

Cold Case Alcohol- and Drug-Facilitated Sexual Assault¹

Cases of alcohol- and drug-facilitated sexual assault pose challenges for investigators and prosecutors because of the complex issues involved; these issues include toxicology, capacity to consent, overcoming a consent defense, offender conduct, victim responses to trauma, and probative evidence of the crime. In the past, these challenges often led to minimal investigation or even claims that an assault did not occur. As a result, many of these incidents became cold cases and are now being reopened following the testing of previously unsubmitted sexual assault kits.

This brief examines the issues and evidence that investigators and prosecutors may encounter in cold case prosecutions involving alcohol- and/or drug-facilitated sexual assault; this document also offers strategies for overcoming common trial challenges—particularly, ways of explaining evidence to the jury that pertain to toxicology, consent, self-blame, victim responses, and offender behavior.² The renewed investigation and evidence presented at trial should focus on more than the acts committed during the assault; investigators should also focus on

- ◆ the circumstances surrounding the assault,
- ◆ the offender's premeditation and intentional use of alcohol and/or drugs to commit the crime, and
- ◆ the offender's role in contributing to the victim's reactions and behavior in the wake of the assault.

Toxicology

Offenders use alcohol as a means of perpetrating sexual assault far more often than other drugs.³ Alcohol progressively impairs cognitive functions and abilities.⁴ Multiple factors impact alcohol absorption; these factors include⁵ body size, prior food consumption, amount of alcohol by volume, duration of drinking, level of fatigue, personal tolerance, and the presence of any other drugs in the system.

Blood alcohol content (BAC) is likely to be much higher in females (potentially more than double) than in males, even when a male and female have ingested identical quantities of alcohol.⁶ Females tend to have a lower proportion of muscle,⁷ a higher proportion of fat, and less water in their bodies compared to males; for these reasons, females

have a higher BAC than males.⁸ With these differences in mind, law enforcement personnel should try to determine (or approximate as closely as possible) the offender's and victim's height and weight at the time of the offense because body mass is subject to change over time. If both parties were drinking at the time of the assault, evidence of the relative size of each party may show that the female victim's level of intoxication may have been significantly higher than that of the male assailant.*

The impact of drugs on the central nervous system can be similar to that of alcohol (depending on the drug); however, drugs can act much more quickly and with greater potency than alcohol. The synergistic effects of alcohol and drugs can make an individual even more vulnerable to a sexual assault.⁹ The window for detection is small because drugs can metabolize rapidly and are quickly eliminated from the body.¹⁰ Therefore, the absence of drugs in a victim's system, even hours later, does not mean that a drug was not used to commit the sexual assault.

At trial, a qualified toxicologist can provide expert testimony about relevant information related to the assault, including

- ◆ BAC,
- ◆ detection of drugs or alcohol in the victim's system,
- ◆ visible signs of intoxication,
- ◆ effects of drugs commonly used in sexual assault, and
- ◆ differences between a "blackout" and "passing out."^{11,12}

Capacity to Consent

Alcohol-facilitated sexual assault is most often prosecuted under one of two theories, depending on how the crime is statutorily defined: (1) The victim was unconscious when the assault occurred or (2) the victim was too intoxicated to provide valid consent.¹³ Both statutes address cases in which a victim had willingly consumed alcohol, or by surreptitious administration or coercion. Of course, intoxication (as a result of voluntary or involuntary alcohol consumption on the victim's part) does not preclude prosecution for

*Although this paragraph primarily focuses on a female victim's BAC compared to a male assailant's BAC, we recognize that both males and females can be the victims of assault at the hands of male or female perpetrators; therefore, alcohol should be considered as just one of many factors in sexual assault cases.

forcible assault where the evidence and the law support such prosecution.¹⁴

An unconscious victim cannot factually or legally consent to a sexual act. Alcohol-induced unconsciousness is sometimes referred to as “passing out” or a blackout.¹⁵ In such cases, the prosecution must prove that a sexual act occurred while the victim was unconscious (i.e., asleep or passed out).¹⁶ In some jurisdictions, a victim who drifts in and out of unconsciousness is considered to be unconscious for purposes of the statute.¹⁷

In some jurisdictions, the prosecution may need to prove that the defendant knew (or should have known) that the victim was too intoxicated to consent.¹⁸ Many victims in such cases have difficulty recalling events or have incomplete memories.¹⁹ A blackout (e.g., loss of memory due to intoxication or drugs) differs from unconsciousness.²⁰ Generally speaking, a person experiencing a blackout, although conscious, may display visible signs of gross intoxication and will be drowsy or sleepy. These visible signs can be used as evidence to show not only that the victim was too intoxicated to consent, but that the offender knew that to be the case. When taking a fresh look at these cases, it is also important to note recent (2016) research conducted by Heather Flowe, et al. This research found that many victims retain their memory of the core details of the assault but will have trouble remembering the peripheral details.²¹ Investigators may be able to locate persons who saw the victim or offender immediately before or after the assault. Although corroborating witnesses are undoubtedly helpful, such corroboration generally is not essential to prosecuting and proving the case.²²

