

Comparative Studies on Rape Trauma Syndrome Evidence in Criminal Court and Its Implications*

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〈국문초록〉

성범죄 사건에서도 국민참여재판이 적용되는 사례가 증가함에 따라 형사 절차상 전문가 증언의 역할이 중요해지고 있으며, 해당 사건에 대한 배심원의 이해도가 고도로 요구되고 있다. 또한, 이에 영향을 미칠 수 있는 정보 제공 단계 또한 상당히 중요하다고 여겨지고 있다. 미국에서는 성범죄 사건과 신드롬 증거의 증명력과 관련하여 상당한 연구가 존재하는데, 강간외상증후군(Rape Trauma Syndrome)으로 대표되는 심리적 증후군을 증명하는 전문가 증언이 형사재판에서 배심원에 미칠 수 있는 영향이 무엇인지에 대한 학제 간 연구가 활발한 편이다. 다수의 강간 피해자들은 사건 이후 외상후스트레스, 우울감, 불안감 등과 같은 심각한 심리적 후유증을 경험하게 되면서 일반 평균적인 배심원들이 이해하기 어려운 비합리적인 행동을 하기도 하며, 이는 사회적 통념의 기준에서 뚜렷하게 벗어난 모습이라는 점에 기인한 결과이다. 이와 관련된 미국의 다양한 선행연구에 따르면, 재판에서 전문가들이 강간외상증후군과 관련한 증언을 유효하게 실시할 때 배심원들이 보다 합리적이면서도 편파성이 감소된 판단을 할 수 있다고 한다. 본 연구의 목적은 강간외상증후군 등과 같이 다양한 사회과학적 증거를 활용하는 법적 작용의 중요성에 대하여 논의함과 동시에 이와 관련된 최근의 성인지 감수성 관련 국내 판례를 추가적으로 검토함으로써 성폭력 피해자의 외상 후 인지지에 대한 지속적인 후속 연구의 필요성을 강조함에 있다. 더 나아가, 다양한 유형의 전문가 증언이 배심원에게 미치는 긍정적 효과를 탐색함으로써 전문감정인 선정 과정에서의 폭넓은 수용이 이루어져야 함을 제안하며 글을 마무리하고자 한다.

주제어 : 강간외상증후군, 전문가증언, 국민참여재판, 강간통념, 미국형사소송법

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I. Introduction

Rape Trauma Syndrome (“RTS”) is the second most frequently discussed psychological syndrome evidence in the trial. RTS is admitted into court to explain the behavior or demeanor of the victims of rape.¹⁾ Ann Burgess and Linda Holstrom created syndrome term, RTS in 1974 and organized the common symptoms exhibited by the forcible-rape victims. Clinical nurse Ann Wolbert Burgess and sociologist Lynda Lytle Holmstrom²⁾ examined 92 rape victims and in their initial research, they interviewed victims right after the rape, and interviewed them once again after the term of one month.

According to the study, rape victims generally go through two kinds of phases that are referred to as, an “acute crisis phase” and “re-organizational phase”³⁾. During the first phase, which is also described as an acute crisis phase, certain emotional states last for a few days or weeks and they tend to become more severe with various other external symptoms including insomnia, feelings of numbness and pain, or lost appetite, and also psychological symptoms like extreme fear, nightmares, depression or suicidal thoughts. In the second “re-organizational” phase, long term reactions are described as disturbances in general functioning, development of phobias, sexual problems, and lifestyles changes.⁴⁾ While every single victim has slightly different experiences in the length of the time in each phase, all victims eventually go through the second phases. Thus, according to the research, rape victims appeared to be suffering from severe and overwhelming reactions right after the assault, and later in the long term, disorganization and lifestyle disruptions were present in victims.⁵⁾

1) Daniel A. Krauss & Joel D. Lieberman, *Psychological Expertise in Court: Psychology in the Courtroom Volume II* (2009) at 108.

2) Lynda Lytle Holmstrom, & Ann Wolbert Burgess, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974).

3) *Id.* at 981.

4) Daniel A. Krauss & Joel D. Lieberman, *Psychological Expertise in Court: Psychology in the Courtroom Volume II* (2009) at 108; *See also*, Lynda Lytle Holmstrom, & Ann Wolbert Burgess, *The Victim of Rape: Institutional Reactions* (1983)

While RTS is relatively a new concept in criminal court, expert witness endeavored to introduce the term into court since early 1980s.⁶⁾ The following chapter examines the history of the U.S. courts, while it varies from state to state, in admitting the expert testimony of RTS in criminal cases.

II. RTS Cases and Expert Witnesses in Criminal Court – focused on the U.S.

In the U.S., Kansas trial court was the first to allow the RTS testimony in criminal case. In *State v. Marks*⁷⁾, the court stated that, “the woman was suffering from RTS, which is one type of Post Traumatic Stress Disorder(“PTSD“).” The state Supreme Court ruled that the testimony was admissible reasoning that the rape trauma was a common reaction of one who has been sexually assaulted and that the expert testimony would not improperly invade the province of the jury.⁸⁾ In *People v. Taylor*,⁹⁾ New York Court of Appeals ruled that the expert testimony of RTS was admissible to explain atypical behavior of the victim where juries may find certain behaviors inconsistent with a claim of rape, but ruled that the evidence is not admissible if its sole purpose is to prove that the rape actually occurred.¹⁰⁾ Notably, in 1984, the Supreme Court of Kansas in *Kansas v. McQuillen*¹¹⁾, overturned the charge dismissal against a rapist

5) Mila Green McGowan & Jeffrey L. Helms, *The Utility of the Expert Witness in a Rape Case: Reconsidering Rape Trauma Syndrome*, 3 *Journal of Forensic Psychology Practice* 51 (2003) at 52.

