

INTIMATE PARTNER SEXUAL ASSAULT

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AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

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LEARNING OBJECTIVES

- At the conclusion of this presentation,
participants will be better able to:
 - Identify victims of intimate partner
sexual assault.
 - Apply an understanding of the unique
medical-forensic issues for patients
presenting after intimate partner sex
assault.
 - Prosecute intimate partner sexual
assault.

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IPSA PERPETRATORS WE COMMONLY MISS

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PERPETRATORS

- ◉ Spouses
 - Community leaders
- ◉ Romantic partners (current/former)
 - Heterosexual
 - LGBT
 - Gang members
 - Pimps/traffickers

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GANGS AND PIMPING

When I first met CD, she and I were more like boyfriend-girlfriend. That changed within three weeks. I told CD she and I could have a life together but that she needed to "work" to make us money. By "work" I meant having sex with men for money. I had no job and the only money I was making was through CD's "work." CD loved me and she agreed to be a prostitute. I'd tell CD how much to charge for sex acts; I'd tell CD where to go and who she could and couldn't talk to. CD called me "daddy," and gave me all of the money she made after each "date." CD and I would argue and I would yell or push her over her work as a prostitute. CD knew I was a Street Mobb member.

Provided by King County Prosecutor's Office, Seattle, WA

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MINIMIZING IPSA PERPETRATORS

**Failure to recognize IPSA
perpetrators as dangerous or
problematic to the community**

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IPSA PERPETRATORS

- More experienced
- More invested
- Crossing more boundaries
- Safer
- Creating more betrayal/family conflict
- More psychologically/emotionally involved in offending

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WEAPONS

- | | |
|--|---|
| <ul style="list-style-type: none">• Traditional<ul style="list-style-type: none">• Gun• Knife• Ligature• Object | <ul style="list-style-type: none">• Nontraditional<ul style="list-style-type: none">• Pre-meditation• Planning• Manipulation• Deceit• Betrayal of trust |
|--|---|

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MINIMIZING THE OFFENSE

"The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent [and] contract the wife hath given up herself in this kind unto her husband, which she cannot retract . . . (I)n marriage she hath given up her body to her husband."

Commonwealth v. Chretien, 417 N.E. 2d 1203, 1207 (Mass. 1981) (quoting Hale, *Please of the Crown* 628 (1800))

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CASE THEORY

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CONTEXT

- Victims do not fit into a single mold
- Public versus private
- Force overt or threat based on past behavior

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STATE v. MARK KOCAJ

- What is the intimate relationship between the victim and defendant?
- How is sexual violence used in the relationship?
- What type of force was used in this assault?

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CHARGING

- ◉ How are you going to charge?
 - Force, threat of force, non-consent

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FORCE/THREAT OF FORCE

- ◉ Context is critical
- ◉ Past abuse, other acts
- ◉ Other criminal activity
 - 404b
 - Current /former/ other victims

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CHALLENGES

- ◉ All intimate partner violence is under-reported
- ◉ Common domestic and sexual violence dynamics
 - Victim behavior
- ◉ IPSA may co-occur with other serious crimes
- ◉ Intimate partners rapist know victims better than anyone else
- ◉ Victims may not recognize assault as rape

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STRATEGIES

- Safety
- Support
- Protection
- Pretrial techniques
- Trial strategies

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VICTIM SAFETY

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ASSESSING RISK/LETHALITY

- Prior violent acts toward the victim or others
- Prior threats toward the victim or others
- Violation of court orders
- History of mental health or addiction treatment

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ASSESSING RISK/LETHALITY

- Suicide threats or attempts
- Possession of firearms
- Obsessive type behavior since crime or arrest
- Contact since arrest and/or day of interview

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ADDRESSING RISK/LETHALITY

- Bail
- No contact orders
- Safety plans
- Advocacy
- Sentencing
- Probation/parole conditions

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VICTIM SUPPORT

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SUPPORT

- ◉ Coordinating the response
 - Traditional coordinated community response (CCR) in domestic violence cases
 - Sexual Assault Response Team (SART)
 - Multidisciplinary team (MDT)

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VICTIM INTERVIEW

- ◉ Have a witness
- ◉ Do not coach
- ◉ Do not judge or disparage victim's choices
- ◉ First goal: ascertaining the truth
- ◉ Second goal: case building

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LEARN TO LISTEN

- ◉ Ask for victim's description of:
 - Themselves
 - The defendant
 - Their relationship
 - What happened before, during and after the crime

