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## “That’s How She Talks”: Animating Text Message Evidence in the Sexual Assault Trial

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This ethnographic study of criminal sexual assault adjudication shows how prosecutors, defense attorneys, and witnesses animate text message evidence. In contrast to other forms of courtroom testimony, text messages function as multiauthored representations of recorded correspondence in the past. Attorneys and witnesses animate texts authored by or said to characterize persons represented at trial. By whom and how the texts are animated shapes trial processes. Through a detailed comparative case analysis of two Milwaukee, WI, sexual assault trials, this article attends to the process by which text messages are said to personify or characterize authors’ meaning and intent. This animation of electronically transmitted text speaks to credibility and variably emphasizes a witness’s place within gendered and racialized cultural norms. Rather than unsettling the trope of “he said, she said,” text messages become contested evidence animated by court actors within contexts of long-standing cultural narratives of sexual victimization and offending.

### Introduction and Background

“There’s no video, no injury. It’s purely one hundred percent ‘he said, she said.’ They had a terrible relationship. They were nasty to each other and they don’t get along well, probably never will. But there is no evidence to support the state’s case, other than their words.” (Defense Attorney in *State v. Lee*, 2013)

An oft invoked trope in cases of sexual violence, “he said, she said,” suggests that without third-party eye witness testimony or

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The title is taken from a direct quote of a witness who stated, “that’s how she talks” when explaining the tone and context of text messages exchanged between himself and a victim-witness. Witnesses of all genders are examined in this article, and the cultural norms through which courts make sense of the texts discussed in this research are highly dependent on gender and race.

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material evidence, sexual assault allegations rest on conflicting reports provided by victims and alleged perpetrators. Scholars thus argue that questions about witness credibility, particularly of victim-witnesses, are critical sites of legal decision-making “at a number of stages in the handling of sexual assault cases” (Frohmann 1991: 213). Developing the concept of intersectionality, legal scholar Kimberlé Crenshaw (1993: 1244) urged scholars to consider, “the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color.” Courtroom practices constitute one site in which we can consider how structural forces shape the experiences of trial participants, as racializing practices are “in the everyday workings ‘in [criminal courts]’—in the interaction and social exchanges that define the experience of institutions” (Gonzalez Van Cleve 2016: 5). Indeed, jurors’ assessment of witness testimony often does not focus solely on the content of testimony but rather on extralegal factors including complainants’ behavior before the alleged sexual assault (Estrich 1987; Frohmann 1991, 1997; Konradi 2007; Matoesian 1993; Taslitz 1999) and persuasive cues such as nonverbal behaviors (Chaiken 1980; Ellison and Munro 2009). Sexual assault trial practice is particularly reliant on corroborative evidence and credibility assessments (Corrigan 2013a, 2013b; Frohmann 1991, 1997), despite feminist legal reforms in the 1980s and 1990s that removed corroborative evidentiary standards from rape statutes (Bevacqua 2000). Electronic technology (e.g., cellular telephones, the Internet, social networking sites) has created new sites for social interaction and communication across a range of social sectors (Horst and Miller 2006), providing new forms of evidence that are able to bring previously private scenes and conversations to life in a court of law. Research suggests that to interpret testimony, including these private scenes and conversations, jurors often consider witnesses’ age, gender, and ethnicity (Brodsky et al. 2010; Bunt 2008; Nagle et al. 2014). This article examines credibility in “the everyday workings” of criminal courts as they engage with text messaging evidence in sexual assault prosecution.

Scholars have revisited evidentiary rules following an influx of instant messaging and posts from social media sites such as Facebook and Twitter introduced as evidence into U.S. courts (Kessler 2011; Uncel 2011). Judges have noted that email and text messages are common forms of evidence (Kessler 2011). Legal scholars argue that the admissibility of text messaging evidence follows the standards of earlier telecommunications (Finkelstein and Storch 2010; Frieden and Murray 2011; Goode 2009; Grant 2012). Federal Rules of Evidence were designed with flexibility in mind so that social media and other digital

technologies require admittance under standards that address relevancy, authentication, and probative value (Frieden and Murray 2011; Uncel 2011). Judges treat authentication of digital evidence similarly to other types of evidence, and court challenges are rarely based on reliability or authenticity (e.g., *Daubert* grounds) but rather on procedural grounds or credibility (Kessler 2011; Van Buskirk and Liu 2006). Beyond the evidentiary issues, however, little sociolegal scholarship has investigated how text messages are animated during adjudicative processes, even as courts are increasingly striving to make sense of text transcripts (Kessler 2011; Uncel 2011). Like any form of evidence introduced at trial, the text messaging transcript has little intrinsic weight (Conley and O'Barr 2005). We argue that it is only when prosecution and defense counsel inventively deploy text messages that it becomes a form of corroborative evidence. Legal scholars reason that focused analysis of the trial reveals how law's unwritten rules are implemented in everyday trial practices (Burns et al. 2008). As a recent and now ubiquitous form of everyday communication, text message transcripts demonstrate how law's unwritten rules function within sexual assault adjudication, drawing upon existing social norms around race, gender, and class.

This ethnographic study of criminal sexual assault trials shows how prosecutors, defense attorneys, and witnesses animate written texts to address contested legal facts and witness credibility. In contrast to other forms of witness testimony and material evidence, text messages are interpretable as demonstrations of talk. Namely, text message transcripts consist of messages exchanged between two or more actors (or authors). Animating text messages in trial includes the often strategic enunciating and performance of electronically transmitted text in court in order to personify or characterize both authors' meaning and intent. These performances speak to questions of witness credibility by representing both the words and characterization of witnesses. Text messages are recorded and preserved communication, distinct from memory recalled on the stand or material documents recorded for official purposes and by institutional personnel (e.g., police records, medical exams, and forensic reports). Court officers introduce text messages authored by adjudicants and witnesses as a form of authentic evidence used to corroborate or dispute particular elements of the "he said, she said" story. Text messages are also unique from letters or electronic mail in important ways. In our contemporary social world, the mobile phone represents the immediate capacity to communicate from anywhere via direct contact and turn-by-turn interaction (Katz and Aakhus 2002). Mobile technologies have modified the communication environment, altering the traditional nature of public and

private space and relationships. It is the immediate and often intense interaction that is pivotal to understanding text message communication. The dually authored text message transcript is often time-stamped, and the swift nature of communication seems to unfold in short periods, with participants able to send several messages back and forth within seconds. Research demonstrates that the tone and cadence of the transcript is intersubjectively crafted (Gershon 2010). In comparison, letters and emails are most often single-authored and have longer correspondence lags, and do not reflect the coauthored features that text message transcripts exhibit.