6) *See generally*, David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 *B.C. L. Rev.* 1143 (1985) at 1153, 1156.

7) 647 P.2d 1292 (Kan. 1982)

8) *Id.* at 1299; Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness* 41 *Akron L. Rev.* 981 (2008) at 1018.

9) 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990)

10) William J. White, *New York Court of Appeals Holds that Rape Trauma Syndrome Is Admissible to Explain the Victim's Behavior, but Not to Prove the Rape* 64 *St. John's L. R.* 381 (1990) at 383.

stating that the lower court excluded the evidence of RTS which should not have been.¹²⁾

Meanwhile, quite different decision had been made in the same year in Wisconsin. The Wisconsin Supreme Court did not permit any expert evidence or opinion on testifying the rape victim's credibility.¹³⁾ The Court of Appeals in the state of Maryland permitted the syndrome evidence of RTS only as a rebuttal to the defendant's claim of consent,¹⁴⁾ whereas the Pennsylvania court, in *Commonwealth v. Gallagher*¹⁵⁾ allowed the expert opinion on the syndrome and the rape victim's abnormal behavior. Rape victim in the case failed to indicate the rapist in a line-up right after the incident, but she identified the rapist 4 years after the rape.¹⁶⁾

As previously noted, RTS is comprised of "post-rape physical and emotional traits that many rape victims share as a result of rape or attempted rape,"¹⁷⁾ and the victim's reactions and symptoms may slightly vary in each phase. For instance, some victims may show extreme fear and anger, while others may appear to be oddly calm and depressed. Because people usually assume that the rape victim would be highly emotional and frantic following the assault, they would often falsely think

11) 689 P.2d 822 (1984)

12) Mila Green McGowan & Jeffrey L. Helms, *The Utility of the Expert Witness in a Rape Case: Reconsidering Rape Trauma Syndrome*, 3 *Journal of Forensic Psychology Practice* 51 (2003) at 53.

13) *Gates v. State*, 283 N.W.2d 474, 477 (Wisc. App. 1979); Mila Green McGowan & Jeffrey L. Helms, *The Utility of the Expert Witness in a Rape Case: Reconsidering Rape Trauma Syndrome*, 3 *Journal of Forensic Psychology Practice* 51 (2003)

14) *State v. Allewalt* 308 Md. 89 (Md. 1986) 517 A.2d 741; Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness* 41 *Akron L. Rev.* 981 (2008)

15) 519 Pa. 291 (1988); Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness* 41 *Akron L. Rev.* 981 (2008)

16) Mila Green McGowan & Jeffrey L. Helms, *The Utility of the Expert Witness in a Rape Case: Reconsidering Rape Trauma Syndrome*, 3 *Journal of Forensic Psychology Practice* 51 (2003) at 54.

17) See also, Frazier & Borgida, *Juror common understanding and the admissibility of rape trauma syndrome evidence in court* 12 *Law and Human Behavior* 101 (1988) at 109; PTSD is an anxiety disorder triggered by a stress factors and since 1980, the symptom has been listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.

that the victim is not suffering from the rape, or even mistakenly assume that the rape did not occur from the first place, if the victim is appeared to be calm. People further believe that rape victim would report the crime right after the incident; however, the study indicates that victims who suffer from RTS would rather refuse the reality that they have been raped and try not to recall the traumatic experience vividly.¹⁸⁾ Thus, in long term, victims do not have clear memory on the assault. In this respect, expert testimony on RTS would greatly help in explaining the victim's counter-intuitive behavior that might otherwise lead jurors to believe that the victim was not raped.¹⁹⁾

III. Judicial Approach in Admission of Rape Trauma Syndrome Evidence – focused on the U.S. Cases

1. Syndrome Evidence and Legal Framework

Every court defines syndrome differently and thus, the judicial approach in admitting the syndrome evidence varies as well. First of all, each court decides on whether the testimony and evidence of RTS constitutes as an expertise in the case and, secondly, court applies different standards in determining whether the evidence is scientific or not. These are important ramifications for the way courts analyze syndrome evidence.²⁰⁾ Some states have held that the expert testimony of RTS in particular is inadmissible stating that the evidence would either unfairly prejudice the defendant or would not help the jury.²¹⁾ Although these are minority states that strictly

18) *See generally*, Lynda Lytle Holmstrom, & Ann Wolbert Burgess, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974).

19) Nina Gupta, *Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence*, 76 Law and Contemporary Problems 413 (2014) at 416.

20) Nina Gupta, *Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence*, 76 Law and Contemporary Problems 413 (2014) at 417.

