



Kansas Attorney General Derek Schmidt

40-Hour SANE-SART Pediatrics Course

Role of the Prosecutor in Sex Crimes Prosecutions

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Role of Prosecutor

- The obligation of a Prosecutor “in a criminal prosecution is not that it shall win a case but that justice shall be done.”

Berger v. United States, 295 U.S. 78, 88
(1935)



Role of the Prosecutor

- Comments at Model Rule 3.8, Special Responsibilities of a Prosecutor, state:

“A prosecutor has the responsibility of a ***minister of justice and not simply that of an advocate***. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”



Role of Prosecutor

• Issues:

1. Whether and what to charge?
2. Plea negotiations
3. Trial



The Offense

- Report
 - Investigation = Law Enforcement
 - Interviews
 - The SANE Exam
 - Presentation for Charges
- “What have you got?”



Role of Prosecutor

- When to charge the case?
 - Model Rules of Professional Conduct Rule 3.8(a) states:

“A prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”



Mandatory Reporting

- 38-2223 – children
- 39-1402, 39-1431 – dependent adults
- Get Law Enforcement involved
- PRC 800 number
- Don't make promises, the victim WILL testify if charged.
- 2012 Legislation - Penn State - HB 2533
- Broadens who should report



Role of Prosecutor

- We ask a LOT of victims. Are we relying SOLELY on the victim for proof?
- What else do we need?
 1. Objective facts
 2. Quality investigation
 3. Theme to closing



What to charge?

- Elements
- Age of victim
- Under 14 = Jessica's Law 21-4643
- 14-16
- Penetration vs. Lewd fondling or touching
- Over 16: w/o consent, force or fear, unconscious, incapable of consent, mentally incapable



Charging Decision

- Objective Facts
 - Interview of V close in time to offense
 - Don't forget: 911 tape, witnesses of initial disclosure
(friend, teacher, parent, Crawford issues, process crime scene, the house)
- SANE and DNA: if not, why not?
- Def's statements: even if denial, valuable for CODIS hits. Recorded interviews.



Objective Facts

- Relationship of the parties: motive, bias?
- le: who put V up to this? Is caregiver appropriate?
- Record any later statements of V for consistency, corroboration
- Diaries, blogs, notes, Facebook
- Physical Evidence: sex toys, landmarks
- Porn: For us or for the defense



Is there a strategy?

- Guilt in Fact
- Legal Sufficiency
- Charging is NOT a leverage tool
- Follow through
- National Prosecution Standards
- Objective consistency



Charging

Why are *objective facts* so important?

- 3 Explanations:
 1. It happened
 2. It did not happen at all
 - a. Lied all by herself
 - b. Someone told her to lie
 - c. She just misunderstood/confused
 3. SODDI



Objective Facts

- Takes pressure off V
- ESPECIALLY TEEN V'S
- Small children – what is their motive?
- Adults – women do not need this drama, trauma, horrible experience
- Teens – sadly, juries are askance
- HAVE TO HAVE FACTS



Negative Evidence

- No DNA? Fondling, touching, interrupted act
- Det. Or DNA analyst to explain
- If not even tested, explain why not
- Lack of SANE exam: over 72 hours (SANE will explain)
- Fingerprints & video – Did they even try?



Theme

- Defense will have one
- - "Scorned lover. Hell hath no fury . . ."
- - "Problem teenager" Crazy
- - "I was drunk"
- - "Her mother put her up to this"
- - "She did not want her boyfriend to find out, so she cried rape."
- State needs theme to give the jury a thread to follow.



Theme

- Child
- - How does she know what she knows?
- - Who put her up to this?
- - Why would she say this?
- Teens and Adults: need corroborative evidence.
- "Don't believe me, believe the DNA"
- Consistency



What else

- What else is he going to say?
- What will he know about you?
- Ouija board case

Non-stranger cases.



Offense Charged

- Disclosure, investigation, presented, charged
- Arrest
- 1st Appearance
- Bond and Motions practice
- Preliminary Hearing/ Arraignment
- More motions
- Continuances



Legal Issues

- Prior Crimes 60-455
- Rape Shield 21-3525
- Psychological Evaluations on victim

- Requires compelling evidence on why



Trial or Plea

- Advocacy during trial
- Preparation is key
- Never be alone with the victim
- Tour of the courtroom
- Review, but don't rehearse or coach
- Support people
- WASAC, MOCSA, etc.



