



## Evidence-Based Prosecution in Sexual Assault Cases

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Sergeant Joanne Archambault (Ret.), Chief Executive Officer and Founder, EVAWI  
Kimberly A. Lonsway, PhD, Director of Research, EVAWI

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Recently, we have had a number of interesting conversations with advocates, law enforcement professionals, and prosecutors about the question of whether or not “evidence-based prosecution” should be used in cases of sexual assault. (Among criminal justice professionals, we often hear this concept referred to as “hostile prosecution.”) In the past, we have typically only seen this type of prosecution strategy used in domestic violence cases where the victim has recanted. In these situations, the prosecution sometimes moves forward with a case based only on the physical evidence and testimony of witnesses – but without the cooperation or testimony of the victim.

For most of us working in this field, we would agree that this strategy has been extremely successful in many domestic violence cases. Victims of domestic violence are often very relieved to know that they are not the ones who are responsible for deciding whether or not criminal charges will be filed. The goal for evidence-based prosecution is therefore to hold more offenders accountable for their crimes and also to decrease the risk of additional harm to the victim because the offender knows that the victim is not the one in control of decision making.

Based on the success of evidence-based prosecution with domestic violence cases, we have recently heard discussion about the possibility of extending its use to sexual assault. In support of this position, some professionals argue that the safety and welfare of a community outweighs the rights of an individual. As a result, the community has an interest in pursuing sexual assault cases regardless of whether or not the victim is able to participate in the criminal justice process. Because most sexual assault crimes are felonies (unlike many domestic violence crimes which constitute misdemeanors) -- and felonies are crimes against the state (and not an individual) -- it is clear that prosecutors are not legally required to have the victim’s consent or cooperation in order to file criminal charges in a sexual assault case. Therefore, there is no question that evidence-based prosecution is available to prosecutors in their toolbox for sexual assault cases. The argument is that this strategy should be used in the interest of enhancing community safety.

Another argument that is made in support of using evidence-based prosecution for sexual assault is the possibility that it might create the kind of positive changes that we have seen in the criminal justice system’s handling of domestic violence. Clearly, most prosecutors would not currently even consider pursuing a sexual assault case without the cooperation or testimony of the victim. But there was also a time when no one would have thought to prosecute a domestic violence case without the victim’s cooperation. Partly as a result of shifting attitudes in society and an increased understanding of the cycle of



violence, we have seen significant decreases over the past decade in the number of domestic violence incidents and especially domestic violence-related homicides. Many would argue that the use of evidence-based prosecution has played an important role in contributing to this positive change. As a result, some professionals are asking what would happen if we forced sexual assault cases forward with the same degree of dedication that is currently seen with domestic violence (at least in some communities). Would we begin to see a similar change in the social attitudes about sexual assault? Would these changing attitudes then be reflected in a decreased incidence of sexual assault and/or increased rates of conviction for sexual assault offenders?

These are important questions, and we certainly agree that these are the kind of paradigm shifts that we all must consider carefully as we work to improve the criminal justice and community response to sexual assault. However, we want to use this Promising Practices article as a way of pushing these questions further and exploring the implications of using such a prosecution strategy with sexual assault cases, the realistic limitations of how and when such a strategy might be used, and the important differences between the criminal justice processing of sexual assault versus domestic violence. Yet the bottom line is that we cannot imagine sexual assault cases realistically being prosecuted without the victim testifying. And even if they were, it is hard to imagine that the prosecution could win a conviction. We therefore believe that the calls for evidence-based prosecution with sexual assault cases are based on myth and not reality.

### **Time for a reality check**

In fact, we think it's time for a reality check in the discussion of this issue. First, it is difficult to imagine forcing sexual assault prosecutions forward in cases where the victim does not want to go to trial when there are thousands of sexual assault victims in communities across the country who are desperately trying to pursue justice in their case – but, for a variety of reasons (usually “insufficient evidence”), criminal charges are not filed. If prosecutions are not being pursued in cases where victims want it, why would we spend our resources pursuing cases where the victim does not? If we really are considering using evidence-based prosecution in order to hold more offenders accountable, it seems like a better strategy to meet this goal would be to more successfully investigate and prosecute cases where victims desire prosecution. The reality is that evidence-based prosecution is only likely to be seen in cases that are high-profile or serial assaults committed by a stranger.

Another problem is that we all know a common tactic that is used by the defense in a sexual assault case is to attack the credibility of the victim. After all, rape cases are the only cases in which we need special rules (i.e., rape shield laws) to protect victims by keeping their sexual history and other personal information out of court. A moral argument could therefore be made that we need to do a better job with our investigations and prosecutions -- and do more to educate the jury pool (i.e., community members) -- before we put sexual assault victims at risk for further victimization from the offender as well as the criminal justice system by pursuing evidence-based prosecution.