21) Minnesota, Washington, and Pennsylvania have each held that expert testimony on rape trauma syndrome for any purpose is inadmissible; *See also*, Nicole Rosenberg,

prohibit the admission of expert evidence on syndrome evidence, a number of other jurisdictions are partially limiting the evidence as well, showing similar concerns on the problem in admitting the syndrome evidence.

Because RTS is generally not perceived as ‘hard science’²²⁾, such syndrome evidence is often perceived to be subjective, and scientifically un-verifiable. The field of psychology is in the state of hybrid and people would most likely to agree that the research in psychology is more scientific than other fields of soft science; however, people may also argue that the psychology is in the borderline of hard science where it has no specific features of pure physical sciences.²³⁾ Therefore, the State court’s decision would give more clear distinction on what kind of tests to apply for the syndrome evidence.

In federal court, the court would apply Federal Rules of Evidence(“FRE“) 702 and the Daubert²⁴⁾ standard in deciding the scientific and non-scientific aspect of the evidence.²⁵⁾ While the Daubert decision applied to only scientific expert testimony initially, the holding was later extended to all kinds of science in *Kumho Tire Co. v. Carmichael*.²⁶⁾ Therefore, in federal court, the same standard is applied for both scientific and non-scientific evidence. FRE 702 permits the expert testimony if the evidence would assist the fact finder comprehend the evidence and the testimony is built on a reliable principles with sufficient facts or data. Daubert standard adds

Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim, 42 Hastings L.J. 1143 (1991) at 1151.

22) “Hard science” refers to natural and physical sciences that study the universe through theories, hypotheses and experiments, such as, physics, chemistry, biology, anatomy, etc. “Soft science”, on the other hand, encompasses a specialized field or discipline that focuses on the study and interpretation of human behavior that includes the field of sociology, psychology, anthropology, etc.

23) Mila Green McGowan & Jeffrey L. Helms, *The Utility of the Expert Witness in a Rape Case: Reconsidering Rape Trauma Syndrome*, 3 Journal of Forensic Psychology Practice 51 (2003) at 55.

24) *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

25) “Admissibility” shall be distinguished from “Probableness”, also known as “Probative value”. Please refer to the Federal Rules of Evidence 403; https://www.law.cornell.edu/wex/probative_value

26) *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

several other factors to FRE 702 that federal courts should consider in determining the admissibility of the syndrome evidence.

RTS, as other types of syndrome evidence, is frequently utilized in three ways: a) to rehabilitate the victim's credibility; b) to explain the victim's unreasonable behavior third; c) to refute the defendant's claim of consent. Rehabilitating the credibility and explaining the counter-intuitive acts could be considered as relatively supportive toward the victim's side.²⁷⁾ If the defense has attacked the victim's claim, prosecutor could use the expert evidence on RTS to rehabilitate the victim. Some state has admitted the testimony of an expert witness to rehabilitate the victim when his or her statements are consistent with the RTS.²⁸⁾ The expert testimony must also help the juror in comprehending the case, but not invading the province of the jury. Because there exists a fine borderline between 'rehabilitating the victim' and 'bolstering the credibility of the victim,' courts need to properly narrow down the scope of the evidence.

Rehabilitating the victim's credibility normally occurs after the defendant attacks the victim; however, it may also occur before the defendant's attack. In *Hutton v. State*,²⁹⁾ the Maryland appellate court articulated that the syndrome evidence of victim's alleged suffering and symptoms were inadmissible. In *Hutton*, the victim was abused sexually by her stepfather since she was 7.³⁰⁾ The state invited clinical social worker and clinical psychologist. In the case, the social worker was not permitted in diagnosing or giving an opinion about the syndrome and instead, she was only allowed to state general features of the sexually abused child and connect the explanations to the victim in the case. In *Hutton*, the court stated that the testimony was inadmissible for both of the social worker and the psychologist may invade the province of the juror by addressing

27) Nina Gupta, *Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence*, 76 Law and Contemporary Problems 413 (2014) at 420.

28) *Id.* at 421.

29) 339 Md. 480, 663 A.2d 1289 (1995)

30) *Id.* at 1291.

issues on the credibility of the victim.

However, the court further articulated that the syndrome evidence could have been admitted, only if it was utilized to refute the defendant's claim of consent or to explain the victim's counterintuitive behaviors, while the case does not fall under those exceptions. Therefore, Hutton case took the proposition in admitting the syndrome evidence that is primarily defensive in nature, as long as the evidence assists the jury's understanding in case without invading the province of the jury.³¹⁾

2. Expert Witnesses in Other Social Science Fields

As previously stated, courts often have had hard time in distinguishing between rehabilitating the victim and bolstering the credibility of the victim in sexual crime case. The West Virginia Supreme Court of Appeals held that the expert evidence on RTS and its consistent symptoms are relevant to the case and thus, admissible, especially when the defendant attacks the victim's credibility.³²⁾ The court further noted that only jury could decide the credibility of the victim and that the expert's testimony on whether the unreasonable behavior of the victim following the rape adhered to the "common post-rape behavior" was not admissible for the testimony because such testimonies imply that the defendant actually raped the alleged victim in the case.³³⁾ The court said that the experts could present statements on whether the alleged victim showed behaviors consistent with RTS, but should not give any explicit or implicit opinions on the issue of whether the alleged victim had actually been raped. Similarly, Supreme Court of Wisconsin articulated that expert testimony of RTS could be introduced to rehabilitate the victim as long as it does not express an opinion on the issue of whether the victim was raped or not.³⁴⁾

31) 663 A.2d at 1301; Nina Gupta, *Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence*, 76 Law & Contemporary Problems 413 (2014) at 421.

