



ENHANCING  
**CONVICTION**  
**INTEGRITY**

# Seeking a Fair and Just Verdict: Guiding the Jury's Response to the Evidence

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# Patricia D. Powers

Patti Powers joined AEquitas after serving as a Senior Deputy Prosecuting Attorney in Washington State for 27 years, bringing extensive litigation expertise as a well-respected trial attorney. She supervised the Sexual Assault-Domestic Violence Unit and prosecuted and tried a high volume of violent crimes—specializing in adult sexual assault, child sexual assault and abuse, sexual exploitation of minors, domestic violence, and related homicides (including complex litigation of high-profile, as well as cold and current cases). Patti served on the domestic violence and child fatality review committees and was a member of the Washington State Technical Assistance Committee for Child Death Review Guidelines. For five years, she was appointed as a Highly Qualified Expert for the United States Army, Criminal Investigation Division; in this role, she provided training for army criminal investigation agents and prosecutors at Fort Leonard Wood, Missouri, and in Germany. Patti is the lead Attorney Advisor on the SAKI project.



# Objectives

- 
- 1 Guide the jury's response to the evidence, from jury selection through closing argument.
  - 2 Ensure fairness during the jury selection process.
  - 3 Employ themes that place the evidence in the context of experience.
  - 4 Conduct trauma-informed witness examinations, centering the victim's experience of the crime.
  - 5 Identify issues that require expert testimony and present testimony effectively at trial.

# Public Misconceptions

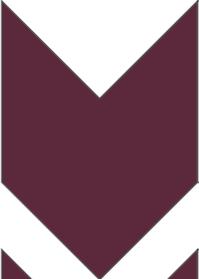
“They didn’t act like a victim.”

“Why did this case take so long to come to trial? Is there something wrong?”

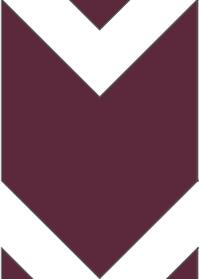
“He’s too successful to be out there taking risks like this.”

“They knew each other, so how could this have happened?”

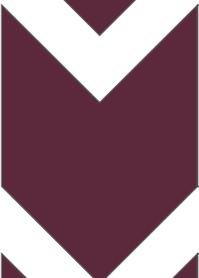
## Lead Prospective Jurors To...



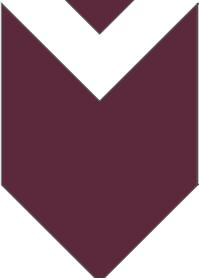
- Understand dynamics of offender conduct



- Recognize impact of trauma on victims

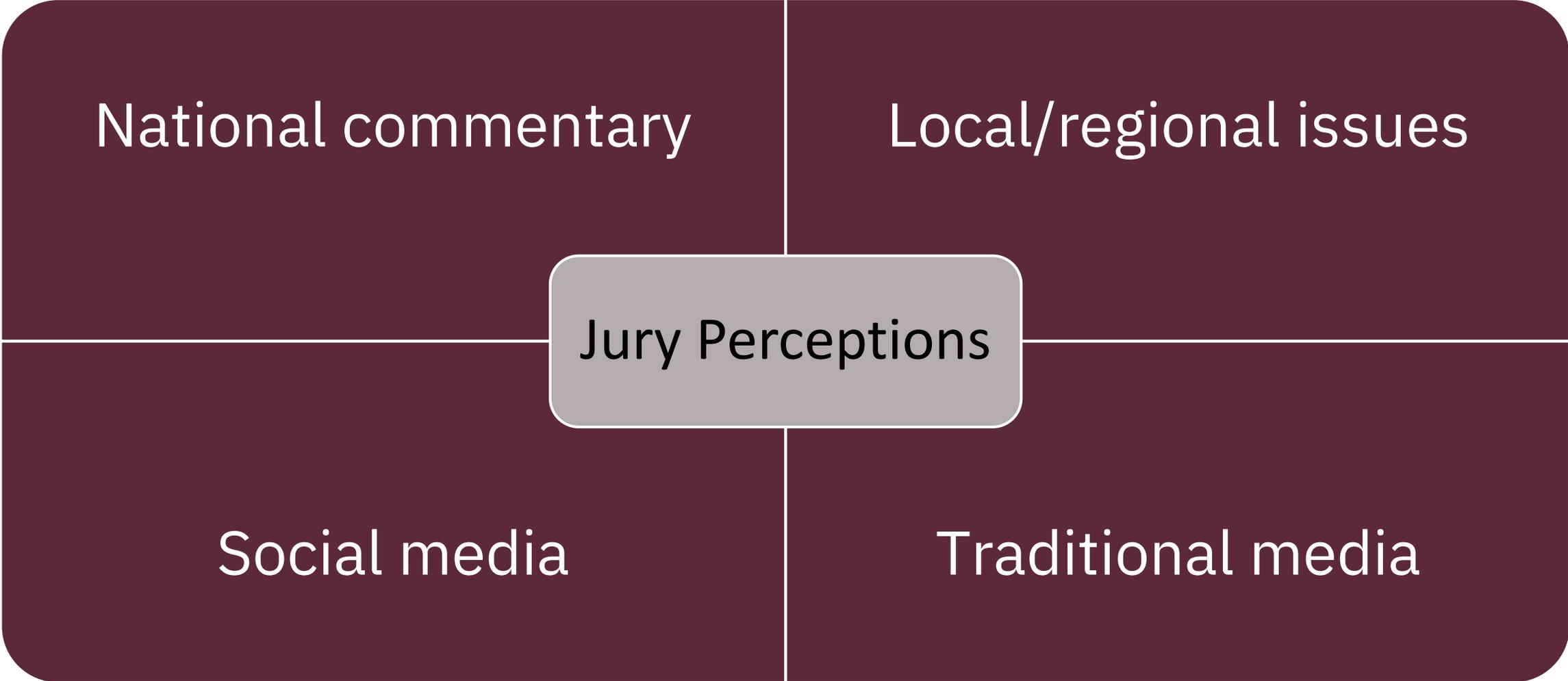


- Recognize danger of offenders both known and unknown to victims

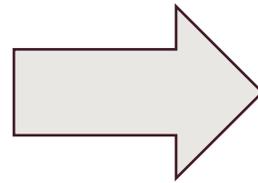


- Realize that for victims of sexual assault, the effects of the crime remain over the years

# Recognize the Current Public Context



# Shifting our Focus



Who does the public put  
on trial?

