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Mock juror sensitivity to forensic evidence in drug facilitated sexual assaults

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ABSTRACT

Mock jurors' reactions to variations in the quality of toxicological evidence regarding the presence of drugs in a sexual assault trial were examined. In Study 1, participants received a trial summary in which a negative test result, a negative test result plus expert testimony, or no test result was presented. The time taken by the complainant to report the alleged sexual assault was manipulated. The negative test result influenced participants' judgments, but this effect was minimized by the presence of expert testimony. The complainant's delay in reporting had little impact on judgments. In Study 2, complainant time to report was again manipulated along with the outcome of the test result (negative finding and no result). Results revealed that men were less conviction prone when the negative test result was obtained early as opposed to late. In contrast, when the test result was unavailable, men were more conviction prone when the complainant reported late as oppose to early.

1. Introduction

In cases of drug facilitated sexual assault (DFSA), negative forensic findings for the presence of drugs (i.e., no drugs found in the complainant's blood) can present significant challenges to a complainant's claim. Such was the case in *Regina v. Alouache*.[1] In this case, the defense introduced a negative forensic report to support the defendant's claim that he had not drugged and sexually assaulted the complainant. The prosecution, in turn, moved to introduce expert testimony to contextualize the negative forensic findings. The defense countered, arguing that the introduction of the expert testimony "would be highly prejudicial to the defense."[2] In its consideration of the case, the Ontario Court of Appeal upheld the prosecution's request to introduce the expert testimony. The present research is conducted against this backdrop. By varying both the quality of the forensic test result, as well as the presence of expert testimony contextualizing the evidence, the current research explores mock jurors' sensitivity to variations in the probative value of forensic evidence, their receptivity to expert testimony, and how they weigh expert testimony in reaching their decisions.

1.1. DFSA and the challenges it presents at trial

With terms such as 'date rape drugs' and 'drug facilitated sexual assault' now in the common vernacular, as well as mounting interest from the scientific community, attention has been drawn to the contributory role of drugs and alcohol in sexual assault (e.g., Du Mont et al., 2010; Hindmarch, ElSohly, Gambles, & Salamore, 2001; Hindmarch & Brinkmann, 1999; Olszewski, 2009). The low rates of reporting, prosecution, and conviction that characterize sexual assault (e.g., Backman, 1998; see generally Temkin & Krahé, 2008), is likely even more pronounced in cases in which the victim has been surreptitiously drugged. The drugs used are fast-acting; within 15 min of ingestion (Wells, 2001) victims may experience distortions in perception, confusion, inhibition, along with an inability to offer any resistance, followed by rapid sedation and loss of consciousness (Freese, Miotto, & Reback, 2002; LeBeau et al., 1999; Wells, 2001). With victims unable to clearly recollect the circumstances surrounding the events, they may initially downplay or be unaware of the seriousness of what occurred (Fitzgerald & Riley, 2000). Accordingly, they may also delay reporting their victimization, if they report it at all (McGregor, Wiebe, Marion, & Livingstone, 2000). Indeed, in comparison to other sexual assaults, victims identified in a sample of suspected DFSA cases had longer time delays before presenting to hospital, had sustained less physical injury, and were less likely to involve the police (McGregor, Lipowska, Shah, Du Mont, & Siato, 2003), all variables that have been found to be negatively correlated with the believability of the complainant's account (Frazier & Haney, 1996; McGregor, Du Mont, & Myhr, 2002).

To further complicate matters, the victim's reluctance to report the crime can affect not only the plausibility of her claim, but it can also result in a time delay in testing for the presence of drugs in the woman's system (Hurley, Parker, & Wells, 2006; Wells, 2001), which can have serious ramifications for the accuracy of the forensic test result. Moreover, with date rape drugs often consumed alongside alcohol, their side effects may closely resemble signs of heavy alcohol intoxication (Scott-Ham & Burton, 2005), a variable that has been

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[1] [2003] CanLII 9494 (ON S.C.).
[2] *Supra* note 4 at Para. 19.

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consistently identified as influencing third parties' perceptions and treatment of victims (e.g., Schuller & Stewart, 2000; Schuller & Wall, 1998) with law enforcement agents more dismissive of a complainant if the alleged victim has consumed alcohol (Dorandeu et al., 2006; Jordan, 2004; LeBeau et al., 1999). In turn, due to their dismissive attitudes, law enforcement officials may not stress the necessity and urgency of forensic drug testing (Hurley et al., 2006).

Lack of evidence of physical injury and inconsistencies and/or gaps in the complainant's account of the assault can render forensic evidence in a DFSA trial of critical importance. Given its import, it is imperative that jurors recognize the strengths and limitations of drug testing evidence. For instance, such evidence may be particularly probative when there is a short time delay between the alleged ingestion and the testing for drugs (although even with a short delay there are drugs that may not be effectively detected), but is far less probative when the time delay to testing is greater than the half-life of the date rape drugs tested (e.g., GHB is completely undetectable 12 h after ingestion, Olszewski, 2009; Scott-Ham & Burton, 2005).