Cultural narratives remain crucial to understanding trial and legal outcomes as they often rest on the veracity of the victim's narrative (Estrich 1987; Flood 2012). Sexual assault adjudication has long relied on the cultural scaffolding of gender and sexuality (Gavey 2005) including heteronormative, patriarchal, and racialized discourses (Bunt 2008; Estrich 1987; Flood 2012; Frohmann 1997; Gonzalez Van Cleve 2016; Konradi 2007; Matoesian 1993; Taslitz 1999). Depending on these discourses, attorneys provide the legally compelling narratives that convince jurors and judges of the victim's credibility (Schafran 1995; Taslitz 1999). They employ rape myths as "the culturally pervasive tales of proper intergender sexual behavior that affect the crafting of courtroom and rape narratives at trials" in ways that are likely to resonate with jurors (Taslitz 1999: 19). Prosecutors and defense counsel differentially attach rape myths to adjudicants when considering charging and trial decisions (Frohmann 1991, 1997). Weighing the challenges for women witnesses during domestic violence trials, Schafran (1995) characterized the credibility challenges faced with a tripartite typology that included collective credibility, contextual credibility, and consequential credibility. Collective credibility, as Schafran defined it, rests in belonging to a sector of society that is generally well regarded and trusted. Based on U.S. custom and law, Schafran argued that women, as a group, are collectively mistrusted and are thus compromised in their collective credibility. Schafran (1995: 6) described contextual credibility as "that [which] depends upon understanding the context of the claim." Just as research on rape myths and trials show, jurors' perceptions and decision-making processes are associated with cultural understandings of sexual assault and social norms. The third category, consequential credibility, requires the adjudicant to have their "harms and injuries taken seriously—not devalued and trivialized" (Schafran 1995: 41). With case law, Schafran revealed how court outcomes and sentencing decisions historically trivialized the experiences and injuries suffered by women. As a window into a past conversation between adjudicants, text

messaging transcripts can speak to collective, contextual, and consequential credibility. Taken together, research on the credibility challenges faced by victim-witnesses in sexual assault trials and the “double dose of rape myths” (Donovan and Williams 2002: 98) to which Black and Brown women are often subjected, it is clear that achieving credibility in court depends on intersectional structures and representations (Crenshaw 1993). In sexual assault adjudication, texts can shed light on the relationships between adjudicants and depict both the victim-witness and the defendant as more or less sympathetic.

In light of these issues, attorneys face the dilemma of how to animate text messages within the courtroom. We argue that text transcripts hold a unique legal status because they cannot be criticized as incomplete due to shortcomings of memory, or fall into the category of hearsay—two criticisms attorneys often level against courtroom testimony. Texts also complicate the courtroom narrative of “he said, she said,” as they transform recalled speech into recorded transcript. The two Milwaukee County sexual assault cases examined in this article provide an in-depth account of how witnesses animate messages authored by themselves and others, and how attorneys are in the unique position to present and contextualize text messaging evidence by selecting when and by whom the transcript is read at trial. We demonstrate how animating text messages often emphasize witnesses’ collective credibility and thus their place within gendered, racialized, and familial cultural norms so that juries and judges can assess adjudicants’ contextual and consequential credibility.

Considering these forms of talk from an interactionist framework, Goffman’s (1981) participant roles of author, animator, and principal help to situate the production of testimony. We recognize the original sender of the text message as one of the “authors” of the transcript, while the person who reads the text in court is the “animator” (Goffman 1981: 144). By revealing and interpreting past moments to the jury, the work of the animator reading the text messages of the author may directly impact both the victim-witness and the defendant, both considered “principals” in Goffman’s framework. The principal is “someone whose position is established by the words that are spoken, someone whose beliefs have been told, someone who is committed to what the words say” (Goffman 1981: 144). Thus, the jury are also among the principals in Goffman’s framework, as they are listening and observing, and required to formally make a disposition in the legal case. In this article, we consider the various principals in the courtroom, focusing on how text messages are articulated as evidence of individual positions and beliefs. By whom and how the text message is animated matters according to tone, emotional inflection, temporality,

and quality of delivery. We suggest that the jury's perception of the content of text messages is affected as much by the animator's performance as it is by the animator's social role and position (Frohmann 1997; Powell et al. 2017). Unlike other forms of material evidence and courtroom testimony, the author, animator, and principal of text messages are not one and the same. Therefore, the attorneys' decisions of how to animate text messaging transcripts, transforming them from written to spoken form, impacts their reception.

The text messages analyzed in each case position the victim-witness in relation to the defendant and provide a lens through which the trier of fact must assess credibility. Depending upon the animator, the text messages in each case are simultaneously deployed as paralleling, contesting, or corroborating memory (Campbell 2002), while always understood through broader cultural discourses (Matoesian 1993; Taslitz 1999). The law of sexual assault, like law in general, operates in relation to cultural norms, or *nomos*, as Robert Cover (1983) terms it. Sexual assault adjudication is unique in that jurors are asked to consider questions of violence, sexuality, and consent that often rely on their personal understandings of gendered, racialized, and sexualized norms (Flood 2012; Frohmann 1997; Gavey 2005; Konradi 2007; Taslitz 1999). Building upon Schafran's work on credibility, Hartley's (2001: 514) observations about juries in domestic violence trials can be extended to juries in sexual assault prosecutions, as many cases "involving a 'he said, she said' dispute of evidence, a woman's perceived lack of credibility, evidentiary constraints on defendants' prior character and acts, jurors' possible misconceptions [...] all present obstacles to prosecuting." In this article, we produce a detailed analysis of two trials, *State v. Moore* and *State v. Lee*, wherein prosecution was reliant upon text messaging transcripts of conversations between the victim-witness, defendant, and other witnesses to meet the burden of proof. We introduce two victim-witnesses, "Anna" and "Tamee," who are both women of color, and illustrate how their text messages, and those of the defendants, become part of each trial. We show how prosecutors and defense counsel reproduce, and at times, transform text messages into live speech events that play out in front of the jury. While one case results in a conviction and the other results in an acquittal, it is the process through which presenting text messaging evidence reinforces and reproduces cultural narratives of victimization that is significant. Providing a close analysis of the use of texting, we argue that rather than serving to eliminate doubt, current technologies introduce new avenues of interpretation that reinforce long-standing cultural narratives of victimization and sexual offending, with passive victims more likely to be

deemed credible and “rapeable” (Konradi 2007) than victims who are sexualized or appear agentic, oppositional, or angry. Attributes associated with credibility are inextricably intersectional, drawing on gender, race and ethnicity, and, as the analysis below shows, can extend to both victim-witnesses and defendants.

## Method and Case Selection

This article provides a detailed comparative analysis of two sexual assault trials drawn from a larger ethnographic study of felony sexual assault adjudication in Milwaukee, WI, from May 2013 to February 2014.<sup>1</sup> During field research, we observed 643 court hearings and appearances<sup>2</sup> made by or on behalf of defendants in criminal sexual assault cases, including 34 jury trials. Text messages were used as evidence in 6 of the 34 observed trials.<sup>3</sup> Three of the six trials incorporated text messages as the medium of sexual assault disclosure. Examples of text message evidence included single utterances from the victim-witness to other witnesses such as, “Help, I am being kidnapped,” or “My cousin just raped me.” In two cases, cell phones were additionally used to triangulate GPS coordinates of witnesses or defendants. Two trials in contrast, *State v. Lee* and *State v. Moore*, involved extensive testimony about text messages exchanged between the victim-witness, the defendant, and other witnesses as well as multipage transcripts that were introduced as evidentiary exhibits. Prosecutors in both cases introduced text message evidence to illustrate, clarify, and establish case facts and witness credibility. They further told the researchers prior to, and during trials, that they were confident the jurors would find the text messaging evidence supportive of the state’s argument.

Unlike the other four trials described above, the prosecutors and defense attorneys in *State v. Moore* and in *State v. Lee* submitted lengthy cell phone transcripts of detailed and time-stamped

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<sup>1</sup> The larger project examines the role of technology and expertise in sexual assault adjudication. Names and other identifying information were changed in fieldnotes, court and interview transcripts, and manuscripts.

<sup>2</sup> The hearings include, but are not limited to, probation reviews, initial appearances, pre-trial motions, guilty plea hearings, and sentencings.