Who actually IS on trial?

# Dive Deeper Into Evidence

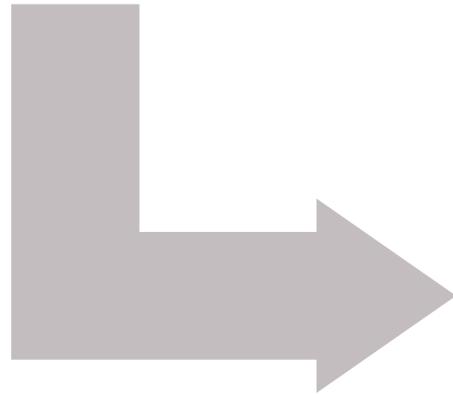
- Recognize evidence of predatory conduct
- Assess evidence of premeditation and planning
- Ask yourself additional questions:
  - Was there co-occurring stalking, sexual exploitation, witness intimidation?
  - Did the offender exploit known or perceived vulnerabilities of the victim?
  - Did the offender rely on public misperceptions involving alcohol / drugs?

***The key is to analyze and convey to the jury the effect of the offender's conduct on the victim.***

# Defining the Core Issue of Responsibility

It's not:

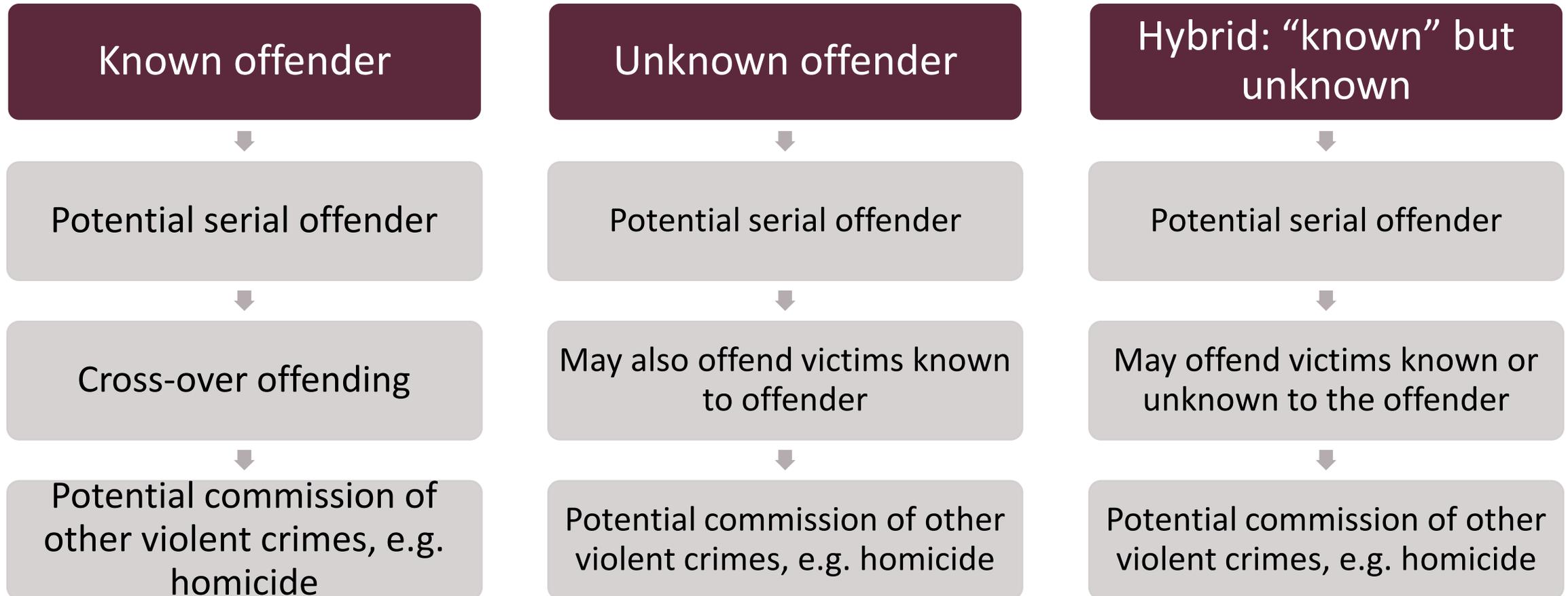
What did the  
victim do?



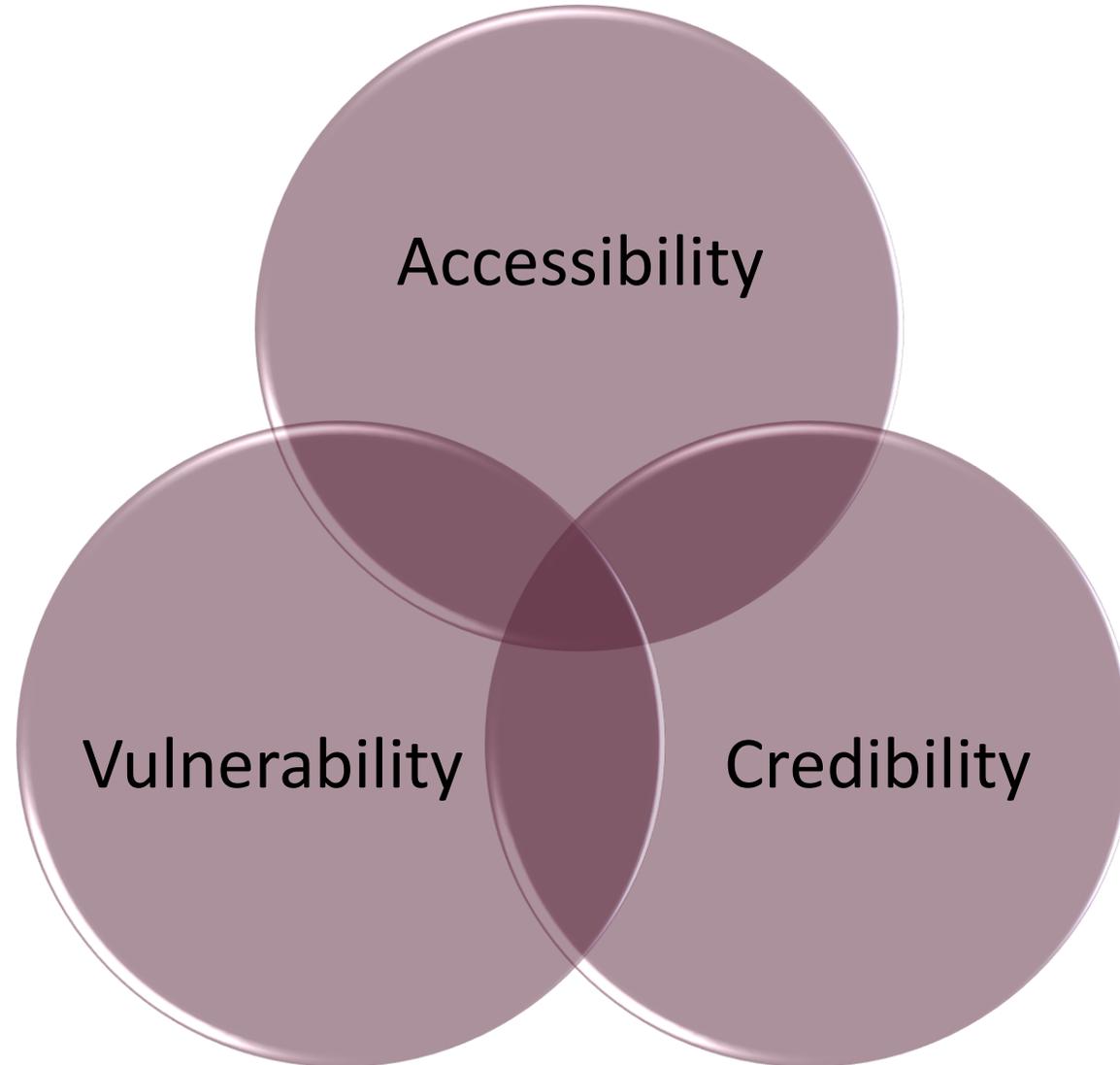
It is:

What did the  
offender do?

# Know the Offender



# Offenders Plan the Commission of Crimes

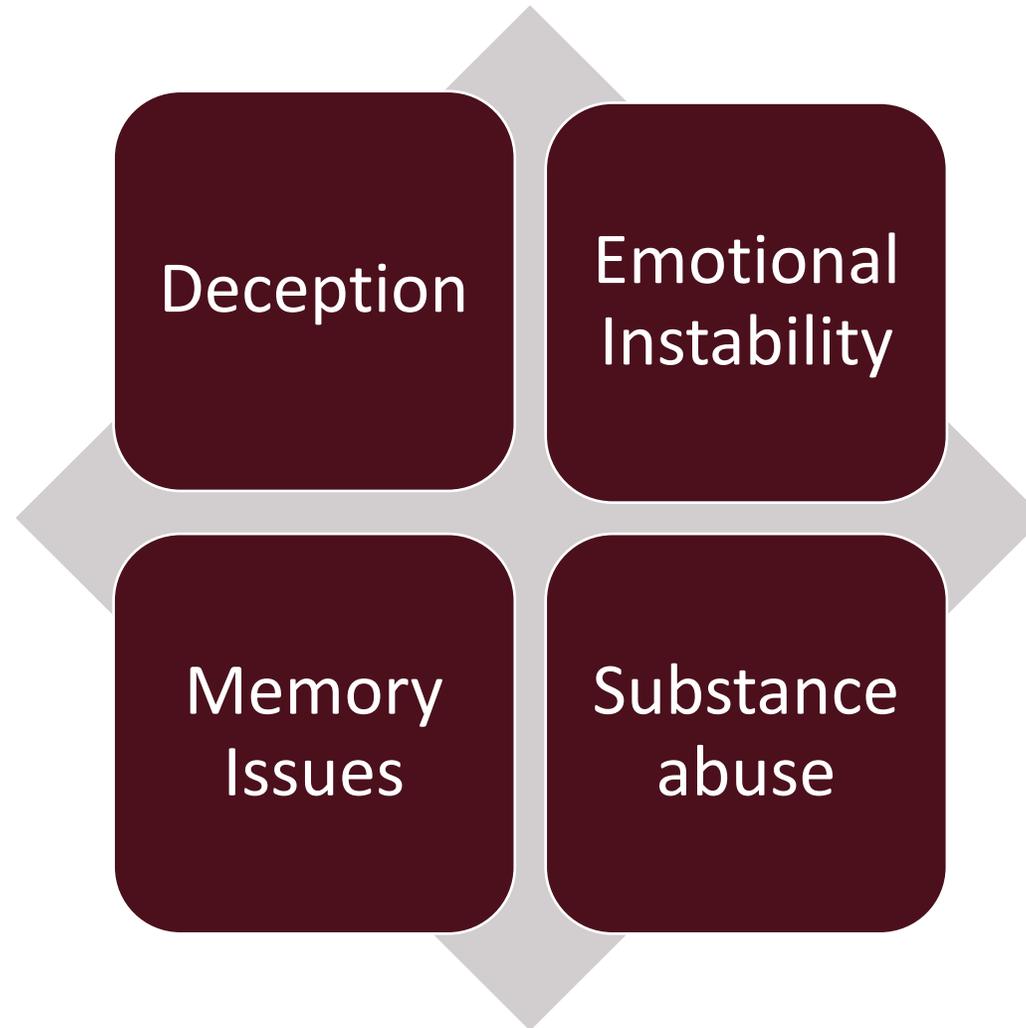


# Dissecting the Offender's Plan

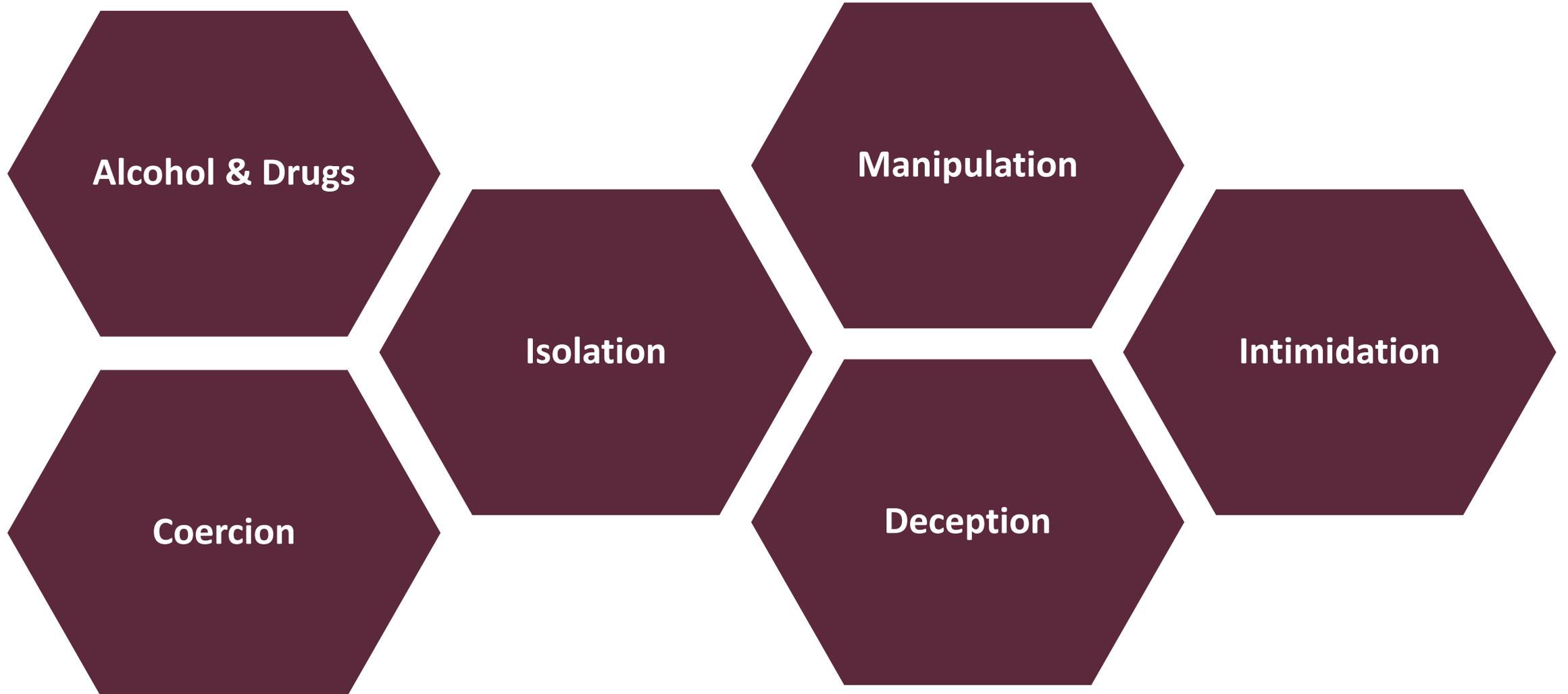
Offenders target victims who they believe lack credibility, based on a comparison of social circumstances, status, or other historical or situational factors, including but not limited to:

- Alcohol or drug use
- Difference in age, experience, or education
- Intellectual or developmental disability
- Isolation
- Sexual exploitation

Offenders create or aggravate symptoms.



# Identifying Offender Weapons and Tactics



## Focus on Specifics of Offender Behavior

Garnering trust

Blaming others

Denying some or all of the victim's account

Trying to play the victim

Hiding behind reputation, relationship

Making confrontation and suspicion uncomfortable

# Offender Focus and Reframing Challenges

## Passage of time

The victim never forgot.

## Initial delay in disclosure

Who caused it?

## Voluntary intoxication

Who needs force when you have alcohol?

## Prior relationship

He knew her, but she didn't know him.

# Preparation for Jury Selection

Encapsulate the evidence in a theme and introduce it during jury selection.

Turn perceived challenges into strengths.

Keep the focus on the offender.

Establish a connection between the jury and the evidence.

# Jury Selection

# Juror Questionnaires: Know the Panel before *Voir Dire*

01

Provides counsel and court with opportunity to know the composition of the jury and identify any specific issues

02

Allows panelists an opportunity to review questions and consider their answers

03

Minimizes time in court for judicial economy and public health concerns

04

Becomes part of the record but usually requires the court's permission to access.

# Basic Information

Occupation  
(in or outside of  
home)

Significant personal  
relationship:  
spouse, partner,  
civil union

Educational  
background

Prior jury service

Community  
involvement

Availability for jury  
service

# Composition of Questionnaire

List of potential witnesses who may be called at trial: knowledge of or acquaintance with witnesses

Acquaintance or relationship with the court or either attorney

Concern with credibility of any particular group of witnesses (*e.g.*, law enforcement)

