

# Alcohol Facilitated Sexual Assault

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# Introduction of the Issue

# What the presentation will cover?

- The Effect of Alcohol on Victims
- Making the Charging Decision
  - Federal Statutes
- Analyzing Credibility and Corroboration
- Trying the Case/Offender-Focused
  - FRE 412 and 413
  - Cross examining the D
  - Jury Selection
- Q & A

# How Common is AFSA?

- Due to low reporting of SA, it is difficult to arrive at a definitive statistic
- Anecdotal evidence indicates majority of cases of SA being reported to LE involve alcohol use by V +/-or D
- Researchers find approx 50% of SA involve alcohol
- Crowell and Burgess suggest that alcohol involved in up to 75% of acquaintance rapes

# New nail polish may prevent date rape

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**RALEIGH, N.C.** — Undergraduates at [North Carolina State University](#) are being credited with creating a new kind of nail polish.

The polish doubles as a way to prevent sexual assault, according to the [Triangle Business Journal](#), the nail polish changes color when the person wearing it is exposed to date rape drugs.

So, how does it work?

The person wearing the nail polish has to use their finger to stir their drink. If the drink has a date rape drug in it, the nail polish will change colors.

The [Washington Post](#) reports, 55% of about 1,570 colleges and universities with more

# Potential Barriers to Prosecution

- Use of alcohol common in society
- Jurors may question whether D did rape or just had consensual, albeit drunken, sex with V
- Jurors may view a voluntarily intoxicated V with skepticism or dislike
- Physical manifestations of alcohol
  - Decrease inhibitions
  - Impair perception
  - May be unable to remember details of assault

# Overview of Toxicology

- Alcohol is a central nervous system depressant
  - Alcohol impairs both cognition (the process of knowing, thinking, learning and judging) and psychomotor skills (voluntary movement).
  - Alcohol first affects the most recently developed parts of the brain, which are responsible for judgment, inhibition, personality, intellectual, and emotional states.
  - As alcohol concentration increases, the impairment of psychomotor functions like muscle coordination increases
  - Eventually involuntary movement, like respiration, is affected – leading to possible coma or death

# Victims using alcohol.....

- May be less likely than sober victims to realize that the D is trying to sexually assault them
- D's may not need to be as physically forceful with extremely intoxicated Vs because less force is required to subdue them
- The desirable effect of alcohol to a sex offender is its similarity to therapeutic and abused drugs such as tranquilizers, narcotics, and sedatives.
- Alcohol is typically legal and readily available



# How Drunk Does the V Have to Be?

- Generally no bright-line test
- Analyzing Consent and Distinguishing Rape from Drunken Sex:
  - Why is the type of rape alleged?
  - How drunk was the V?
  - Is there a motive to lie?
  - What are the time and circumstances of the report
  - What was the V's physical condition?
  - Was the V injured?
  - Where did the incident happen?
  - Was there prior interaction between the V and the D?

# Analyzing D's Predatory Behavior

- Did the D use force or threaten the V?
- Did the V say “no”?
- What was D's level of intoxication?
- Was there any planning or manipulation on the part of the D?
- Is there evidence of grooming?
- Did the prey upon the V's vulnerabilities?
- Has the D done it before?
- Did the D know the V?

# Understanding Trauma

# Step 1: Making the Charging Decision

- What is the prosecutor's theory of the case?
  - Intercourse with a V without consent by using force or the threat of force?
    - Intoxication only relevant to V's credibility and vulnerability
  - V unconscious at the time of the rape and could not consent
  - V too intoxicated to consent
    - Will need to be able to show V's level of intoxication
- Moral rape v. legal definition of rape

# Sexual Abuse Statutes

## Federal Code/Chapter 109A

- Aggravated Sexual Abuse – 18 U.S.C . § 2241
- Sexual Abuse -- 18 U.S.C . § 2242
- Sexual Abuse of a Minor or Ward -- 18 U.S.C . § 2243
- Abusive Sexual Contact -- 18 U.S.C . § 2244
- Sexual Abuse Resulting in Death -- 18 U.S.C . § 2245

# Sexual Abuse Definitions 18 U.S.C. § 2246

- Sexual act =
  - Penis/vulva, penis/anus – penetration however slight
  - Mouth/penis, mouth/vulva, mouth/anus
  - Anal or genital opening by hand or finger or any object, penetration however slight, with an intent to abuse humiliate, harass, degrade or arouse or gratify the sexual desire of any person
  - The intentional touching, **not through the clothing**, of the genitalia of another person who has not attained the age of 16 years with an **intent** to abuse humiliate, harass, degrade or arouse or gratify the sexual desire of any person
- Sexual Contact =
  - Intentional touching, **either directly or through the clothing** of genitalia, anus, groin, breast, inner thigh or buttocks of any person with an **intent** to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person

