

STOP Newsletter:

Resources for Pennsylvania STOP Teams



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APPELLATE CASE CHANGES TPFA PROCESS

Many counties in Pennsylvania currently grant temporary protection from abuse (TPFA) orders based on in camera review of allegations in Protection From Abuse (PFA) petitions. But last week, the Pennsylvania Superior Court ruled that practice unconstitutional.

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COURTROOM EVIDENCE: A RESOURCE FOR THE PROSECUTION OF DOMESTIC VIOLENCE CASES

This resource was designed in consultation with prosecutors from across Pennsylvania. Its purpose is to address important evidentiary issues that are regularly encountered by prosecutors who specialize in domestic violence, dating violence, and stalking cases.

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WHEN AND HOW: ADMITTING EXPERT TESTIMONY ON VICTIM BEHAVIOR IN SEXUAL ASSAULT CASES IN PENNSYLVANIA

On August 28, 2012, Section 5920 of the Pennsylvania Judicial Code, "Expert testimony in certain criminal proceedings", became effective. The law is a critical tool for prosecutors who seek to provide a context for understanding sexual assault and sexual assault victims, as well as to counter entrenched myths and misperceptions about sexual assault and sexual assault victims.

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APPELLATE CASE CHANGES TPFA PROCESS



By the PCADV Legal Department

Many counties in Pennsylvania currently grant temporary protection from abuse (TPFA) orders based on *in camera* review of allegations in Protection From Abuse (PFA) petitions (judges review the petition without speaking with the petitioner). But recently, the Pennsylvania Superior Court ruled that practice unconstitutional.¹ In *Ferko-Fox v. Fox*, the Superior Court held that to meet the requirements of due process, trial court judges must conduct an *ex parte* hearing (meet with the petitioner) prior to the entry of a TPFA order.² For many courts, this decision will force changes in local practice and procedure for issuing a TPFA order.

In *Ferko-Fox*, the plaintiff filed a PFA petition in Lancaster County and was granted a temporary PFA order against her husband (defendant) that provided her with protection until the final order hearing. After reviewing the allegations of abuse *in camera*, the court issued the temporary PFA order.

At the final order hearing, the plaintiff testified

that the defendant screamed in her face and shoved her during an argument. The plaintiff attempted to flee from the defendant by running up the stairs, but he caught her, grabbed her leg, pulled her down the stairs, sat on her and punched her arms until she gave him a document that he wanted. The defendant committed this assault knowing that the plaintiff had a neck injury. In addition to reinjuring her neck, the defendant bruised the plaintiff's shoulder and leg during the assault. The plaintiff also testified that on several occasions, the defendant shoved, pushed or threw her against the wall; pinched and grabbed her arms; belittled her; and called her crazy. Based on this testimony, the trial court granted a final PFA order for one year and six months.

After the entry of the final order, defendant appealed to the Superior Court, arguing – in relevant part³ – that his due process rights were violated because the trial court did not conduct an *ex parte* hearing with the plaintiff as required by the PFA Act.

On review, the Superior Court affirmed the entry of the final PFA order, but agreed with defendant that an *ex parte* hearing – in the presence of the petitioner – is required for the entry of a temporary PFA order.

The Court held that unless there are special circumstances that prevent a petitioner's being in court, due process under section 6107(b) of the PFA Act requires the trial court to hold an *ex parte* hearing with the petitioner present before entering a TPFA order.⁴ Judge Ott dissented, concluding that an *in camera* review of the petition meets due process requirements for issuance of a temporary PFA order.

In discussing its rationale, the Superior Court noted that an *ex parte* proceeding allowed the trial court to ask questions about the facts and circumstances beyond allegations in the petition. Also, the ability of the trial court to observe the petitioner's mannerisms during the *ex parte* hearing is a critical

component for determining the petitioner's credibility. The Superior Court explained that the county's interest in judicial economy did not justify the procedural due process shortcoming of *in camera* review in TPFA proceedings.

As a result of this decision, trial courts must conduct an *ex parte* hearing with the plaintiff when the plaintiff files a petition for a PFA order to determine whether the plaintiff is entitled to a temporary order for protection.