1.2. The impact of negative forensic results in a case of DFSA

To assess the impact of a negative forensic report on mock jurors' judgments in a DFSA trial, as well as the impact that expert testimony contextualizing the negative report may have on jurors' judgments, Jenkins and Schuller (2007) conducted a juror simulation study. For some of their participants, the results of a negative forensic report (no drugs found in the complainant's blood/urine) were introduced into evidence by the defense. For another group, who also received the negative forensic report, additional testimony from the prosecution was provided by an expert witness who outlined the variety of factors that could contribute to a negative test result. For a final group, the toxicological screening was not introduced into evidence (control). Comparison across these conditions, revealed that, compared to the control condition, the presentation of the negative forensic report in the absence of expert testimony produced greater verdict leniency and evaluations more favorable to the defense. The information provided by the expert, however, negated the impact of the negative forensic report, with participants in this condition rendering judgments similar to those in the control condition. In short, when accompanied by expert testimony, the decision-makers now gave less weight to the negative test result.

How should we interpret these findings? Did the presence of the expert testimony result in the mock jurors being more accurate in their evaluation of the forensic evidence? Possibly, but it is also possible that the toxicological evidence was not given its due weight. Although the expert in Jenkins and Schuller provided information about the testing and the variables that can affect the likelihood of detection of drugs if they were present, variables impacting the sensitivity of the testing were not manipulated. The probative value of the negative forensic evidence should depend upon the accuracy of the negative test result. For example, if the screening is conducted within a reasonable time frame following the alleged ingestion, the negative finding should be evaluated as more accurate and as a result, should be more persuasive, than had the testing been delayed.

At the most basic level, in order for jurors to use expert testimony, they must evaluate and weigh the information the expert provides and appropriately apply that new information to the case at hand. When expert testimony improves juror understanding and application of the factors that are critical to evaluation of the evidence, its impact has been referred to as "sensitizing" (Crowley, O'Callaghan, & Ball, 1994; Cutler, Dexter, & Penrod, 1989; Kovera, McAuliff, & Hebert, 1999; Wells, 1986). In contrast to sensitization, however, another form of impact has also been identified. Expert testimony can also produce greater skepticism about other evidence, whereby jurors favor the side that employs the expert regardless of the relevance of the information conveyed by the expert to the evidence at hand (Buck, London, & Wright, 2011; Cutler et al., 1989; Krauss & Sales, 2001; Levett & Kovera, 2008). Whether expert testimony will result in juror sensitization or skepticism in a DFSA case has not yet been effectively tested, and thus, the current research was designed to address this issue.

1.3. Overview of current research

In the present article, we describe the results of two studies that build upon and extend Jenkins and Schuller's initial exploration of the impact of negative forensic evidence in the context of DFSA by: (1) investigating the impact of a negative forensic report on mock jurors' decisions; (2) examining how the quality of the forensic report impacts their decisions; and (3) testing whether the presence of the expert testimony sensitizes the jurors to the factors that influence the quality (hence validity) of the forensic finding.

2. Study 1 — Method

In Study 1, participants read a simulated sexual assault trial that involved an allegation of DFSA. Judgments of participants who were not provided negative toxicological test results were contrasted with those of participants who did receive the negative test results. To assess mock jurors' sensitivity to the quality of the forensic evidence, the time frame within which the complainant initiated testing was varied. For some of the participants, the time delay was short (within 5 h of the alleged sexual assault), thus resulting in a toxicological test result that would have high diagnostic value. In a long delay condition, the complainant reported more than 24 h after the alleged assault resulting in a test with more questionable accuracy (low diagnostic value). When the negative test result was presented, half of the participants were provided with expert testimony contextualizing the negative forensic report and the other half were not.

Based upon previous research (Jenkins & Schuller, 2007), it is predicted that jurors will be less likely to believe the complainant's claim and will evidence more leniency towards the defendant when the forensic report is presented in the absence of expert testimony. Secondly, although it is not clear what effects the time delay will have on verdicts, a growing body of research suggests that through expert testimony, jurors can become more sensitive to variations in scientific evidence (e.g., Buck et al., 2011). As a result, it is hypothesized that the expert testimony will interact with a time delay in reporting, rendering the mock jurors more sensitive to the effects of the time delay manipulation on the accuracy or validity of the test result. Thus, this should result in fewer convictions in the short time delay condition but only when it is paired with expert testimony. Additionally juror characteristics, such as gender, have been shown to influence juror decision-making in cases of sexual assault (Schutte & Hosch, 1997). In line with previous research, it is predicted that men will be less likely to render guilty verdicts and will rate the complainant as less credible than women.

2.1. Participants

Participants were 208 undergraduates (87 men, 115 women, and 6 unidentified), ranging in age from 18 to 23 ($M_{age} = 19.46$, $SD = 1.11$) recruited from a consortium of small liberal arts colleges in Southern California. They received course credit for their participation.

Twenty participants were dropped prior to the data analyses because they indicated that they had been sexually assaulted (n = 12) or chose not to indicate whether they had been sexually assaulted (n = 8). Two participants who indicated that they were not jury eligible, as well as 8 who provided incomplete data, were also excluded, leaving 180 participants in the sample (100 women and 80 men).[3]

[3] In both this as well as the subsequent study, analyses that retained these participants produced a similar pattern of results.