



Achieving Justice: Suspect Statements and Cross-Examination of the Defendant in Violent Crime Cases

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Patricia D. Powers

Patti Powers, Senior Attorney Advisor, joined AEquitas as the lead Attorney Advisor on the SAKI project after serving as a Senior Deputy Prosecuting Attorney in Washington State for 27 years. She supervised the Sexual Assault-Domestic Violence Unit and prosecuted and tried a high volume of violent crimes—specializing in adult sexual assault, campus sexual assault, child sexual assault and physical 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.

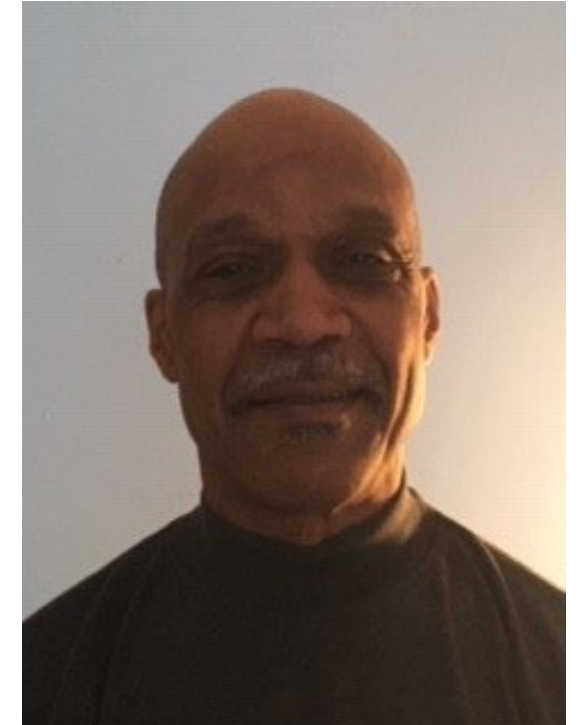


Dave Thomas

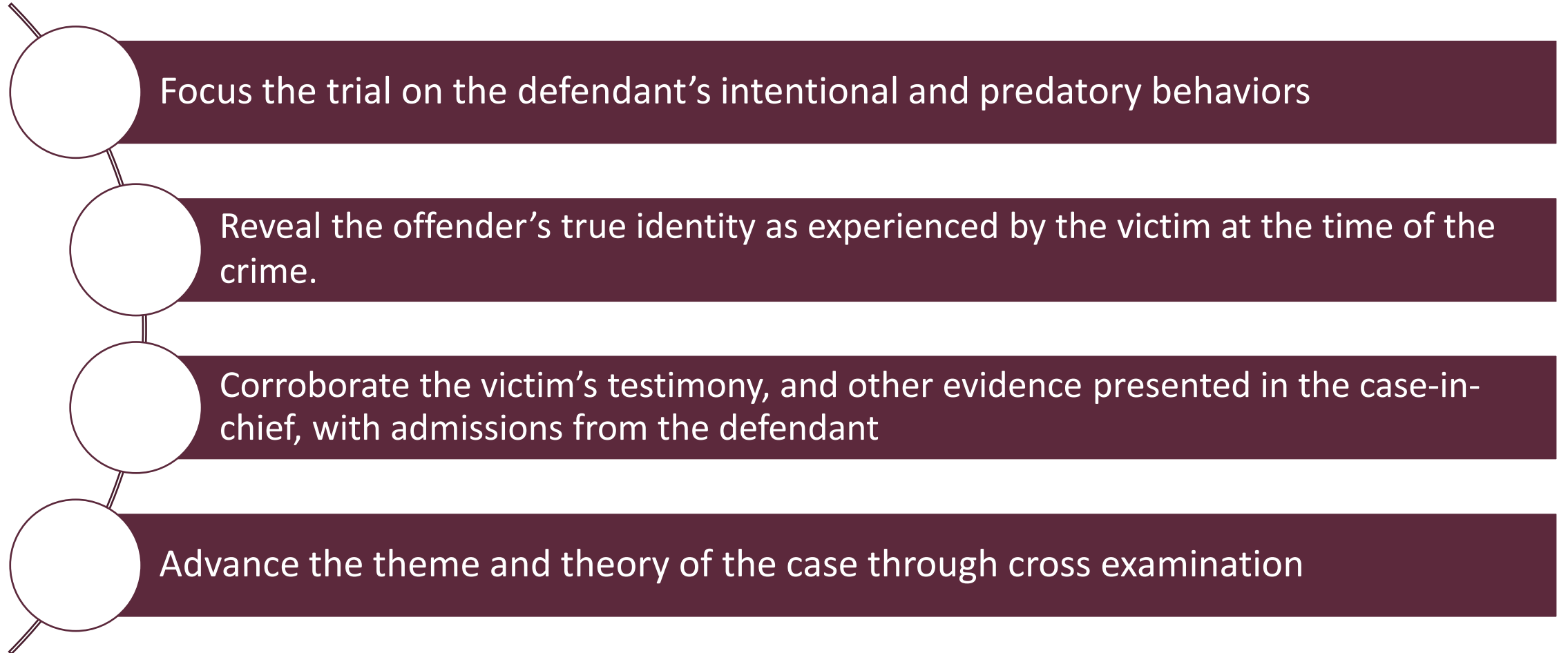
Dave Thomas is a Senior Law Enforcement Consultant primarily providing training and technical assistance in areas pertaining to intimate partner violence. Additionally, he addresses use of force, community/law enforcement engagement, the coordinated community response and multidisciplinary teams, and hate crimes recognition and response.

Most recently, Dave served as a Program Manager at the IACP primarily focusing on projects pertaining to violence against women, preventing gender bias, and strengthening law enforcement-community interactions. Dave retired from the Montgomery County Police Department (MCPD) in December of 2000 on full disability after 15 years of service. He received his bachelors' degree from Towson University, his masters' degree from the University of Maryland, and a Certificate in Advanced Trauma Treatment from the Institute for Advanced Psychotherapy Training and Education. During his law enforcement career Dave taught at the Training Academy, served on the S.W.A.T. team, was a Hostage Negotiator, and a member of the Domestic Violence Unit. At the time of his retirement, he was honored to have been the 2nd highest decorated officer in the department's history receiving numerous awards including the silver medal of valor, the bronze medal of valor, policeman of the year, and the Women's Alliance of MD Domestic Violence Advocacy Award to name a few. Upon leaving the police department he served as a Senior Advisor to the Governor's Office of Crime Control and Prevention Victim Services Unit as a Domestic Violence Specialist.

