Successfully Investigating Acquaintance Sexual Assault
A National Training Manual for Law Enforcement

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Law and Investigative Strategy

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Introduction

Although specific statutory definitions of sex crimes vary by state, most are conceptually similar and can be understood by analyzing their elements. The analysis of each element, moreover, can be represented in the chart provided at the beginning of this module. By following the chart and making a series of decisions, the investigator can determine not only which specific crime was committed but can also frame the entire investigative strategy based on the defense that is most likely to be raised. Sexual assault laws will thus be discussed conceptually in this module; this must be supplemented with information from local definitions and statutes.
Sexual Penetration Versus Sexual Contact

In most states, the first decision to be made in a case is whether sexual penetration or sexual contact has occurred. The specific terminology and definitions will vary, but states generally recognize a conceptual distinction between penetration (e.g., intercourse, fellatio, sodomy) and other forms of sexual activity short of penetration (e.g., fondling, grabbing, pinching).

- In some states, crimes involving sexual penetration are referred to as sexual assault whereas those involving sexual contact are described as sexual abuse.

- In other states, sexual assault offenses are characterized as first degree, second degree, etc., depending on whether penetration or contact occurred.

Regardless of the specific language and definitions, most states differentiate crimes involving sexual penetration versus contact. The investigator must therefore recognize this distinction to appropriately identify which type of offense has been committed.

- Of course, any incident may involve multiple offenses, including some combination of sexual penetration and contact. However, each count or charge must be identified independently.

The investigator must thus be familiar with the terminology and definition of sexual assault offenses, and identify whether the case at hand involves sexual penetration, contact, or both.

   Throughout this module, offenses will be described with reference to sexual penetration. However, it is important to recognize that the structure for offenses involving sexual conduct will be parallel -- but with lesser corresponding charges.

Investigative strategy: Overcoming a denial defense

When a suspect is charged with a sex crime, one primary element of the offense will always be the sexual act involved (whether sexual penetration or contact). In other words, to successfully prosecute any sex crime, the state must first establish that the alleged sexual activity took place.

- If the offense involves sexual penetration, the state must prove that sexual penetration (however slight) occurred between the suspect and victim.

- If the offense involves sexual contact of some kind, the state must similarly prove that this activity took place between the parties.

Because the sexual activity constitutes one element of the offense, it also provides the grounds for a defense strategy - denial. If the suspect denies that the sexual activity took place, and he can create reasonable doubt to that effect, he will be acquitted. For this reason, any investigative strategy must first focus on establishing whether or not the sexual activity took place.

- The most traditional evidence for sexual activity is seminal fluid collected from the body of the victim (or her clothing). In addition to seminal fluid, other evidence on the victim's body can be used to prove sexual activity, such as spermicides or lubricants.
• However, additional evidence collection efforts can focus on swabbing any areas of the victim's body that were kissed, sucked or bitten by the suspect.

• The colposcope can also be used to magnify and document evidence of genital microtrauma, and nuclear stains such as toluidine blue dye can be used to help make these microscopic injuries more visible.

See the chapter on the forensic examination for further discussion of these evidence collection techniques.

Although law enforcement has historically focused on the body of the victim for evidence of sexual contact, there are other sources to be found on the suspect's body or clothing.

• For example, a forensic examination of the suspect can identify evidence of transfer from the victim's body, such as vaginal fluid or cells. Evidence of spermicides or lubricants could also be suggestive of sexual contact if a match is found between materials present on the victim's and suspect's bodies.

• In cases where multiple offenders are involved, there can even be a transfer of bodily fluids or cells between suspects. To illustrate, seminal fluid from Suspect #1 may be found on the body of Suspect #2, if they penetrated the victim consecutively. This transfer could also involve material other than cells or bodily fluids, such as hairs or other trace evidence.

For all of these reasons, it is imperative that investigators conduct forensic examinations of the suspect(s) involved in a sexual assault offense. Although this exam is often overlooked, it can be crucial for identifying and documenting evidence of sexual contact between the victim and suspect.

**Force Versus No Force Required**

The second decision to be made by the investigator is whether the sexual activity (whether penetration or contact) was committed using force or threat -- or whether the situation was one in which no force is required for sexual activity to constitute a criminal offense.