<sup>3</sup> We observed only two cases in which letters were introduced as evidence. In one case, the letter was from the Department of Corrections and was used to demonstrate that the State had made a good faith effort to contact the defendant. In a second case, a victim-witness wrote a letter to her mother, making a disclosure of assault. Neither case included returned correspondence, nor did the documents appear to have multiple authors, unlike text messaging transcripts in which it is the interactive nature of the authorship that generates particular insight.



**Table 1.** Race and Ethnicity of Trial Participants

Race and ethnicity												
Trial Participants	Af-Am/Black		White		Latinx		Asian/Arab		Unknown		Total	
	%	N	%	N	%	N	%	N	%	N	%	N
Defendants	70.3	26	16.2	6	8.1	3	5.4	2	0	0	100	37
Victim-Witnesses	65	26	20	8	12.5	5	0	0	2.5	1	100	40

text messages between the victim-witness, the defendant, and other witnesses. *State v. Moore* and *State v. Lee* were analyzed using field notes from three observers on the research team<sup>4</sup> and full court transcripts based on the similarities between the cases and their distinct outcomes, allowing for analytical focus on the process. Both cases were tried by the same judge, Rebecca Colin, ideal in a case study approach as this diminished our focus on judicial discretion. Both cases included evidence of documented physical injury,<sup>5</sup> and the defendant and the victim-witness had prior relationships. Thus, while these two cases were unusual compared to sexual assault adjudication generally because they went to trial,<sup>6</sup> involved injuries, and included material evidence, they were also representative of typical adult cases resolved at trial based on prosecutorial discretion, witnesses' prior relationships, common "he said, she said" arguments, and reliance upon witness testimony. Finally, the adjudicators in the cases—including the defendants and the victim-witnesses—were people of color, while the court practitioners and most jurors were white. Both prosecutors for the trials analyzed were white women, and the defense attorneys were white men. These demographics generally reflect the overall sample of trials observed (see Table 1) but are disproportionate to the population of people of color in Milwaukee County. The 2010 census indicated Milwaukee was 40 percent African American and 40 percent white. About 17 percent of Milwaukee residents were Hispanic/Latino. These census figures demonstrate the extent to which African Americans are

<sup>4</sup> The investigators, Sameena Mulla, an anthropologist, and Heather Hlavka, a sociologist, conducted field research together, often joined by undergraduate research assistants. Amber Powell, the third observer, was the longest tenured field researcher working with investigators.

<sup>5</sup> Visible physical injury is very rare in sexual assault prosecution (Mulla 2014), making these two cases distinct from other observed trials.

<sup>6</sup> In 2010, Milwaukee County reported a rate of 102 sexual assaults per 100,000 residents, totaling 977 incidents, or over 20% of the 4857 sexual assaults reported across the state of Wisconsin for the year (Wisconsin Statistical Analysis Center 2011). In 2010 and 2011, between 30 and 40 sexual assault prosecutions reached the stage of jury trials, and from January to May 2012, 19 jury trials took place.



particularly over-represented within the 34 jury trials observed. These different demographic characteristics allowed us to consider various attributes of speakers in the animator role, as well as that of the authors, and principals.

While some prosecution units invest significant time in preparing victim-witnesses, others do not (Konradi 2007). This is not necessarily a function of neglect, but of both prosecutorial resources and preferences. The typical prosecutor with the Milwaukee County District Attorney's Office carried a load three to four times higher than recommended by the American Bar Association and had little time to prepare witnesses for court. In addition, interviews with court staff revealed a desire for testimony to be spontaneous and unrehearsed. Thus, the witnesses who testified during the trials had little to no preparation for taking the stand.

The cases selected for analysis originated in a broader grounded theory approach (Glaser and Strauss 1967; Strauss and Corbin 1998), using an analytic-inductive method (Patton 1990). We used open coding to develop patterns and interrelationships within and between cases. Employing a constant comparative method (Glaser and Strauss 1967; Strauss and Corbin 1998), we collected and analyzed data simultaneously, documenting the interplay between interactional, discursive, institutional, and contextual circumstances (Holstein and Gubrium 2008). This process moved us along a spectrum of initial coding and memoing to focused coding and elaborated propositions, from which our classifications and categories emerged (Patton 1990). Two prominent thematic clusters that emerged from coding included: (1) social media and communications evidence; and (2) credibility. We coded field notes and transcripts for all courtroom interactions, hearings, and trials involving text messaging and cell phone use, both when the court was on and off the record. Prosecutors presented extensive text messaging transcripts as evidence in two trials, thus our analysis employed an ethnographic case study approach in which the phenomenon under analysis—the use of text messages during sexual assault trials—undergoes close hermeneutic scrutiny with attention to the precise context in which evidence is introduced. As social actors, witnesses “glances, looks, and postural shifts carry all kinds of implications and meaning,” and in reading or recalling past events, engage in a process Goffman (1981: 144–45) identified as discourse theatrics “vivifying the replay with caricaturized theatrics.” Case studies allow for intensive (rather than extensive) analysis (Stoecker 1991), building on sociolinguistic traditions in which studies of speech acts, linguistic style, and discourses are often based on just one or two trials (e.g., Ehrlich 2001; Matoesian 2001). Focused and intensive microanalysis allows close reading of fieldnotes and transcripts,

with particular attention to the intersubjective nature of text messages: a single message is either generated in response to a previously sent message or invites a subsequent response.

We open with a discussion of the ways in which courtroom actors generally refer to and use cell phones. Framing cell phones as culturally commonplace within and beyond the space of the sexual assault trial allows the analyst and reader to track how court officials and jurors might appreciate text messages as simultaneously informal and evidentiary. In the description and analysis that follows, we examine *how* prosecutors and defense counsel deploy text messaging as evidence, presenting it as authentic, reliable, or dubious. We show that such evidence can substantiate or repudiate the elements of a crime, which contributes to or detracts from the state's case. Most significantly, text messaging evidence contributes to how the jury may perceive the participants in relation to contextual and consequential credibility. How do attorneys distinctively deploy text messages to form corroborative evidence and credibility assessments? In Goffman's (1981) terms, how do the authors, animators, and principals convey different meanings for the same text messaging evidence lauded for avoiding pitfalls of faulty memory, preparation, or hearsay commonly attached to courtroom testimony?

The analysis begins with an overview of each case followed by a discussion of how text messaging was addressed during *voir dire* and opening statements. We analyze text messages at the evidence stage of each trial, and end with closing arguments. In the conclusion, we attend to the unique position offered to the text message transcript as legal artifact, and, correspondingly, its animation in court that relies on and reinforces cultural tropes about victimization, sexuality, and consent.

### **Text Messages and Cell Phones in the Courtroom**

For the duration of our courtroom observations, it was clear that cell phones and text messages were commonplace in the Milwaukee County Felony Courts. While jury instructions banned cell phone use during the trial, and texting about trial details, attorneys routinely kept their cell phones in public view throughout the court, checking them when off the record, scheduling hearings and appearances with mobile calendars, and using them to communicate with other courtroom personnel. In *State v. Moore*, the assistant district attorney (hereafter ADA) used text messaging to portray Anna, the victim-witness, as passive and naïve. The ADA focused on text exchanges between Anna and her sister, and Anna and Evan Moore, the defendant. Defense counsel in the case argued that text messages showed that Anna,

a 30-year-old white Latina woman, was in a romantic relationship with the defendant, a 30-something year old mixed-race, Afro-Caribbean and South Asian man. In *State v. Lee*, the prosecution used text messages to demonstrate the defendant's harassment and abuse of Tamee, a 20-something year old African-American woman. In this case, defense counsel highlighted Tamee's agency and anger via the text record, claiming "that's how she talks" and she "gave as good as she got." We note the contrast between the passivity and sisterly qualities of Anna and the sexualized casting of Tamee as an aggressive, negligent mother. We assert that the victim-witnesses' anger, sexuality, fragility, and family roles are refracted through their African-American and Latina identities. We also show how attorneys deployed text messages to communicate these identities and the related stereotypes to the jury, laying the groundwork for juries to assess the collective, contextual, and consequential credibility of the victim-witnesses.