Knowledge or information about the case from any source, including newspaper, social media, television, online

# Composition of the Questionnaire

- Crime(s) charged and ability to assess the evidence and render a verdict.
- Prior victimization, or family member or close friend who was a victim of this type of crime or other violent crime.
- Prior accusation, or family member or close friend who was accused of this type of crime or another violent crime.

# Sexual Assault

## Questionnaires

Have you, a close friend, or a family member been the victim of sexual assault?

Do you have information about that sexual assault?

Have you, a close friend, or family member been accused of sexual assault?

Do you have information about that sexual assault?

# Follow-Up

Cont'd

- Was panelist, family member, or close friend accused of sexual assault?
  - Consider defense will usually inquire
  - Respect the panelist's willingness to discuss
- Was person, relative, or friend treated fairly?
- Given the experience, would it be unduly difficult to be seated in a criminal case?
- Can the panelist decide this case based on evidence presented?

# Any Questions About Previous Sexual Assaults

Cont'd

- Jurisdictional practice: open court in presence of public, attorneys, and staff with balance of panel excused, or open court?
- Follow up questions:
  - Was sexual assault reported or not?
  - Was the case handled fairly in investigation and prosecution?
  - Given that experience, can the panelist decide this case purely based on evidence presented?

# Analysis of Questionnaire

- Are there panelists who...
  - Are concerned about the length of trial, the loss of income, or interference with work responsibilities?
  - Have concerns about the criminal justice system?
  - Have omitted answers to certain questions?
- Determine how any peremptories or challenges for cause would affect balance of jury panel.

## Separate Interview Considerations

- Determine the need for separate interview in open court.
- Consider:
  - Whether or not panelist wants separate interview to respond to a question
  - Whether there are reasons to conduct the interview separately (*e.g.*, sensitivity to panelist, high profile case)
- Ensure that defendant is personally present for interview, as well as any peremptories or challenges for cause.