**Force or Threat**

If force or threat is used to commit a sexual act such as penetration or contact, the elements of the offense can be thought of in terms of simple math. For example:

Sexual Penetration + Force or Threat = Sexual Assault

What is NOT included in this "formula" in most states, is any reference to the presence or absence of consent by the victim. Although some states retain language that the sexual act must be "against the will" of the victim, most states have recognized that nonconsent is implied by the presence of force or threat. In other words, when force or threat is present, it is assumed that the victim does not consent to the sexual activity in question.
No clear standard

Despite this general recognition that sexual activity is illegal when committed using force or threat, there remains no clear standard as to what constitutes such a situation. Rather, the presence of force or threat must be determined by considering the entire context surrounding the event. For example, the officer should consider the following:

• Was physical violence or a weapon used?

• Were physical or verbal threats made?

• What were the surrounding circumstances that made the victim believe that real or implied threats would be carried out?

• Was there a discrepancy in the size and strength of the individuals involved?

• Were the individuals isolated from others?

• What was the victim thinking and feeling at the time of the event?

• Were there multiple suspects involved or other individuals present during the assault?

Thus, there is no clear standard for force or threat; rather, the determination must be made by examining the entire context of the situation. When making this determination, moreover, special consideration should be given to the victim's perception of events, because many situations that are threatening or frightening to one person (such as a woman) might not be for someone else (such as a man).

• Although the victim's perceptions can thus be examined, most states clearly state that the victim's behavior cannot be used to make this determination.

In other words, physical resistance on the part of the victim can be used as evidence that force or threat was present in a sexual situation. However, the lack of physical resistance cannot be used as proof of consent (i.e., the absence of force or threat).

Investigative strategy: Consent versus identity defense

Any suspect charged with a sex crime can deny that the alleged sexual activity actually took place, as discussed in the previous section. However, when the sexual activity is stipulated or proven, and it is alleged to have been committed using force or threat, there are two additional defenses available to suspects.

• The first is a defense of identity, raised primarily in cases where the suspect is a stranger to the victim. This is the defense that can be characterized as, "You've got the wrong guy. Someone else might have raped her, but it wasn't me."
• The second is a consent defense, typically used when the victim and suspect know each other to some degree. This is the defense that usually stipulates that the sexual activity took place, but argues that it did not involve force or threat. This defense can be described as, "Yeah, the sex took place, but she wanted it. There was no force involved."

Although this classification generally captures the essence of the two primary defense strategies used in forcible sexual assault, it is of course difficult to pigeonhole these complex cases. Moreover, cases will sometimes change from one to the other - usually from identity to consent.

• For example, if the suspect originally raises an identity defense (i.e., "You've got the wrong guy") but the prosecution can prove that sex actually took place between the suspect and victim, he may switch his story to assert a consent defense (i.e., "She wanted it").

For all of these reasons, it is important that investigators strategize their investigation around the defense that is most likely to be raised. At the same time, it is crucial to remain flexible and document evidence that can address any possible defense.

Identity defense: "You've got the wrong guy"

Again, the suspect will likely raise an identity defense if he is a stranger to the victim. This defense strategy centers around the claim that although the victim might truly have been raped, it wasn't the suspect who committed the crime. In these cases, the investigative strategy is not that different from other crimes (e.g., burglary or robbery) because it focuses on:

• A complete physical description of the suspect (from the victim or other witnesses)
• DNA evidence collected from the victim's body, clothing, etc.
• DNA evidence collected from the suspect's body, clothing, etc.
• Any evidence linking the suspect to the victim and/or crime scene

In any case where an identity defense might ultimately be raised, it is important to first determine whether the suspect denies engaging in sexual activity with the victim. If the suspect does deny the sexual activity, the types of evidence outlined above will be useful in challenging this denial.

If the suspect is charged with multiple crimes it will be important to gather information and evidence linking the incidents. For example, if the offender used a specific behavioral pattern (M.O.) for committing the crimes, it will be crucial to demonstrate that the same pattern was exhibited in the cases being linked.

To support an identity defense, the suspect will likely focus on issues such as the following:

• Factors which limited the victim's ability to see/hear the offender during the assault
• Factors which could have potentially biased the police identification procedures
• Limitations of the police evidence collection or analysis (i.e., evidence tainting)

• Failure to pursue investigative leads that might point to an alternative suspect

The police investigation must therefore be conducted with meticulous care and documentation for all evidence collection and analysis. Identification procedures must be implemented in compliance with departmental policies and procedures, to assure that the victim is not led or biased toward any particular direction. Finally, police investigators must maintain an open mind to the possibility that the suspect is in fact innocent. All investigative leads must be pursued to identify potential suspects, and evidence gathered to rule them in or out of consideration.

Altogether, some have argued that overcoming an identity defense represents the "science" of sexual assault investigation.