## **Animating Text Message Evidence**

### **Text Messages in *State of Wisconsin v. Moore***

On September 10, 2013, jury selection began in the trial of Evan Moore, charged with 2nd degree sexual assault of an unconscious person. Anna, his accuser, worked on the line at a local food production factory where Moore was an engineer. Two of the other witnesses, also Latina, worked at the same factory signaling the working-class identities of these witnesses, a subtle and intersectional form of racialization as philosopher Linda Alcoff has demonstrated (2006: 104). *Voir dire* was completed within a few hours and a panel of jurors was selected. During jury selection, ADA Brooks addressed the issue of text messages: "Is there anyone on the panel who doesn't text?" Presenting texting as familiar, Brooks foreshadowed her intended use of text messages while simultaneously positioning the jurors and the witnesses as subjects who rely on similar technologies and language. One panelist immediately raised his hand and said he did not text because, "I just got the phone. I use it and shut it." Brooks smiled and replied, "I don't have a smart phone, but I text like a teenage girl," which elicited laughter from the panel. Two panelists raised their hands and said they did not own cell phones and a third panelist explained that while he frequently received texts from his son, he would only call his son back. When ADA Brooks asked whether there were any panelists who did not know what a text message was, no one replied. During his brief questioning of the jury panel, defense counsel did not ask about cell phones and texting.

Text messaging and cell phones are not mere abstractions in the context of a courtroom. Judge Colin made frequent use of a smart phone when court was off the record, as did many of the ADAs in the Sensitive Crimes Unit. Judge Colin began court with a basic admonishment that jurors were not to discuss the case with each other or anyone else until it was submitted to them for deliberation. The admonishment extended to online and cellular discussions:

COLIN: Deputies will take electronic devices and they will be returned to you at the end of the day and at lunch. You are not to have access to any communication device. No email, blog, Facebook, Twitter, whatever. NOTHING. No communication about the jury case whatsoever.

Among the four judges assigned to the felony sexual assault-homicide courts, Judge Colin alone had the bailiffs collect juror cell phones before trial each day.

Jury selection was completed just before the lunch break, and jurors were admonished not to discuss the case and reminded “there is to be no visiting of the crime scene, in person or online.” The cell phone, then, was not just cast as a communicative conduit, but also a window into the world. When the jurors returned after lunch, Judge Colin’s own cell phone rang loudly in the jury’s presence. Visibly embarrassed, the judge exclaimed, “Oh my goodness. I violated my own rule.” There were some sympathetic laughs and smiles from the jurors. The judge quickly turned off her phone and began formal jury instructions. The attorneys then made opening statements.

ADA Brooks made few direct references to text messages. Instead, she began by comparing the trial to working on puzzles with her two young daughters, likening the evidence to “pieces of a puzzle” that would emerge through witness testimony. Brooks said that Anna would tell the jury what happened in her own words. Anna’s sister would then tell them what she saw and heard that same night. Two police officers would describe their investigation, and a crime lab technician would show that Moore’s DNA had been found in the victim’s underwear. Finally, a nurse would describe the examination she conducted, and the injuries found on Anna’s body. Brooks framed the evidence as fragmented, cautioning the jury that having one missing area of the puzzle did not obstruct the total picture. Invoking a puzzle may have signaled to the jury to think in a broader context, drawing upon all that they learned during the trial, and making sense of it through their own normative orientations.

In his opening statements, defense counsel briefly countered the state's theory of the case. He argued that Anna's pain was the result of hemorrhoids, not sexual assault. Counsel reasoned that Anna was romantically interested in Moore, and there had been consensual kissing and intimacy between them. He insisted that Moore did not sexually assault Anna, asking the jury to find his client innocent of all charges. His tactic mirrored a common trope defense attorney's deployed in cases involving Latina witnesses: descriptions that suggested that young women in particular were "brazen Lolita" types (Powell et al. 2017). Testimony began following the opening statements.

The text message evidence paralleled the puzzle metaphor: short, fragmented, and pieced together through witness testimony. Anna first testified about what she could recall concerning the timing and content of her communications with Moore, referencing text messages sent and received. She then read them out loud for the court, animating both herself and the defendant from the witness stand. When Anna's sister took the stand, ADA Brooks gave her photos of texts between her and her sister. With the photos in her hand, Anna's sister animated herself and Anna from the witness stand, testifying to her recollection of the night in question. Brooks published<sup>7</sup> the cell phone images to the jury.

The details of testimony were as follows. Anna explained that she had a single drink in a motel room with Moore, who was talking about ordering a "veggie pizza" as they watched television. From the stand, she testified that she was suddenly aware that she could not speak or close her hand:

ANNA: He tried to hand me another drink, and I couldn't even take it from him. The last thing I remember, he was taking the drink.

Anna said she woke up face down on the bed moaning, with her pants low about her ankles. She noted being vaguely aware of pain, but she could not tell where the pain was coming from. During the trial, a Sexual Assault Nurse Examiner testified to finding both genital and anal tears when she conducted a forensic examination 4 days following the assault. Both the nurse and a detective testified to seeing bruises on Anna's breast and arm.

Anna testified that after she woke on the bed, she stood up "to fix my pants" and then staggered to the bathroom where she passed out again. She later came to on the bed to find her purse

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<sup>7</sup> Publication refers to the formal process of showing an exhibit to a jury. Attorneys must seek permission from the judge to publish an exhibit, and upon being granted permission, may elect to project or pass documents so that the jury is able to examine them closely.

open and her cell phone in her hand although she recalled putting her purse down in the corner across the room when she arrived. She did not know how the phone got into her hand. Moore drove her home, and she reported she was unable to remain conscious in the car. When ADA Brooks asked her how she felt during the drive home, Anna testified that she had no memory of her feelings.

When Brooks asked what time she had arrived home, Anna said: "The next morning I looked at my phone and guessed midnight," demonstrating reliance on her phone to reconstruct the lost hours of the evening. Confused by her inability to remember the night before, or to understand why she felt physical pain, Anna sent a text to Moore the next day. At ADA Brook's request, Anna read the text messages, beginning with messages sent moments before Moore picked Anna up that evening:

ANNA: March 16th 2013

4:20 PM Moore: "Be there in 5 minutes."

4:21 PM Anna: "OK."

4:26 PM Moore: "Across the street in a red car."

March 17<sup>th</sup> 2013

7:03 AM Anna: "Sorry, I guess I can't handle drinking. How long did I pass out for?"

7:03 AM Anna: "You're probably annoyed with me for texting so early, but I wanted to know what happened that day?"

[...]

9:24 AM Moore: "You passed out for about 2 hours in the bathroom."

9:30 AM Moore: "We only 4play. Hangover?"

9:41 AM Anna: "What's your definition of hangover and of foreplay?"

9:41 AM Moore: "Look it up."

10:11 AM Moore: "I forget that you don't get sick next morning after drinking."

10:12 AM Anna: "That's why I said your definition. No hangover. I don't like the way I feel."

10:28 AM Moore: "You should eat."