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FACTORS TO CONSIDER

- Cultural sensitivity
- Gender sensitivity
- Disclosure is a process, might be piece meal
- False reporting is not the big problem, under-reporting is

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ASSESS COOPERATION

- Fear of defendant
- Dependence upon defendant's family
- Financial dependence upon defendant
- Victim's experience with prior reporting or lack of knowledge about the criminal justice system

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ASSESS COOPERATION

- Access and control defendant has over victim's mail, transportation or communication
- Victim has a current condition or situation such as pregnancy or care-giving responsibilities
- Collateral consequences like deportation, job loss, parental custody rights loss

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INTIMIDATION

- Prepare the victim for this
- Apology = confession
- Preserve all evidence of contact from offender
 - Phone calls, voicemails, texts, e-mails, etc.
- Be prepared to obtain corroboration

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INTIMIDATION

- Address attempts to intimidate in court and out of court
- Allay fears about threats from perpetrator to retaliate with child welfare and/or criminal allegations

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OFFENDER-FOCUSED PROSECUTIONS

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OFFENDER-FOCUSED

- ◉ Perpetrator as:
 - Predator
 - Manipulator
 - Planner
 - Strategist
- ◉ Weapons
 - Pre-meditation
 - Planning
 - Manipulation
 - Deceit
 - Betrayal of trust

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JUROR PERCEPTION

- ◉ We expect people to accept responsibility for their own well-being and safety
 - Why did she pick him in the first place?
 - She should just leave
 - She should cooperate with those who are trying to help her
 - She doesn't care so no one else should
 - No victim = no crime

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JUROR PERCEPTION

- ◉ Jurors often do not understand dynamics
- ◉ Jurors often minimize the impact of the violence on victims
- ◉ Jurors may believe stereotypes about domestic and sexual violence
- ◉ Common domestic and sexual violence dynamics
 - Victims may be reluctant to testify or refuse to cooperate
 - Jurors expect victims to be cooperative with prosecution

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FOCUS ON THE OFFENDER

- ◉ It's NOT:
 - What did the VICTIM do?
- ◉ It IS:
 - What did the ACCUSED do?

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CREDIBILITY

- ◉ It's not "she said, he said" – It's "the State said, he said"
- ◉ Does the victim or defendant have a motive to lie?
- ◉ What witnesses would you call in this case?

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EXPLAINING VICTIM BEHAVIOR

- ◉ Expert testimony
 - Caselaw
 - Relevant (401)
 - Proper subject of expert testimony (702)
 - Expert qualified
 - Strategy
- ◉ Direct of victim

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OVERCOMING CONSENT DEFENSE

How do you explain
consensual encounters --
prior to or following assault?

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OTHER CRIMES, WRONGS OR ACTS

- ◉ F.R.E. 404b
 - Prior to current assault
 - After assault but prior to trial
 - Motive, intent, preparation, plan, knowledge, identity, absence of mistake or accident
 - Convictions, acquittals
 - ◉ Check your state law
- ◉ F.R.E. 413
 - Commission of other sexual violence

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OTHER CRIMES, WRONGS OR ACTS-DV CRIMES

- ◉ Rare
- ◉ Illinois, California, Colorado and Minnesota

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VICTIM STATEMENTS

- ◉ Prior inconsistent statements
 - F.R.E. 613(b)
- ◉ Prior consistent statements
 - F.R.E. 801(d)(1)
- ◉ Medical treatment and diagnosis
 - F.R.E. 803(4)

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EVIDENCE BASED PROSECUTIONS

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CRAWFORD v. WASHINGTON

- ◉ Testimonial
 - Reliability of statements can only be tested through
 - ◉ Cross-examination of the witness, or
 - ◉ Prosecution shows that the declarant is unavailable + prior opportunity to cross-examine.

541 U.S. 36 (2004)

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CRAWFORD v. WASHINGTON

“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”

541 U.S. 36 (2004)

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DAVIS AND HAMMON

- ◉Police interrogation NONTESTIMONIAL if:
 - Objective circumstances show that the primary purpose of the interrogation is to enable police to meet an ongoing emergency.

126 S.Ct. 2266 (2006)

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DAVIS AND HAMMON

- ◉Police interrogation TESTIMONIAL if:
 - Circumstances objectively indicate
 - ◉No ongoing emergency
 - ◉Primary purpose of interrogation to establish or prove past events potentially relevant to later criminal trial.