Mr. Thomas received the 21st Annual Martin Luther King Jr. Community Service Award from JHU in January 2004, was honored at the White House as a 2012 Champion of Change and appointed by the White House to serve as a Public Delegate to the 2013 United Nations Commission on the Status of Women meetings held in New York City. Just prior to joining the staff of the IACP, Mr. Thomas served as the Senior Advisor, Highly Qualified Expert Law Enforcement, SES, to the U.S. Air Force Sexual Assault Prevention and Response Office out of the Pentagon.

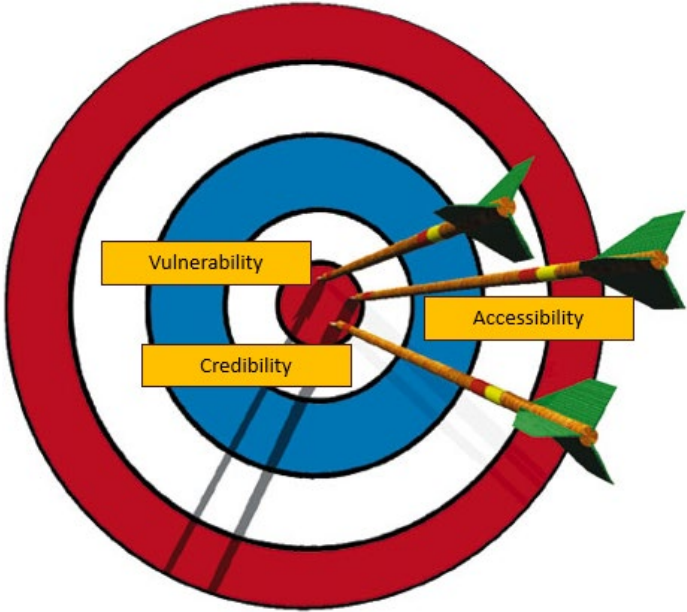
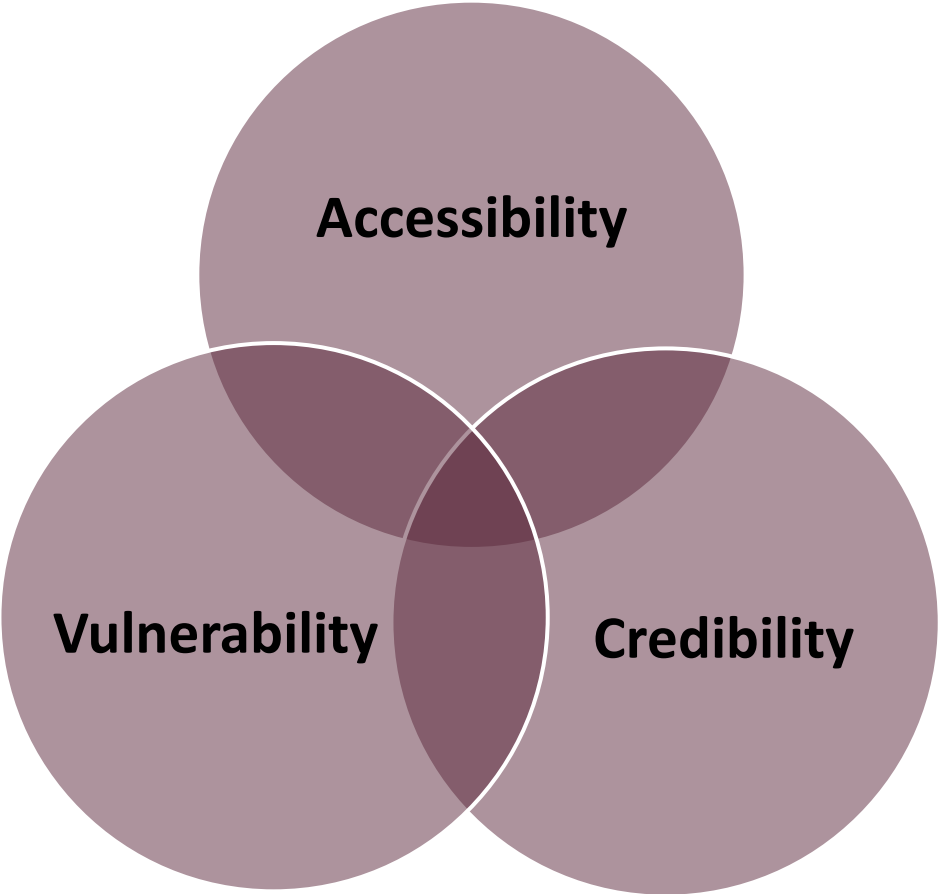


Objectives

- 
- Focus the trial on the defendant's intentional and predatory behaviors
 - Reveal the offender's true identity as experienced by the victim at the time of the crime.
 - Corroborate the victim's testimony, and other evidence presented in the case-in-chief, with admissions from the defendant
 - Advance the theme and theory of the case through cross examination

Offenders as Predators

How Offenders Target Victims



Stacking the Deck

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 use deception to create or aggravate symptoms.



Memory issues

- You don't remember much, do you?

