5. *Failure to Account for Confounding Variables*

The *American Prosecutors Research Institute* (2007) states;

- *"The victim's personal characteristics coupled with multiple external factors make it virtually impossible to predict how an individual might react following a sexual assault. As such, this monograph will explore different psychological (e.g., depression, anger, or anxiety) and behavioral responses (e.g., not fighting back during a rape, continuing to date an assailant, or not reporting the sexual assault until months later) to sexual violence and why these responses appear to be "counterintuitive" to the general public."* (p.3)
- *Although many victims report distinctive psychological post-rape responses such as heightened fear, avoidance, re-experiencing the traumatic event, and anxious arousal, not all victims will have these specific post-rape reactions. Of those that do experience these reactions the frequency and duration may vary considerably from victim to victim.* (p.3)
- *"Although it is important to identify common reactions to a traumatic event, 'there is tremendous variability in the extent to which women are affected'. . . . Different psychological responses manifest different behavioral patterns or coping strategies for each survivor of sexual assault. In addition, external factors such as victim social support network, severity of the assault, or a victim's relationship to the assailant may also have an impact on a victim's psychological functioning after a sexual assault . . . A complex combination of individual characteristics and external factors influence how a woman will react to sexual victimization."* (p.5)
- *"Yet, there is a paucity of research that explores what factors curtail or intensify the most traumatic aspects of sexual victimization (Koss & Burkhart, 1989). Given the number of potential influences on a victim's response following a sexual assault, no comprehensive model of coping among sexual assault victims exists (Littleton & Radecki, Breitkopf, 2006). Frazier and Burnett (1994) surmise that the most common coping strategies for victims are difficult to assess because researchers define and measure "coping" differently across studies. . . . Factors such as past life experiences, developmental level, spiritual beliefs, social support systems, content and intensity of the event and genetic predisposition may all influence a victim's reaction to sexual assault"* (p.7)
- *"Littleton and colleagues (2006) report that sexual assault victims engage in "fairly extensive coping efforts in managing the assault" (p. 770). Yet, there is a paucity of research that explores what factors curtail or intensify the most traumatic aspects of sexual victimization (Koss & Burkhart, 1989). Given the number of potential influences on a victim's response following a sexual assault, no comprehensive model of coping among sexual assault victims exists (Littleton & Radecki Breitkopf, 2006). Frazier and Burnett (1994) surmise that the most common coping strategies for victims are difficult to assess because researchers define and measure "coping" differently across studies."* (p.7)
- *"As there is nothing normative about being sexually victimized, there cannot be a 'normal' reaction to such a traumatic event. Victims are caught between societal expectations and personal feelings in an attempt to cope with the experience."* (p.9)

"*Confounding variables*" get a bit technical but join me in the weeds on this one. There are internal, external, cultural, and gender factors that impact how research subjects react to claimed sexual assault. In this section we'll also explore the influence of alcohol and alcohol blackouts on mistaken or false reports.

A. Subject (internal) Variables

The *American Prosecutors Research Institute* cautions:

> *"Additionally, there is research to suggest that victims who experienced prior mental health problems . . . and prior victimization such as child physical and/or sexual abuse . .*

. experienced more severe post-rape responses. In fact, Kaltman et al., (2005) concluded that victims who experienced a sexual assault were at greatest risk for developing psychopathology, poor social adjustment, and engaging in risky sexual behaviors." (p.10-11)

"*Subject variables*" asks the question "*What is going on <u>inside</u> a person that impacts their reactions?*" CIBs cannot be assumed to be exclusively caused by a sexual assault. Symptoms can be due to a wide assortment of personal factors. But experts testifying about CIB typically have failed to conduct a clinical assessment of the complaining witness and to account for other psychopathology that may better explain CIB symptoms (e.g., anxiety, depression, psychosis, or personality disorders).

- Some clinical symptoms and conditions, including antisocial personality disorder, borderline personality disorder, histrionic personality disorder, delirium, psychotic disorders, dissociation and intellectual disability, have been proposed as pathways to false sexual assault accusations (Engle & O'Donohue, 2012).
- Personality traits and trauma intensity have been shown to account for up to 43% of the variance in PTSD severity with a notable significant interaction between trauma intensity and neuroticism (Lauterbach & Vrana, 2001).
- CIB theory does not distinguish between child, adolescent and adult victims. It is not clear how CIB generalizes across ages or developmental stages.