# Identify Legal Considerations

Determine applicable law regarding separate interview circumstances and findings, if necessary.

- 6<sup>th</sup> Amendment to the US Constitution guarantees the Defendant **an *open and public trial***. Voir dire is part of trial proceedings.
- 1<sup>st</sup> Amendment to the US Constitution provides presumptive right of access to criminal trial proceedings to the public and press.

## U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, **or of the press**; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

# Public Trial: 1<sup>st</sup> Amendment Right

Voir dire of prospective jurors must be open to the public under the First Amendment.

Press-Enterprise I, 464 U.S. 501 (1984)

Public has a right to be present regardless of whether any party has asserted the right.

Presley v. Georgia, 558 U.S. 209 (2010)

## U.S.C.A. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## *Presley*

558 U.S. at 214

“The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from the premise that ‘[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’” (Quoting *Press Enterprise I*, 464 U.S. at 505).

# Voir Dire: to Speak the Truth

Discover if grounds for cause challenges exists

Determine if jurors have expressed definite opinions as to defendant's guilt/innocence for any charged offense

Determine if jurors can follow the law and apply it to case facts

Obtain information for the intelligent exercise of peremptory challenges

Build the infrastructure for the reality of the crime

# Practice Tips

Refer to panelist by number and explain this reference (privacy/safety)

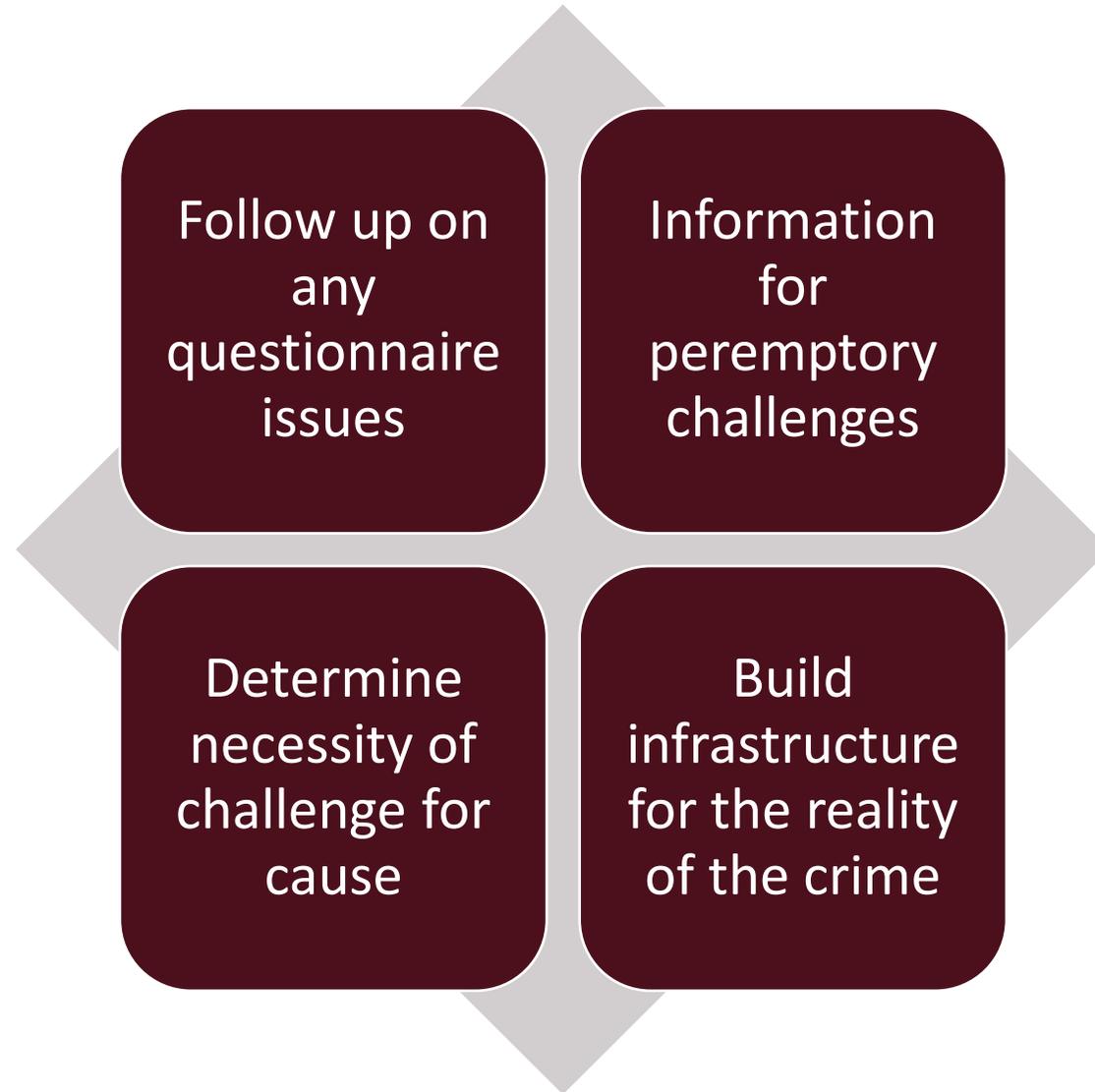
Refer to answers from the questionnaires during oral questions

Voir Dire

Consider body language and demeanor of other panelists who are observing

When bringing a challenge for cause before the panel, express appreciation of the candid answer

# Voir Dire: to Speak the Truth



# Peremptory Challenges

- Prosecution and defense are entitled to peremptory challenges
- No explanation is necessary, but ...
- A peremptory challenge may not be used to impermissibly discriminate against a member based on race or gender
  - Race: *Batson v. Kentucky*, 476 U.S. 79 (1986)
  - Gender: *J.E.B. v. Alabama*, 511 U.S. 127 (1994)
  - Sexual orientation: dependent upon state law (contact AEquitas for case law compilation)

## Ensuring Fairness During Voir Dire

Batson v. Kentucky, 476 U.S. 79 (1986) and subsequent cases apply to both parties

- A *Batson* challenge is made by one party in a case to the other party's use of peremptory challenges to eliminate potential jurors on the basis of sex, race, ethnicity, or religion.