Substance abuse

- No one will listen to you

Emotional Instability

- You're crazy

At the Time of the Event

VICTIM



- Amygdala
- Survival brain
- Fragmented recall
- Memory gaps

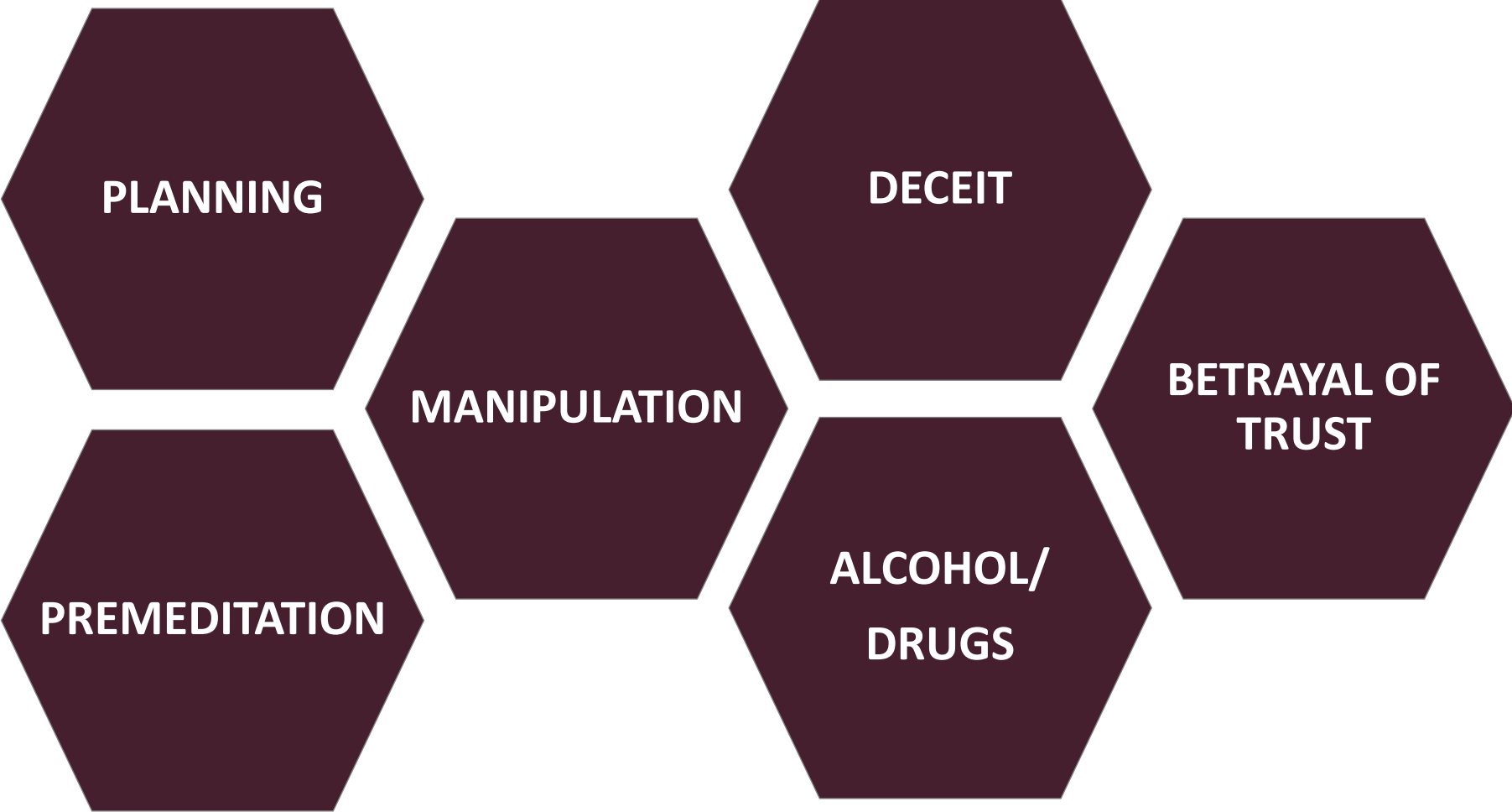
1000 SA's
344 reports
63 arrest
13 prosecuted
7 convictions
6 serve time
994 walk

SUSPECT



- Prefrontal cortex
- Rational thought
- Linear articulation
- Complete story

Examine Predatory Behavior



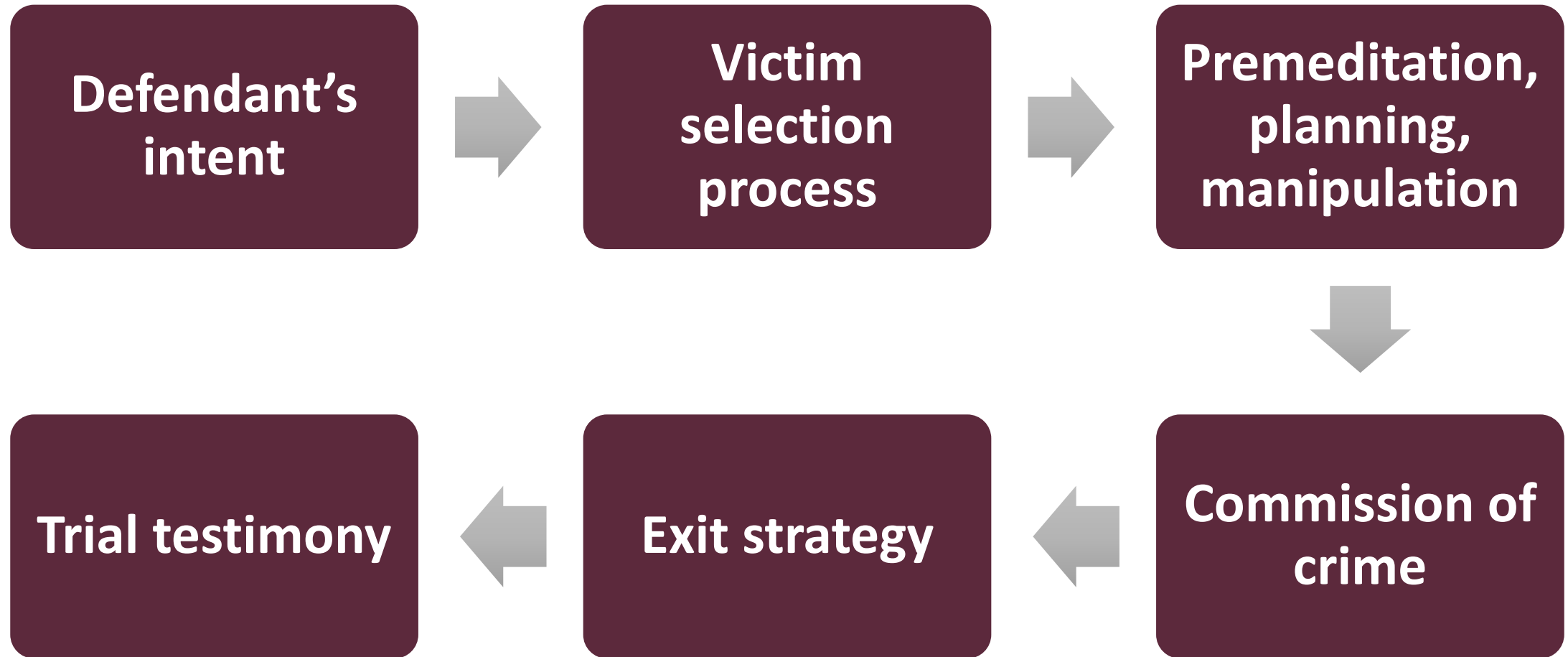
Plans for the Evening

(Vulnerability, Accessibility, Credibility)

