7. The Devil is in the Details

I was recently in a trial working with the Defense team. Government's CIB expert was asked to opine about an alleged sexual assault between two men who had a platonic friendship before the night in question and remained friends after the event. They only had the one sexual encounter. Government needed to explain why the male victim would remain friends with the accused after the alleged assault and didn't report the event until more than 1½ years later. The Defense's theory of the case was this was an instance of consensual exploration between two male friends and the complaining witness was embarrassed when the encounter was discovered. Keep these basic facts in mind as we review the expert's testimony in this case and the four studies she submitted as the basis for her opinion.

Study #1: Ferguson (2016). Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates.

Government worked to establish that the false-reporting rate for sexual assault is very low. On direct, the CIB expert said with confidence the false-reporting rate for sexual assault was 5% based on Ferguson's findings. On cross, she was asked to read out loud the following quotes from the study:

> *"The objective of the study was to determine, through meta-analysis, the rate of confirmed false reports of sexual assault to police. . . The total false reporting rate, including both confirmed and equivocal cases, would be greater than the 5% rate found here."* (p.1185)

> *"A proportion of cases in the studies included here were equivocal, where the researchers simply could not determine whether the accusation was false. Certainly, there are likely to be cases where the accusation is indeed false, but the falsity could not be proven. The sometimes high number of cases which were in doubt but not confirmed as false in the studies included here supports this assertion."* (p.1192)

Next the Defense attorney posed a question about the FBI's findings on false and unfounded sexual assault claims. During a seven-year period they cataloged over 10,000 DNA submissions to their laboratories. Their results showed that 20% of sexual assault claims were proven false and 20% were inconclusive. The CIB expert had never heard of the FBI data.

In an effort to repair the damage, on re-direct Government noted that none of the studies reviewed in the Ferguson article included male victims, so the results didn't apply to this trial (actually four of the seven studies had included males, but Defense wasn't going to correct Government's mistake). Appreciate this moment – Government is correcting their own expert by saying the study she relied upon didn't apply to the trial. Imagine being one of the members while Government explains that their own expert misled the court. In this short line of questioning Defense was able to frame the CIB expert as uninformed, deceptive and demonstrate that the false and unfounded rate of sexual assault claims were at least 40%.

Study #2: Edwards, 2012 – Predictors of Victim-Perpetrator Relationship Stability Following a Sexual Assault: A Brief Report

In a second study the expert cited Edwards (2012) in which researchers assessed the predictors of victim-perpetrator relationship stability following a sexual assault. On page 28 of their report, the authors state:

> *"Further, relationships where women were assaulted by a steady dating partner were more likely to remain stable post-assault than relationships where women were assaulted by a friend or a casual dating partner."*

Can you spot the two major problems with citing this study?

1) There were no female victims alleged in this trial.
2) The victim and the accused had never been in a previous dating relationship together.

This study literally had nothing to do with the trial.

Study #3: Sawatsky (2015). Consensual Victim–Perpetrator Intercourse after Nonconsensual Sex: The Impact of Prior Relationship.

On the first page of the report, the authors describe their findings:

> *"Intercourse is more likely during nonconsensual sex when the victim and perpetrator have previously had a sexual relationship; thus, subsequent consensual intercourse may simply be a continuation of that prior relationship. . . victims who had intercourse with perpetrators prior to the nonconsensual sex event were significantly more likely than other victims to experience nonconsensual intercourse and to engage in subsequent consensual intercourse with the perpetrator."*

Again, can you spot the major problem with this study?

1) The victim and the accused had never been in a sexual relationship prior to the instant event. They did not have a sexual relationship subsequent to the instant event. What does this study have to do with the actual facts at trial? Absolutely nothing. But an astute Defense attorney could flip this studies' results:
    a. If the victim and the accused did <u>not</u> have a <u>subsequent</u> sexual relationship, then;
    b. the study suggests their initial sexual encounter was a onetime, consensual exploration. (I know, this hurts your brain. But think about this for a moment).

Study #4: Lee Ellis, (2009). Perpetrators of Sexual Assault Continuing to Have Sex with Their Victims Following the Initial Assault Evidence for Evolved Reproductive Strategies.

> *"Among a sample of college students, roughly 30% of the women and 12% of the men reported having been the victim of a sexual assault sometime in their lives. Of the assault victims, approximately 23% of both sexes stated that they had sexual intercourse with their assaulters on at least one subsequent occasion."* (page 1)

How does two men who had a one-time sexual encounter qualify as a reproductive strategy?

Bottom Line:

The devil is in the details. Of the studies the CIB expert submitted as the basis of her testimony, all four had nothing to do with the actual case. In your case have Government's expert provide you the titles and actual copies of the research articles they are basing their opinion upon. <u>Don't let him/her dump them on you last minute</u>. Then be sure that you and your own expert read through each study to identify ways in which it might not apply to your case and the cautions/limitations that are always described at the end of the article (Scientists call this "*lack of generalizability*.") In Part II of this paper, an extensive list of research abstracts is provided for the most common CIB reactions. Identify the specific behaviors the expert is going to testify about and do your own research for studies that are contradictory.