# Sexual Abuse - 18 U.S.C. § 2242

- It is a federal crime to knowingly (or attempt) to:
  - Cause another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
  - Engages in a sexual act with another person if that other person is –
    - Incapable of appraising the nature of the conduct; or
    - Physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;
- Sentence = any terms of years or for life

# 8<sup>th</sup> Circuit and Proof of “Knowing”

- *United States v. Bruguier*, 735 F.3d 754 (8<sup>th</sup> Cir. 2013)
  - The issue before us is whether “knowingly” in [section 2242\(2\)](#) requires only that Bruguier knowingly engaged in a sexual act with Stricker, or whether it also requires that Bruguier knew Stricker was “incapable of appraising the nature of the conduct” or “physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.” [§ 2242\(2\)](#). This is an issue of first impression for this Court.



# Abusive Sexual Contact

## 18 U.S.C. § 2244

- It is a federal crime knowingly engage in or cause sexual contact with or by another person, if to do so would violate:
  - 2241(a) or (b)/not more than 10 years imprisonment
  - 2242/not more than 3 years imprisonment
  - 2243(a)/not more than 2 years imprisonment
  - 2243(b)/not more than 2 years imprisonment
  - 2241(c)/any term of years or for life
- 2244(c) – if the contact (other than (a)(5)) is with a child under 12 max term of imprisonment is 2x sentence provided in this section

## Step 2: Analyzing Credibility and Corroboration

- Prosecutors may be unwilling to charge and Jurors may be reluctant to convict on the V's word alone
  1. Actual credibility. V may be embarrassed or feel shame. Prosecutor must encourage V to be completely honest.
  2. Ability to perceive. Diminishes as alcohol level increases.
  3. Ability to remember what happened.
    - Fragmentary blackouts vs en bloc blackout

## Step 2: Analyzing Credibility and Corroboration cont.

### 4. Existence of corroborative evidence

- Physical evidence
- Fresh complaint witness
- Eyewitnesses to any part of chain of events
- Friends of the victim
- Other women the D may have dated
- Surveillance tapes
- Medical evidence
- D interview
- Pretext phone calls

### 5. Victim likeability – unfortunately flaws that made the V a target for the offender may make the V less credible to the jury

# United States v. Myron Harry

# Cross-Examination of the Defendant

- Anticipate and prepare for D's testimony
- Plan to make points that can be used in closing
- If defense is consent, try to get the D to agree to as many of the facts as possible.
- Possible topics:
  - Corroborate intercourse occurred
  - D's state of intoxication
  - What is attractive about really drunk women?
  - The D chose the V
  - D claims he was in relationship with the V
  - When the D bashes V during testimony
  - Post rape behavior changes showing consciousness of guilt

# Step 3: Trying the Case/Offender-Focused

- Jury may think it is a crime of opportunity
- Instead, explain to the jury why the D would prey upon a person like the V
- Voluntary intoxication does not equal consent to sexual acts
  - Bond
  - Courtroom
  - Rape Shield (FRE 412)
  - Motion in limine to exclude irrelevant facts
  - Be aware of illegal defenses
  - Evidence of similar crimes in sexual assault cases (FRE 413)

# United States v. Baker and Phillips

# Voir Dire Topics for SA Trial

- Graphic Nature of Crime/Discussion of Sex
- Questions related to alcohol use
  - Stereotypes of Indians and alcohol
- Five most common rape myths:
  1. Only strangers rape.
  2. Rapists always use weapons and cause injury. All Vs resist.
  3. Vs behave in certain ways – during and after the rape/on the witness stand.
  4. Women lie about being raped.
  5. Rape Vs can assume the risk of being raped.



# Working with the Victim.....

- Take time to prepare the V – both substantive testimony and the rules for testifying.
- Prepare the V for cross-examination
- Voir Dire – try to educate the jury panel
- Witness Order
- Direct exam – explain moment she knew she was in danger
- Medical Evidence – will there be injury???
- Use of experts

# FRE 412 – Rape Shield

- Generally excludes evidence of a rape victim's past sexual behavior
  - “to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives” Rep. Mann
  - to encourage the reporting of sexual assaults
  - to prevent the wasting of time on distractive collateral and irrelevant matters.
    - *Jeffries v. Nix*, 912 F.2d 982, 986 (8<sup>th</sup> Cir. 1990)