All of these <u>internal</u> conditions may have existed long before the purported sexual assault in your case. How has the CIB expert accounted for the presence or absence of these psychological conditions in the complaining witness? Could these psychological conditions be a better explanation for the odd behaviors or a false report?

B. *Possible <u>External</u> Mediators*

How have <u>external</u> events impacted a person displaying CIBs?

- Are symptoms better or worse if a complaining witness reports their sexual assault right away as compared to delaying for several months?
- Does getting therapy change the CIBs?
- What about talking with friends?

The *American Prosecutors Research Institute* states:

"Littleton and colleagues (2006) report that sexual assault victims engage in "fairly extensive coping efforts in managing the assault" (p. 770). Yet, there is a paucity of research that explores what factors curtail or intensify the most traumatic aspects of sexual victimization (Koss & Burkhart, 1989). Given the number of potential influences on a victim's response following a sexual assault, no comprehensive model of coping among sexual assault victims exists (Littleton & Radecki Breitkopf, 2006). Frazier and Burnett (1994) surmise that the most common coping strategies for victims are difficult to assess because researchers define and measure "coping" differently across studies." (p.7)

What research can the expert point to that accounts for important mediating factors?

- Was there information regarding whether research participants did or did not receive any type of treatment between the initial assault and subsequent research interview?
- How did counseling (if any) influence the relationship between sexual assault and CIB symptom severity?
- Research has shown that social support and coping styles impact CIB symptom development and severity (Ullman, Relyea, Peter-Hagene, & Vasquez, 2013; Wright,

Kelsall, Sim, Clarke, & Creamer, 2013). How has the expert accounted for these influences in this particular victim?

- In published research there is typically no information about how recent the claimed sexual assaults had occurred.
- There are various levels of sexual assault. The Sexual Experiences Survey (SES; Koss & Gidycz, 1985), is a measure frequently used in sexual trauma research (Marx & Soler-Baillo, 2005; Wilson, Calhoun, & Bernat, 1999; Yeater & O'Donohue, 2002). The SES distinguishes between sexual contact, attempted penetration and completed penetration, as well as the types of penetration. Proponents of CIB describe reactions in victims of sexual assault but make no distinctions between various levels of sexual assault (i.e., digital penetration of the vagina versus anal intercourse) and how these might be related to CIB.

C. *CIB Is Not Culturally or Gender Sensitive*

The *American Prosecutors Research Institute* cautions:

> *"In attempting to adjust or find meaning in the traumatic event, victim behavior may vary considerably from person to person. In addition, responses may also be varied when compared across different racial and ethnic minority groups."* (p.10)

- There is little in the research literature on the cultural sensitivity of CIB, meaning advocates have failed to describe how CIB symptoms differed across ethnicities. This is problematic because members of different cultures report different symptoms of the same disorder (e.g., somatic versus cognitive symptoms of depression; Kirmayer, 2001).
- There is little description for how men and women differ in their response to sexual assault.

D. Alcohol Consumption and Alcohol Blackout effects on the Complaining Witness's Perception of the Instant Event.

For the past four years I have been an instructor for the Advanced Sexual Assault Litigation Course (ASALC) at Maxwell. One of the topics I teach is *Alcohol Blackouts and Sexual Assault*. For an in-depth primer on this topic, please go to my website – http://www.drpaulsimpson.com/seminars. Here's some of what is discussed in the handout:

Alcohol combined with claims of sexual assault are a frequently occurring phenomenon.

- Approximately half of sexual assault claims are associated with alcohol use by the accused, victim, or both. (Abbey, et al., 2001)
- Up to 75% of acquaintance rape claims involve alcohol. (Crowell & Burgess, 1996)

If your case involves alcohol consumption on the part of the complaining witness, consider the following.