Offender Behavior

Perpetrators who know their victims rarely need to use traditional weapons to commit sexual assault. Instead, these perpetrators weaponize tactics such as careful planning, manipulation, deceit, and betrayal of the victim’s trust. Most notably, many employ alcohol to commit sexual assault.²³ Alcohol is often the weapon of choice because it is easily accessible, culturally normative, and highly potent.²⁴

Whether or not sexual assault victims voluntarily consumed alcohol, perpetrators often try to shift the focus of an investigation or a trial off of their behavior and redirect attention to the victim’s behavior. The victim’s use of alcohol will be portrayed as the height of personal irresponsibility, which enables the offender to suggest that the victim invited or deserved whatever happened while being intoxicated. The prosecution must consider whether the offender coerced the victim to consume alcohol. What appears “voluntary” may be a result of the suspect’s repeated urging or even a threat to leave the victim.

On the other hand, perpetrators who consumed alcohol themselves will seek to use the slightest impairment on their part as a means to avoid responsibility. Instead, they will portray themselves as unsophisticated, hapless (but basically decent) people who made—at worst—a poor (but understandable and excusable) judgment call while under the influence.²⁵ Focusing on offender conduct is consequently important; evidence of signed bar tabs, interaction with others, or playing games (e.g., pool, darts) may offer proof of minimal impairment. Contacting the offender’s former associates or colleagues as part of a cold case investigation can also yield significant information about the offender’s level of sobriety.

At trial, the defense team may challenge the victim’s credibility by questioning his/her reactions to the assault. Such reactions (including emotional difficulties, substance abuse, and memory problems) are the direct result of the assault and are properly attributable to the actions of the offender, who also stands to benefit directly from them.²⁶ The prosecution should convey to jurors the offender’s responsibility for reactions and behavior attributable to the assault; this approach helps jurors understand why the offender assaulted someone who was intoxicated, and/or how and why the offender sought to cause these behaviors.

When an alcohol-facilitated sexual assault becomes a cold case, an offender may feel untouchable, having escaped responsibility for months or years. Investigators should anticipate that the opening or reopening of the case will revive the perpetrator’s attempts to paint the victim as blameworthy and therefore less credible. Those efforts may include fabricating or embellishing details that other evidence can disprove.

During a cold case investigation, witnesses may recall additional details not previously disclosed; this newfound information can refute defense assertions and/or corroborate the prosecution’s theory of the case. The current investigation should include a search for other (possibly similar) crimes the perpetrator may have committed that may provide a source of 404(b) evidence to reveal predatory planning.²⁷ Interviewing people in the offender’s social circle may uncover reports of the offender boasting to others about the assault under investigation or similar crimes committed while a victim was intoxicated. In certain cases, a pretext phone call may also be an appropriate investigatory tool.²⁸

Victim Responses

Sexual assault victims experience individualized reactions during, and in the aftermath of, the assault; this is true no matter the type of sexual assault (e.g., alcohol-facilitated, drug-facilitated, no alcohol or drugs involved). During the

assault, victims may “freeze” (i.e., not physically resist the offender) as a result of shock, fear, and/or trauma.²⁹ Some victim responses, such as self-blame for voluntary ingestion of alcohol or drugs,³⁰ are often more common in alcohol-facilitated assault cases.

Sexual assault victims frequently do not report crimes.³¹ Victims of alcohol- and drug-facilitated rapes are least likely to report the assault to authorities.³² The reasons for not reporting may include feelings of shame and embarrassment, a sense of disbelief, failure to self-identify as a rape victim,³³ self-blame, feelings of guilt about certain behavior, concerns about getting the perpetrator “in trouble,” inability to recall details, the possibility of the victim’s future contact with the offender, the desire for life to return to normal, and fear of being treated poorly by law enforcement officials.³⁴

If not adequately explained at trial, many of the victim’s behaviors and reactions may be misunderstood. As a result, some individuals may view such behaviors and reactions as undermining the victim’s credibility or as an indication that the victim consented.³⁵ One strategy is for prosecutors to present expert testimony to explain the range of varying responses victims may have to the trauma of sexual assault. The expert should testify in general terms, without having met with the victim or reviewed discovery,** and without opining about the victim’s credibility or whether the victim was assaulted.³⁶ Specific credentials are not necessary; an individual may qualify as an expert based on professional experience working with victims of alcohol- and drug-facilitated sexual assault, as well as familiarity with relevant studies and literature. Desirable expert qualifications include clinical experience, direct victim service, education and/or training, knowledge of relevant articles, authorship of articles, and prior qualification as an expert on victim behavior in criminal or civil court.