4 Components of Offender's Modus Operandi

1. Means
2. Setting
3. Opportunity
4. A plan to avoid arrest

Scrutinizing Offender Behavior



Predatory Behavior: Known and Unknown Offenders

- Victim selection process
- Control of victim and/or environment
- Isolation, invasion of boundaries
- Premeditation and planning
- Preying on vulnerability
- Altered reality: offender is a stranger
- Exit strategy and offender view of credibility
- Playing to the audience



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?

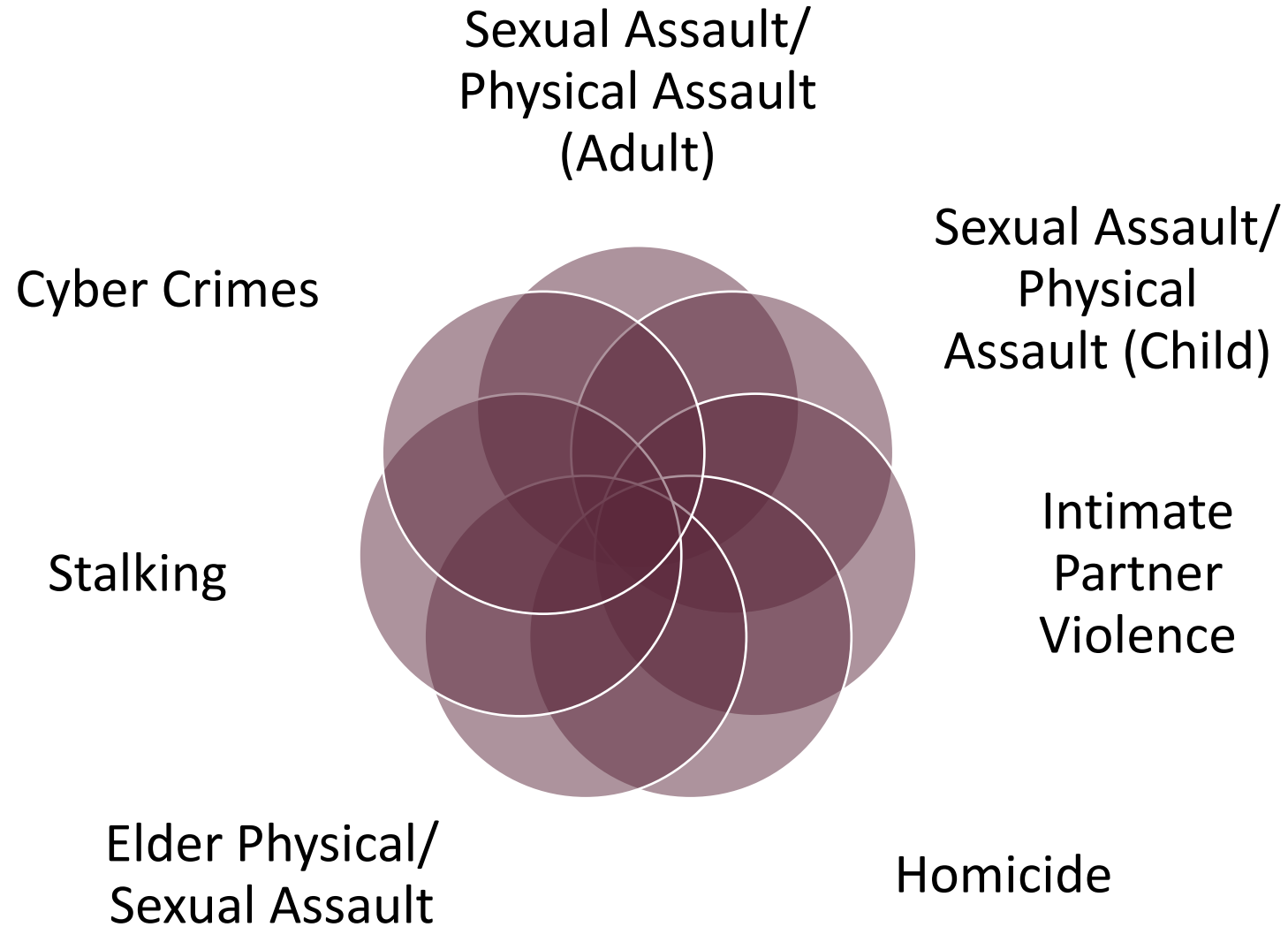
VULNERABILITY

- 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?

Co-Occurring Crimes



Overlapping Nature of Abuse

- Over 50% of **batterers** *sexually abuse* their **partners**
- In over *50%* of **homes w/children** in which an adult is being abused, the **children are also being physically abused**
- 32% of **rapist** **sexually assaulted a child**
- *Family members* account for 65% of **elder abuse**



Other Crimes to Consider

Home Invasion, Trespass

Harassment

Voyeurism

Sexual Exploitation

Offender-Focused Investigative Strategies

- Pre-assault
 - Targeting, testing, grooming
 - Isolation of victim
 - Buying victim drinks
 - Outcry witnesses (bartender, friends, etc.)
 - Surveillance footage
- During assault
 - Elements of the offense
 - Video evidence
- Post-assault
 - Manipulation, cover-up and destruction of evidence
 - Pretext phone calls
 - “He said/she said” to “he said/they said”



Suspect's Background



Investigative Questions

- What's their reputation?
- Does he/she have a reputation for sexual conquest among friends/fraternity/etc.?
- Does he boast of sexual exploits, routinely bring home different women?
- Has he ever been accused of sexual assault?
- Does he film his sexual exploits? If so, does his partner have knowledge of the filming?
- Did he talk of making a conquest that night?
- If so, did he make any preparations?