10:28 AM Anna: "Everything from Saturday is bothering me a lot. What exactly did you do to me?"

[...]

10:05 PM Moore: “We 4played for a bit. Then you went to bathroom and passed out.”

10:21 PM Anna: “What is your idea of foreplay? I don’t remember 4 hours of time. I have pain. You don’t like me, care about me, or respect me.”

The trial continued with testimony by Anna’s sister who read the text messages they had exchanged:

SISTER: March 16<sup>th</sup> 2013

6:16 PM Anna: “I think he’s [her] kind, as [other sister] would say.”

10:58 PM Sister: “Hi Neenee. I’m home. Wedding ended early. Hope you’re not too drunk. That can’t be good. See you in a bit.”

11:06 PM Sister: “Remember now, we have to be up early. H-deal under the lintel and gym.”

11:21 PM Sister: “Hello, can you acknowledge?”

11:45 PM Sister: “Anna, oh, Anna.”

Segments of the messages gave context for Anna’s relationship with her sister. The nickname “Neenee,” as well as the familial lexic such as the short-hand “H-deal” show the close relationship between the two sisters. The sororal role itself emphasized Anna’s femininity and invoked the framework of respectability through kinship, moving Anna squarely into a class of women deemed more collectively credible. When ADA Brooks asked Anna to clarify what she meant by, “he’s [her] kind,” she indicated that she thought Evan Moore was a dating match for her other sister. These exchanges demonstrated to the jury not only the order of events, but Anna’s position within intimate familial relations. Anna’s uncharacteristic nonresponse to the text messages worried her sister. When reading her own text message, “Anna, oh, Anna,” the sister used a playful, sing-songy voice, introducing a marked contrast with her tone of alarm and concern. When Anna did not respond, her sister called Anna’s cell phone. At first, Anna did not speak when she answered her sister’s call. “I asked if she was with Moore,” her sister said, to which Anna responded “yes.”

SISTER: I asked her if she’d be home soon. She said yes, I’ll be home soon. She sounded small. And lost.

When testifying, the sister’s voice waivered, and she appeared visibly saddened. She continued, noting the receipt of a blank



text message and what appeared to be a typo. She called her sister back immediately. This time, whoever answered immediately hung up:

SISTER: The call was at 11:53 PM. I texted her twice. "What?" and then "help you?"

Anna's sister testified that she was alarmed at this point because she did not understand the strange communications from Anna.

BROOKS: Why were you alarmed?

SISTER: Because her voice sounded funny. Because she wasn't responding to my messages. And I didn't know what this text meant.

The text messages both operate to fill in for Anna's fragmented memory, but also provide the space for her sister to contextualize Anna's demeanor and character: Anna sounded "small" and "lost" and arrived home looking "rough and beat up." Following her testimony, Judge Colin called a recess and asked the bailiff to clean up the pages of text message transcripts lying in disarray on the witness stand.

For the state to meet its burden of proof, the prosecutor needed to supplement Anna's fragmentary memories of the night in question with additional evidence. Her sister's testimony about the text messages was used to corroborate Anna's timeline of events and her unconscious state. The text messages also provided insight into Moore's perspective of the night, particularly because he elected not to testify. The ADA used the texts to prove the three statutory elements of the crime: (1) the defendant had sexual intercourse with Anna; (2) Anna was unconscious; and (3) the defendant knew Anna was unconscious. Because Moore did not testify, both Anna and the ADA animated his text messages for the court. The text messages exposed Moore's knowledge of Anna's unconsciousness ("you passed out for about 2 hours"). The texts also demonstrated that at some point during the evening Moore had "4play" with Anna, which he refused to define for her. These details fit into the structure of the charges, and though fragmented, built up the contextual credibility by providing a plausible story that the defense did little to contest.

Appearing petite, slight, and plainly dressed in court, Anna's self-presentation was consistent with the attributes highlighted by the ADA throughout the trial. She wore a faded gray T-shirt, jeans, and sneakers with her hair pulled back in a low ponytail with little or no makeup on her face. She spoke softly and was

asked by Judge Colin to speak louder and directly into the microphone on numerous occasions. During closing arguments, ADA Brooks described Anna's self-presentation and stature in court. She emphasized Anna's role as a sister in a close family, as feminine, naïve, and respectable, and therefore someone the jury could identify as a trustworthy, credible witness. Her characterization of Anna as naïve was in stark contrast with the defense's depiction of Anna as a slighted lover, these opposite descriptions channeling the pervasive, racializing, and pathologizing "virgin-whore" dichotomy (García and Torres 2009). Text messages figured heavily in closing arguments. Brooks returned to the description of the puzzle: "Even if a piece is missing from a puzzle," she stated, "you can tell when you are looking at an elephant." The "puzzle pieces" were then enumerated for the jury, beginning with Anna.

Projecting an image of the text messages on a large video screen, Brooks read them for the jury and judge with her own intonation. Emphasizing each word, she echoed Anna's sister's description of "a scared little girl, weak and lost." She reminded the jury that Anna was a "quiet, naïve, 30-year-old girl" and that her passivity could be read as credibility (Konradi 2007). She described Anna's pain and injuries in detail and recounted the testimony of Anna's coworkers. Both were Latina women who spoke English as a second language, further contextualizing Anna's occupation, her social and cultural life, and evidence of her sad, withdrawn demeanor at work in the days following the assault. ADA Brooks projected another image of the text message exchange between Moore and Anna. This time, Brooks animated the exchange, slightly altering the projected text and reading it as follows:

**BROOKS:**

Anna: "How long did I pass out for?"

Moore: "You passed out for about two hours in the bathroom. Did not get anywhere."

Moore: "We only 4played. How are you feeling today?"

Anna: "What is your definition of foreplay?"

Moore: "Well, just look it up."

Because Moore did not testify in court, the prosecutor was able to verbalize his texts in a callous tone and frame them as a definitive admission of Moore's sexual contact with Anna, and his knowledge of her unconsciousness. There was no question that the words belonged to Anna and Moore. Anna was framed in the

ongoing narrative as the victim who was trying to piece together the same puzzle, evidenced by her text message: “What did you do to me?”

Borrowing ADA Brooks’s puzzle analogy, defense’s closing statements introduced doubt to the state’s theory of the case, arguing:

DEFENSE ATTY: The problem here isn’t that there are a few pieces missing from the puzzle. The problem is the pieces don’t fit.

He suggested that rather than naïve, the victim was unreliable, calculating, and angry. Without visual aids, he referenced Anna’s text message, “I’m sorry I can’t handle my drink” as evidence that she intentionally had more than one drink. He submitted that she testified to only one drink because she lied to investigators and was now stuck with “her story.” He interpreted Moore’s text message, “We only 4played,” as minimal physical contact. Her lack of a text response to the revelation of foreplay, he argued, showed that there must have been previous intimacy. Defense counsel argued that Anna was a liar, because a “naïve” girl would get angry if there had been no previous sexual contact between them. Defense counsel addressed Anna’s message, “I know you don’t like me, care for me, or respect me,” arguing it was not the text of someone ending a friendship but rather of a person ending an intimate relationship—drawing the word “relationship” out for a full second, stressing each syllable. For defense, the text messages were situated in a particular history and context—that of Anna’s vengefulness after a break up within the escalating drama of a relationship. Giving an alternative account of the “he said, she said,” between his client and Anna, defense counsel asked the jury to find his client not guilty based on the absence of evidence: the texts were proof that Anna had lied on the stand; the insignificant touch DNA on Anna’s clothing was consistent only with foreplay and not intercourse; and the medical evidence of Anna’s pain was from hemorrhoids.