32) State v. McCoy (366 S.E.2d 731 (W. Va. 1988)); Nina Gupta, *Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence*, 76 Law & Contemporary Problems 413 (2014) at 423.

33) *Id.* at 422.

The court allowed the expert evidence on RTS that explains the victim's unreasonable behaviors and ruled that the expert testimony would assist the jury to comprehend the case, because the defendant claimed that the alleged victim was not actually raped for staying calm right after the incident and when filling out the statement in front of the police. While the expert did not give any opinion on the victim of the case, she only testified based on her studies of the victims' demeanors with other related symptoms and her analysis on other rape victims as well. Court explained that the experts helped juries in understanding the evidence of the case because people are probably not familiar with the atypical reactions.³⁵⁾ Thus, for expert witnesses on RTS to be allowed in rehabilitating the alleged victim, the expert's testimony should not include any evidence as to the issue of whether the alleged victim had actually been sexually assaulted or not. Rather, the rehabilitation of the alleged victim could happen when the testimony is consisted of general characteristics of the victim's post-rape behaviors and observation of other comparable victims. Thus, expert witnesses cannot provide evidence regarding the reliability of the victim for question being solely for the juries.

Secondly, regarding the counter-intuitive behaviors of the victim, courts usually admit the RTS evidence if the expert witness presents the information on the victim's unreasonable behaviors that are incongruent with presumed common behaviors of post-rape victim that are often misconceptions and stereotypes held by the public. Representative example RTS behaviors or symptoms that are not congruent with the presumed-typical behaviors of the victims of sexual assault are delay in reporting and calm attitude after the incident. In *State v. Kinney*³⁶⁾, RTS expert testimony was allowed in explaining the observed behavioral patterns of

34) *State v. Robinson*, 431 N.W.2d 165 (Wis. 1988); Nina Gupta, *Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence*, 76 Law & Contemporary Problems 413 (2014) at 422-23.

35) Nina Gupta, *Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence*, 76 Law & Contemporary Problems 413 (2014) at 422-23.

36) 762 A.2d 833 (Vt. 2000)

sexual assault and counter-intuitive demeanors of the victim. In the case, the victim claimed that the defendant sexually assaulted her, whereas the defendant alleged it was a consensual sex.³⁷⁾ Expert testimonies in the case gave general descriptions on the symptoms of RTS and explained that it was not abnormal for the sexual assault victim to delay the reporting of the crime and then, fell asleep after the rape.³⁸⁾ The court allowed the expert testimony of RTS holding that the expertise statements would assist jury in assessing the evidence, that the victim's behaviors do not match the typical behavioral patterns of post-rape.

Aggressive use of RTS evidence, however, could be a potential trouble in violating the rape shield law as delineated in the case of *Spencer v. General Electric Co.*³⁹⁾ The defendant attempted to introduce the evidence that the alleged victim had participated in consensual sexual intercourse after the alleged rape, and that since the loss of interest in physical relationship is a common symptom of RTS, the defendant asserted the evidence of such sexual activity after the incident would be inconsistent and irrelevant with the victim's symptom of RTS. The court in the case ruled that the evidence was inadmissible, not because of its relationship with the rape shield statutes but because of its scientific invalidity and outweighing prejudicial effect over the probative value. When there is a problem or risk in overtly intrusive examination by the defendant's psychiatrist, the judge could call separate neutral expert to administer a single examination on the complainant's RTS evidence. Federal judge's power to appoint a neutral expert and the judge's own inherent power is codified in FRE 706. In a criminal case, the expert is compensated "from funds which may be payable by law."⁴⁰⁾ However, judges rarely utilize Rule 706 and they only choose to use in a few very complicated circumstances where the experts of the partisan have diverged conclusions and the juror has a hard time evaluating the truth of the expert's testimonies, and these

37) *Id.*

38) *Id.*

39) 697 F. Supp. 204 (E.D. Va. 1988)

40) Federal Rules of Evidence 706 Court Appointed Expert Witnesses

situations occur in mostly civil trials. The proposed use of the rule in RTS cases, to protect the victim from the intrusions inherent in multiple psychological examinations, is unusual.⁴¹⁾ However, the Rule 706 could be further applied in criminal court, especially in rape cases where it could efficiently reduce any unnecessary, misleading or confusing information that the fact-finder need to review, and possibly reducing the expert's cost that often burdens the victim.

IV. Expert Testimony and Syndrome Evidence In South Korea

1. Syndrome Evidence in Korean Criminal Procedure

According to Korean Criminal Procedure Act 169 (hereinafter "the Act"), "A court may order a person of learning or experience to give an expert evidence." Furthermore, according to the Act 279-2, professional psychological committee member may be appointed to testify on social science expertise. Additionally, social scientific evidence may be in the form of summary of defense, expert statement, opinion, report, petition, witness statement, etc. The field in which social science is used in criminal proceedings tends to be expanded within the past couple of decades. For a long time, psychopathological and clinical psychological opinions have been written as expert appraisals to be submitted to the court. In recent cases, the Supreme Court identifies post-trauma stress disorder, one of the psychological symptoms, as a type of injury.⁴²⁾ For instance, studies and concepts developed within the field of clinical psychology, battered women syndrome and rape trauma syndrome, have also been presented and utilized in Korean legal system.⁴³⁾

41) Jeffrey T. Waddle & Mark Parts, *Rape Trauma Syndrome: Interest of the Victim and Neutral Experts*, University of Chicago Legal Forum 399 (1989) at 415.

