the bedrock of our criminal justice system. When a person takes an oath and promises to testify truthfully in a court of law, their words become more than just a solemn account. In fact, those words become *evidence,* a thing of actual legal weight that a jury or a judge can put into a mental calculus when making a determination in the case. Sworn testimony, as any judge will instruct a jury, is evidence. The question for factfinders in the case (the judge or jury) is what credibility and probative weight, if any, to assign to that evidence.

Meeting Legal Elements: Victim Statements

How might victim statements help to meet the legal elements of a sexual assault offense? First, victims might testify both about sexual acts committed by the defendant, as well as the conditions that rendered those acts unlawful. For example, in a case of involving force, threat, or fear, the victim may testify regarding the factors that created this environment, including the defendant's use of any weapons, the defendant's size and strength, physical isolation, history of prior violence, etc. Or, in a drug- or alcohol-facilitated case, the victim may testify about the specific drugs or alcohol consumed, the level of incapacitation they experienced, and the defendant's role in creating, encouraging, or otherwise facilitating the victim's incapacitation. Testimony by the victim would then be offered as direct evidence to establish one or more of these legal elements.

[13] See, for example, work conducted by the High Value Detainee Interrogation Group (commonly referred to as "the HIG") which aims to accumulate evidence for a variety of interviewing techniques and package them together in an approach described as "science-based investigative interviewing." Like trauma-informed interviewing, the HIG approach includes "developing cooperation via rapport, persuasion and conceptual priming" and "eliciting information via conversational rapport and facilitating memory retrieval" (see Meissner et al., 2017). The approach also incorporates strategies and techniques from Fisher and Geiselman's (1992) Cognitive Interviewing (CI) protocol. However, this approach does not integrate other research, including neuroscientific research, on how the trauma of sexual assault can affect victims' attention, cognition, behavior, and memory processes. Nor does the HIG approach (or CI) address the impact of deep-seated cultural misconceptions about sexual assault, and the profound skepticism that has long been directed toward sexual assault victims and their disclosures. If the statements and behaviors of sexual assault victims are not considered in light of these factors, this can potentially lead to errors in assessing credibility. This is particularly concerning when victims withhold information or provide inaccurate information, for example, because they feel ashamed, fear being disbelieved or judged, or can tell that the interviewer doesn't understand or believe what they're saying. See Fisher, R.P. & Geiselman, R.E. (1992). *Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview.* Springfield, MA: Charles C. Thomas; Meissner, C.A., Surmon-Böhr, F., Oleszkiewicz, S., & Alison, L.J. (2017). Developing an evidence-based perspective on interrogation: A review of the U.S. government's high-value detainee interrogation group research program. *Psychology, Public Policy, and Law, 23* (4), 438-457.

Victim Statements Involving Neurobiology of Trauma

So then, how does the neurobiology of trauma come into play? During the course of a trauma-informed interview, a sexual assault victim might describe experiences that could potentially be explained – at least in part – by neurobiological processes associated with severe stress and trauma. For example, victims may say that they: "froze," "couldn't move all of a sudden," "collapsed like a rag doll," "spaced out," "felt like I left my body," "felt like I was watching the whole thing from the ceiling," "couldn't see anything but the knife in his hand," "focused on this one painting on the wall," "felt like I was going in and out of the scene like a movie," or "I just kept saying [or thinking] the same thing over and over again."

When victims use phrases like this, the investigator's job is to document the exact wording – but then use open-ended prompts to find out what the victim means by the phrase. For example, when victims say they "froze" during the sexual assault (which they often do), investigators should document this exact wording, but then go on to elicit a detailed description of any physical, sensory, cognitive, and emotional aspects of that part of the experience that the victim can recall: "Tell me more about when you 'froze.'" "What if anything do you remember seeing?" "What if anything do you remember hearing?" "What were you feeling at that point?" or "What was going through your mind when you 'froze?'" The investigator can then document these sensations, feelings, thoughts, and experiences as part of the victim's statement. If the case goes to trial, the statements might be admitted into evidence through the victim's sworn testimony.