Consent defense: "She wanted it"

In cases where the suspect and victim know each other to some degree, a consent defense is more likely to be raised. This can be determined by finding out whether the suspect denies engaging in sexual activity with the victim, or acknowledges the activity but claims that it was consensual. Even in cases involving strangers, the suspect may switch from an identity to consent defense after the investigation has conclusively established that sexual activity took place. When a defense of consent is raised, the investigation should focus primarily on evidence to establish that consent was absent and force or threat was present, including:

• Evidence of physical or verbal resistance on the part of the victim

• Evidence of genital or nongenital injury

• A detailed account of the victim's thoughts and feelings during the assault

• Information regarding the suspect's size and strength, in comparison with the victim's

• Information regarding the environment in which the assault took place (e.g., isolation)

• Information regarding the victim's post-assault behavior, including post-traumatic stress

In addition, any other evidence to corroborate the victim's account can be useful, as well as anything that is inconsistent with the character of a consensual sexual act. Information that demonstrates consistencies between the victim's and suspect's description of events can also contribute toward efforts to overcome a consent defense.

• As previously stated, evidence of injury or physical resistance on the part of the victim can be useful in establishing that force or threat was present in the situation. However, the absence of injury or resistance cannot be used as proof of consent.
In a consent case, the issues at trial will likely focus on the victim's and suspect's behavior, as well as perception of events. It will also center on challenges to the victim's credibility, as discussed at length in the module on victim interviewing.

Some have suggested that overcoming a consent defense is the "art" of sexual assault investigation.

**No Force Required**

As described in the previous equation, sexual assault can be comprised of sexual activity perpetrated using force or threat. In addition, however, there are situations in which sexual activity is criminal in the absence of force or threat. These include situations where the victim is legally viewed as unable to consent, either due to age or some type of incapacitation (e.g., disability, lack of consciousness, drug use).

- In these situations, a consent defense is precluded and so the investigative strategy should not focus on issues of force. Rather, the defense is limited to (1) denying that the sexual activity, (2) disputing the status of the victim that renders them unable to consent, or (3) claiming that the suspect did not know and could not reasonably have known about the status of the victim.

This will be discussed in greater detail pertaining to each of the three major types of situation in which no force is required for sexual activity to constitute criminal behavior. However, there may be cases in which the investigator and/or prosecutor prefers to charge the suspect with forcible sexual assault instead of (or in addition to) the offense in which no force is required.

- For example, if the victim and suspect are of certain ages that are recognized in state law as constituting statutory rape, the investigator has only to establish (1) sexual activity, (2) the ages of victim and suspect, and (3) the suspect’s knowledge of the victim’s age. Force or threat need not be proven because the situation is one in which no force is required to constitute an offense.

- However, if force or threat was present in the situation, the investigator will most likely charge the suspect with forcible rather than statutory rape - because if the former charge carries a higher penalty. In these cases, evidence will of course be needed to prove the element of force or threat, in order to overcome a traditional consent defense.

Successful sex crimes investigators need to recognize common theories of sexual assault offenses, but they must also maintain a flexible orientation in case an alternative charge is preferred or the defense strategy is something other than expected.

**Unconscious victim**

Clearly, a victim who is unconscious cannot legally consent to sexual activity - or anything else, for that matter. When a victim is unconscious, the mathematical expression to denote the elements of a sexual assault offense is thus:

\[
\text{Sexual Penetration} + \text{Unconscious Victim} = \text{Sexual Assault}
\]
As previously stated, a suspect can defend against this type of sexual assault charge by denying either (1) that the sexual activity took place or (2) that the victim was unconscious. In either case, the investigative strategy should focus on establishing each of these two elements. The investigation does not, however, need to focus on the issue of force because the victim's lack of consciousness equates with an inability to legally consent to sexual activity.

**Incapacitated victim**

Somewhat more difficult is the case in which the victim was incapacitated during the sexual activity. Incapacitation in this sense is typically due to alcohol or drug use, whether caused by voluntary consumption or covert administration by the suspect. However, it could also be due to some other cause creating physical or mental incapacitation. The elements of this type of sexual assault are thus:

Sexual Penetration + Incapacitated Victim = Sexual Assault

What makes this issue difficult is that there is no clear legal standard for incapacitation, and so it is a matter of contention between the prosecution and defense.

- For the purposes of illustration, it is easy to imagine a situation in which the victim is so incapacitated by drug or alcohol use that she is near unconsciousness. Based on the victim's account, toxicology evidence, and interviews with witnesses, it is possible to demonstrate that the victim was so incapacitated that she could not legally consent to sexual activity.