Alcohol is a central nervous system depressant

- Confusion
- Memory loss
- Impaired judgement
- Behavioral changes
- Cognitive impairment
- Reduced inhibitions

Alcohol's Impact on Memory of Criminal Events (non-blackout)

- Alcohol affects women's reports more than men's, which may be because alcohol affects attention and memory consolidation more clearly at a lower dose for women than for men. (Karlén, 2015)
- Moderately and highly intoxicated individuals are less complete when recollecting crime details. (van Oorsouw, 2012)
- One study suggests that a second interview 24-hours after intoxication can produce additional details of a crime. (La Rooy, 2013)
- Severely intoxicated participants display a greater tendency to go along with suggestive cues compared with sober participants. Researchers found intoxication impaired memory and increased suggestibility during an immediate interview, and both effects persisted when sober again. (Van Oorsouw, 2015). But, see Gawrylowicz, 2017.

Underestimation of Alcohol Consumption

- People underestimate their own consumption by increasing amounts when engaging in heavy drinking. (Northcote, 2011)
- Young people and women are more likely to underestimate how much they drank. (Martin, 2016)
- Female students who reported typically drinking larger amounts of alcohol in party settings were more likely to make errors when estimating their intoxication for moderately high numbers of drinks. (Mallett, 2009)
- Accurate estimation of peer's drinking decreased significantly with increasing personal consumption. (Stock, 2014)

Alcohol Blackouts

- Episodes of amnesia during which a person can actively participate in events. (Goodwin 1995)
- Does not erase memories that were formed before (retrograde) (White 2003 p. 1)
- Inhibits memory of events after the level of intoxication reaches critical mass (anterograde) (Westrick 1988; Mintzer and Griffiths 2002; White 2003, p. 1 & 4;)
- *Blacking out* is different than *passing out*.

Blackout vs. Passed Out

- Blackout is…
  - Things a person does while drunk
  - They are CONSCIOUS!
  - The person is capable of carrying out complex and goal-directed behaviors (including sexual behaviors)
- Passed out is...
  - A person falling asleep or becoming unconscious.
  - They are NOT CONSCIOUS!
- You can have a blackout and then pass out.
  - "Blackout" tends to occur during *ascending* BAC. (Goodwin 1970; White 2003, p.6)
  - "Pass out" tends to occur during *descending* BAC.
- People can't tell the individual is in a blackout state. They just see the behaviors the person is doing.
- They can't see the person's hippocampus.

General Points regarding Alcohol Consumption and/or Alcohol Blackout

1. While in an alcohol-induced blackout, a person maintains the ability to engage in a wide array of complex and goal-directed activities, such as carrying on a conversation, driving, or having sexual intercourse. They maintain the functional capacity to engage in these activities but simply not encoding those memories; thus, memory for parts or the totality of an event is jeopardized (including consenting to sexual activity. Individuals in the midst of an alcohol-induced blackout remain conscious (as opposed to being passed out and unconscious) while maintaining the functional and behavioral capacity to engage in a wide array of complex, goal-directed behaviors. Thus, their actions are engaged in while in a conscious state. Given that there is no way of knowing that an individual is in the midst of a blackout, their behaviors and actions appear fully volitional and intentional to an observer (and still can be 100% volitional and intentional).

2. The recollection of events (i.e., memory recall) is a reconstructive process. In other words, when an individual is asked to recall an event, it is not as if they go into their brain and pull an exact, carbon copy recording of what occurred. Rather, memories are recalled as a result of a reconstructive process. It is also well-established in the psychological literature that when individuals are asked to describe or explain events or actions they may not readily recall, they may be prone and vulnerable to filling in the blanks when constructing their memories. This has been repeatedly demonstrated in experimental, empirically-validated studies.

3. Alcohol can cause a person to perceive information inaccurately. It can also cause what is referred to as "alcohol myopia," which refers to the phenomena where a person will narrowly focus only on salient immediate stimuli at the expense of other contextual information. Thus, when this occurs, much of the contextual information is never encoded and subsequently will not be remembered.