Brooks’s rebuttal was more strident compared to her initial closing statements, and she sounded outraged: “Foreplay does NOT cause injury,” adding this was particularly true when sexual contact was consensual. She reminded the jurors that they could ask to see the exhibits and examine the text messages for themselves. She revisited Anna’s character and credibility, describing her as a passive, slight woman who would not have responded to the defendant with anger. The ADA recapped how Anna had to be asked seven times to speak loudly into the microphone and explained that her text apology for not “handling her drink...is

exactly the type of text message a passive person would send.” Finally, Brooks insisted that the most important text message to consider was Anna’s “What did you do to me?” In her closing, Brooks made sure to emphasize Anna’s collective, contextual, and consequential credibility.

Within 2 hours, the jury returned with a guilty verdict. Weeks later, Moore was sentenced to a 17-year term of imprisonment, with a bifurcated sentence of 7 years confinement and 10 years of supervision. Moore wept at his sentencing. A conversation with ADA Brooks later revealed that he feared potential deportation as he was not a U.S. national.

### **Text Messages in *State of Wisconsin v. Lee***

In *State v. Lee*, Kelvin Lee was charged with false imprisonment and attempted first-degree sexual assault with the use of a dangerous weapon. Tamee and Kelvin Lee had known each other for over 7 years and had two children together. Both Tamee and Lee were African American, and in their early 20s. While they had broken up, they still shared responsibilities for their children. After an ex-boyfriend posted a compromising video of Tamee on Facebook, Lee sent her a flurry of text messages insulting her, berating her, and avowing his sexual ownership of her. Tamee testified that Lee asked her to get into his car at a gas station, drove her to a secluded location, and locked her in the car with him as he physically forced her head into his lap while holding a gun to her head. Tamee’s brother testified that he saw Tamee get out of Lee’s car and enter their home in tears. Tamee and her sister called the police. The police transported Tamee to the hospital after she complained of neck pain and scratches on her chest and neck. Hospital staff took photos of the scratch marks, which were entered into evidence at trial. Police investigators also testified to the acquisition of cell phones, text messages, and a .45 caliber semiautomatic pistol found at Lee’s residence. The defense’s sole witness was Lee himself, who chose to testify.

The prosecution first introduced text messaging to the jury during *voir dire*. Echoing a question posed during jury selection in *State v. Moore*, ADA Grace Nelson asked the potential jurors if anyone had “never used text messages.” Only three panelists raised their hands, explaining that they knew about text messages but chose not to use them. ADA Nelson continued along these same lines, questioning whether anyone on the panel was “addicted to texting” or ever “had their phone analyzed” or “received an angry text message and YOU responded angrily?” Three jury members explained that they had texted angrily, each

instance involving disputes with family members. Defense counsel did not address texting during *voir dire*. After a jury was selected, Judge Colin instructed them not to do outside research and not to share information on Facebook, Twitter, or other social media.

ADA Nelson opened the state's case by explaining that Lee "sought for control [over Tamee] that was slipping away." She described the text messages as evidence of Lee's "intention to demean and humiliate" Tamee, "calling her a 'ho', 'a bitch', et cetera." Nelson argued that the text messages corroborate Tamee's testimony and her descriptions of their in-person interactions:

NELSON: He yelled at her what a bitch, what a whore she was—you have money, you're not leaving this car! He is yelling, pulls out a black handgun in her face and tells her she is going to suck his dick! He unzipped his pants and tried to shove her head on him. She is pushing away, off him. He says "don't tell, or I'll kill you." He drives her home and she is hysterical! Her brother and sister call police.

Defense counsel challenged Tamee's credibility: "What you heard is a nice story, but it's one side of the coin." The text messages, he argued, showed not an aggressor and a victim but two antagonists: "She gave as good as she received—they went back and forth, back and forth." Defense counsel portrayed Tamee as angry, aggressive, and asking for it. In short, her consequential credibility was in question. He described the attempted assault as merely an argument after which "she called the police for some reason and lied." Just as the ADA used the text messages to reinforce her depiction of Lee as aggressive and profane, defense counsel used the messages to position both authors—in Goffman's framework—as engaged in a mutually antagonistic relationship:

DEFENSE ATTY: There's no video, no injury. It's purely, 100 percent "he said, she said." They had a terrible relationship, they were nasty to each other and they don't get along well, probably never will, but there is no evidence to support the State's case, other than their words.

Here, defense counsel dismisses "words" as unreliable utterances.

Following opening arguments, Tamee entered the court to testify. She stood tall and had a thin build, wearing a black skirt, high-heeled ankle boots, and a petite leather jacket. Her hair was black and long, pulled together on the side in a ponytail. She spoke directly and confidently into the microphone, at some points talking too fast for the court reporter to keep up. On occasion, Judge Colin asked Tamee to slow down her speech so the court reporter

could “get down every word.” Following a description of her relationship with the defendant that “never worked out,” Tamee explained that Lee wanted her to give up her children:

TAMEE: I wouldn't do that. He's a great father, I know he wouldn't do nothing to hurt them. He's never harmed or done wrong to the kids. He could probably be physical and verbal as the next man toward me, but not to the kids.

Here, Tamee described Lee as a good father even as she normalized his abusive behavior toward her. Following this statement, ADA Nelson introduced text messages as corroborative evidence of Lee's verbal abuse and threatening behavior. Tamee told the court that Lee's text messages “depended on his mood—between I love you, to hey bitch, get that dick out of your mouth. He was calling me a ‘ho,’ ‘a bitch this,’ ‘bitch that.’”

ADA Nelson aimed to establish a motive for Lee's attempted assault:

NELSON: Anything make Mr. [Lee] upset?

TAMEE: That I was an entertainer, and I was seeing someone that he didn't like. He saw a video on Facebook that pissed him off.

NELSON: You've been an entertainer for a long time though, right?

TAMEE: Yes.

When she identified herself as an “entertainer,” Tamee revealed to the jury that she worked as an exotic dancer. The video referenced was a recording of sexual activity between her and an angry ex-boyfriend that had been uploaded online without her consent. Tamee explained that Lee was jealous because she was “very social on Facebook and Twitter.” Tamee's profession compromised her collective credibility and the stage was set for the jury to understand subsequent testimony through this association.

NELSON: What was Mr. [Lee's] reaction?

TAMEE: He was mad, he referred back to the video, that I should suck his dick like I did to this guy. He didn't mention the video til' we were arguing in his car. [...]

NELSON: Was there a conversation with Mr. [Lee] and yourself?

TAMEE: Earlier that day we were supposed to see each other. I didn't answer my phone cause I was busy—he was texting vulgar to me like “who you fuckin'.” We were texting back

and forth, like 30 messages back to back to back. Eventually I texted back, he called me a bitch, ho, that I didn't wanna be by my kids. I said I don't want to be with *him*. I don't wanna see *him*. My fight was up. I can't keep fighting. I was scared to go outside cause he was texting for like 2, 3 hours, like, "stay below the windows." I thought that meant he would shoot in the windows.

During her testimony, Tamee began to cry as she described how Lee continued to refer to the video on Facebook as he was trying to force her head to his lap, saying "you going around fucking and sucking everyone like you did in that video" and "I got a new mother for [the kids]—you're not a good mother, you're not gonna see them again." During the attempted sexual assault, Tamee said the defendant repeated "suck my dick" with a gun against her head. Tamee's account of the attempted sexual assault was introduced through court testimony, while the text messages attested to her interactions with Lee prior to the attack.