For some counties, the process for obtaining a TPFA order will not change, but for other counties this case will significantly change how the court reviews petitions and issues TPFA orders. [View the map of PFA process by county.](http://pubs.pcadv.net/palegal/TPFACountyProcessMap.jpg) <http://pubs.pcadv.net/palegal/TPFACountyProcessMap.jpg>

It is important for all counties to note two critical points in the development and implementation of procedural changes to the TPFA process:

- **The defendant is not permitted to attend or participate** in an initial *ex parte* hearing for the issuance of a TPFA, as it would further endanger the petitioner and is not necessary to meet the requirements of due process.⁵
- The standard for issuing a TPFA order has not changed: The plaintiff must establish that he or she is **"in immediate and present danger of abuse."**⁶ This standard has been held to be less onerous than the final order hearing, which requires a finding of abuse by the preponderance of the evidence.⁷

If your county currently uses *in camera* review for its TPFA order petitions, please feel free to call PCADV's legal department for technical assistance at 888-235-3425 or 717-671-4767. We can assist counties to determine best practices for ensuring litigant safety while promoting efficiency.

Notes:

¹ *Ferko-Fox v. Fox*, 2013 PA Super 88 (April 17, 2013).

² 23 Pa. C.S. § 6107(b).

³ Defendant raised two other important issues on appeal. First, defendant argued that his due process rights were violated because the trial court continued the final order hearing beyond ten days of the date the PFA petition was filed. On this point, the court found that the lapse in time did not violate due process because the trial court initiated the pertinent PFA hearing within the ten-day period and granted plaintiff a continuance in order to obtain counsel. The court was explicit in its holding that section 6107(c) of the PFA Act provides a trial court with the discretion to continue evidentiary hearings. *Id.* at 14-17.

Defendant also argued that he was entitled to cross-examine plaintiff about the identity of individuals present at the hearing. Defendant's counsel asked plaintiff to tell the court who was in the back of the courtroom, and plaintiff's counsel objected on the grounds of relevance. The trial court sustained, finding that the identity of non-testifying individuals in the courtroom had no relevance to whether abuse occurred. The Superior Court affirmed, citing Pennsylvania Rule of Evidence 401. *Id.* at 21-23.

⁴ *Id.* at *13.

⁵ *Id.* at *6 & n.6 ("Under either procedure, Husband is barred from participating. He would not be entitled to have counsel present, cross-examine Wife or her witnesses, or otherwise present an explanation, justification, or defense to the petition.").

⁶ 23 Pa. C.S. § 6107(b)(2).

⁷ *Drew v. Drew*, 870 A.2d 377, 378 (Pa. Super. 2005) ("The *ex parte* hearings conducted in order to secure a temporary PFA Order ... require only that the petitioner convince the court he or she is in 'immediate and present danger of abuse'" as opposed to the hearing required under section 6107(a) where the plaintiff's burden is the preponderance of the evidence.)

COURTROOM EVIDENCE: A RESOURCE FOR THE PROSECUTION OF DOMESTIC VIOLENCE CASES

PCADV is pleased to announce its publication of a new resource for Prosecutors.

This resource was designed in consultation with prosecutors from across Pennsylvania. Its purpose is to address important evidentiary issues that are regularly encountered by prosecutors who specialize in domestic violence, dating violence, and stalking cases. Issues covered in Courtroom Evidence include:

- Relevance of Prior Abuse
- Witness Competency
- Spousal Privilege
- Hearsay
- Confrontation
- Child Witness Statements
- Social Media Evidence
- Experts
- Special Evidentiary Concerns in Stalking Cases

For your convenience, Courtroom Evidence is equipped with a hyperlinked Table of Contents for easy navigation to relevant case law and analysis of evidentiary rules in domestic violence, dating violence, and stalking cases.

If you have any questions, or require additional assistance with your case, please feel free to contact the PCADV Legal Department at 717-671-4767.