4. Source misattribution is a psychological concept in which a person does not accurately link the original source of a memory to what is later recalled and retold to others. There are many potential causes of source misattribution. A basic example would be an eyewitness hearing from the police that a suspect was carrying a gun and later coming to believe that the suspect was carrying a gun without actually having seen a gun. The use of alcohol increases the risk and vulnerability of a source misattribution error. This becomes even more pronounced when a person is in a fragmentary blackout state.

5. The concept of transience of memory is that memory generally deteriorates and gets worse over time. Research has shown that a significant percentage of people experience major errors in their memory over the course of time, even for events that could be considered memorable or important. The memory issues associated with alcohol use can increase the potential for memories to be altered when recalled.

6. Suggestion and suggestibility refer to the psychological concept that memories can be affected and distorted by suggestion that is external to the individual. A well-intentioned non-witness can suggest or insist that something occurred in a particular way or that an event should be conceptualized in a certain way. This "suggestion" can potentially lead a witness to recall their memories in a new light and cause distortion in their memory to conform with the suggestion. When external suggestion is applied to a situation that occurred when an individual was under the influence of alcohol or in a blackout state, the individual may be even more prone to suggestion because research has shown that individuals who are less certain of events are more prone to suggestion regarding those events.

7. Hindsight bias is the concept that a person will restructure their beliefs or understandings about an event in order to conform with information later obtained. There is significant research on the subject of hindsight bias that shows that a memory can be reconstructed to fit that person's current beliefs or knowledge. The context provided by the new information can restructure that person's understanding and beliefs about what they remember occurring.
8. Motivated memory refers to several different concepts in which a person may consciously or unconsciously have a motivation to distort a memory. Embarrassment, shame, or self-justification are factors that can motivate a person to reconceptualize past events or create inaccurate memories in order to prevent negative feelings and conform with other beliefs that individuals may have about themselves. The memory issues associated with alcohol can make this more likely to occur since an individual's memory of an event may be incomplete and/or distorted.
9. Imagination inflation is a concept in which a person thought about or imagined something occurring which did not actually occur, however, the individual later remembers that thing having occurred. A basic example of this would be someone intending to say something during a conversation but forgetting to say it. Later, falsely believe they actually said that thing during the conversation. The use of alcohol or being in an alcohol-induced blackout state have the potential to increase the risk of this occurring due to other memory issues being experienced by someone in those states.
10. It is important to note that none of these aforementioned psychological concepts operate in a vacuum. Multiple concepts can interact to distort an individual's memory. For example, suggestion, hindsight bias, and motivated memory can all be applicable to a situation and lead a person to have a false and/or inaccurate memory about an event that occurred. Furthermore, alcohol—and the resulting memory issues that accompany its use—exacerbates the likelihood and vulnerability of memory distortions in these situations.

If the complaining witness in your case was consuming alcohol; how has the CIB expert accounted for these effects? Be sure to go to the author's website – www.ArizonaForensics.com - for a seminar handout on *Alcohol Blackouts and Sexual Assault Claims* (under the picture of me in the desert holding a mandolin, click on >*CLE Seminar*s< and the handout is the first in the list).

Bottom Line:
In your cross of the expert you want to challenge him/her on <u>*subject (internal) variables*</u>:

- What has CIB research discovered about how internal factors impact CIBs?
- How has the expert accounted for these in the victim?
- Over 50% of sexual assault claims have been determined to be unproven or false. How does this impact research on CIBs? How has the research distinguished between true and unproven claims of sexual assault?
- How does a complaining witness who is lying impact their CIBs?

What about <u>*external*</u> mediating factors?

- How does CIB research distinguish between various degrees of sexual assault, time since the assault, number of sexual assaults, getting therapy versus no therapy, disclosing to friends, etc.
- How has the expert accounted for these in the present case?

What about cultural and gender issues?

- How did the CIB researchers control for different ethnicities in their studies?
- How do men and women differ in their reactions?

- How does gay, lesbian or heterosexual orientation impact CIBs? If a gay man is sexually assaulted by another man, is that different than a straight man who is sexually assaulted by a man?

How has the expert accounted for the consumption of alcohol and/ or alcohol blackout in the reactions of the complaining witness?

A tip for prosecutors – Remember that all this applies to the accused as well and can be a good area of cross for the Government.