Issue challenges for cause where appropriate and articulate them on the record, including record of any necessary observations

Display professionalism toward panelists — this allows them an opportunity to self-assess their ability to serve fairly and impartially

# Juror Challenges

## Race

- *Batson v. Kentucky*, 476 U.S. 79 (1986)
- *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019)

## Native American

- *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006)

## Sex

- *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994)

## LGBTQ

- *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (2014)

# Batson Analysis

Moving party must establish a *prima facie* case of impermissible discrimination;



Burden shifts to the opposing party to articulate a neutral, nondiscriminatory reason for the peremptory; and



The court determines whether the moving party has carried their burden of proving purposeful discrimination.

# Raising a Batson Challenge

1/3

- Carefully evaluate composition of panel within the range of peremptory challenges
- If concern develops during defense inquiry, ask questions to rehabilitate if possible
- Look for pattern of strikes or object on basis of one strike
- Fairly analyze necessity as opposed to unfair striking of member of cognizable class
- Motion can be brought at any time before seating of jury

Georgia v. McCollum, 505 U.S. 42 (1992)

# Raising a *Batson* Challenge

2/3

1

Establish prima facie case of purposeful discrimination

2

Identify stricken juror as member of protected cognizable group

3

Argue that membership in group and relevant circumstances creates inference that strike was based on membership

# Defending Against a *Batson* Challenge

Take good faith  
peremptory  
challenges

Prepare to justify if  
necessary

Take time  
questioning the  
panelist

State behavioral  
observations clearly  
on record if they  
form part of concern

Maintain notes to  
record all areas of  
concern

*Batson v. Kentucky*, 476 U.S. 79, 89 (U.S. 1986) ;  
*J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994)

# Challenges for Cause

- Addressed in open court.
- Submitted on the record with defendant present.
- Frame objection based upon concern for fairness and impartiality, respecting panelists' candor.
- Be aware of context of objection and reactions of other panelists.

# Connection With Jury



# Developing Context for Questions

- Strategically encapsulate questions in context of fairness.
- Questioning should be conversational if allowed in your jurisdiction.
- Questions should offer a fair opportunity for the panelist to provide a truthful response without negative feedback.
- Always keep other panelists in view while questioning individuals.
- Instill an infrastructure for evidence through experiential questions.

# Overcoming Juror Misconceptions

Develop questions to help jurors understand:

- Reasons for delay
- Impact of trauma on victim
- Victim behavior
- Witness availability

# Addressing Issues in Cold Case

Age of case and implications

Issues with earlier investigation

Motivation

## Offender-Focused Themes

Time did not erase  
memory

For the victim, this  
is not a cold case

The victim never  
forgot

“On that day”

## Cold Case Questions: Age of Case

- We anticipate that you will hear graphic evidence about a sexual assault that occurred x years ago.
- Is there anything about the nature of this crime, which involves graphic evidence of violence, that you feel would be difficult for you to fairly evaluate and discuss along with the other jurors?
- Do you have any concern about hearing evidence of a violent crime occurring earlier that would impact your ability fairly assess the evidence in this case?

# Issues with Investigation

- *Has anyone had the experience or has known someone to do their best with a task, and fall short of a desired result?*
- *Does not having resources or tools for the task make a difference?*
- *In your experience, is it fair for someone to explain shortcomings and reasons?*
- *In your experience, has technology changed over the past x years?*

## Trauma and Memory

- *How many of us have had a traumatic event occur earlier in our lives or years ago? Were you able to talk about it right after it happened?*
- *Did you ever forget it? Did you remember details?*

## Investigatory Issues: Absence of Victim

- Have you ever reached a decision and then been unable to follow through? What are some reasons for “backing out” or withdrawing? Would it be fair to assume that the reasons for not being able to follow through depend upon the person, persons involved, and maybe also the context?
- Would you be able to listen to and fairly assess evidence of how a person responds to a traumatic event, even if it’s different than what your response would be?

## Victim's Experience of the Passage of Time

*Have you waited for important news at some point in your life?*

*What did you do while waiting?*

*What if the news never came?*

# Passage of Time

- We expect that the victim will testify at this trial. Do you have any expectations about the victim's testimony? Is there any reason why you would not be able to listen fairly to the victim's testimony, given the nature of this crime, the violence involved, or any other reason?
- Would the passage of time before this case was charged make any difference to you in your assessment of the victim's testimony?

# Delayed Disclosure

## Impact of Trauma

How many of us have had a traumatic event occur earlier in our lives or years ago?

- Were you able to talk about it right after it happened?
- Did you ever forget it?
- Did you remember details?

# Educate Jury on Predatory Conduct

Capturing Offender Targeting through Questions

## ACCESSIBILITY

- The evidence will establish that the victim was in a relationship with the offender.
- Can you consider evidence of a crime in the context of a relationship?

## VULNERABILITY

- Have you ever had a confidence betrayed?
- Have you shared information with someone you trusted who betrayed that confidence?

## CREDIBILITY

- As a potential juror, you are the judge of credibility in this case.
- Are you able to fairly decide credibility in the context of a person's vulnerability?

## Offender Known to Victim

- Have you ever experienced a situation where you thought you knew a person and then realized that you didn't know them at all?
- How did you feel about that — when you thought you knew this person?

# Consent

- Based on your life experience, do you have to agree to do something another person wants, or are you free to make up your own mind?
- What if you had originally decided to do something — can you change your mind?
- Do other people get to make your decisions?

# Use of Alcohol

You will hear evidence involving the consumption and impact of alcohol

- Are you able to listen carefully to this evidence and determine how alcohol was used?
- If a person's judgment is impaired by alcohol, does that give anyone a license to harm or hurt them?

## Concluding

You know yourselves better than anyone else here. Is there anything from your life experience or personal views that would make it difficult or impossible for you to fairly access all the evidence in this case and render a verdict fair to the state and to the defendant? Have you been asked a question by myself or the defense counsel during this process of jury selection that you would like to discuss again?