Inappropriate to Label or "Diagnose" Victim Responses

There's a risk that someone who has received training in the neurobiology of trauma may, when hearing a victim describe their experience with such phrases, instantly assume the role of an armchair neuroscientist or trauma expert. They may think: This victim was clearly experiencing "impairment of the prefrontal cortex," or "dissociation," or "tonic immobility," or "collapsed immobility," etc. However, as we emphasized in the first training bulletin in this series, it is inappropriate for investigators and other non-clinicians to label or diagnose such victim responses.

While it's essential that the process of *listening* to victims and *eliciting* more information from them is informed by an understanding of common brain-based responses, *explaining* and *interpreting* such information should be left to experts. Indeed, it is not the investigator's role to determine whether someone has experienced *trauma.* As taught in report writing classes for law enforcement, the investigator's job is to document the victim's statements, then elicit more detail with open-ended prompts.

Remember, prosecutors often use victim testimony as direct evidence to establish the legal elements that render a sexual act a crime, such as (a) force, threat or fear, or (b) incapacitation. With examples such as those described above, a prosecutor would most likely use the victim's testimony to establish these elements, arguing that the experiences described by the victim are more consistent with force or incapacitation than they are with consensual sex. The defense will then most likely seek to undermine this testimonial evidence by challenging the victim's credibility, and arguing that the victim consented to the sexual acts.

(2) Investigator Observations

The first type of evidence thus involves the *content* of a victim's statement. However, closely related to what the victim says are the observations documented by an investigator about how the victim *appears or behaves* during the interview. This includes things like the victim's general demeanor, and specific reactions, like crying, trembling, handwringing, staring vacantly, slumping in the chair, etc. The investigator's observations of these behaviors are the second type of evidence that can be produced from a trauma-informed interview.

But they will only be introduced as evidence if they are relevant to the case, admissible in court, and probative in terms of proving a legal element. The prosecutor might call the investigator to testify about such victim behavior during the interview, as circumstantial evidence that the person was sexually assaulted.

Hypothetical Exchange #1

To illustrate what this might look like, we'll offer a hypothetical exchange between a prosecutor and investigator at trial. In this case, the investigator is testifying about a trauma-informed interview conducted with a victim of sexual assault. The investigator simply makes behavioral observations about the victim, and describes how this behavior changed at various points during the interview.

> **Prosecutor:** Detective, without telling us what was said during the interview you conducted, please tell us this: While you were asking these questions, what was the complainant, Ms. Chen's, demeanor?
>
> **Investigator:** She cried through much of the interview, so her eyes were red and swollen. She had to stop and collect herself several times.
>
> **Prosecutor:** Did you give her a chance to collect herself?
>
> **Investigator:** Yes, I offered her the opportunity to take a break. I let her sit quietly for a few minutes, and I went and got her a cup of coffee. I've found that sometimes helps.

Prosecutor: And in this case, did it help?

Investigator: Yes. When I came back with the coffee, about five minutes later, Ms. Chen appeared much calmer. I gave her a chance to drink the coffee, and we just sat quietly for a few minutes. After that, I asked her if it would be okay to continue with my questions.

Prosecutor: And did you?

Investigator: Yes. I was able to complete the interview.

In this exchange, the victim's behaviors fit with common expectations for how a sexual assault victim will behave during an investigative interview. They will therefore "make sense" to most judges and jurors, and will not require further explanation. Of course, the prosecutor may still provide additional information about the victim's behaviors, if this will help the judge or jury better understand them. For example, the prosecutor might call an expert to explain that these reactions are common among people who have experienced sexual assault.

Meeting Legal Elements: Investigator Observations

Again, keep in mind what the point of such testimony is: It is designed to meet the prosecutor's burden by establishing legal elements of the crime. If the investigator testifies that the victim was "crying," "shaking," or "tearing a tissue to shreds" while describing the sexual acts, the prosecutor may argue in closing that this demonstrates the victim was clearly frightened and upset, and that this corroborates the nonconsensual nature of the act – that it was committed by the defendant using force, threat, or fear, or while the victim was incapacitated.

Yet again, investigators should not label or diagnose any such behaviors that victims might exhibit *during their interview*, just as they should not for behaviors victims describe experiencing *during the sexual assault*. Any investigator who uses such terminology may find themselves defending their "diagnosis" in court and they might not be able to provide an explanation based on science.