Order of Trial

- Motion practice
- Jury Selection – voir dire
- Burden of Proof: State 1st, Defense, Rebuttal
- Jury Instructions
- Deliberations
- Verdict
- Sentencing



KSGA

- Severity Level 1 – 10
- Criminal Hx: A – I
- Departures – Dispositional/Durational
- Hard Time
- Sex Offenders – Lifetime Registration, post release, CODIS, EMD
- J- Law – Hard 25, 1st offense, Hard 40 2nd offense, LIFE for 3rd or more offense

SENTENCING RANGE - NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	1 st Offense	2 nd Offense	3 rd Offense & Felony	4 th Offense Felony	5 th Offense Felony	6 th Offense Felony	7 th Offense Felony	8 th Offense Felony	9 th Offense Felony
I	600 630 660	615 645 675	630 660 690	645 675 705	660 690 720	675 705 735	690 720 750	705 735 765	720 750 780
II	690 720 750	705 735 765	720 750 780	735 765 795	750 780 810	765 795 825	780 810 840	795 825 855	810 840 870
III	780 810 840	795 825 855	810 840 870	825 855 885	840 870 900	855 885 915	870 900 930	885 915 945	900 930 960
IV	870 900 930	885 915 945	900 930 960	915 945 975	930 960 990	945 975 1005	960 990 1020	975 1005 1050	990 1020 1080
V	960 990 1020	975 1005 1035	990 1020 1050	1005 1035 1065	1020 1050 1080	1035 1065 1095	1050 1080 1110	1065 1095 1140	1080 1110 1170
VI	1050 1080 1110	1065 1095 1125	1080 1110 1140	1095 1125 1155	1110 1140 1170	1125 1155 1185	1140 1170 1200	1155 1185 1230	1170 1200 1260
VII	1140 1170 1200	1155 1185 1215	1170 1200 1230	1185 1215 1245	1200 1230 1260	1215 1245 1275	1230 1260 1290	1245 1275 1320	1260 1290 1350
VIII	1230 1260 1290	1245 1275 1305	1260 1290 1320	1275 1305 1335	1290 1320 1350	1305 1335 1365	1320 1350 1380	1335 1365 1410	1350 1380 1470
IX	1320 1350 1380	1335 1365 1395	1350 1380 1410	1365 1395 1425	1380 1410 1440	1395 1425 1455	1410 1440 1470	1425 1455 1500	1440 1470 1560
X	1410 1440 1470	1425 1455 1485	1440 1470 1500	1455 1485 1515	1470 1500 1530	1485 1515 1545	1500 1530 1560	1515 1545 1600	1530 1560 1680

Probation Terms are:
 36 months recommended for felons classified in Severity Levels 1-5
 24 months recommended for felons classified in Severity Levels 6-7
 18 months for felons classified in Severity Level 8
 12 months for felons classified in Severity Levels 9-10

Probation Supervision Terms are:
 36 months for felons classified in Severity Levels 1-4
 24 months for felons classified in Severity Level 5-6
 12 months for felons classified in Severity Levels 7-10

KSO High Performance Manual 2008
 Appendix G Page 2

LEGEND
Probation/Parole
Hard Time
Probation/Parole/Imprisonment



Appeal

- Every felony jury trial is appealed
- ADO
- Average of 1.5 years
- Court of Appeals
- Supreme Court
- Victim Notification



PLEA NEGOTIATIONS



Role of Prosecutor

- Constitutional and Statutory obligations to advise victim & tell about plea & sentencing
- Her expectations - starts with cops, investigators & nurses and continues . . .
- Is she realistic? (or not – prison, castration? What if I refuse to come?
- Is her mom, dad, other controlling course of case?



Role of Prosecutor

- It's your case, but she lived it
- How invested are cops, investigators, others, medical professionals (Valadez)
- Owe them your best, yes, but that includes your objective, realistic assessment.
- Tell them the truth
- Abner vs. Autistic boy case



Plea Negotiations

- Three Areas
- 1. Felony or misdemeanor?
- 2. Sexually motivated?
See KORA registration requirements
- 3. Prison or probation?
- But 7-1-08 Limitations on Departure
21-4719



Plea Negotiations

- Consider the strengths of the case; including the intangibles
- How is the victim?
- Legal issues
- His statements and Jackson v. Denno hearing?
- Bottom line: what are you going to prove?
Objective facts or emotional appeal.
- Make sure sexually motivated for disposition



Who may speak?

Constitutional and statutory considerations of victim's rights

Kansas Constitution, Article 15, Sec 15(a)

“Victims of crime shall be entitled to certain basic rights . . . To be heard at sentencing”

K.S.A. 74-7333 Bill of Rights

(5) The views and consequences of victims should be ascertained . . .