# Trial: Working from the Foundation Developed During Jury Selection

# Trial Perspective: Building the Case

## Expectations

- I just planned on an evening with friends

## Sensory, psychological, physiological details

- It felt like his hand penetrated my neck

## Life after sexual assault

- I wasn't safe at home anymore

## Response to moment when offender became a stranger

- I thought I knew him

# Opening Statement

1

Advance the theme and theory to introduce the evidence

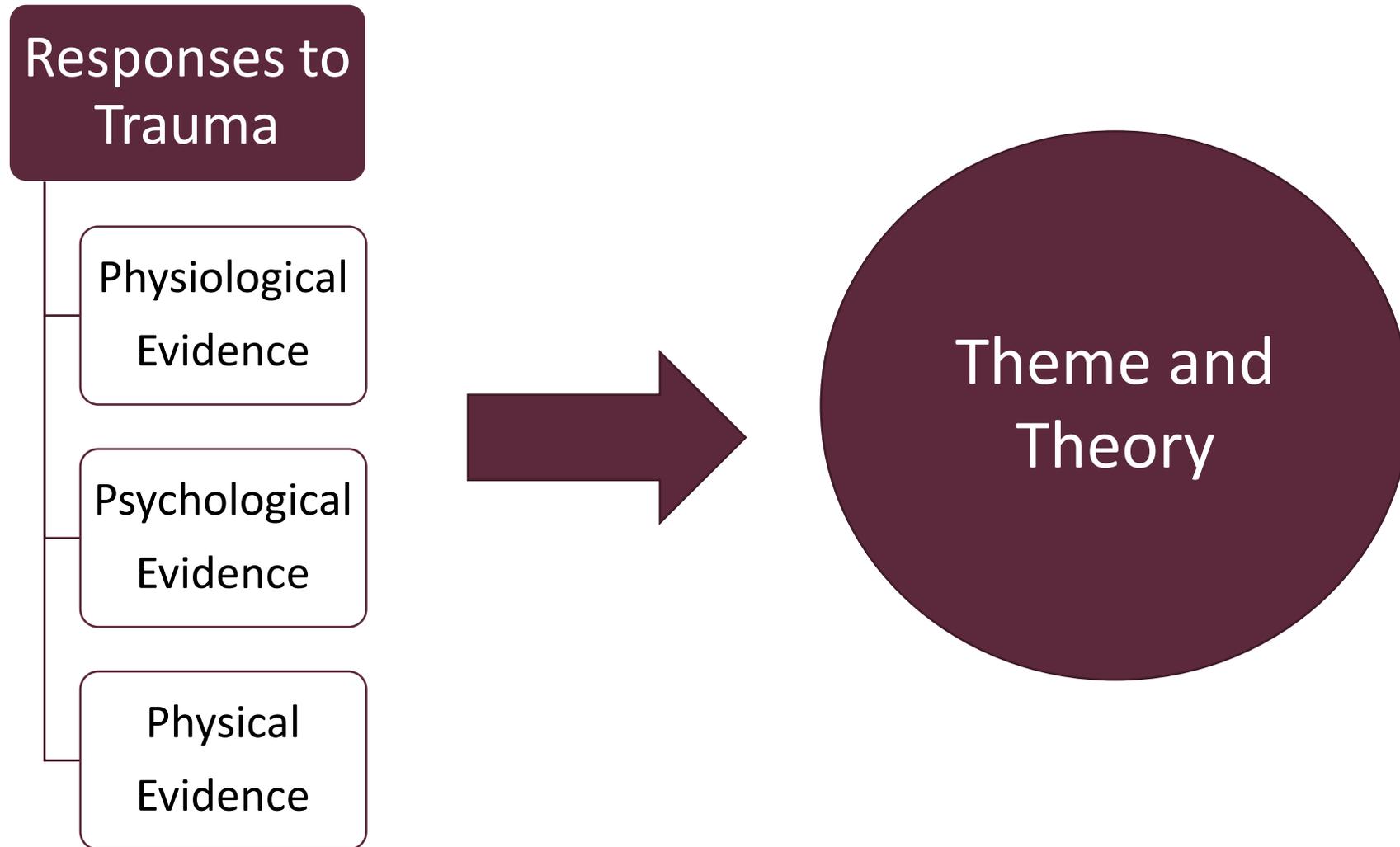
2

Identify key aspects of victim experience

3

Set the stage for closing argument

# Presentation of Evidence



# Evidence of Victim's Experience

## Sensory Details

Sight

Sound

Touch

Taste

Smell

## Emotional Response

How did you  
feel?

What did you  
think then?