126 S.Ct. 2266 (2006)

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MICHIGAN v. BRYANT

562 U.S. ____ (2011)
2011 WL 676964

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MICHIGAN v. BRYANT

◉CASE SUMMARY

- Police respond to a radio dispatch of a man shot
- Police find victim with gunshot to abdomen in great pain/difficulty speaking
- Police ask
 - ◉What happened?
 - ◉Who shot him?
 - ◉Where shooting occurred?
- Victim identifies shooter and circumstances of shooting
- Victim dies at hospital within hours

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HOLDING

1. Reaffirmed the “primary purpose” test from Davis;
2. Directed the use of an objective evaluation of the case circumstances to determine the primary purpose of the statement;
3. Clarified that the existence of an ongoing emergency is among the most important factors to consider, but not the only factor; and
4. Explained that the statements and actions of both the declarant and the interrogators provide objective evidence of the primary purpose of the interrogation.

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FORFEITURE BY WRONGDOING

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GILES v. CALIFORNIA

- ◉ Forfeiture applies when a prosecutor shows:
 - The defendant wrongfully caused the victim's absence AND
 - The defendant committed the wrongful act with the purpose of preventing the victim's testimony or cooperation.

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GILES v. CALIFORNIA

- ◉ However, the Court also held that:
 - Acts of domestic violence are often intended to dissuade a victim from resorting to outside help.
 - A defendant's prior abuse, or threats of abuse, intended to dissuade a victim from resorting to outside help, would be highly relevant to determining the intent of a defendant's subsequent act causing the witnesses absence

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RAPE SHIELD

◉F.R.E. 412

- Exceptions
 - ◉Source of semen, injury other evidence
 - ◉Prior consent
 - ◉Constitutionally required
 - Bias
 - Motive to fabricate

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ENSURING AN APPROPRIATE MEDICAL-FORENSIC RESPONSE

Addressing the Unique Issues of the IPSA Patient

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IN GENERAL...

- ◉Patients with a chief complaint of sexual assault at the hands of an intimate partner have some very different issues than other types of sexual assault patients.
- ◉Understanding the relationship of the victim to the assailant allows clinicians to accurately craft a discharge plan specific to the needs of the individual patient.
 - Preprinted discharge instructions frequently provided to sexual assault patients are often inadequate to address their highly individual situations and priorities.

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HOW IS THIS EXAM DIFFERENT FROM THE “TYPICAL” SAFE EXAM?

- Potentially greater emphasis on photo documentation
- Case more likely to involve a continuum of injury, which will need to be carefully documented
- Children are frequently involved and must be screened and referred appropriately

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HOW IS THIS EXAM DIFFERENT FROM THE “TYPICAL” SAFE EXAM?

- There is a very good chance the patient will return to the assailant
- Lethality is a very real issue post-exam
- Medical-forensic exam findings may be used in misdemeanor trial
- Medical-forensic exam findings may be used in civil proceedings

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POTENTIALLY GREATER EMPHASIS ON PHOTO DOCUMENTATION

- Intimate partner violence (IPV) cases tend to be photo-intensive
- Important to ask patients to return within the week for repeat photos as injuries blossom and change, particularly in cases involving strangulation
 - If medical can't provide this service, consider discussing with coordinated community response (CCR) team to create protocols for obtaining repeat photographs through other means

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**POTENTIALLY GREATER EMPHASIS
ON PHOTO DOCUMENTATION**

- Since IPV patients may recant their statements before going to trial (either voluntarily or from duress), these photos will often be the sole record of the event
 - Important that the clinician is confident that photos are of high quality.
 - Should be maintained as a part of the medical record to underscore that the photos are *medical* documentation, and not simply tools for investigation

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**CASE MORE LIKELY TO INVOLVE
A CONTINUUM OF INJURY**

Since IPV tends to be a chronic issue, and because patients often do not present after the first incident, it is important to look closely for older injuries, including fading contusions, scars, keloids and other indicators

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**CASE MORE LIKELY TO INVOLVE
A CONTINUUM OF INJURY**

- Clinicians should be careful to document all injury and, where possible, differentiate the injury resulting from the present episode from previously inflicted injury.
- Past medical treatment and hospitalization from other episodes of violence can also be documented in patients' medical histories, and as potential support for discharge plans where appropriate.

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CHILDREN ARE FREQUENTLY INVOLVED

- A large number of IPV patients have children in the home at the time of the abuse
- It's imperative that the children are screened for abuse, as well as the parent (even if they are not present)

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CHILDREN ARE FREQUENTLY INVOLVED

- If the children are also being abused, mandatory reporting requirements must be adhered to
- Need parameters for referrals for children who witness violence, but are not physically assaulted or abused—when are these cases reported? Does your community have resources to assist them and their families?