Focus on the Offender

- How did they meet, or why did suspect target the victim?
- What role, if any, did drugs and alcohol play?
- Did suspect provide drugs/alcohol to others, or just the victim??
- How did suspect manipulate the environment and circumstances to get the victim into a position of vulnerability and isolation?
- Grooming / testing methods, contrived circumstances (drugs/alcohol)

Focus on the Offender

Digital Forensics Capabilities

- Computer related drug research by suspect
- Email, text messages, cell phone calls, admissions, times, identify witnesses
- Cell phone; assault photos, video (hidden recordings)
- Social media; photos, comments, information

Focus on the Offender

- Pre- and post-assault conversations
- Pre- and post-assault text messages/calls
- Men's and women's bodies process alcohol differently – use expert witness to explain medical impacts

Preparation with Investigator

1

- Discuss statements with investigator to obtain their insight into offender's words, demeanor, and strategy

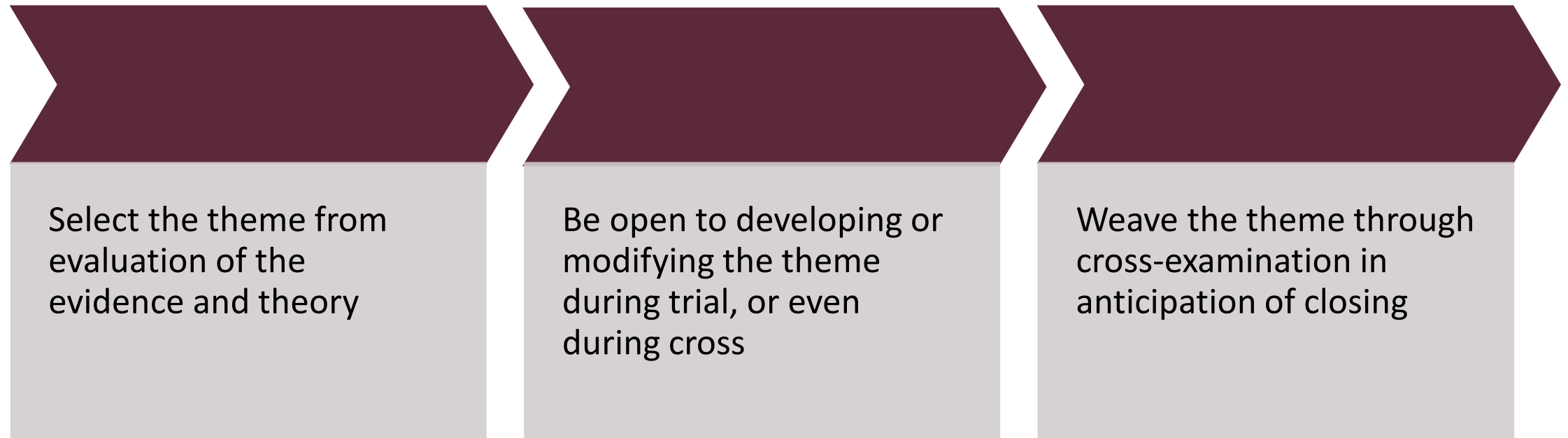
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- Analyze all statements / admissions made to other witnesses

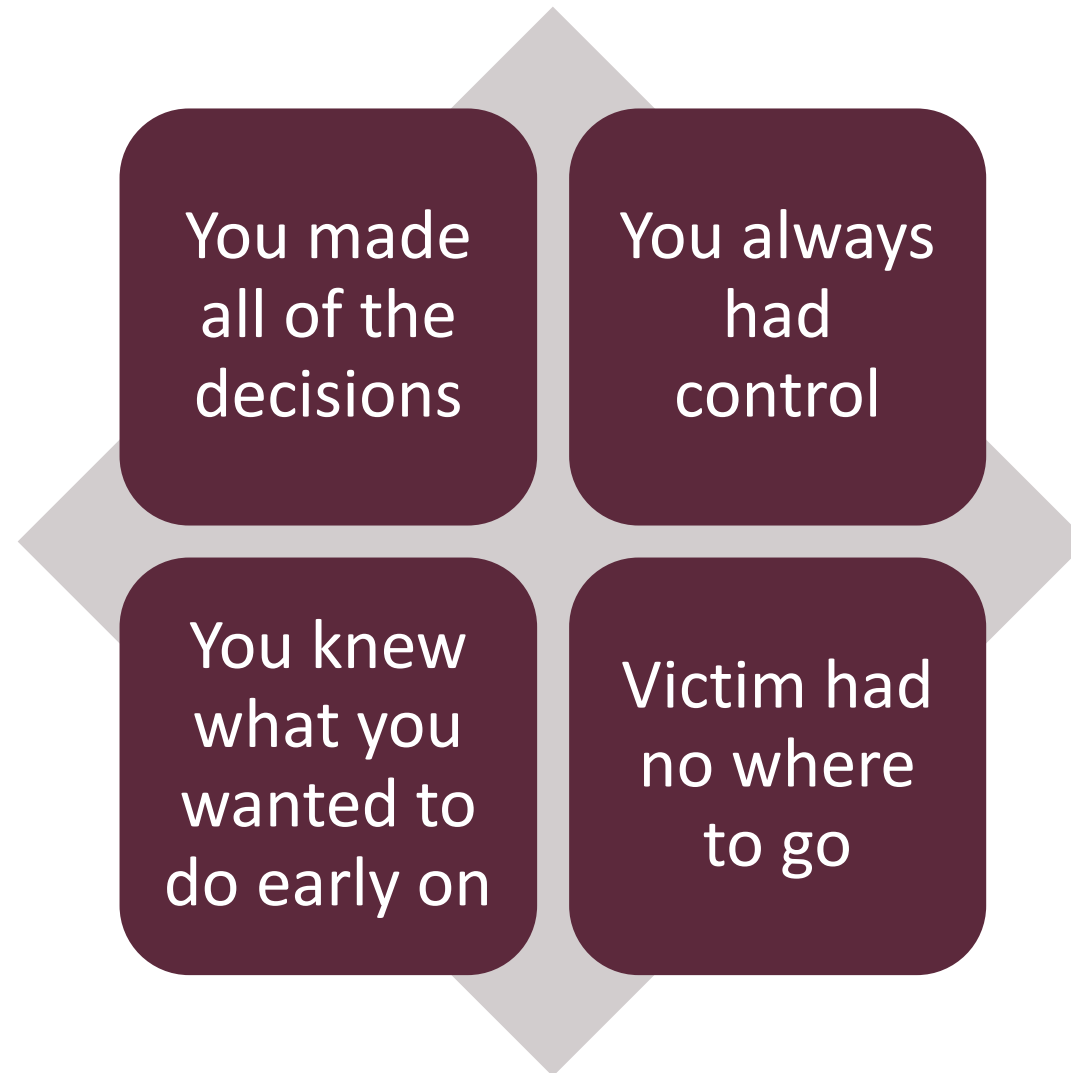
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- Develop an evidence-based theory of offender accountability