Conclusion

Perpetrators of alcohol- and drug-facilitated sexual assault rely on several individuals (including those within the criminal justice system, jurors, and even the victim) to blame the attack on the victim. Cold cases should not discourage investigators and prosecutors from pressing forward. A renewed investigation will likely reveal evidence that was not understood fully at the time of the initial report or is newly discovered.

Prosecutors must present evidence that focuses on the facts and contextual information surrounding the crime, show

evidence of the offender’s premeditation and knowledge of the victim’s condition around the time of the assault, and plan for relevant experts to testify on toxicology and victim responses to trauma. By following these suggestions from the SAKI TTA Team and collaborators, prosecutors can present an offender-focused case that allows jurors to engage in informed deliberations to arrive at a just verdict.

References:

1. Significant portions of this article were adapted from Kristiansson, V. (2016). Prosecuting alcohol-facilitated sexual assault: A substantive article for allied professionals. *Sexual Assault Report*, 20(2), 17–36.
2. Many of these issues and strategies will be equally applicable in non-cold-case sexual assault prosecutions. Throughout this article, examples of rules of evidence, statutes, and case law are included in the footnotes, using legal examples from only a few jurisdictions in order to keep the resource more streamlined. Those jurisdictions include Ohio, West Virginia, Pennsylvania, and New Jersey. For more information about statutes across the nation addressing alcohol- or drug-facilitated sexual assault, contact AEquitas.
3. “If recreational drugs were tools, alcohol would be a sledgehammer.” White, A. M. (2003). What happened? Alcohol, memory blackouts and the brain, *Alcohol Research and Health*, 27(2), 186; and Abbey, A., Zawacki, T., Buck, P. O., Clinton, A. M., & McAuslan, P. (2001). Alcohol and sexual assault. *Alcohol Research & Health*, 25(1), 43–51.
4. *Id.*
5. See, e.g., American Prosecutors Research Institute. (2003). Alcohol toxicology for prosecutors: Targeting hardcore impaired drivers. Alexandria, VA: Author. Retrieved from http://www.ndaa.org/pdf/toxicology_final.pdf; and Scalzo, T. (2007, Aug.). Prosecuting alcohol-facilitated sexual assault. Alexandria, VA: National District Attorneys Association, American Prosecutors Research Institute. Retrieved from http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf.
6. National Institute on Alcohol Abuse and Alcoholism. (1990, Oct.). *Alcohol alert: Alcohol and women*. No. 10 PH 290. Retrieved from <http://pubs.niaaa.nih.gov/publications/aa10.htm>; and Frezza, M., di Padova, C., Pozzato, G., Terpin, M., Baraona, E., & Lieber, C. S. (1990). High blood alcohol levels in women—The role of decreased gastric alcohol dehydrogenase activity and first-pass metabolism. *New England Journal of Medicine*, 322(2), 95–99.
7. *Id.*
8. *Id.*
9. Kerrigan, S. (2010, January). The use of alcohol to facilitate sexual assault. *Forensic Science Review*, 22(1), 15–32. See also University Health Service, University of Michigan. (n.d.). The effects of combining alcohol with other drugs [Web page]. Retrieved from <https://uhs.umich.edu/combine>. Accessed August 23, 2016.
10. LeBeau, M.A., & Montgomery, M. A. (2010). Challenges of drug-facilitated sexual assault, *Forensic Science Review*, 22(1), 1–6.
11. White, 2003.
12. For additional information about alcohol-facilitated sexual assault, see Scalzo, 2007.
13. See, e.g., 18 Pa. Cons. Stat. Ann. § 3121(a)(3) “(a) Offense defined.—A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant: . . . (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.” The two theories are not necessarily mutually exclusive, as a victim may have been too intoxicated to consent at one or more points in time during the incident, and unconscious at other points in time. See also Long, J., Whitman-Barr, C., & Kristiansson, V. (2016, August). *Alcohol and drug-facilitated sexual assault: A survey of the law*. Statutes in Review. Washington, DC: AEquitas. Retrieved from http://www.aequitasresource.org/Alcohol-Facilitated-Sexual-Assault-A-Survey-of-the-Law_SIR1.pdf.