On cross-examination, defense counsel introduced additional text messages and texted photos. He implied that Tamee was a bad mother, claiming she failed to seek sole custody of her children in the past, and she did not provide for her children, evidenced through her unwillingness to "do her children's hair." Described by Lee as deficient in maternal virtue, defense called Tamee's consequential credibility into question. Defense portrayed her as angry and aggressive, arguing that her hostility was targeted not only at Lee, but also Lee's girlfriend via text messages. Tamee's voice was strong, direct, but calm as she disagreed with defense counsel, and he abandoned this line of questioning.

On re-direct, ADA Nelson followed up with questions regarding text messages Tamee had sent to Lee's girlfriend, connecting the texts to Lee's motivation for the assault:

NELSON: Ever meet [his girlfriend]?

TAMEE: Never met [her], but texted her. NOW they are boyfriend, girlfriend.

NELSON: Did this incident have anything to do with moving at all?

TAMEE: No, ma'am.

NELSON: It was about money, yes, and this video?

TAMEE: Yes.

NELSON: Pictures of money from a long time ago?



In response to further questions from ADA Nelson, Tamee said her testimony about the text messages were solely from her memory, and she had neither seen police reports nor the printed text message transcripts. The defense drew explicit attention to Tamee's employment as an exotic entertainer, child placement arrangements, and a prior violent incident between her and Lee. He quickly introduced and then abandoned topics during cross-examination:

DEFENSE ATTY: So, when primary placement [of the children] was given to him, you were in court?

TAMEE: No, I was incarcerated when he got that. When I have the kids, I'll support them, when he has them he can support them til' a court tells me otherwise.

DEFENSE ATTY: You sent him a picture of money, of \$2,000, to aggravate him?

TAMEE: Yes.

DEFENSE ATTY: He wanted to go to Illinois, but you said no.

TAMEE: I said no, you can move. You're grown, but you can't take the kids.

Now referencing the Facebook video, defense continued:

DEFENSE ATTY: You're an exotic dancer, right?

TAMEE: Yes.

DEFENSE ATTY: Regarding the video of you "performing," you had no knowledge? Do you blame [Lee] for being upset?

ADA: Objection.

Judge Colin sustained the prosecutor's objection based on relevance. Defense's use of the term "performing" to describe Tamee's sexual contact with her then-boyfriend connected her employment as a dancer with her sexual acts in the video. Having also mentioned her previous incarceration, the jury could view Tamee through the lens of both exotic dancing as well as criminality. Defense counsel further suggested that Tamee was hypersexual and deficiently maternal. The text messages were used to bolster Lee's contextual credibility and character, suggesting that he only needed money to support their children, and Tamee was flashing it around via a texted photo, but would not provide him with financial support.

ADA Nelson also called a detective to the stand to explain how he compared outgoing and incoming text messages between Tamee and Kelvin Lee's cell phones. The white male detective had almost 25 years of experience working for the Milwaukee Police Department, specializing in electronic evidence collection and providing credence to such forms of evidence including:

DETECTIVE: ... phone records, intercepted phone calls, intercepted text messages, analyzing phone records, cell tower locations, and then I've been involved in several wiretap investigations where the phones are one of the primary sources of evidence.

Given some limitations in the technology, the detective explained how he took photographs of every text message screen on cell phones belonging to Tamee and Lee. Screen shots were assembled on 188 pages of a court exhibit to show how each message proceeded in date- and time-stamped succession. The majority of texts were authored by Lee, and ADA Nelson asked the detective to read, and therefore animate, some of the 167 harassing and threatening text messages sent to Tamee between February 6th and March 6th 2013. The detective methodically read the texts into the record with little variance in tone or inflection, including jarring descriptions of sexualized threats and profanity. He also explained his, "experience in dealing with text messages and phone calls and conversations that deal with street language," which he thought assisted the investigation, "given [my] insight into what things mean." Among the texts read by the detective from 28 pages of Lee's messages were

DETECTIVE: "I can't sleep. I can't get you off my mind."

DETECTIVE "I'm not with you on a daily nor weekly. I need mine too."

DETECTIVE "And I know you think everything a game but try me. You will never see [the kids] again. Don't call no cops because it's gonna be trouble. I don't hit women but I smack the shit out of hoes"

DETECTIVE: "You serve no purpose in life. What is you here for? Just kill yourself."

The detective's monotone reading of Lee's text messages in succession spanned over 10 pages of trial transcripts and 12 minutes of court testimony. The defense did not challenge the messages, conceding that they were, in fact, sent by Lee. The witness's tone, in

comparison to Tamee and the ADA, sterilized the barrage of profanity even as Lee's texts sexualized Tamee and pathologized what he and ADA Nelson called "street language," perhaps a coded term for "urban" and "black" colloquial forms. This segment of animated transcript illustrates the intersectionality of collective credibility (Schafran 1995), showing how custom and language can exclude persons of color from groups that have credibility culturally, historically, and in a court of law (Flood 2012). At one point, the detective read Lee's text messages to the court, and Nelson asked him to decipher and rephrase it for the majority white jury:

DETECTIVE: "I gotta dollar for you. Come suck my dick so I can bust in yo face. You know you want this money."

NELSON: From your experience working with street language and deciphering it, could you translate that for us into more normal parlance, please?

DETECTIVE: Just the last message you're talking about?

NELSON: Yes.

DETECTIVE: He's offering her a dollar to have sex and suck his penis and he's saying that he's going to ejaculate on her face and that he knows that she wants the money, that he would pay her for having sex with him.

Nelson, too, contributed to the pathologizing of both Tamee and Lee by asking the detective to translate the transcripts into "normal parlance." The detective was asked to read more of the text messaging exchanged a few days later, which he did with the same methodical tone:

DETECTIVE:

10:34 PM Lee: "Wow. Everybody talking about yo dumb ass"

10:35 PM Tamee: "Whatever. Stop texting me."

10:36 PM Lee: "Come over here. We want some head, too."

10:38 PM Lee: "You coming to give us some?"

10:41PM Lee: "Well, I just take some what's good."

[...]

2:27 PM Lee: "I want my dick sucked before you go. I'll come over there. Stop playing, hoe."

[...]

4:09 PM Lee: "I'll have you robbed right now and that's on my kids.

4:30 PM Lee: "Sorry for whatever happens. Hope you be smart about it."

7:06 PM Lee: "Yeah, I see you. Imma really enjoy this, show you how I really feel."

7:15 PM Tamee: "[Kelvin], leave me the fuck alone."

7:31 PM Lee: "And Imma show you better than I can tell you. You already dead to me really."

8:11 PM Lee: "Stay away from the windows."

The texts demonstrated the uneven nature of communication between Tamee, who sent only two texts, while Lee sent ten in this short section of the transcript. After comparing cell phones, police detectives also discovered many text messages erased from Lee's cell phone prior to confiscation. Two of these text messages were read by the detective:

DETECTIVE: Tamee sent a message to Mr. Lee that read "delete, delete, delete. Stop wasting your time sending me novels" and another that said "leave me the fuck alone, [Kelvin]."

Kelvin Lee then took the stand for direct examination by the defense. Following a brief description of himself and his relationship with Tamee, defense counsel asked him: "Why all the texting like this?"

LEE: That's the way she likes it, that's how she talks, lots of trash talk. [...]

DEFENSE ATTY: Why send texts that you wanna get with her, have sex?

LEE: Because things were probably good at the time.

DEFENSE ATTY: Was there a buildup of issues before this incident?