WHEN AND HOW: ADMITTING EXPERT TESTIMONY ON VICTIM BEHAVIOR IN SEXUAL ASSAULT CASES IN PENNSYLVANIA

Jennifer Gentile Long, JD, Viktoria Kristiansson, JD, and Christopher Mallios, JD¹

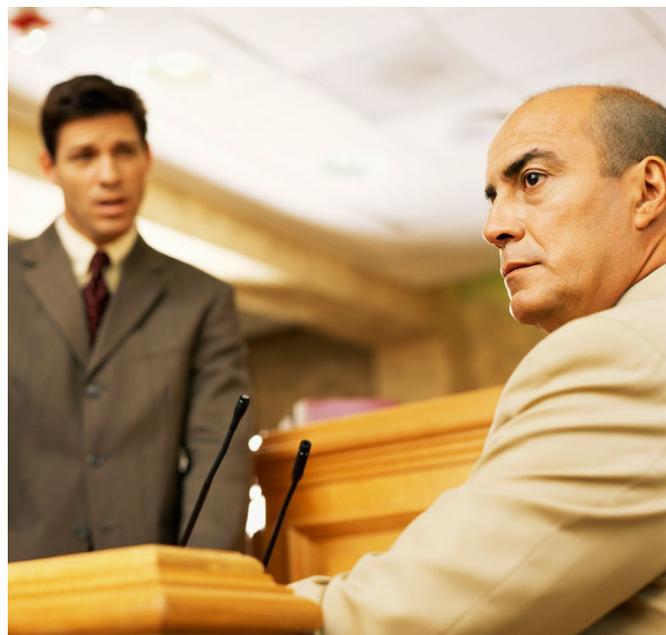
Introduction

On August 28, 2012, Section 5920 of the Pennsylvania Judicial Code, “Expert testimony in certain criminal proceedings”^{2,3}, became effective. The law is a critical tool for prosecutors who seek to provide a context for understanding sexual assault and sexual assault victims, as well as to counter entrenched myths and misperceptions about sexual assault and sexual assault victims. These fallacies have been reinforced for centuries by public discourse, inadequate laws created by misguided and uneducated legislators, and nefarious defense strategies designed to discredit victims through the exploitation of common rape myths.

The impact of myths on jurors

The prevalence of sexual violence myths causes the public to search for reasons to doubt allegations of sexual assault, rather than reasons to believe the victim. At the root of the myths is an almost-immediate reactionary tendency to analyze the assault by scrutinizing the victim’s – rather than the offender’s – actions. Frequently, the public’s expectations of how victims “should” behave conflict with the way victims actually behave.⁵ Jurors become fixated on their expectations of the victim’s behaviors, and if the victim fails to measure up to those expectations, jurors could jump to the conclusion that the victim is incredible and her testimony should not be believed.⁶

Regardless of whether the defendant is a stranger or someone the victim knows, jurors may express victim blame “in several themes: victim masochism (e.g., she enjoyed it or wanted it), victim participation (e.g., she asked for it; it happens only to certain types of women), and victim fabrication



(e.g., she lied or exaggerated).”¹¹ Even common victim responses to trauma may undermine a victim’s credibility in jurors’ eyes because jurors perceive the responses as counterintuitive.¹⁷

Defense tactics routinely exploit public suspicion of sexual violence victims, arguing that a victim’s behavior is inconsistent with the behavior of a “real” victim. Sexual violence cases are often labeled by defense attorneys (and, unfortunately, the public) as “he said, she said,” and the trials unfold into a focus on the victim’s rather than the defendant’s behavior. The victim’s credibility becomes so inextricably linked with her behavior that, left unexplained to jurors, it becomes the defense’s most effective weapon to negate her testimony.²⁰ This inability to process sexual assault and sexual assault victims through an unbiased lens – i.e., without an expert to provide the context through which sexual assault dynamics can be understood – may result in not guilty verdicts.

Recommended practices

In a sexual assault criminal prosecution, there is no pre-determined, one-size-fits-all prescription for determining whether to utilize expert testimony, which expert to call, or what questions to ask. The protocols for explaining victim behavior during a criminal prosecution vary based on the laws of a particular jurisdiction and the specific circumstances of each case.²¹ Pennsylvania prosecutors who are looking for guidance on recommended practices should read the new statute very carefully, review cases from across the country, and reach out to individual experts and agencies for technical assistance.