Instead, investigators should simply document the victim's behavior during the interview with concrete and objective wording that is free of interpretation. For example, it is always possible that victims might lapse into a dissociative state during an investigative interview (even one that's trauma-informed). If so, the investigator will likely observe behavioral indications of such a lapse. However, even if the investigator suspects that the victim is dissociating during the interview, it is not appropriate to state in the report that the victim "experienced dissociation" or "went into a dissociative state." Rather, the investigator might document that the victim "did not make eye contact," "stared at the wall throughout the interview," "spoke without any emotional expression," etc.

Statements and Observations: Is it Evidence?

Of course, it's not certain that any particular statement made by the victim, or any specific observation documented by the interviewer, will be introduced as evidence in the case or be testified to at all. As previously noted, this depends on whether they are determined to be relevant, probative, and admissible in court. For example, the victim will not typically testify about the quality of coffeeshops, or other irrelevant statements made throughout the course of the interview. Similarly, the investigator will not testify about clothing worn by the victim to the interview unless there is some reason why this is relevant and probative.

But it is not always obvious at the beginning of an investigation what evidence will become critical in the case. This will typically only become clear after taking additional investigative steps and interviewing any suspects and witnesses.

This point can be illustrated with an example of one type of physical evidence: Latent prints. Crime scene investigators will often collect numerous latent prints at the scene of a sexual assault and home invasion, not knowing which might ultimately be probative. All the latent prints that are collected will be impounded as *evidence,* but the only ones that will be presented by the prosecution at trial will be those that are relevant to the case. Latent prints found on the outside of a window may be used to identify the defendant, and to help prove the criminal offense by establishing a point of entry and the fact that the suspect was not invited into the victim's home. The defense may then try to introduce other prints that were collected, to show that the crime could have been committed by some other person – assuming all the impounded prints could not be identified and excluded as belonging to the residents of the home, or any past guests.

Another analogy can be drawn with biological samples drawn from the victim. At the time samples are collected from the victim during a medical forensic exam, we don't know (yet) if they are *evidence.* We don't know if they will help to prove a legal element (or disprove it), or whether they will corroborate (or challenge) any statements made by the victim, suspect, or witnesses. At this point, a vial of blood or a vaginal swab are just that: A vial of blood or a vaginal swab. More investigation is needed to determine whether they will become evidence in the case. Similarly, it is impossible to know during a victim interview which documented statements, observations, and items of evidence collected will ultimately be introduced as evidence in the case, by the prosecution *or* defense.

How Victims Recall and Relay Memories

When we are talking about the neurobiology of trauma, however, some behaviors observed by an investigator will pertain to *how victims remember and share their memories of the sexual assault*. For example, victims may have inconsistencies or gaps in their memories (even significant ones). Their memories may lack any logical order (such as chronology). They may lack any sense of time or context (such as the layout of

a room). Victims may also have "flashbulb memories," particularly at the onset of an attack, where they can recall a great deal of detail, followed by periods of time where they cannot seem to recall many details at all, including details that would seem "unforgettable" to investigators (e.g., whether the suspect sexually penetrated the victim, wore a condom, and/or ejaculated).

But it is critical to note that *these observations of how someone recalls, or shares memories are not evidence that the person was sexually assaulted.* In other words, they do not help meet the legal elements of a sexual assault offense.

This is because such behaviors may be explained in part by neurobiological process, but they may also be due to other causes. For instance, trauma can certainly cause gaps and inconsistencies in memory, but so can alcohol or drug use, inappropriate interviewing tactics, and many other factors – and it can be difficult or impossible to differentiate what the actual cause might be.

Victims can also deliberately withhold certain information, including details about the sexual assault that are particularly shameful or humiliating, or information the victim does not want the investigator to know about (like underage drinking, drug use, or involvement in sex trade). Observed behaviors may therefore be *consistent with* sexual assault and trauma, and expert testimony may be used to help the jury understand this, because the defense will often point to these behaviors as evidence that the person is not credible and was not sexually assaulted. However, they should not be considered evidence of the sexual assault itself ("Look, he has gaps in his memory – that proves he was raped.")

Who Should Testify: Victim or Investigator?