Trial - Expectations

- Witnesses
- Who to call? What's cumulative evidence vs. unanswered questions
- Presentation? When to call V?

Nap time? Missed breakfast? Start with child early(stronger witness) or bury weak adult in the middle of your case in chief

Exhibits: Photos, maps, vaginas



Expert Witnesses

- Within the scope of special knowledge, skill, experience and training
- Based on facts or data known, perceived by or made known to the witness at the hearing
- Otherwise not available to the jury
- Opinion or inference is OK
- My Cousin Vinny, sure, but you are MUCH MORE



Keep track

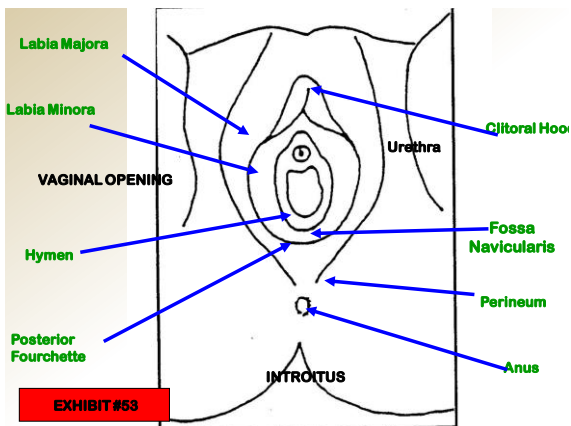
- Your CV
- Education
- Training
- Teaching
- Publications
- Organizations, professional associations
- Experience
- # times testified



Anatomy

- The definition of sexual intercourse:
- Penetration of the female sex organ . .

- You teach the female sex organ . . .





Teaching Mode

- Anatomy
- Order of Exam
- Importance of Hx taking
- Findings
- Documentation
- Are your findings consistent with the Hx she gave?



Other Concerns

- Commenting on Credibility
- Use of recorded statements: State v. Elnicki
- We must redact any statements on credibility
- Consistency is fine



Good Testimony

- Preparation
- Read and review your notes
- Slide review
- Physical Evidence?
- Review your prior testimony
- Know the literature and be current
- Know your CV
- Have you reviewed their expert?



Trial Prep

- Meet with the attorney
- What is your role?
- Determine your focus
- What questions will be asked
- What is NOT permissible
- Anticipate defenses to prepare for cross
- Go into teaching mode.
- Be eager to share your information.



Style

- Professional appearance
- Be natural, personalize your testimony
- Listen carefully
- Objectivity is critical
- Respect the court and the defense
- Matter of fact – confident in what you know
- Use narrative answers
- Do not guess or hedge



In the courtroom

- Permission to answer “I don’t know” to yes or no question
- Ask for clarification
- Plain English: “like a scrunchy”
- Vary the format, tempo of an answer
- Vary the loudness of your voice and direct eye contact to all



In the courtroom

- Don't argue
- Avoid nervous habits
- Don't be defensive
- OBJECTION . . . (wait) for the ruling, then you may answer
- Show your experience in court
- Enter well - Leave well - Sequestered.
- Professionalism



Your goal

- Master what you know and how you know it
- You are the only one who has this knowledge in the case
- True colors moments
- Assist the jury so that justice can be done



Kansas Supreme Court

**What if your patient becomes
“unavailable” before trial?**



Recent view of SANE's

A stmt given to a SANE is testimonial when:

1. the statement is made in the presence of a law enforcement officer who asks questions
2. the declarant is reporting past events
3. there is not an ongoing public safety or medical emergency, AND
4. the statement is given in a formal setting.



St. v. Bennington 10-28-11

A stmt given to a SANE is testimonial when:

1. the stmt is made in answer to questions asked by the SANE
2. while completing a questionnaire provided by the KDHE as part of a sexual assault evidence collection kit approved by the KBI
3. where there is not an ***ongoing emergency or other circumstances to suggest the statement is nontestimonial.***



Patient Care

- #1 concern is patient care
- Care and treatment 1st
- You are a health care provider, not an arm of law enforcement.
- Don't worry about the prosecution of the case. Your role is special to the patient.



The Advent of SANE

SANE's have dramatically changed the ability of prosecutors to effectively pursue cases of sexual abuse and sexual assault.

***The goal is justice
Many, many thanks.***



QUIZ FOR MODULE 8

- Please enter your first and last name. The password is "hospital".
- Pediatric Course: Module 8