**A process that starts at the beginning of the case and continues up until the trial. During discovery, the prosecution must provide the defendant copies of evidence and information that will be used at trial.

14. Other theories may also apply where a victim is voluntarily intoxicated. Contact AEquitas to discuss theories and legal analysis for specific jurisdictions.
15. Sedation occurs when the central nervous system has been depressed, and resembles the state of sedation associated with surgery.
16. In addition, a sleeping victim who awoke to the act of penetration is deemed incapable of appraising the conduct. *Platt v People* (en banc), 201 P.3d 545, 547 (Colo. 2009) (specifically analyzing the application of the prong of the statute criminalizing penetration where “[t]he actor knows that the victim is incapable of appraising the nature of the victim’s conduct,” Colo. Rev. Stat. Ann. § 18-3-402(1)(b)). See also *Commonwealth v. Erney*, 548 Pa. 467 (1997).
17. Intermittent unconsciousness is sufficient to establish unconsciousness for purpose of the statute. Long, J., Whitman-Barr, C., & Kristiansson, V., *supra* note 13, citing *Commonwealth v. Erney*, 548 Pa. 467 (1997).
18. See, e.g., La. Rev. Stat. Ann. § 14:43(A)(1); Ohio Rev. Code Ann. § 2907.02(a)(1); Va. Code Ann. § 18.2-67.10(3-4). Some jurisdictions have statutes addressing sexual assault where the perpetrator caused the victim’s intoxication through surreptitious or deceptive means. See, e.g., N.J. Stat. Ann. § 2C:14-1(i); 18 Pa. Cons. Stat. Ann. § 3121(a)(4); W.Va. Code Ann. § 61-8b-1(4). Such statutes do not preclude prosecution for sexual assault of a voluntarily intoxicated victim. Long, J., Whitman-Barr, C., & Kristiansson, V., *supra* note 13. See also Attardo, M. A., *Defense of Mistake of Fact as to Victim’s Consent in Rape Prosecution*, 102 A.L.R.5th 447 (2002). Please contact AEquitas for further discussion and assistance with mistake of fact defenses.
19. Flowe, H. D., Takarangi, M. K., Humphries, J. E., & Wright, D. S. (2016). Alcohol and remembering a hypothetical sexual assault: Can people who were under the influence of alcohol during the event provide accurate testimony? *Memory*, 24(8), 1042–1061.
20. White, 2003; Scalzo, 2007.
21. *Id.*
22. See, e.g., (Crim) Conviction Based on Victim’s Uncorroborated Testimony in Sexual Offenses – General, PA-JICRIM 4.13B (2016) (“The testimony of [name of victim] standing alone, if believed by you, is sufficient proof upon which to find the defendant guilty in this case. The testimony of the victim in a case such as this need not be supported by other evidence to sustain a conviction. Thus you may find the defendant guilty if the testimony of [name of victim] convinces you beyond a reasonable doubt that the defendant is guilty.”). But see also, e.g., *Uniform Crime Charging Standards*, California District Attorneys Association 14 (2004) (requiring additional witnesses to provide “significant information consistent with the victim’s account of what took place”).
23. Between 2005 and 2010, “victim[s] reported that the offender possessed or used a weapon in 11% of all sexual assaults”—6% used a gun, and 4% used a knife. Planty, M., & Langton, L. (2013). *Female Victims of Sexual Assault 1994–2010*. Washington, DC: Bureau of Justice Statistics. Retrieved from <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>. “86% of victims reported the use of physical force only, and 7% were unsure.” (2000 NCVS). Abbey, A., & Guy Ortiz, L., *Alcohol and Sexual Violence Perpetration*, VAWnet.org (2011), http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=1586. Accessed August 18, 2016.
24. Scalzo, 2007; and Abbey et al., 2001.
25. “Federal statistical series obtaining data on arrested or convicted persons show a remarkable similarity in the characteristics of those categorized as rapists: 99 in 100 are male, 6 in 10 are white, and the average age is the early thirties.” Greenfeld, L. A. (1997). *Sex offenses and offenders: An analysis of data on rape and sexual assault*. Washington, DC: Bureau of Justice Statistics. Retrieved from <http://bjs.gov/content/pub/pdf/SOO.PDF>. “Though the vast majority of violent sex offending involves males assaulting female victims, females account for a small percentage of known offenders, and males account for a small percentage of victims. In a very small fraction of sexual assaults, victim and offender are of the same sex.” *Id.* At iii.
26. *Id.*