- In these cases, the defense is likely to focus on denying that the victim was incapacitated to the degree alleged by the prosecution, thereby denying the second element of our equation. Because the victim was not incapacitated, the defense will argue, she was able to consent to the sexual activity in question. It is therefore critical to establish through interviews and other evidence that the level of victim intoxication was severe.

- The defense will also likely argue that the suspect was also intoxicated, and so it becomes important to demonstrate who was in control of the situation. For example, witnesses can be interviewed about the relative levels of intoxication of both victim and suspect.

- In any of these cases, the defense will also need to argue, however, that not only could the victim consent to sexual activity - she did consent to the acts in question. Thus, even in cases where the prosecution has framed the case as one involving an incapacitated victim, the defense is likely to challenge this characterization and raise a more traditional consent defense.

When a consent defense is raised, the victim's intoxication is usually used as a means of challenging the victim's credibility, an issue discussed at length in the modules on victim interviews and drug-facilitated sexual assault.
Victims with a disability affecting cognition or communication

As with other forms of incapacitation, there is often no clear legal standard for when a disability affecting cognition or communication renders an individual unable to consent. Therefore, a determination must first be made to decide whether the individual is capable of understanding and giving consent to sexual activity.

Specific guidelines for determining the ability to consent to sexual activity are provided in the module on special populations.

However, assuming that an individual is deemed unable to consent due to a cognitive or communication disability, the elements of the sexual assault offense can be represented as:

Sexual Penetration + Evidence of Disability = Sexual Assault

If an individual is determined to be unable to consent, then the only element that remains to be established is whether or not sexual activity took place. Issues of force and consent should not be raised, as the individual is not legally recognized as able to consent to sexual activity.

• There is, however, a possibility that an affirmative defense can be raised in which the defense asserts that the suspect did not know of the victim's disability. The availability of this defense and the statutes governing its use will vary by state.

On the other hand, if an individual with a disability affecting cognition or communication is nonetheless determined to be able to consent to sexual activity, the defense will likely revert to traditional issues of consent.

Statutory rape

Another major category of cases in which no force is required are those involving victims who are unable to consent because of their age. All states have established an age before which an individual is not recognized as able to consent to sexual activity.

Most also have additional statutes which constitute offenses on the basis of age combinations between the victim and suspect or due to the position of trust, authority, or supervision held by the suspect (e.g., teachers, coaches, clergy, counselors).

• For example, Connecticut has an offense of "second degree sexual assault" that is charged when sexual intercourse occurs between a victim who is 13-15 years old and an offender who is 2 or more years older than the victim.

• Illinois also includes in their statutory definition of criminal sexual assault any sexual penetration occurring between a victim who is 13-17 years old and an offender who is in "a position of trust, authority, or supervision in relation to the victim."

As with other situations in which no force is required, sexual assault crimes of this type are established with the following elements:
Sexual Penetration + Victim Age (or Combination with Suspect Age/Position) = Sexual Assault

The investigation must therefore focus on establishing the sexual activity and the age/position of the victim and suspect. Again, consent is not an issue in these cases because the victim is not legally recognized as being able to consent to sexual activity.

- It is not required to provide any evidence of force or threat, because statutory rape constitutes a situation in which no force is required. The defense can only (1) deny that the sexual activity occurred or (2) contest the age/position of the parties.

- The defense may also raise an affirmative defense, by arguing that the suspect did not know - and could not have reasonably known - the victim's age or status. The availability of this defense and the statutes governing its use will vary by state.

Other situations in which no force is required

Many states additionally specify a number of situations in which no force is required for sexual activity to constitute criminal behavior. For example, some states prohibit specified sexual activity between patients and their psychotherapists, doctors, or other service providers. Some statutes outlaw sexual activity perpetrated using a false representation of identity. Of course, states also prohibit sexual activity between family members, and these relations are typically spelled out in the code of criminal offenses.

Other Types of Evidence

Throughout this module, we have primarily discussed the types of evidence required to prove an element of the various offenses. Thus, evidence proving that sexual activity took place addresses one element of each offense. Other elements are met with evidence documenting the presence of force or threat, the incapacitation or age of the victim, etc. Investigators must determine the purpose for each piece of evidence, to make most effective use of it. The three primary purposes for evidence are:

- Proving an element of the offense
- Connecting the suspect with a particular person or place, or
- Reconstructing or corroborating the victim's account of events
- Reconstructing or corroborating the suspect's account of events

The latter purposes are typically met with associative evidence and evidence that is reconstructive or corroborative.