Using a Theme Effectively



Themes for Cross-Examination



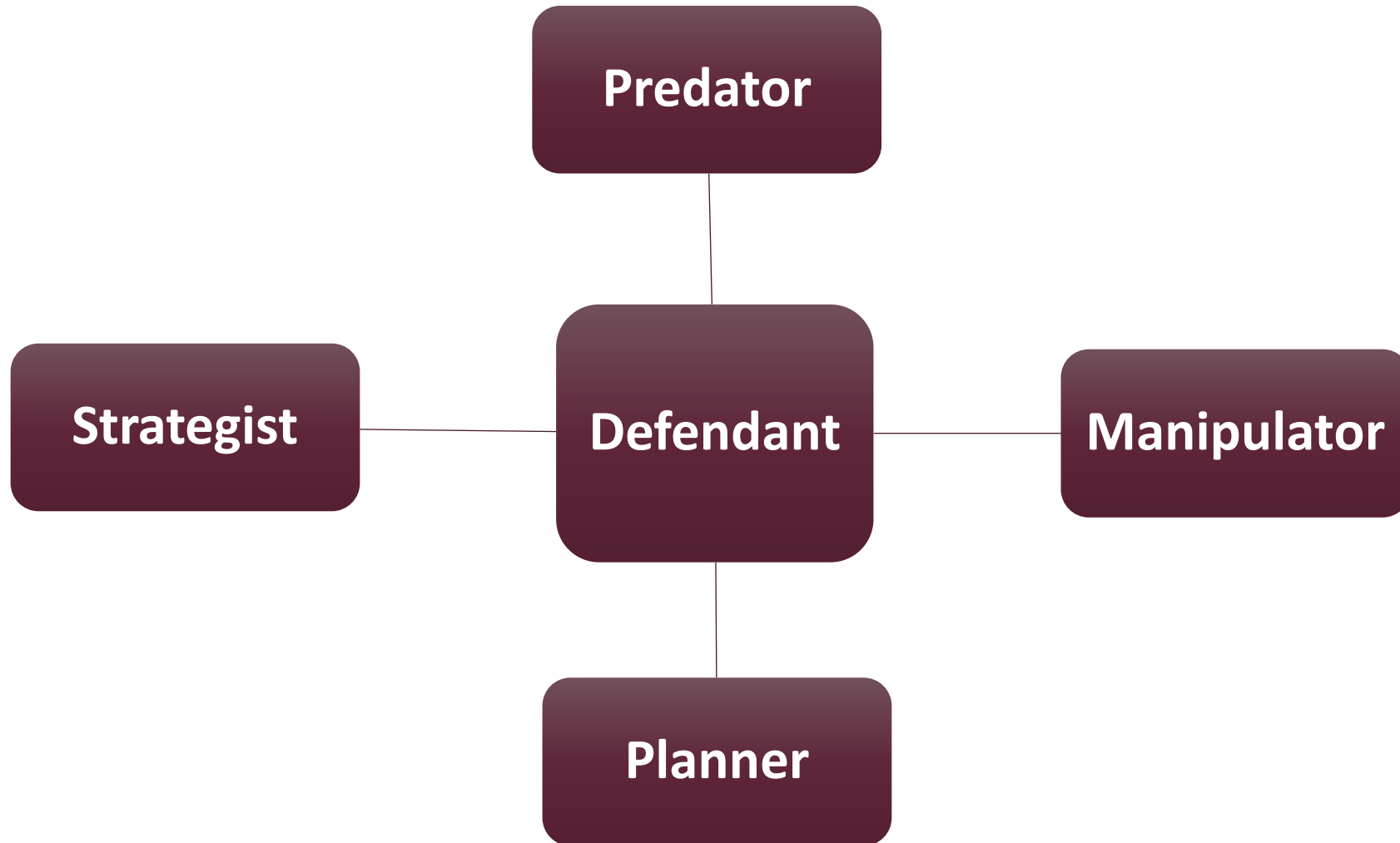
Trial Strategy

Review anticipated defense witness testimony

Remember defense opening statement

Keep prosecution closing in mind

On the Witness Stand



Cross-Examination Questions about Accessibility and Vulnerability

- The victim was always accessible to you in your relationship / acquaintance?
- You knew the victim took the late bus home every day, didn't you?
- You knew the victim had been released from rehab recently, didn't you?
- You planned that the victim would become intoxicated, didn't you?

Remember that although the defendant challenges the victim's credibility, the jury alone can decide the issue.

