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PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-Finding Aids

Cindy Kanusher*

I will talk briefly about the way in which rape trauma syndrome has come to be used as a form of expert testimony in rape and/or sexual assault cases. I will also make a suggestion as to whether or not we should continue to use rape trauma syndrome testimony as it has developed or whether we should “think outside the box,” as Vicki said earlier this morning, about the way that we use expert testimony in rape cases.

For the most part, rape trauma syndrome evidence is an acceptable form of expert testimony throughout the country. In most jurisdictions rape trauma syndrome testimony is used in rape trials to explain specific behavior on the part of the victim that might seem unusual to a lay juror unfamiliar with the patterns of responses exhibited by a rape victim. Specifically, this testimony is used most often to explain behaviors that are inconsistent with the victim’s claim of rape and to dispel misconceptions regarding the ordinary responses of victims to the crime of rape. Examples of behaviors that rape trauma syndrome has been used to explain are: delays in reporting after a rape; the behavior of a rape victim in the hospital; the inability of rape victim’s to recall specific events in chronological order or to recall details of the events; and the calm demeanor of a rape victim after an attack.¹ In cases of non-stranger rape, rape trauma syndrome testimony has also been used to explain a victim’s refusal to identify her attacker, even when she knew the

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1. See generally EDNA B. FOA & BARBARA OLASOV ROTHBAUM, *TREATING THE TRAUMA OF RAPE* (1998); see also Kathryn M. Petro, *Rape Trauma Syndrome*, at <http://www.kathrynpetro.com/mindfullife/archives/000290.html> (Feb. 26, 2004).

identity of her attacker, as well as to explain why victims would return to or continue a relationship with their attacker after being raped.²

As a result of the way that rape trauma syndrome testimony has been used in court, the prosecution of rape and sexual assault cases has become easier and more successful. However, I think there remains a huge gap or a hole in the way that rape trauma syndrome testimony has been used. It has not been used to explain the behavior of a victim during the attack, for example, to explain why a victim didn't scream, didn't resist, or didn't try to escape. This is particularly important in rape cases, since these are behaviors that are used very often to attack the victim's credibility and become big issues in the case. Let me provide an example: imagine a robbery case in which a woman is accosted in a dark alleyway or street and is told to give up her money, give up her earrings, give up her wallet, and stay there for five minutes after the perpetrator leaves. The victim complies with these demands and after reporting to the police, the perpetrator is ultimately arrested. Based on my experience, my guess is that when this case comes to trial it is going to be an "ID" case. That is, that the defense will be that there wasn't enough time for her to accurately see who her attacker was and that it was too dark for her to have had a good look at the perpetrator. Therefore, the defense will question the victim's ability to correctly identify her attacker. But, if you change the facts and make it a rape case or a sexual assault case, while there may still be questions about the victim's ability to correctly identify her attacker, there will undoubtedly be other issues that are brought up in the case that are generally used to attack the victim's credibility based on the way the victim acted during the attack. Using the same facts, if the victim is accosted and assaulted by the perpetrator in a dark or a dimly lit street, and she doesn't resist, doesn't scream, doesn't try to escape and waits for the perpetrator to leave before leaving the location and reporting to the police, these behaviors will be brought up by the defense to attack the victim's account of the assault. The defense will use the victim's failure to resist, scream or try to escape to challenge her claim that the perpetra-

2. See *People v. Taylor*, 552 N.E.2d 131 (N.Y. 1990).

tor raped her in a way that would not occur if it were a robbery case.

Since these are such big issues in rape cases, we need to figure out a way to address these types of behaviors. When I was a prosecutor, I remember prosecuting a case in which the victim was a young woman who was about twenty-two years old, if my recollection is correct. She had met a young man on the train. They talked, exchanged numbers, and she went out on a date with him. Some time after that, he called her one night and said, "I want to come over." She said, "no." He called her back and said he really wanted to come over, and again, she said "no." Then he called her from the phone downstairs and said, "I'm downstairs, I'm coming up." When he came to her door, he knocked and she opened it a little bit and said, "I don't want you to come in." Although he didn't bang the door down, he edged his way into her apartment and they sat down on the couch. Ultimately, he forced her to have sexual intercourse and assaulted her in a variety of other ways. During the attack, she did not scream; she did not try to escape; she did not resist in any way. And, upon his leaving, when he said, "I'm going to call you, will you go out with me?" She said, "Yes, I'll go out with you." After he left, she called her friend and the police were called. He was ultimately arrested. When we went to trial, the defense argued that the victim had had consensual sex with the defendant and attacked the victim's credibility by pointing out that she didn't resist, didn't say no, didn't scream and didn't try to escape. Those were the big issues that this case revolved around. And quite honestly, I didn't think to use an expert on rape trauma syndrome to respond to these attacks. I didn't think that I could. Nobody in my office suggested that I should and had I asked, the likelihood is that they would probably have said no. I got lucky. The defendant waived a jury trial; I had a really good judge. The defense attorney wasn't particularly good and the defendant hung himself on cross-examination. Ultimately, he was convicted. But, had the circumstances been different, it would have been a very, very difficult case for me to prosecute successfully.