42) Supreme Court [S. Ct.], 98Do3732, Jan. 26, 1999 (S. Kor.)

The ruling stipulates that the definition of injury goes beyond the actual damage in physiological disorder, and further includes a disorder in mental function.

However, the criteria for evaluating and determining the admissibility of expert testimony on social scientific evidence have not yet been clearly established. The judgment of the admissibility of psychological evidence, sociological evidence, and others in the realm of social science depends on the discretion of individual fact-finders. The standard of proof that courts in South Korea apply to scientific evidence and expert testimony varies as well.⁴⁴⁾ According to the Supreme Court's ruling, the types of scientific evidence are generally divided into five categories, and the level of proof differs in each category. The strongest scientific evidence, such as genetic testing, blood type testing, and pollutant analysis fall under the first category. Second category is comprised of methamphetamine and hair analysis, whereas the third category has relatively subjective analysis of expert opinion such as handwriting analysis, voice analysis, and traffic accident analysis. Polygraph, however, is only recognized when there is a high degree of accuracy.⁴⁵⁾ On the other hand, in areas such as handwriting, fingerprint, bite marks, and hair analysis, specific requirements for the scientific accuracy are waived.⁴⁶⁾

In South Korea, depending on the summary appraisal or expert statements from professional psychological committee members, it may be decided whether to step forward to the formal appraisal procedures. Therefore, it is necessary to further expand the pool of professional expert committee members that can be utilized in trial procedures.⁴⁷⁾ The Supreme

43) Wu Ye, Kang, *The Study on Reliability and Admissibility of Social Scientific Evidence in Criminal Process* 34 Hanyang Law Rev. 199 (2017) at 200.

44) Supreme Court [S. Ct.], 83Do3146, Feb. 14, 1984 (S. Kor.); Supreme Court [S. Ct.], 2005Do130, May. 26, 2005 (S. Kor.), case on polygraph); Supreme Court [S. Ct.], 94Do1335, Sept. 13, 1994 (S. Kor.)

45) Wu Ye, Kang, *The Study on Reliability and Admissibility of Social Scientific Evidence in Criminal Process* 34 Hanyang Law Rev. 199 (2017) at 206.

46) Supreme Court [S. Ct.], 83Do712, Sept. 13, 1983 (S. Kor.), Wu Ye, Kang, *The Study on Reliability and Admissibility of Social Scientific Evidence in Criminal Process* 34 Hanyang Law Rev. 199 (2017) fn.39; Supreme Court [S. Ct.], 2008Do8486, Mar. 12, 2009 (S. Kor.), Wu Ye, Kang, *The Study on Reliability and Admissibility of Social Scientific Evidence in Criminal Process* 34 Hanyang Law Rev. 199 (2017) fn. 31.

47) Min-young, Choi and Jin, You, *A Study on Psychiatric Examination in the Criminal Justice System* Korean Institute of Criminology 1 (2017) at 311.

Court stipulates that the final judgment is based upon the discretion of the court by evaluating the relevant evidence such as the circumstances, means, and the defendant's behavior before and after the incident. It is expected that the significance of the social science expert testimony and its role in the criminal court would increase, whereas the conventional forensic scientific evidence and adoption of suspect's confession would play less important roles in the court.⁴⁸⁾

Specifically in syndrome evidence, psychologists and other social science experts, such as counselors and related professionals, contribute greatly to the trial. According to the study on sexual re-traumatization, the survey result indicates that 50% of adult rape victims have certain history of early life sexual victimization,⁴⁹⁾ and rates of PTSD were high and equivalent in the re-traumatized (75%) and adult sexual assault only(non-childhood) (70%) groups.⁵⁰⁾ Victims of the adult sexual assault suffered from extreme depression and were more likely to be alexithymic⁵¹⁾, showing high risk for dissociative disorders and attempted suicide.⁵²⁾

As more sexual crime cases are tried as jury trials in South Korea, it is crucial to utilize expert witnesses to educate juries in trials. According to the study on expert testimony and juries in the court, when the evidence is complex or does not clearly favor one side, jurors are more likely to use extra-legal factors.⁵³⁾ Because juries face challenges in effectively evaluating complicated scientific and technical evidence, it is important to

48) Soo Jung, Lee, *Korean Expert Testimony System in Criminal Cases: Limited to The Field of Psychology* 23 Korean Criminological Review 219 (2012) at 220.

49) Marylene Cloitre, et al., *Posttraumatic Stress Disorder, Self- and Interpersonal Dysfunction Among Sexually Retraumatized Women* 10 Journal of Traumatic Stress 437 (1997) at 437.

50) *Id.* at 447.

51) neuropsychological phenomenon expressing important difficulties in identifying and describing the experienced emotions by oneself or others.