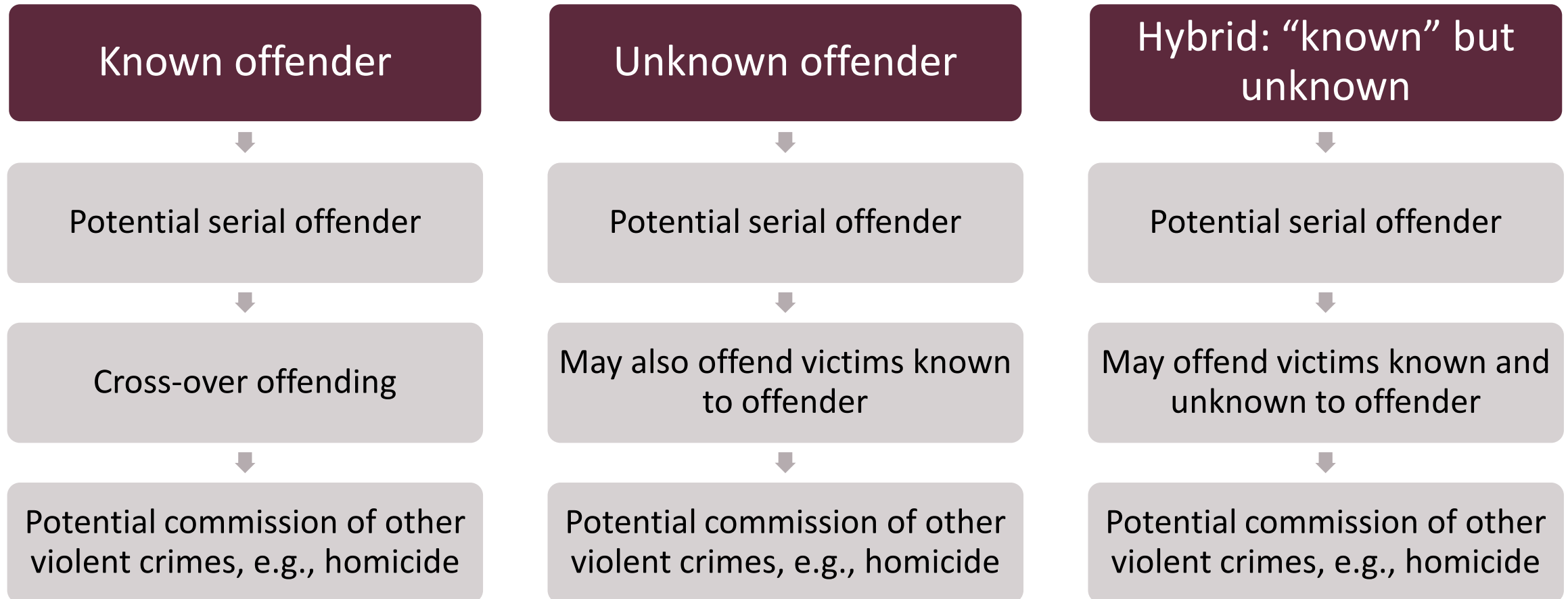
Parallels between Direct and Cross-Examination

- The victim was accessible to the defendant
- The defendant had control
- Offender set the stage for assault: isolation, coercion, use of alcohol
- Victim's vulnerability was clearly known to the defendant; used to create issues of credibility

The evidence clearly establishes that the victim was accessible and vulnerable, and it further establishes their credibility

Serial Offending

Consider the offender may have offended before.



“Research found that serial sex offending proves much more common than expected—approximately a third to a quarter of subjects identified as part of these SAK initiatives were serial offenders.”

Rachel Lovell et al., *Identifying Serial Sexual Offenders Through Cold Cases*, LAW ENF'T BULL. (May 7, 2020), <https://leb.fbi.gov/articles/featured-articles/identifying-serial-sexual-offenders-through-cold-cases>

Broadened Perspective for Serial Sex Offending

- Consider that a rapist possibly has done this before, will continue to do this in the future, or both.
- Serial sex offenders frequently assault both victims known and unknown to them and often exhibit intraserial variations in victim relationship, age, and even gender.
- Offenders do not necessarily follow substantially similar patterns across offenses.

Rachel Lovell et al., *Identifying Serial Sexual Offenders Through Cold Cases*, LAW ENF'T BULLETIN, May 7, 2020

Other Crimes, Wrongs, or Acts

FRE 404 (b)

Motive

Opportunity

Intent

Preparation

Plan

Knowledge

Identity

Absence of
Mistake / Lack
of Accident

Other Acts Evidence

- FRE 404(b) list is not exhaustive—this is a rule of inclusion
- Provides investigatory intelligence for suspect interrogation and insight into commission of crime(s)
- Develop effective practices for presenting FRE 404(b) in case in chief, or to gain intelligence/insight into offender conduct for cross-examination or rebuttal
- ***Recognize that patterns or signs may be physical, behavioral, or both***

Investigating Other Bad Acts

Reputation

Social Media

Education/
Employment
Records

Former
Relationships

Acquaintances

Uncharged
Crimes /
CODIS Hits

ViCAP

Anecdotal
information
from victim

Social
networks

Cross-Examination of a Serial Offender

- Carefully evaluate all reports, including those from investigations of crimes against other victims
- Recognize offender may have escaped detection and have confidence
- Be prepared in advance with understanding of “gaps” in time with absence from jurisdiction
- Understand that sex offenders are not limited by geographic boundaries
- Recognize any similarity in status of victim, vulnerability, environment, use of force / threats

Cross-Examination of a Serial Offender

Cont'd

- Inquire about each victim separately
- Keep in mind the timeline of all charged offenses, anticipating alibi
- Weave in any similarities from other crimes committed against another victim(s)
- Recognize any pattern in offender's narrative of different offenses (*e.g.*, victim blaming, claim of intoxication)

