

The Goldilocks Challenge

Strategies for the Prosecution

- The Goldilocks Challenge – “*This bed’s too soft and this one’s too hard*”
- The defendant knew or should have known the victim was severely intoxicated/unconscious and unable to give consent to a sexual encounter. Dr. Simpson’s website has two excellent articles:
 - *Prosecuting Alcohol-Facilitated Sexual Assault*. Scalzo, 2007. Nat. District Attorneys Association.
 - *Alcohol Toxicology for Prosecutors*. American Prosecutors Research Institute, 2003.
- Testimony regarding alcohol blackouts tends to favor the defense because most often the defendant is not taking the stand. So, it is the complaining witness whose account is under intense scrutiny. When crossing the expert, be sure to ask: “*Dr. Jones, isn’t it true that everything you’ve just described about alcohol blackouts could apply to someone accused of sexual assault?* (Yes) “*So it’s possible that a victim could have said “no” and resisted her assailant, but he couldn’t recall her resistance because he was in blackout that night?*” (Yes, it is possible).
- Be sure to challenge the expert on dynamics about blackouts that are not well understood. For instance, there is little research on how *passing out* is different than *falling asleep*. This is because it is unethical for researchers to induce such severe intoxication levels that subjects could potentially die from alcohol poisoning. So, during your cross work to emphasize what is not yet understood about this phenomenon.

Strategies for the Defense

Affirmative Defense

- The Goldilocks Challenge – “*This ones just right!*”
- “*Mistake of fact as to consent*”
 - “*The accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.*”
 - It is possible that a complaining witness in a sexual assault case, who was in the midst of an alcohol-induced blackout, willingly engaged in sexual acts but does not remember doing so and/or remembers events inaccurately.
 - In a blackout state, the identified victim is still fully conscious and maintains an ability to engage in a wide array of complex behaviors (including sexual acts).
 - If the complaining witness is in an alcohol-induced blackout, the accused does not know this. The accused just sees behaviors that the identified victim is engaging in.

False claim of sexual assault because . . .

- “*Confabulation*”
 - It’s not a bimodal question: “*She’s either lying or telling the truth.*” There is a third explanation, a memory reconstruction error.
 - Filling in the missing spaces with what is supposed to be there.
- Confusion
 - Wake up unaware of where/how they got here.
 - Unable to recall what happened the night before.
- Embarrassment
 - “*I’m not that kind of person . . .*”

- Fear
 - *“What will my fiancé/spouse say?”*
 - *“How do I explain herpes?”*
- Anger / Revenge
 - *“You’re engaged!!!”*
 - *“You’re married!!!”*
 - *“You knew you had herpes!!!”*
- Post-event Misinformation / Contamination
 - A friend says, *“That’s rape in my book.”*
 - *“If you were that drunk, he shouldn’t have had sex with you!”*
 - *“You need to go talk to SARC!”*

Alcohol Intoxication, Consciousness, Memory