Pennsylvania's statute specifies that:

- (1) In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.
- (2) If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.
- (3) The witness's opinion regarding the credibility of any other witness, including the victim, shall not be admissible.
- (4) A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.²²

Victim advocates; shelter or crisis center directors; social workers, counselors, and therapists; sexual assault nurse examiners (SANEs) and physicians; psychologists and psychiatrists; academics with relevant clinical experience; and law enforcement professionals are some examples of persons who may possess the qualifications and experience that will allow them to be deemed experts in "the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted"²³ in a sexual assault

criminal prosecution.

The expert's testimony should focus on objective observations based on the expert's experience with, or specialized knowledge about, common reactions of sexual violence victims. It should also focus on the behaviors and issues related to sexual violence that are relevant to the case in which they are testifying. Where relevant and admissible, an expert's testimony may also include a discussion about myths related to sexual violence. Although experts should be familiar with current research or articles related to victim behavior, the most effective qualification will be an expert's extensive experience working with or observing sexual violence victims. An expert should also discuss his or her training experiences, which can be relevant to victim behavior as well as the public's belief in myths about sexual or intimate partner violence. The reliability of this type of testimony, as compared with an expert's subjective evaluation of a victim, rests squarely on the extent of the expert's experience as well as his or her ability to articulate the observations and knowledge gained in the course of his experience.

Victim behavior should be addressed generally. Expert testimony that describes victim behavior in terms of a syndrome is *not* recommended. The most significant reasons for this are set forth below.

First, using syndromes and disorders to describe victim behavior risks making jurors believe that the victim suffers from a pathological condition. Not only may it be improper to label a victim as suffering from a pathological syndrome, but it may also further jurors' deep-seeded beliefs related to victim-blaming by promoting the defense message: "You see?! She *is* crazy! She is not to be believed!" Further, the battle of the experts may lead to misleading and irrelevant testimony on whether the victim's behavior is consistent with an individual who suffers from a syndrome or disorder, as well as whether her syndrome or behavior was caused by a particular event.

Second, syndromic testimony will necessarily involve, at a minimum, a personal review of the victim's counseling and other records, and may even involve interviews with state and defense "experts" that could turn the trial into a side show

in which there is an unnecessary focus on the victim's emotional trauma, rather than the defendant's criminal behavior. Access to records and interviews may further traumatize the victim and feel like a hurtful invasion of privacy, delaying the victim's healing and recovery from the trauma of rape.

Third, many of the syndromes that have historically been used in prosecutions regarding victim behavior were developed under other studies that may have been geared, for example, to explain the behaviors of a woman who had been battered and committed a crime against her batterer.²⁵ Thus, these syndromes are incongruous with an expert's ability to appropriately explain victim behavior in sexual assault cases. In addition, testimony on syndromes may be vulnerable to defense attacks that it is unreliable. The goals of explaining victim behavior in sexual violence prosecutions are much different than those used by the defense to excuse or justify criminal behavior of sexual and domestic violence victims. As a result, terms and practices that may be well-suited to the defense are ill-suited when employed by the prosecution.

Further, since experts who use these terms often render a subjective opinion about the victim, either directly or through a hypothetical, their opinions are easily countered by a different expert's opinion of the same facts.

Fourth, the Pennsylvania statute states that the expert should testify to assist the "trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted."²⁴ The statute tells us that the testimony is not to be a subjective account of *this* victim's behaviors and reactions, but rather focused on general sexual assault dynamics and victim behavior. Further, the statute specifies that opinion testimony regarding the victim's credibility is not permitted.

Because the expert testimony is objective, cross-examination likely will focus on the expert's honesty, i.e., whether he or she is truthfully relating his or her experiences, the breadth of the expert's experience, his or her knowledge of the literature, and any possible bias toward victims of sexual violence.

Common attacks on expert testimony addressing victim behavior can be avoided by focusing expert testimony on an expert's observations,

experiences, research, writing, education, training, or review of articles or studies that address: (1) a general discussion of sexual violence; (2) the existence and prevalence of common myths surrounding these types of violence; and (3) common victim responses to trauma or behaviors in these types of cases. By utilizing this method, because the subject of the testimony is objective (facts and observations) rather than subjective (diagnosis and conclusion), it remains effective testimony, which is less vulnerable to attack.