52) Marylene Cloitre, et al., *Posttraumatic Stress Disorder, Self- and Interpersonal Dysfunction Among Sexually Retraumatized Women* 10 Journal of Traumatic Stress 437 (1997) at 447-48.

53) See generally, Min C. Kim, Steven D. Penrod, Legal decision making among Korean and American legal professionals and lay people, 38 International Journal of Law, Crime and Justice 175 (2010)

utilize expert testimony to educate Korean juries on complex evidence to prevent them from making biased legal decisions.⁵⁴⁾

2. Supreme Court case on Gender Sensitivity

Gender sensitivity⁵⁵⁾ refers to the attitude or inclination toward gender equality of a society, and government policy. According to the Supreme Court case in South Korea⁵⁶⁾, legal definition of sexual harassment is defined as, “verbal and physical behavior of sexual nature” under Article 3 Subparagraph 2 of the Framework Act on Gender Equality. In this specific case, the Court deliberates over determining the admissibility of a sexual harassment victim’s statement. The Court articulated that, “Sexual harassment cases ought to be resolved with gender sensitivity in striving for gender equality and better understanding of gender discrimination issues⁵⁷⁾ under the Article 5(1) of the Framework Act on Gender Equality). The Supreme Court further emphasized that⁵⁸⁾:

(a) sexual harassment victims are constantly insecure and afraid that they may be exposed to secondary victimization (also known as victim-blaming behavior or practice) upon having reported the incident and may be subjected to unfavorable treatment or suffer emotional distress; and, as such, (b) a victim remains silent and stays in contact with the offender (if the offender is a superior or holds a higher stature), or raises the issue together with other victims after a considerable time has passed, or tends to become passive when giving testimony.

54) *Id.*

55) In Korean, the term is translated as 성인지감수성. <https://eng.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=1178&mode=6&searchWord=>

56) Supreme Court Decision 2017Du74702 Decided April 12, 2018 **【Revocation of Decision of the Appeals Commission for Educators】**

57) Supreme Court Decision 2017Du74702 Decided April 12, 2018 **【Revocation of Decision of the Appeals Commission for Educators】**

58) Supreme Court Decision 2017Du74702 Decided April 12, 2018 **【Revocation of Decision of the Appeals Commission for Educators】**
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The Court determined that denying the admissibility of the victim's statement in the case of sexual assault would go against the justice and equity by further stating the Article 2 of the Equal Employment Opportunity and Work-Family Balance Assistance Act. As scholar Han stated in his article, justice can be furthered through adopting alternative legal theory that replaces currently dominant one, and this would eventually lead to resolving the existing anomalies:

"Once a dominant opinion or dominant legal theory is formed, it becomes normal jurisprudence ... However, a normal jurisprudence is disturbed when such anomalies or non-routine cases emerge and accumulate... and it finally replaces the existing dominant paradigm or dominant opinion and becomes the new dominant paradigm.⁵⁹⁾

V. Implications: Rape Myth and Effects of Expert Testimony in Criminal Court

It is crucial to understand the thought processes of the jurors when they are presented with the expert evidence and how the rape-myth affects this process. According to the research, the stronger the mock juror's belief in rape myth, the more likely they are to attribute blame to the alleged victim and the less likely they are to blame the defendant.⁶⁰⁾ Also, jurors tend to rely on schemas of rape myths in reaching the verdict when the stories of the victim are unclear or ambiguous.⁶¹⁾ It is consistent with the narrative construction process outlined in the story model, where the jurors tend to

59) See generally, Han, Sang Hoon, *Paradigm and the Changes of Law - a Perspective on Methodology of Korean Criminal Law* 158 Justice 240 (2017)

60) Nathan Ryan & Nina Westera, *The effect of expert witness testimony and complainant cognitive statements on mock jurors' perceptions of rape trial testimony* *Psychiatry, Psychology and Law* 693 (2018) at 694.

61) *Id.* at 695; See also, Ellison, L., & Munro, V. E., *Reacting to rape: Exploring mock jurors' assessments of complainant credibility* 49 *British Journal of Criminology* 202 (2009)

fill in the gap of evidence with their erroneous perceptions of rape myths and of what generally happens in a rape scenario.⁶²⁾

In a mock jury study conducted by Ellison and Munro's,⁶³⁾ juries participated in a mock trial where they were introduced to the expert witness' testimony with jury instruction or in the absence of the jury instruction. Jurors, after some time of deliberation, were required to answer a question list that addresses typical rape myths including delayed reporting, complainant's behaviors, and the victim's absence or lack of resistance.⁶⁴⁾ According to the qualitative analysis of the participants' responses, the results indicate that when jurors are exposed to the expert testimony, they were less likely to consider the factors of behaviors of the complainant and delayed reporting when making their decisions; thus, the expert testimony explaining her behavior were found to be effective in negating or neutralizing the lack of resistance in rape myths.⁶⁵⁾ The ratings of defendant blameworthiness increased when the mock jurors were exposed with both expert testimony and the complainant's explanations.⁶⁶⁾ Therefore, as the study indicates, jurors are likely to use the legal reasoning based on the 'legal meaning' of sexual assault when they are exposed to the expert's testimony and the complainant's statements.⁶⁷⁾

Sexism is a type of rape myth and it impedes the sexual assault case in affecting the participants in the trial. In cases of sexual assault in trust relationship, people tend to devalue the credibility of the statements made by the alleged victim and have stereotypes about specific gender that shapes the result of the trial. In our society, people have stereotypes toward the nature of men and women's behaviors in sexual relationships

62) *Id.* at 701.