My point in telling this story is to highlight the question of how you use rape trauma syndrome testimony in rape cases to address these issues. Or, the more compelling question is,

should you be using a different type of testimony? The *Bennett*³ case is a good example of whether or not you can or should use rape trauma syndrome testimony to explain a victim's behavior during a rape or sexual assault. In *Bennett*, the victim was driving to a family wedding in upstate New York and was stopped by a uniformed State Trooper who told her that she was driving erratically. He told her to get out of her car and walk a straight line, which she did. Then, he told her to get into his car, breathe into his face twice. The second time, he kissed and fondled her. He then told her that he was going to "do it, or make it" with her, but that first he need to go back to the police barracks to get a condom. He directed her to get in her car and follow him to the barracks, which she did. Upon arriving at the barracks, he got her out of her car and put her in his car, went into the barracks, got the condom, came out, drove her to a secluded area and then assaulted her. He then brought her back and put her in her car and she went to the wedding that she was on her way to. At the wedding, she excused her delay as car trouble, and not until a few days later, after she hadn't eaten or slept for two days, did she report it to a crisis center and ultimately to the police. When the case came to trial, the prosecutor used rape trauma syndrome testimony to explain the victim's behavior before, during, and after the assault.⁴ In fact, Dr. Anne Burgess, one of the originators of the theory of rape trauma syndrome,⁵ testified as the expert in that case. As part of her direct testimony, the prosecutors used various hypothetical questions to explain the victim's behavior during the assault. The defendant was convicted, but on appeal to the New York Court of Appeals, it was reversed on other grounds having to do with a pre-trial ruling that the trial judge made about cross-examining the defendant about a pending crime.⁶ How-

3. *People v. Bennett*, 593 N.E.2d 279 (N.Y. 1992).

4. *Id.* at 466-67.

5. In 1972, Anne Burgess and Linda Holmstrom performed a first of its kind study of the behavioral responses of rape victims. In this study, Burgess and Holmstrom interviewed and followed approximately 100 women who entered a Boston area emergency room. Based on the results of this study, Burgess and Holmstrom coined the term "Rape Trauma Syndrome" and used this term to describe certain behavioral patterns and/or responses that were exhibited by victims of rape or sexual assault. Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

6. *Bennett*, 593 N.E.2d at 283.

ever, the court specifically addressed the question of whether or not rape trauma syndrome could be used in the case to explain the victim's behavior during the attack. What the New York Court of Appeals said was that it was unclear whether rape trauma syndrome testimony could be used for this purpose. They stated that this use was different from the way in which the testimony had been used in the past.⁷ Thus, a *Frye* hearing⁸ would be necessary to determine if this was a legally acceptable use of this type of testimony. A finding would have to be made that using rape trauma syndrome testimony to explain the behavior of a victim during an attack is accepted by the relevant scientific community, that such testimony would be helpful to a lay jury deciding a rape case, and that the potential value of such testimony in a specific case would outweigh the possibility of undue prejudice to the defendant.

In *Bennett*, the court left open the question of how rape trauma syndrome testimony can be used.⁹ The other question that remains unanswered is whether rape trauma syndrome testimony is the testimony that you want to use, or are you better off using another form of expert testimony? Upon reading the *Bennett* case again recently, and looking at Dr. Burgess' explanations of the victim's reactions, she said the woman would react by doing exactly as she was told. She explained that this behavior is consistent with the way someone would react when told to act by an authority figure holding a gun. Once ordered to do something, she knew that it was something that she must do, and she wouldn't cry or try to get away in her own car because of the fear and stress concerning what else the officer might do.¹⁰ After listening to Donna Gaffney's description of

7. *Id.* at 283-85.

8. In New York, the admissibility of expert testimony is governed by the standard set out in *Frye v. United States*, 293 F. 1013 (1923). According to this standard, in order for expert testimony to be admissible there must be a finding that the testimony is generally accepted within the relevant scientific community, and that such testimony is such that it would aid a lay jury in reaching a verdict. *Id.* at 1014. In each specific case, the court must also look at the reason why the testimony is being offered, to determine the helpfulness, relevance and potential prejudice of the testimony in that case, in making the determination as to whether the testimony is admissible in the specific case. *People v. Taylor*, 552 N.E.2d 131 (N.Y. 1990).

9. *Bennett*, 593 N.E.2d 279.

10. *Id.* at 283-84.

rape trauma syndrome and her explanation of how such information can be used,¹¹ it is apparent to me that while rape trauma syndrome testimony will be useful in certain parts of a rape case, it is not going to be helpful in a large part of the case to explain the victim's behavior during the attack. And once we realize that Dr. Burgess' testimony in *Bennett* has more to do with what Donna Gaffney was talking about, which is the physiological responses of victims to any traumatic event and not specifically to rape, it becomes clear that only using rape trauma syndrome testimony in a rape case is too limiting. My suggestion is that we think outside the box, and just because it is a rape case, don't immediately decide to use a rape trauma syndrome expert, but think to use a different expert who can address, in a more general way, the physiological responses of victims to a life-threatening event that happens to be a rape or the thought that they might be dying. This is the type of expert that prosecutors should be using to explain a victim's behavior, whether it be behavior before, during or even after the assault.

In the same way that rape trauma syndrome testimony can be used to expel misconceptions that are held by jurors about post-rape behavior, expert testimony about how victims respond to trauma in general can be used as a means of helping jurors understand how victims of rape may act in a certain way prior to and during the attack.

11. See Donna Gaffney, *PTSD, RTS and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact Finding Aids*, 24 PACE L. REV. 271 (2003).