Another question is whether the victim or the investigator should be the one to testify about certain experiences or observed behaviors on the part of the victim.
In almost all cases (and subject to hearsay exceptions), an interviewer can't simply repeat in their testimony what the victim is already testifying to. For one thing, this would be hearsay evidence. But it would also be improper because it's *cumulative.* The jury will hear from the victim personally, so it is considered unduly prejudicial to hear the same information repeated by someone else. For this reason, the victim's account will almost never be repeated by another person to whom they gave it. The victim will typically be the only one to testify regarding what they experienced and felt, in terms of both sensations and emotions.

On the other hand, the interviewer may be the best person to testify regarding their observations of how the victim *behaved* during the interview. This may be seen as more credible and compelling by the judge or jury. To illustrate, rather than having the victim testify about her feelings ("I was upset and cried a lot in the interview") the investigator might testify regarding observed behaviors ("She was crying so hard I had to keep waiting to ask her follow-up questions").

Investigator observations of victim behavior may corroborate victim statements about emotional experiences, and this in turn, may challenge misinterpretations of what those behaviors mean. For example, many victims are quiet and non-responsive during their interview, and this can come across as uncooperative or indifferent. However, this may actually be due to the victim feeling hopeless and depressed, and these emotions can be described by the victim in the interview.

Or, the victim may describe the sexual assault in a matter-of-fact way, without any visible display of emotion. This may lead factfinders to question whether the sexual assault really happened, or how traumatic an experience it was for the victim. Yet the victim might have been profoundly traumatized by the sexual assault; it may be that the victim is dissociating during the interview, or that after telling the story so many times the words have lost their emotional impact. Alternatively, the victim might be compartmentalizing the assault emotionally, to maintain composure and equilibrium. If victims are provided the opportunity to describe their emotional experiences, this can demonstrate that the feelings and experiences do in fact line up with the observed behaviors and therefore counter potential challenges to their credibility.

Hypothetical Exchange #2

Once again, we will illustrate what this type of testimonial evidence might look like in a courtroom exchange with the prosecutor. As in the first example, the investigator in this second exchange offers behavioral observations documented during a trauma-informed interview with a sexual assault victim. However, this time, the victim's behaviors are different from many people's expectations.

> **Prosecutor**: While you were asking these questions, what was the complainant, Mr. Garcia's, demeanor?
>
> **Investigator:** He was actually very calm, and almost conversational when he was describing what happened to him.
>
> **Prosecutor:** Did that reaction strike you as odd?
>
> **Investigator:** Me? No, not at all.
>
> **Prosecutor:** Why not, Detective?
>
> **Investigator:** Well, because I've interviewed hundreds of sexual assault victims throughout my career. I've seen everything. The fact is, victims react in many different ways. It's not unusual to see crying, or obvious signs of fear on the part of a victim while giving details about the sexual assault. But it's also not unusual to see nervous reactions like laughter, or no emotional expression at all. It just runs the gamut.

Prosecutor: What happened then?

Investigator: Nothing out of the ordinary. Because he was in a calm state, I was able to complete the interview. After that, I gave him a brochure to refer him to our local rape crisis center, and I included details about the interview in my investigative report.

Again, the prosecutor may want to provide further context for these behaviors – perhaps with expert testimony that such behaviors are common among sexual assault victims. This may be helpful for factfinders to better understand the behaviors, and not see them as a challenge to the victim's credibility. Or, the prosecutor may prompt the investigator him/herself to offer additional context, for example that he's seen the same lack of emotion in traumatized fellow police officers or fellow soldiers while serving in the military.

Hypothetical Exchange #3

This alternative strategy is illustrated in a third hypothetical courtroom exchange, where the investigator provides the same type of testimony about victim behaviors observed during a trauma-informed interview, but then goes on to describe the range of reactions seen among sexual assault victims.

Prosecutor: While you were asking these questions, what was the complainant, Ms. Ahmad's, demeanor?

Investigator: She appeared very frightened. She was obviously upset. Her eyes were red and swollen. She had to stop and collect herself several times.

Prosecutor: Is this a reaction you've seen before when interviewing victims of sexual assault?

Investigator: Certainly.

Prosecutor: What other reactions do you sometimes see?

Investigator: I see everything. Really there's no telling how a victim will react when asked to give an account in a trauma-informed interview. One of the things we're trained on about sexual assault is that victims will react in many different ways. We need to be prepared for all of them.