63) *See generally*, Louise, Ellison & Vanessa, E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility* 49 *The British Journal of Criminology* 202 (2009)

64) *Id.*

65) Nathan Ryan & Nina Westera, *The effect of expert witness testimony and complainant cognitive statements on mock jurors' perceptions of rape trial testimony* *Psychiatry, Psychology and Law* 693 (2018) at 696.

66) *Id.* at 696.

67) *Id.* at 701.

and incorporate the biased thoughts to fill up the extra evidence in reaching their decisions. For instance, how the victim should have behaved before the rape, after the rape, or even during the rape. People with rape myths tend to assume that when woman says, “no,” it means “yes” because they think woman implicitly says “yes” by saying “no.” Other examples given by DelTufo include the following:⁶⁸⁾

Women are asking for sexual intercourse when they wear revealing clothes and go to bars or walk down the street late at night; if women say “yes” once, there is no reason to believe her “no” the next time; women who visit the house of a man on the first date implies that she is ready for the physical relationship; men are justified in forcible sex on women who make him sexually excited; women often derive pleasure from victimization; women falsely claim rape motivated by revenge, blackmail, embarrassment or jealousy.

The frame of rape myth also include the relationship between the utmost resistance and women’s fabricated accusations on rape.⁶⁹⁾ People believe that the degree of resistance is a major concern in deciding whether the false rape charge is present or not.⁷⁰⁾ Rape myths are primarily accepted in the society, though proven inaccurate by prior research and data, because the myths are the product of conventional and patriarchal notions of gender that has been deeply rooted in our society, and even judges and juries would subconsciously perceive the case of sexual assault with belief in the rape myths.

Particularly, juries bring with them basic premises with which to interpret facts and attribute blame, they are largely impacted by the rape myths. In acquaintance rape cases, the danger of rape myths influences the

68) Kara M. DelTufo, *Resisting “Utmost Resistance”: Using Rape Trauma Syndrome to Combat Underlying Rape Myths Influencing Acquaintance Rape Trials*, 22 B.C. Third World L.J. 419 (2002) at 427.

69) *Id.* at 424.

70) *Id.* at 420, 427.

outcome of trial much more, especially when there is no clear distinction of rape survivor with little corroborative evidence.⁷¹⁾ Thus, jurors come down to determine which side's story is more believable, and in doing so, they process information within the structure of their own beliefs, values, prejudices, and bias.⁷²⁾ As human's memory is malleable, they subconsciously continue to maintain the consistency of their memories, and when there are gaps in the evidence provided as in the issue of consent or rape dispute, people tend to reconcile the discrepancy of evidence with their own beliefs in rape myths in interpreting and assessing the case resources.⁷³⁾

According to one study about the typical instances of rape myths, alleged victim's clothing or absence of her clothing is an important indicator of consent to the sexual intercourse, inferring that the blame for rape lies with the victim rather than the perpetrator.⁷⁴⁾ In fact, a number of cases indicated a significant wrongful perception of rape myth regarding the absence of women's clothes. In *Montana v. Smith*⁷⁵⁾, the Montana Supreme Court noted that, "the defendant testified that the sexual contact was encouraged by the dress and behavior" of the 15 year old girl who visited the defendant's house to babysit his children.⁷⁶⁾ In *Ford v. State*⁷⁷⁾, a man convicted of rape appealed a trial court's decision in not allowing the evidence of "the victim wearing sexually suggestive clothing" to show her consent to sexual relationship.⁷⁸⁾ Surprisingly, in 1989 Florida case, the

71) Kara M. DelTufo, *Resisting "Utmost Resistance": Using Rape Trauma Syndrome to Combat Underlying Rape Myths Influencing Acquaintance Rape Trials*, 22 B.C. Third World L.J. 419 (2002) at 428.

72) *Id.*

73) Kara M. DelTufo, *Resisting "Utmost Resistance": Using Rape Trauma Syndrome to Combat Underlying Rape Myths Influencing Acquaintance Rape Trials*, 22 B.C. Third World L.J. 419 (2002) at 428.

74) Temkin, Jennifer et al., *Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study* 13 Feminist Criminology 205 (2018) at 216.

75) 576 P.2d 1110 (Mont. 1978)

76) *Id.* at 1110-11; Theresa L. Lennon, et al., *Is Clothing Probative of Attitude or Intent - Implications for Rape and Sexual Harassment Cases*, 11 Law & Ineq. 391 (1993) at 393.