Conclusion

Although sexual assault cases may seem challenging to prosecute, prosecutors have a new weapon in their arsenal. The use of expert witnesses to explain sexual assault dynamics and common victim behaviors can help educate judges and juries, dispel myths, undercut defense strategies, and lay a strong foundation for persuasive, common-sense arguments that can help juries hold offenders accountable. By carefully selecting well-qualified experts and using their testimony to replace rape myths and misconceptions with facts about how sexual assault victims really behave, prosecutors can help jurors make better decisions in these cases based on the facts, the law, and an accurate understanding of sexual violence and its impact on victims.

This article has been adapted from, Jennifer Gentile Long, Viktoria Kristiansson, & Christopher Mallios, *When and How: Admitting Expert Testimony on Victim Behavior in Sexual Assault Cases in Pennsylvania*, 18 Strategies in Brief (May 2013).

References

- ¹ Jennifer Long is the Director of and Viktoria Kristiansson and Christopher Mallios are Attorney Advisors at AEquitas: The Prosecutors' Resource on Violence Against Women. The authors would like to thank Charlie Whitman, Associate Attorney Advisor at AEquitas for her contributions. This article has been adapted from JENNIFER G. LONG, NAT'L DISTRICT ATTNY'S ASSOC., INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR (2007), http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

²42 PA. CONS. STAT. ANN. § 5920 (West 2012).

³This statute applies to criminal prosecutions for sexual assault (criminal proceedings for an offense for which registration is required under 42 PA. CONS. STAT. ANN. § 9799.11 (West 2013) *et seq.* (relating to registration of sexual offenders) and for an offense under title 18, chapter 31 of the Pennsylvania Criminal Code (relating to sexual offenses)). The statute is silent regarding the admission of this expert testimony in prosecutions for intimate partner violence. Nevertheless, such testimony should be admissible in a prosecution for intimate partner sexual assault.

⁵See, e.g., BOWMAN, *supra note 6*, at 242 (discussing expectations of victim behavior in a battering circumstance); *see also* BEN-DAVID, *supra note 9* (discussing expectations of defendant behavior).

⁶See *U.S. v. Rynning*, 47 M.J. 420, 422 (CAAF 1998) (noting that without expert testimony, a victim's counterintuitive behavior often undermines her credibility); *see also* Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 235 (1992) (stating "studies document the findings that most people maintain misinformation about domestic abuse, which is detrimental to their evaluation of the battering victim's

credibility").

¹¹*Id.*; *see also* LONSWAY, *supra note 7*, at 135 (addressing the myth that only certain types of victims are raped as well as the belief in the number of false claims).

¹⁷Terri Spahr Nelson, *Module 7: Expert Witnesses*, JUDGE ADVOCATE CURRICULUM ON REPORTING SEXUAL ASSAULT (2006).

²⁰See *Rynning*, 47 M.J. at 422 (stating "the victim's behavior will not necessarily undermine his or her credibility if an expert can explain that such patterns of [counterintuitive] behavior often occur in sexual abuse cases") (citation omitted) (quoting *U.S. v. Pagel*, 45 M.J. 64, 68 (CAAF 1996)).

²¹Expert testimony offered by the prosecution to explain victim behavior is not admissible in all fifty states. Therefore, it is imperative for prosecutors to consult the law in their particular jurisdictions before seeking to introduce this type of evidence. In addition, prosecutors should refer to *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *see also* Kenneth Winchester Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227 (1996-1997); Barnes, *supra note 4*; Sarno, *supra note 4*.

²²42 PA. CONS. STAT. ANN. § 5920(b)(1) (West 2012).

²³*Id.*

²⁴*Id.*

²⁵In fact, in many jurisdictions, it is still common practice for expert testimony on victim behavior to be introduced as Battered Women Syndrome, Rape Trauma Syndrome, or through a psychological evaluation indicating that the victim's behavior is consistent with one of these syndromes.



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