Prosecutor: Why is that?

Investigator: It's because there's no appropriate or inappropriate way to feel or act after being sexually assaulted. Just because a victim presents in a way that might not immediately seem typical or normal, it doesn't necessarily mean they're lying. Everyone reacts differently to trauma, so we need to be ready for any reaction and do

our job as best we can.

Note that the investigator does not go into detail about specific victim responses, because testimony is being offered as a fact witness, not an expert witness. An expert witness could give far more detailed information as part of their opinion.

When Does an Investigator Testify?

There are three general ways in which investigators may testify about statements made by the victim or observations of the victim's behavior during a trauma-informed interview. First, the prosecutor might call the investigator to testify during the *case-in-chief*, or in a *rebuttal* to the defense's case. Then, depending on the circumstances, the prosecutor might ask the interviewer to relay what the victim said or how they appeared or behaved. This is not as likely a scenario because of hearsay and other evidence rules, but it does sometimes occur.

Second, the investigator might be questioned about the victim's behaviors or demeanor *on cross-examination*. This may only happen if the investigator was initially called to discuss the interview on direct examination. Third, the defense attorney could call the investigator *as his or her own witness* in the defense's case. In any of these scenarios, what the investigator can testify to will be limited by the rules of evidence, and the rulings of the judge if objections are made.

Information about the *interview process* may also be admissible, as part of the investigator's testimony. This might include general information about trauma-informed interview approaches (or other science-based interviewing techniques), and specific details about how they were used to elicit information in this particular interview. This is entirely case-specific, though; whether or not such testimony would be admitted depends on an almost limitless set of variables.

For a detailed discussion of the investigator's testimony in a sexual assault case, including sample language for both prosecutor and investigator, please see EVAWI's training bulletin, *The Investigating Officer's Direct Exam: Strategic and Tactical Considerations to Take Advantage of the IO's Expertise*.

(3) Identifying Corroborative Evidence

So far, we have described how trauma-informed interviews can potentially produce evidence in the form of victim statements and investigator observations of victim behavior during the interview. As a third possibility, these interviews can lead investigators to additional evidence that corroborates (or challenges) statements made by the victim, suspect, or witnesses.

Case Illustration

To illustrate, imagine that a man reports being sexually assaulted in the suspect's home, and he recalls that the room had a distinctive pattern of wallpaper. The victim then describes the pattern in detail to the investigator. Armed with a search warrant and the location of the suspect's home, the investigator might identify this wallpaper and photograph it. That photograph is now a piece of corroborative evidence produced as a result of the interview. Whether it's relevant or probative depends on other facts in the case. In this example, the recollection of the wallpaper and subsequent corroboration would definitely be relevant and probative for the prosecution, if the suspect denied the victim was ever in his home, or if he denied knowing the victim at all.

Meeting Legal Elements: Circumstantial Evidence

What legal elements could be corroborated with additional evidence identified as a result of a trauma-informed interview? It depends. And this is where the distinction between direct and circumstantial evidence becomes important.

In the example of the wallpaper, the evidence corroborates that the victim was in the defendant's home at some point. It does not provide direct evidence of a sexual act, or the factors that made that act a crime (e.g., force or incapacitation). Instead, it provides one piece of circumstantial evidence to build the case piece-by-piece. Undoubtedly, the defense will provide an alternative explanation for why the victim knows the pattern of the defendant's wallpaper (e.g., because the victim was invited to the defendant's home and they engaged in consensual sex).

Meeting Legal Elements: Direct Evidence

The victim's statement may also help to identify direct evidence. For instance, imagine a scenario where patrol officers respond to a victim's home in the immediate aftermath of a home invasion and sexual assault committed by a stranger. The reporting officer will almost certainly ask the victim about anything the suspect may have touched or used during the commission of the crime (e.g., condom wrapper, jar of lubricant, tissue, or towel to clean up afterward). At the time, the victim may or may not be able to identify any such objects.