77) 376 S.E.2d 418, 419 (Ga. Ct. App. 1988)

78) Theresa L. Lennon, Sharron J. Lennon & Kim K. Johnson, *Is Clothing Probative of Attitude or Intent - Implications for Rape and Sexual Harassment Cases*, 11(2) Law

victim's clothing was not only permitted as an evidence, but it was a crucial piece of the defense argument.⁷⁹⁾

In one study, with the statement of 'bare bottom' and 'blameworthiness', the jury was also plainly being invited to conclude that even if the alleged victim was telling the truth about the rape, she had only herself to blame for what had happened.⁸⁰⁾ Thus, expert testimony of RTS would effectively challenge the rape myths and could possibly educate the judge, juries, and defense counselors in providing alternative ideological framework to treat the case of rape. Social scientists have also conducted a research to see if the average jurors are generally aware of the effects of rape, and what kind of influence the expert could render on the jury's understanding of the subject. One study administered an 18 set of questions on sexual assault to two groups of experts: rape and PTSD experts.⁸¹⁾

Answers from the expert group were compared to the responses from non-expert group that are consisted of students and university staff workers. Replies from non-expert group scored significantly lower on the questions than did the expert group, which means that the participants from the non-expert group were not aware of the changes in rape victim's behavior post-assault.⁸²⁾ Result of the research suggests that jury often need to be informed of the subject to better comprehend the presented evidence and context of the crime and post-crime effects on the victims.

According to Deer's research participants, who were informed of more detailed expert evidence regarding the case were more likely to provide a guilty verdict than those who received less comprehensive expert testimony.⁸³⁾ Additionally, he diagnosed the impact of the "thoroughness of expert testimony" and the participants' perception of the likelihood that the rape

& Ineq. 391 (1993) at 393.

79) *Id.* at 393-94.

80) Temkin, Jennifer et al., *Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study* 13 Feminist Criminology 205 (2018) at 216.

81) Giannelli, Paul C., *Rape Trauma Syndrome*, Faculty Publications 270 (1997) at 273.

82) *Id.* at 273.

83) Deer, LillyBelle K., *The Effects of Expert Testimony in Sexual Assault Trials*, CMC paper (2015) at 22.

occurred.⁸⁴⁾ As a result, there was a major effect of the detailed testimony on the perceived likelihood that the assault occurred. For example, participants who received Level 4 of detailed expert testimony (higher the level, more detailed the testimony) conceived the likelihood of the rape was higher than participants who received Level 2 testimony.⁸⁵⁾ The study suggests that the more detailed the testimony, the more likely they were to consider and weigh the expert testimony in reaching their verdicts.⁸⁶⁾

The psychological reactions of rape victims have been the subject of behavioral and psychological studies in the U.S. for almost several decades and many legal and non-legal scholars have intensively worked on interdisciplinary research to examine the symptoms of RTS and relationship between the expert testimony on psychological syndrome evidence and the juror's verdict in criminal court. When the RTS-related expert testimony gets admitted into trial, jurors may make more rational and less biased decisions in reaching their verdict.

Because lay citizens are often influenced by the "rape myths" that may give them misinformed notions on the sexual crimes, they are in vulnerable position to have false impressions on the victim's unreasonable behaviors after the rape. Therefore, the author emphasizes a major need for various expert witnesses in criminal trials, where psychological syndrome issues are involved. The article also attempts to suggest more broad acceptance in choosing the qualified experts by emphasizing the effects of various types of expert testimonies on the juries, that have been scrutinized throughout the article. Lastly, as courts articulated in RTS cases, if the prosecution provides rape trauma syndrome evidence, then as a matter of fairness, the defense should also have right to have his or her expert examine the complainant.⁸⁷⁾ Also, more empirical studies on the relationship between the

84) *Id.*

85) *Id.* at 23.

86) Deer, LillyBelle K., *The Effects of Expert Testimony in Sexual Assault Trials*, CMC paper (2015) at 23.

87) See generally, Frazier & Borgida, *Juror common understanding and the admissibility of rape trauma syndrome evidence in court* 12 Law and Human Behavior 101 (1988)

expert testimony in non-science field and jury's decision making shall be conducted to draft appropriate jury instructions on syndrome evidence in court.

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[Abstract]

Comparative Studies on Rape Trauma Syndrome Evidence in Criminal Court and Its Implications*

Gina S. Rhee**

As more sexual crime cases are tried by juries in South Korea, the importance of expert witnesses in educating and informing the juries substantially increases as well. Many legal and non-legal scholars have intensively worked on interdisciplinary research to examine the symptoms of Rape Trauma Syndrome (“RTS”) and its relationship between the expert testimony on psychological syndrome evidence and the juror’s verdict in criminal court. Not surprisingly, initial studies on RTS victims have consistently shown that many rape victims suffer from severe psychological symptoms for at least a couple of months post-rape and they further experience severe long-term symptoms. Moreover, the studies infer that when the RTS-related expert testimony gets admitted in court, jurors make more rational and less biased decisions in reaching their verdict. Because lay citizens are likely to be affected by the “rape myths” that may give them misinformed notions on the sexual crimes, they are in vulnerable position to have false impressions on the victim’s unreasonable post-rape behaviors. Therefore, the author emphasizes a major need for various expert witnesses in criminal trials, where psychological syndrome issues are involved. By examining several cases focused on the U.S., where non-scientists have testified in court as expert witnesses, the author proposes more active utilization of expert testimony in the field of social science to eradicate the widespread rape myths and social biases toward the victims in sexual crimes. The author further suggests broader acceptance in choosing qualified experts in the field of social science in criminal jury trials.

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