# Three Exceptions to General Rule of Exclusion Under 412

1. Evidence of past sexual behavior with persons other than D where concerns source of semen, injury or other physical evidence
  2. Specific instances of sexual behavior by the V with the D offered by the D to prove consent or by the prosecutor to rebut; and
  3. Evidence the exclusion of which would violate the constitutional rights of the D
- Court to weigh probative value versus prejudicial effect

# Rules for Admissibility

- Party intending to offer must file a written motion with the court at least 14 days before trial describing the evidence and stating the purpose for which it is offered
- Before admitting evidence, court must conduct in camera hearing and afford V and parties a right to be heard
- Motion, related papers and record of the hearing to be sealed

# Case Examples – 412 Evidence

- Source of semen, injury or other physical evidence – US v. Eagle Thunder, 893 F.2d 950 (8<sup>th</sup> Cir. 1990) – injury must be “reasonably close in time to the alleged rape – existence of non-recent tear was not relevant to the source of the tears that were hours old
- Prior consensual relationship – US v. Saunders, 943 F.2d 388 (4<sup>th</sup> Cir. 1991) – D and friend to testify – only D could testify to his own prior sexual relations with V

## FRE 413/414 – Evidence of Similar Crimes in Sexual Assault Cases

- Evidence of the D's commission of another offense(s) of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant
- Gov shall disclose the evidence to the D, including statements of W or a summary of their expected testimony, at least 15 days before trial or at a later date as the court may allow for good cause

# Rationale behind FRE 413....

- **“SA cases, where adults are the victims, often turn on difficult credibility determinations.** Alleged consent by the victim is rarely as in issue in prosecutions for other violent crimes- the accused mugger does not claim that the victim freely handed over his wallet as a gift – but the D in a rape case often contends that the V engaged in consensual sex and then falsely accused him. **Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches”** – Sen Robert Dole

# Rationale behind these rules....

- “In child molestation cases, for example, **a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of defendant – a sexual or sadosexual interest in children – that simply does not exist in ordinary people.** Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense.”
- US v. Charley, 189 F.3d 1251, 1260 (10<sup>th</sup> Cir. 1999)(quoting Rep. Molinari)



# Admissibility

- There is a lesser standard for admitting “propensity evidence is sex offense cases” US v. Mound, 149 F.3d 799, 802 (8<sup>th</sup> Cir. 1998)
- “these rules were explicitly designed to allot the introduction of evidence of prior sexual crimes in order to prove propensity” US v. LeMay, 260 F.3d 1018, 1032 (9<sup>th</sup> Cir. 2001)(concurring opinion)
- Uncharged offenses are included – Johnson v. Elk Lake School Dist, 283 F.3d 138, 151-152 (3<sup>rd</sup> Cir. 2002)
- Huddleston standard – the judge should ask whether “a jury could reasonably” make such a finding
- 403 balancing analysis

# Factors for Admissibility

- Similarity of the prior acts to the acts charged
- The elapse of time between the acts
- The frequency of the prior acts
- Intervening circumstances
- The need for the evidence at trial, beyond evidence already offered
  - US v. LeMay, 260 F.3d 1018, 1028 (9<sup>th</sup> Cir. 2001)
  - US v. Enjady, 134 F.3d 1427, 1433 (10<sup>th</sup> Cir. 1998)

## Are these rules time sensitive?

- Congress expressly rejected imposing any time limit on prior sex offense evidence
  - US v. Gabe, 237 F.3d 954, 960 (8<sup>th</sup> Cir. 2001)
  - US v. Meacham, 115 F.3d 1488, 1495 (10<sup>th</sup> Cir. 1997)
  - US v. Larson, 112 F.3d 600, 605 (2<sup>nd</sup> Cir. 1997)

# How similar does the prior act have to be to the current offense?

- US v. Tyndall, 263 F. 3d 848, 850 (8<sup>th</sup> Cir. 2001)
  - “The fact that there was a wide age difference between Mr. Tyndall’s alleged victims is not, by itself, sufficient to show that the two incidents were dissimilar. The district court noted that both offenses charged were impulsive crimes of opportunity where it was alleged that Mr. Tyndall had managed to isolate his intended victims, and we agree that this is an entirely sufficient basis for concluding that the offenses were ‘similar’”

# Overcoming the Blackout vs Pass Out Defense

- D may argue that V consented to sex but does not remember due to intoxication/will argue that V “blacked out” and forgot large periods of time.
  - D may call expert – Prosecutor should make sure person qualified and ask for written report from expert
  - Prosecutor object on relevance grounds. Until there is E in record of blackout there is no factual basis to admit testimony of expert
    - Blackout – person is conscious, but brain is not recording memories
    - Pass out – person is unconscious



**Questions?**