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CHILDREN ARE FREQUENTLY INVOLVED

- Clinicians may consider making the report with the patient present in order to allow him or her to hear the details of the statement and potentially answer questions about the incident directly.
- Involving child protection professionals in regular multidisciplinary team meetings can facilitate communication in these types of situations and help clinicians navigate the child protection response in their own jurisdictions.

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THE PATIENT MAY RETURN TO THE ASSAILANT

- Clinicians cannot go into the case expecting or demanding the outcome they believe should occur
- All IPV patients should receive the same consistent quality of care, regardless of whether or not they choose to return ton their assailant

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LETHALITY IS A VERY REAL ISSUE POST-EXAM

- The potential for lethality cannot be ignored.
- An important part of the process is referral and safety assessment. This should be individualized to ensure the best possible chance of her staying alive once she leaves.
- Using tools such as Campbell's Danger Assessment can assist in working with patients to evaluate risk.

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LETHALITY IS A VERY REAL ISSUE POST-EXAM

"Woman forced to have sex when not wanted" was the fifth most predictive item in her risk assessment table, ahead of such factors as escalating physical violence and partner's drug abuse. A physically-abused woman also experiencing forced sex was over seven times more likely than other abused women to be killed.

Campbell, et al., Assessing Risk Factors for Intimate Partner Homicides, 2003

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**MEDICAL-FORENSIC EXAM FINDINGS
MAY BE USED IN MISDEMEANOR TRIAL**

- In some cases the sexual assault charge may be dropped and the intimate partner violence charged at a misdemeanor level
- For prosecutors who are not familiar with forensic clinicians or medical forensic exams (as many misdemeanor prosecutors may not be) there may be confusion around your role or your priorities in patient care
 - Depending on the jurisdiction, misdemeanor prosecutors may not be participating in Sexual Assault Response Teams (SARTs) or other multi-disciplinary response teams (MDTs).

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**MEDICAL-FORENSIC EXAM FINDINGS
MAY BE USED IN CIVIL PROCEEDINGS**

- In cases of IPV, patients may choose to use their medical records in cases of divorce, custody and obtaining protection orders.
- Clinicians may be exposed to an entirely new legal system, including attorneys, magistrates and judges who have had little experience with our practice.

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Clinicians must be prepared to provide comprehensive healthcare to victims of domestic violence that addresses the immediate medical-forensic needs and potential healthcare sequelae of acute and/or chronic sexual violence.

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IDENTIFYING SEXUAL VIOLENCE

- Even when patients have disclosed IPV, sexual violence may still go undetected.
- Patients may have difficulty labeling forced sex by a partner as “rape.”
- Specific screening questions are needed, including different types of sexual violence, not just sexual assault
 - Forced viewing of pornographic material
 - Reproductive coercion (e.g., birth control sabotage)

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ACUTE EPISODES OF SEXUAL ASSAULT

- Patients who disclose acute sexual assault should be offered a medical-forensic exam.
- Patients refusing evidence collection should still be offered the examination, including sexually transmitted infection and pregnancy prophylaxis, as warranted per patient history and according to the patient's wishes.

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HEALTHCARE SEQUELAE OF SEXUAL VIOLENCE

- Patients who disclose sexual violence have the potential to develop a variety of physical and mental health sequelae.
- Understanding their associations will help clinicians identify and treat these issues.
- Furthermore, recognizing the interconnectedness of violence and health status can help decrease the likelihood of judgmental, inaccurate, and detrimental labels such as noncompliant and drug-seeking from being assigned to patients.

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CLINICIAN COMPETENCY

- Clinicians who care for patients presenting with complaints of domestic violence need to be careful not to separate sexual violence as a distinct and unrelated issue.
- Individualizing the approach to sexual assault patients is critical, with an understanding that the context of the assault should influence the course of treatment and discharge planning.

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PRIORITIZING MEDICAL

- The vast majority of patients we see will never see the inside of a courtroom, but 100% will have the opportunity to develop healthcare related sequelae from the violence they've experienced.
- Take care of the medical needs of the patient; document a good quality medical record and the legal system will ultimately benefit should that be the course of action.

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PRIORITIZING MEDICAL

Patients who feel listened to, who feel like they've been given options, who feel like they are more than just a crime scene, are more likely to participate in the criminal justice process.

Campbell, et al., 2010

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