However, it is possible that several days later, during the course of a trauma-informed interview, the victim may recall that the suspect touched a candle on her bedside table, and also that he cleaned himself with a towel, which the victim later threw in her laundry bin. If law enforcement is able to collect the candle, and the crime laboratory identifies

prints belonging to the suspect, this provides direct evidence that the suspect was in the victim's bedroom at some point (a legal element for the home invasion). It also provides circumstantial evidence that the suspect committed the sexual assault (by placing him in

the room). However, the towel might provide *direct evidence of the sexual assault* if ejaculate is recovered and DNA testing identifies the defendant as the source of the biological material.

Painting the Whole Picture

When utilized properly, trauma-informed interviewing can yield information about the victim's psychological experiences (e.g., sensations, thoughts, and feelings, or the absence of those in dissociative states), as well as behaviors or lack of behaviors during the sexual assault that may have a physiological basis (e.g., freezing, habit behaviors, tonic immobility). Such information may enable investigators, prosecutors, and others to better understand the victim's perspective and more fully envision what the experience was like for them. The information may also help identify additional corroborative evidence (like the wallpaper pattern, or the candle and towel). In addition, some of the details that victims recall make compelling testimony, because they are so unique or unusual, they have the true ring of authenticity (as in, "you can't make this stuff up").

The information gathered during a trauma-informed interview can also help prevent the victim's experience from being sanitized or minimized. All too often, sexual assaults are described in factual language and technical terms that utterly fail to capture the terror, horror, pain, confusion, and shame experienced by a victim. This is less likely if there is a recording, or a well-documented report, from an interview conducted with a trauma-informed approach. If the information is accurately captured and introduced as evidence, the judge or jury will be better equipped to truly understand what the sexual assault was like for the victim.

For more information on audiotaping or videotaping victim interviews, please see EVAWI's training bulletin on *Recording Victim Interviews.*

Another way that prosecutors can paint the whole picture is to have an expert testify about neurobiology of trauma or common responses of sexual assault victims (including those described as "counterintuitive"). This may help factfinders better understand the victim's testimony in the context of this scientific knowledge. However, the expert's role is not to vouch for the victim's individual testimony; it is to provide background information that a prosecutor might use in closing arguments to show that the victim´s behavior was closer to the rule than the exception. Also, it is critical that anyone retained as an expert actually understands the science and can explain it clearly to the judge or jury.

Expert Testimony

American law has long recognized the contribution of expert witnesses when legal

proceedings involve topics outside the common knowledge of the average judge or juror. In fact, this is exactly how an expert is defined in all American jurisdictions. For legal purposes, an *expert* is any individual who, through knowledge, skill, experience, training or education, has developed scientific, technical or other specialized knowledge about a subject.[14] The individual is not required to have a particular educational degree or any formal training to be received as an expert in a court of law. Rather, the attorney presenting the expert to the court must simply "qualify" that expert with a series of questions regarding the expertise in question and how the witness possesses it.

Expert witnesses are not supposed to be advocates for either side in a criminal trial; they are (ideally) called simply to give context to other evidence in the case, so the trier of fact can weigh it fairly.

Like all witnesses, experts provide testimony based on legal rules governing admissibility (such as relevance, etc.). This testimony then becomes evidence for factfinders to consider when deciding whether the prosecution has proven their legal elements – or whether the defense has introduced reasonable doubt. The difference is that an expert (unlike lay witnesses) can also provide *opinions* on evidence or testimony in the case. For instance, if prosecutors want the jury to hear more about a victim's behavior during the interview, an expert can be called and qualified, and then the expert witness will render an opinion about these behaviors and how they might be interpreted. This might include behaviors that are consistent with the known impacts of trauma.

Exchange #4: Expert Witness

It might go something like this:

> **Prosecutor:** Dr. Jones, you've been qualified as an expert in psychology, with particular focus on how trauma impacts sexual assault victims. I'd like to ask you some questions about how victims might react to such trauma, particularly when relating the details in an interview. Would that be okay?
>
> **Expert:** Of course, that's what I'm here to do.
>
> **Prosecutor:** First, do you know any of the parties in this case? The defendant, or the complaining witness?

[14] See Federal Rules of Evidence 702.

Expert: No, I do not. My job is to educate the jury on typical victim reactions, but it's not to comment on the reactions of any particular person or case.