Overcoming the Consent Defense

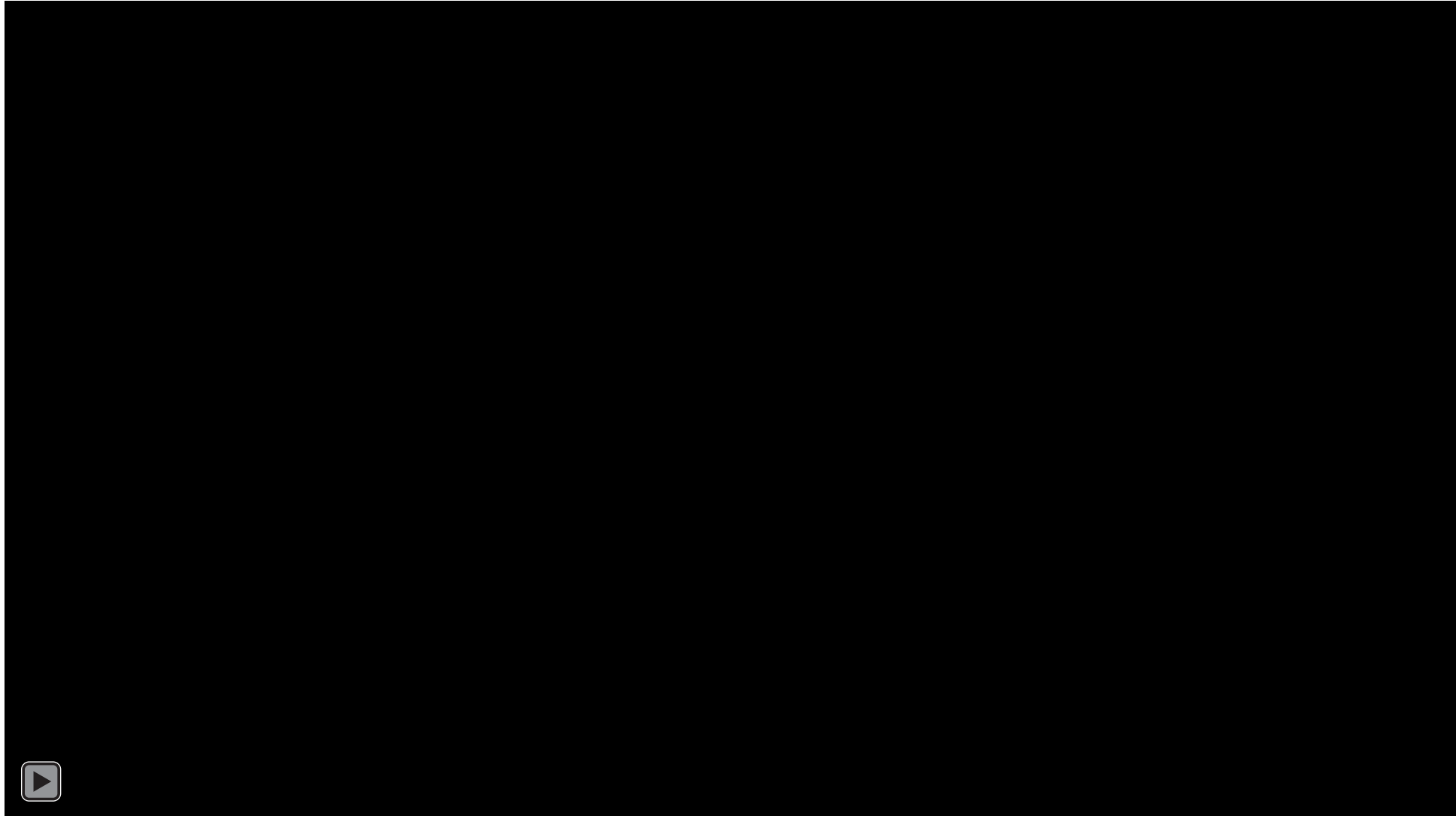
Consent Defined

Freely, Knowingly, & Willingly

- Positive cooperation in act, or an attitude pursuant to an exercise of free will
- The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved
- Based on choice
- Active, not passive
- Possible only when power is equal

Is this theft?





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<https://www.youtube.com/watch?v=oQbei5JGiT8>

Micro-Examining “No”

- What did “no” look like?
- Can “no” be effectively communicated without verbally expressing it?
- Who is responsible for stopping the attack?

The following is NOT consent:

- Giving in because of fear
- Going along to avoid being hurt
- Giving in because of pressure
- Going along to gain approval or avoid reprisal
- Agreeing to one act is not blanket consent

- *Prior consent to sexual activity does not by itself imply consent*
 - *MD Criminal Pattern Jury Instructions – Sp. Supp. to 2020 2nd Edition*

“If fear was in the room, it wasn’t consensual!”

Used with permission of Anne Munch

Fear was reasonable if you find that under the circumstances a reasonable woman/man would fear for his/her safety

MD Criminal Pattern Jury Instructions

Sp. Supp. to 2020 2nd Edition

Remember, the consent defense. . .

- Admits the act.
- Places defendant's credibility in issue especially when there has been a previous denial.

Details for Consent Questions

- Discuss context and/or events leading up to the crime
- Focus on control throughout : “whose idea was it?”
- Establish offender’s awareness of victim’s vulnerability
- Focus on defendant’s abilities and memory while claiming to be intoxicated
- Establish details of assault
- Go over defendant’s statements / admissions early on and over time
- Corroborate peripheral details
- Focus on context as well as crime
- Discuss premeditation / planning / advance thought

Focused Questions for Consent

Emphasize established evidence and use to challenge consent

- Crying doesn't mean consent, does it?
- When she vomited, you didn't take this as a sign of consent, did you?
- When she passed out, this wasn't an act of consent, was it?

Suspect Known to Victim

- You told the investigator you and the victim had a history of sexual relations?
- You also told the investigator that you didn't remember a time when you forced the victim to have sex or when the victim became upset and left the house?
- Today, though, you have testified that on this date the victim consented?

Suspect Unknown to Victim

- When you spoke with the investigator, you claimed you didn't know the victim, didn't you?
- And later you said that it wasn't possible to remember everyone you met years ago, didn't you?
- And today, you said that she consented to have sex with you?

Special Considerations

Cold Cases: The Consent Defense



Cross-Examination in a Cold Case

- If defendant claims inability to remember events / details, be prepared to refer to earlier statement / interview or contextual information
- Look for earlier denials that may change / modify after testing of untested sexual assault kit
- Be aware of timeline and other events
- Focus on recency of alibi if appropriate
- Lack of consent becomes more powerful over the years: the victim never gave up

Sexual Assault and Homicide

Recognize clear link between sexual assault and homicide

Prepare for denial / consent:

- “We had consensual sex and someone else killed the victim”

Work with forensic pathologist or other expert to determine timeline for death and survival time for forensic evidence

Focus on presence of defense wounds and any injuries

Strategy: When the Defendant Doesn't Testify

Consider that there is usually important information in defendant's statement

If prosecution does not offer statement, defense may still introduce it

The defense may choose not to offer the statement — *What is lost?*

Balance the above considerations when determining whether to offer defendant's statement

Going Forward

01

Focus the trial on the defendant's intentional and predatory behaviors

02

Reveal the offender's true identity as experienced by the victim at the time of the crime.

03

Corroborate the victim's testimony, and other evidence presented in the case-in-chief, with admissions from the defendant

04

Advance the theme and theory of the case through cross examination

“Justice is truth
in action.”

Benjamin Disraeli



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