27. AEquitas. (2017). Evidence of other “bad acts” in intimate partner violence, sexual violence, stalking, and human trafficking prosecutions, *Strategies in Brief*, 31. Retrieved from <http://www.aequitasresource.org/Evidence-of-Other-Bad-Acts--In-Intimate-Partner-Violence-Sexual-Violence-Stalking-and-Human-Trafficking-Prosecutions-SIB31v2.pdf>.
28. See International Associations of Chiefs of Police. (2004). *Training Key #574: Pretext Phone calls in sexual assault investigations*. Retrieved from <http://www.theiacp.org/portals/0/pdfs/574PretextPhoneCalls.pdf>. See also Sexual Violence Justice Institute, MN Coalition Against Sexual Assault. (n.d.). Pretext or covert call. *Sexual Assault Investigation Ideas: A Series of the Sexual Violence Justice Institute*. Retrieved from <http://www.mncasa.org/assets/PDFs/website%20pretext%20call.pdf>.
29. American Psychological Association. (n.d.). Trauma [Web page]. Retrieved from <http://www.apa.org/topics/trauma/index.aspx>. Accessed August 18, 2016.
30. Cohn, A. M., Zinzow, H. M., Resnick, H. S. & Kilpatrick, D. G. (2013). Correlates of reasons for not reporting rape to police: Results from a national telephone household probability sample of women with forcible or drug-or-alcohol facilitated/incapacitated rape. *Journal of Interpersonal Violence*, 28(3), 455–473 (citing Abbey et al., 2001).
31. Cohn, A., *supra* note 30.
32. Cohn, A., *supra* note 30; see also Kilpatrick, D. G., Resnick, H. S., Ruggiero, K. J., Conoscenti, L. M., & McCauley, J. (2007). Drug-facilitated, incapacitated, and forcible rape: A national study. *Medical University of South Carolina*. <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>
33. Fisher, B. S., Cullen, F. T., & Turner, M. G. (2000). *The sexual victimization of college women*. Washington, DC: National Institute of Justice and Bureau of Justice Statistics. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>
34. “It can take more resolve to come forward in a case where a victim has engaged in behavior that others may judge.” Patterson, D., & Campbell, R. (2010). Why rape survivors participate in the criminal justice system. *Journal of Community Psychology*, 38(2), 191–192. See also Maryland Coalition Against Sexual Assault. (n.d.). Reporting sexual assault: Why survivors often don’t [Fact sheet]. Retrieved from <https://ocrsm.umd.edu/files/Why-Is-Sexual-Assault-Under-Reported.pdf>.
35. See, e.g., Ellison, L., & Munro, V. (2009). Complainant credibility & general expert witness testimony in rape trials: Exploring and influencing mock juror perceptions. University of Leeds, University of Nottingham. Retrieved from <http://www.law.leeds.ac.uk/assets/files/staff/exploring-the-impact-of-expert-testimony.pdf>. See also Wenger, A. A., & Bornstein, B. H. (2006). The effects of victim’s substance use and relationship closeness on mock jurors’ judgements in an acquaintance rape case. *Sex Roles*, 54, 547–555.
36. Long, J. G., Kristiansson, V., & Mallios, C. (2013, May). When and how: Admitting expert testimony on victim behavior in sexual assault cases in Pennsylvania, *Strategies in Brief*, 18. Retrieved from http://www.ncdsv.org/images/AEquitas_When-and-How-Admitting-Expert-Testimony-on-Victim-Behavior-in-PA-Issue-18_5-2013.pdf. Experts should also avoid in-depth testimony about the neurobiology of trauma, which focuses on the chemical changes that occur in the brain as a result of trauma. Traumatic memory is different from ordinary memory. Further, memory loss can be a natural survival skill and a coping mechanism for psychological harm suffered. See Campbell, R., (2012, December 3). *Transcript “The Neurobiology of Sexual Assault.”* National Institute of Justice for the Real World Seminar. Retrieved from <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/presenter-campbell-transcript.aspx>. Testimony regarding the neurobiology of trauma is beyond the expertise of most witnesses. This testimony may be construed as crossing the line that prohibits testimony about credibility, and it may also invite a “battle of the experts.”

37. This article is dedicated to Teresa P. Scalzo, JD, formerly Deputy Director, Trial Counsel Assistance Program, U.S. Navy. Ms. Scalzo is the author of *Prosecuting alcohol-facilitated sexual assault*, a 2007 publication of the National District Attorneys Association. Additional acknowledgments for their significant contributions go to Marc LeBeau, Chief, Toxicology Lab, Federal Bureau of Investigation; Jennifer M. Sommers, Special Assistant Attorney General, New York; and AEquitas attorneys Jennifer Long (CEO), Jane Anderson, and Charlene Whitman-Barr.

Author:

AEquitas, The Prosecutors' Resource on Violence Against Women³⁷