Another argument that is made by many professionals, especially by victim advocates, is that evidence-based prosecution could be used as a way of pursuing successful prosecution in sexual assault cases without putting victims through the ordeal of going to trial. They correctly point out that there are many sexual assault cases where victims are so traumatized or fearful that they are simply unable to participate in the process of an investigation or prosecution -- let alone appear in court. If the case could be prosecuted solely on the basis of the evidence, they argue, such cases could be pursued, and offenders could possibly be held accountable without requiring the victim to testify. This sounds promising, and of course we all struggle with the balance of trying to hold sexual assault offenders accountable while protecting victims from further trauma. However, evidence-based prosecution is unlikely to meet this goal because it is not very realistic to expect that it would work in the way that these individuals envision.

To understand what we're saying, it requires walking through the logic of a sexual assault prosecution and understanding how it will typically unfold in the real world. First of all, we already know that the majority of sexual assault cases involve a victim and perpetrator who know each other, so the defense is not typically based on identification (i.e., "*you've got the wrong guy*") but rather based on consent (i.e., "*we had sex, but she wanted it*"). This highlights one very important difference between the prosecutions of sexual assault versus domestic violence. While domestic violence is also a crime committed by a known offender, the defense in a domestic violence trial will never be based on consent. The law and common sense both tell us that a domestic violence victim cannot consent to having her arm broken.

However, we also know that the consent defense is often extremely successful in sexual assault cases, because our judges and jurors frequently share common societal beliefs that women "ask for" sexual assault by engaging in behavior that is seen as risky or morally questionable. As a result, the consent defense often succeeds, and sexual assault trials end with an acquittal or a hung jury. Because of the power of this societal belief, it is our opinion that physical evidence and witness testimony are unlikely to overcome the tendency of fact finders to doubt victims and hold them responsible for their sexual assault. Even when there are eyewitnesses to the sexual assault and/or a videotape, we all know of cases where the defense convinced the judge or jury that the acts were consensual despite the existence of a videotape. The reality is that the only evidence that is likely to be persuasive enough to overcome a consent defense is the testimony of the victim. The victim is the only person who can recreate the entire reality of the sexual assault, testify that the sexual contact was forced, and demonstrate the devastating impact that the crime has had on his/her life. Do we really expect a judge or jury to be able to make the proper decision in a sexual assault case -- and to get a sense of the trauma and pain suffered by a victim of sexual assault -- without hearing from that victim? Without victim testimony, we believe that it is extremely unlikely that sexual assault prosecutions would result in conviction.

But perhaps the most significant "reality check" that is needed when we talk about this issue is the fact that prosecutors (and victims) are not the ones who get to decide that a trial will proceed without the victim being called to testify. The defense does. We all know

that the Constitution grants defendants the right to confront their accusers, and it is hard to imagine a defense attorney in a sexual assault case who would not subpoena the victim to testify. Therefore, even if prosecutors wanted to pursue “evidence-based prosecution” and not call the victim to testify, it is virtually guaranteed that the defense will produce a subpoena ordering the victim to do so. At that point, the victim is presented with two options, and it is difficult to determine which of the two would be more traumatizing. On the one hand, the victim can testify as a result of the subpoena, but everyone in the courtroom will know that the victim did not want to be involved in the trial and appears only as a hostile witness. It is difficult to imagine how the prosecution would overcome this challenge and win a conviction.

On the other hand, if the victim fails to appear in court in response to the defense subpoena, he or she could potentially be arrested for contempt of court. This would obviously be very traumatic for most victims, especially when they have been led to believe that they would not have to testify. In addition, defense attorneys in this situation can very easily argue that there is no better evidence to prove that the victim consented to the sexual acts in question than the fact that he/she failed to appear in court. In other words, it is difficult to imagine a scenario where victims could avoid testifying in their cases – other than being arrested -- and regardless of whether or not they testified, the fact that the case was pursued without their participation makes it extremely unlikely to result in a conviction. Is this really what we want? We don’t think so, and we don’t think this is what is envisioned by those professionals who are currently arguing for the use of evidence-based prosecution in sexual assault cases. We think it is simply a matter of not following the logic of something that sounds promising but would probably fail in meeting its objective and cause considerable trauma for sexual assault victims.

As a result of these concerns, it is our opinion that evidence-based prosecution currently represents more of a myth than a reality when it comes to sexual assault cases. However, there may be prosecutors out there who are successfully using this strategy, and if so, we would very much like to hear more about how this is being done. If your community is successfully using evidence-based prosecution with cases of sexual assault, please contact us to tell us more.