Associative (identification) evidence

Associative evidence essentially connects one person either to a particular place or to another person. For example, fingerprints or DNA material found at the scene of the crime can obviously establish
that the suspect was in that location at some point. Blood, semen, or other bodily fluids collected from the victim's body can similarly connect the suspect with the victim. This type of evidence is typically thought of as identification evidence, which is one aspect of associative evidence. In addition, trace evidence such as hair, fibers, and other debris can be used to connect one person with another person or place, even though it may not be used to identify an individual with any degree of certainty.

- Associative evidence will be crucial when investigating any type of sexual offense, just as it is with any other crime.

- This also highlights the importance of the suspect forensic examination for collecting reference standards -- to link the suspect evidence gathered from the victim or crime scene.

Reconstructive/corroborative evidence

Reconstructive or corroborative evidence can help jurors and others visualize the events. This type of evidence is also used to demonstrate consistency with the victim's (or suspect's) account of events. For example, photographs of the crime scene or victim's body can help to corroborate the victim's story of what happened. A detailed account of the victim's thoughts and feelings during the assault can also reconstruct the reality of events for others to experience vicariously.

A Note Regarding Attempt Offenses

Finally, officers need to be familiar with the statutory requirements for an attempt offense. For example, some states require the following to establish an attempt offense:

- An intent to commit a criminal offense, AND

- A substantial step toward committing that act

In these cases, the officer must make the determination that an attempt offense occurred based on the entire context of the situation. For example, it is not possible to make a simple list of behaviors that would constitute a substantial step toward committing a sexual assault offense.

Rather, that determination must take into account a number of factors regarding the victim, suspect, and situation.

When establishing intent, it is important to ask the victim questions such as the following:

- What did the victim think the suspect was going to do? This may be based on prior contact with the suspect, including such behaviors as battering or stalking.

- What did the suspect say? Statements made by the suspect are often key in communicating his intent.

- What did the suspect do? For example, did he tear at the victim's clothing, or begin removing his own?
• What was the suspect's physical appearance? For example, were his pants unzipped, or his penis exposed. Did he have an obvious erection?

• Does the suspect's behavior match that of other crimes in the area, such that they could potentially be attributed to the same person?

• If the suspect is in custody, does he have any prior criminal history or any evidence of an existing paraphilia?

All of these questions can reveal information that is critical for establishing the suspect's intent.

Summary

Using the chart provided at the beginning of this module, it is hoped that the investigator can clearly determine which type of offense is alleged in a particular case. This determination will then predict what defense is likely to be raised and guide the entire investigative strategy.

• For example, all cases require establishing that sexual activity (penetration or contact) occurred, so the investigation must always identify and document evidence to that effect.

• In a case of forcible rape by a stranger, the defense will likely argue misidentification, so evidence regarding the identity of the suspect will be crucial.

• When the victim and suspect know each other, however, the investigative strategy will need to focus on establishing force or threat, because the defense is likely to argue consent.

Finally, there are a number of situations in which no force is required to establish an offense of sexual assault or abuse.

• These include situations in which the victim is deemed unable to consent to sexual activity due to: lack of consciousness, incapacitation, disability, age, etc.

• In these cases, the defense must rely on (1) denying the sexual activity, (2) contesting the status of the victim that rendered her unable to consent, or (3) denying that the suspect knew or should have known about the victim's status.

If the determination is made that a particular victim is unable to legally consent to sexual activity, the defense cannot raise issues of consent and the investigation need not establish that force or threat was present in the situation - unless of course, the investigator and/or prosecutor also charges the case as forcible sexual assault (perhaps due to the stricter penalty that charge carries).

Conclusion

Hopefully, this chart will be helpful to first responders and investigators by providing a conceptual framework for organizing state statutes. Clearly, information must be adapted on the basis of state penal codes. However, this framework is designed to help officers determine what "type" of case
they are handling, predict which defense is most likely to be raised, and guide an investigative strategy toward overcoming that particular defense. This kind of strategy can help an investigator:

- Define what issues are likely to be raised in court
- Prioritize the value of various evidence
- Determine the value of statements made by the victim, witness, or offender

It bears repeating, however, that investigators must remain flexible because defenses are not entirely predictable and may change - even during the course of a single investigation.

- For example, an identification case could switch to consent, if the defense realizes that DNA or other evidence establishes that the victim and suspect did in fact engage in sexual activity.
- Of course, the fact that the suspect switches defense strategies at any point will be used against him by the prosecution.

Keeping this chart in mind can help officers avoid errors such as focusing on issues of identity in a case where the victim and suspect know each other, or struggling to prove force in a case in which the victim is legally recognized as unable to consent.

For further information on techniques for collecting evidence and conducting interviews, please consult the relevant modules (e.g., victim interviews, suspect interviews, the forensic examination).