Prosecutor: Thank you. So, let me ask you a hypothetical question. In an interview with a detective about a sexual assault that happened a few hours earlier, would you expect any particular behavior on the part of the victim? What I mean is, would you expect the victim to be emotional, frightened, or obviously traumatized?

Expert: No, not necessarily. Certainly, they could be. But they might not.

Prosecutor: Would you be surprised if the victim was entirely calm and even lightly conversational, for instance, when describing a sexual attack, even a violent one, that happened recently?

Expert: No, I would not. People react to trauma in many different ways, and that's one of them. There is no right or wrong way.

Prosecutor: Would you be surprised if it was revealed that a victim, even though they were being truthful about the core allegation, initially lied to the investigator about some detail, like what they were drinking or whether they consumed illegal drugs?

Expert: No, not at all. Some victims may withhold information or provide inaccurate information about some detail in the case. Most of the time, this happens because of either shame or fear. Many victims will feel shame if they feel they somehow allowed themselves to be victimized, or if they were taking part in behavior that could be frowned upon, like illegal drug use, or some initial and consensual sexual contact with the suspect. Also, victims are often fearful of either not being believed or not having their case taken seriously if they admit to certain kinds of behaviors.

Prosecutor: Would you be surprised if the victim, while relating details of the crime, got some of those details wrong? For instance, if the victim described the suspect's shirt as red, when actually it was blue?

Expert: Again, no this is not surprising. What we know about the recollection and disclosure of a traumatic event is that it's a process and not a single, uninterrupted and accurate playback. Sometimes they get details wrong, either because they are rushed into answering, or they feel pressured to respond in certain way. Maybe they were presented with leading questions, for example. Or it may be because of the way their brain processed the event, they didn't absorb those details at the time of the assault, or they did remember those details, but now they've faded from memory. Usually over time, accuracy increases, assuming the interactions with the victim are compassionate and competent. What I mean is, they are interviewed by an investigator who is patient, non-judgmental, doesn't ask leading questions, and who

understands the neurobiological effects of trauma on people's perceptions, thoughts, feelings, behaviors, and memories.

Prosecutor: Can you explain?

At this point, the expert could describe some basic neurobiological effects of trauma on behavior and memory, and go on to explain why these common responses are not necessarily indicators of deception. And so on. The defense will then cross-examine the prosecution's expert (and/or call an expert of their own) to undermine these opinions, and thus the credibility of the victim.

Most likely neither the victim's testimony nor the expert's will meet the prosecution's burden of proof on their own. Instead, many sources of evidence are typically needed to corroborate the legal elements, including criminal history checks of the suspect, crime scene diagrams, surveillance videos, 911 calls, other phone calls, text messages, photos and/or videos of the sexual assault. Reports may also be available from the victim's and/or suspect's forensic exam, toxicology analysis, or DNA testing. Investigators will also need to interview the suspect and any witnesses. Prosecutors will then build their case, piece-by-piece, with these various sources of evidence.

Conclusion

Throughout this training bulletin, we have sought to address the question of what type of information might be produced by a trauma-informed interview of a sexual assault victim, and whether it might constitute evidence in a sexual assault case. Our intent is to address possible misunderstandings about whether testimony regarding the neurobiology of trauma – whether it is provided by the victim, investigator, or expert witness – can help prosecutors meet their burden of proof.

As we detail in this training bulletin, such evidence *can* potentially help meet the legal elements of a sexual assault offense. However, it is unrealistic to think that testimony regarding the neurobiology of trauma – *or any other single type or piece of evidence* – will be sufficient to secure a conviction on its own. This is especially true because of the deep-seated misconceptions that factfinders often hold regarding sexual assault and the profound skepticism long directed toward sexual assault victims and their disclosures. Testimony involving the neurobiology of trauma may help to overcome some challenges to the victim's credibility (for example, those based on "counterintuitive behaviors"), but it is unlikely to overcome other credibility challenges, such as victim behaviors that are viewed by many people as high-risk or undesirable, even immoral or illegal. Addressing these challenges will likely require additional evidence, and strategy.

We hope this training bulletin is helpful for investigators and prosecutors seeking to understand this field of knowledge and appropriately utilize these techniques. The neurobiology of trauma is not a silver bullet, or a smoking gun. It is just one more piece of the puzzle in a sexual assault investigation and prosecution.