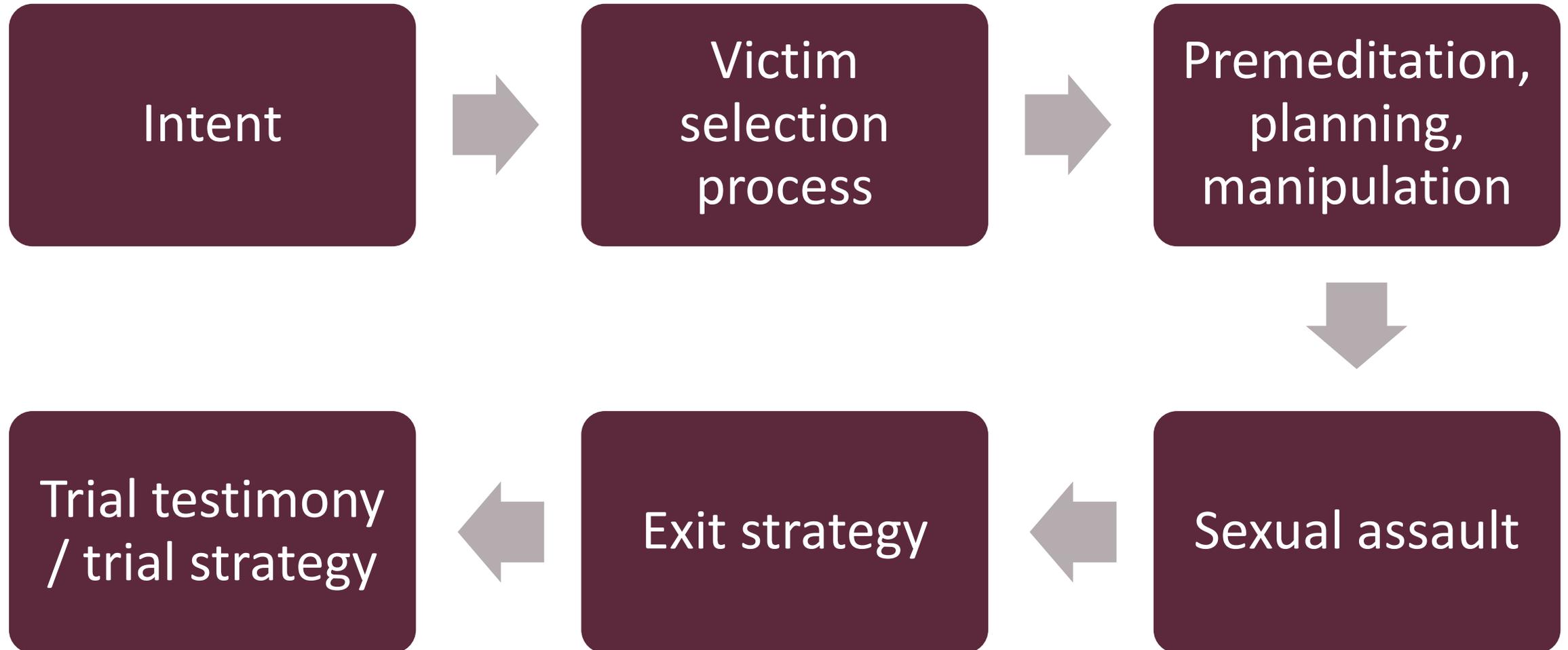
## Physiological Effects

How did that  
affect you?

# Key Aspects of Victim's Experience

- Keep focus on offender.
- Talk about victim responses to trauma:
  - Victim's explanation
  - Direct and secondary witnesses' observations
  - Expert's explanation

Focus on the defendant's behavior.



# Evidence of the Offender's Intent

## **Who was in control?**

- Location
- Movement
- Activity

## **Who made the decisions?**

- What to drink
- Where to go
- Who to be with

- Pay for drinks
- Get victim alone
- Drive
- Enter house or apartment with a key or code
- Go to ATM or store
- Tasks using a phone
- Undress themselves and/or the victim

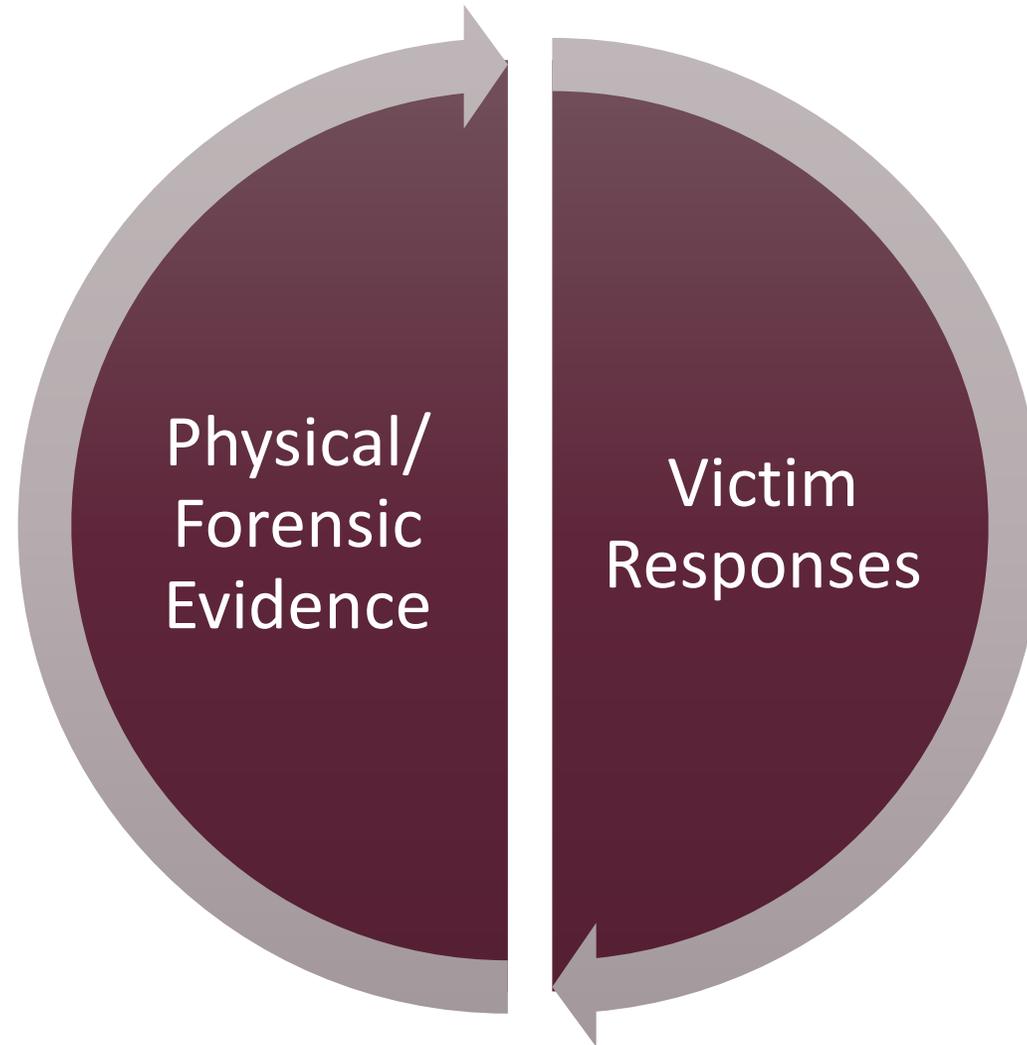
# Focus on Details

- Context and/or events leading up to the crime
- Defendant's control throughout: "whose idea was it?"
- Offender's awareness of victim's vulnerability
- Defendant's abilities and memory while claiming to be intoxicated
- The assault itself
- Defendant's statements/admissions early on and over time
- Corroboration of peripheral details
- Premeditation/planning/advance thought

# Offender Focus

- Have incisive knowledge of any statements or admissions made by defendant
- Focus on context as well as crime
- Establish defendant's control
- Premeditation/planning
- Demonstrate defendant's level of knowledge of victim's vulnerability

# Expert Testimony



# Expert Testimony

**Provides Context**

Places victim's behavior/ responses to trauma in context of history and events

**Supports Victim  
Credibility**

Enables jury to understand victim's perceptions/response

**Dispels Misconceptions**

Left unexplained, jurors may rely on myths/misconceptions

Do these issues require explanation?

## Victim responses to trauma

Delayed disclosure

Issues with  
memory

Impaired  
chronology

Contact with  
offender

Minimization



## Going Forward

Guide the jury's response to the evidence, from jury selection through closing argument.

Conduct an experience-based voir dire.

Identify issues that require expert testimony and present testimony effectively at trial.

Employ themes that place the evidence in the context of common experience.

# Contact Information



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