LEE: Things were okay, we were talking a bit—well in March, I tried to get her to do her daughter's hair and [Tamee's sister] said she was in jail, but it was a lie. I should know she doesn't have no time for her kids—can't do her hair—I was mad. I was told about the video on Facebook from a couple of friends—that she was giving head and she said she wasn't upset about it.

Lee spoke in a smooth, honeyed tone during his testimony, deemphasizing his own agency, noting several times: "that's the way she likes it ... it was because she liked it that way." Lee confirmed that he received a picture of money from Tamee on his

cell phone, and claimed that Tamee sent him a text message: "I'll be rich in a week." Like the police detective before, Tamee's texts were animated by Lee, only this time with a sassy, sharp tone. By explaining that Tamee "liked" profanity-laced sexual speak, Lee questioned her consequential credibility. How could an exotic dancer truly be threatened by overtly sexual talk? Responding to defense counsel's inquiry, Lee confirmed that he sent Tamee the text "don't go by the window" but explained that he was "just messing around. She knows I would never hurt her."

On cross-examination, ADA Nelson directed the jury's attention to the text messages again:

NELSON: Lots of your texts were about you wanting to have sex, wanting your dick sucked. How did you think she felt about this video?

LEE: She didn't care. She was rubbing it in my face.

ADA Nelson read one of his text messages again, with contempt in her voice: "I just wanna slap my dick across your face." She confirmed with Lee that Tamee was identified as "rat ho" in his cell phone contact list, and Lee again explained, "we talked like this because that's the way she likes it." Cross-examination of Lee continued:

NELSON: Why should she stay away from windows?

LEE: We were going back and forth, just trying to scare her I guess, so she thought I would do something.

ADA Nelson sharply enunciated another text message from Lee: "I see you!" Lee argued that he "just [said] I was in the area, I wasn't really there. [Tamee] said she would give me some [money], that's why I went over there." The text messages sent between authors were both raw and immediate that night, yet the animators in court could sharpen, soften, or flatten the messages as they deemed fit.

At 11:15 am on the third day of trial, the jury returned to the courtroom after a short break. ADA Nelson hauled out a large easel with white paper. On it she printed in large black letters, "Power and Control!" ADA Nelson showed the easel to the jury and declared, "He was losing control of her because she was getting sick of it. He's getting the message that she is done!" Nelson held up a large stack of paper clipped together, and waived it in the air. In emphasizing the materiality of the text messages, the content of the messages became "reality"—they were substantive and quantifiable. Nelson identified 167 text messages sent from Lee to Tamee, in comparison to Tamee's 34 messages sent in response. ADA Nelson read some of the text messages again as

she paged through the exhibit. She began with a message sent by Lee to Tamee on March 5th, 2013, referencing the Facebook video:

NELSON: “Wow. Everyone talking about your dumb ass. Well, I just take some—what’s good?” Tamee’s last message to him said “[Kelvin], leave me the fuck alone.”

In her animation of Lee’s message, Nelson read with derision and acrimony, particularly when she emphasized the phrase, “take some.” ADA Nelson reminded the jury of the erased text messages on Lee’s cell phone, reading them out loud, in quick succession: “I’ll have you robbed; I’ll show you how I feel; you already dead to me; stay away from the windows,” again channeling aggression and contempt as she animated Lee’s voice. ADA Nelson steered the jury away from issues of character toward the role of text messages corroborating Tamee’s earlier testimony:

NELSON: This case isn’t about whether they are parents of the year, or about cheating, or using the kids as pawns. It’s about what happened that night. There is a lot more here than “she said, he said.” Words are undisputed by evidence and testimony. She told us the same things here as she did with police that night. Her demeanor, when out of the car: she was hysterical, promptly calling the police right away.

Nelson wrote the charges slowly on the easel with a black sharpie: False Imprisonment and Attempted First Degree Sexual Assault/Dangerous Weapon:

NELSON: There is no doubt about what happened in that car, because she is credible and it is corroborated by texts and by injury. These are indisputable facts. Mr. [Lee] is distorted about what happened.

While the text messages were identified as authored by Tamee and Lee, the interpretation of the transcript was contentious. Text messages, and the ways in which they are introduced and animated at trial, follow old lines of questioning that tend to rely on and reinforce tropes about victimization. On one hand, defense counsel used the text messages to corroborate Lee’s testimony about Tamee and dismiss her credibility. Defense used Tamee’s texted photo of \$2,000 in cash to Lee’s cell phone to claim she was a tease and “she’s stringing guys along.” In closing arguments, however, defense counsel berated the state’s case because it had nothing “material to rest on. No DNA, no fingerprints, no credibility. Nothing.” Rather than legal artifact, the

text messages were relegated to “just words” to be met with the same credibility assessments as other forms of testimony.

In sexual assault cases in particular, the court commonly focuses on the reliability and credibility of the victim-witness (Frohmann 1991). In this case, the defense linked Tamee’s collective, contextual, and consequential credibility (Schafran 1995) to the age-old trope that she asked for it, or she “gave as well as she received.” Throughout the trial, defense animated the text messages to depict her as a sexually promiscuous tease, liar, and an unfit mother:

DEFENSE ATTY: Women are just as good at power and control as men are, women just do it differently than men—tease them, and take it away.

Defense highlighted Lee’s acceptable masculine conduct, noting his respectable self-presentation through his court testimony, and describing him as a “good father” who needed money to support their children, and help “doing his daughter’s hair.” The highly sexualized, profane, and threatening text messages animated by the prosecutor and police detective during trial were explained away by defense counsel: Tamee “liked it that way,” and she “gave as good as she got.” Further invalidating Tamee’s tears both on the stand and as witnessed by her brother the night in question, defense cast suspicion even on the moments when Tamee’s behavior conformed to stereotypical affective and gendered norms of victim behavior (Konradi 2007; Taslitz 1999). “She is a performer! She’s proud of that fact and she was proud of that video. She’s an actress—cries a little bit, cries to get her way.”

In *State v. Lee*, Tamee’s collective and contextual credibility was centered on her roles as co-parent and mother. Defense counsel consistently called her moral integrity into question as he animated her via text messages, casting her as unfeminine, aggressive, angry, and sexually promiscuous. During testimony, Tamee presented as a strong and assertive African-American woman—in the court, she was neither vulnerable nor rapeable. Lee’s texts, animated by the ADA and Tamee herself, were examples of his jealousy and hypermasculinity (Messerschmidt 1993) as he sought to maintain power and control over Tamee. ADA Nelson argued that Tamee’s occupational and relational status were used as leverage to take her children from her. Tamee’s status as a black woman and deficient mother was put on display by multiple court actors. Her character and credibility were called into question by defense who animated her voice via text messages and assembled her story through Lee’s testimonial accounts



in front of a majority white jury. Both Tamee and Lee were othered and pathologized by asking the detective to “normalize” the slang being texted between two black witnesses who socially and historically hold little collective credibility. Scholars have noted that such direct challenges of rape victim credibility are amplified when they appeal to popular patriarchal notions of race and sexuality (Bunt 2008; Flood 2012; Gonzalez Van Cleve 2016; Matoesian 1993; Taslitz 1999). In under 2 hours, the jury returned a not guilty verdict and the court entered judgments of acquittal on both counts.

## **Conclusion**

Our analysis addresses how new forms of media and communication are introduced as evidence, specifically addressing the issue of how, when, and by whom text messages can be animated during the sexual assault trial. There are various forms of talk presented in court including, but not limited to, witness testimony and recorded text produced from institutional reports. Contrary to the criticisms of faulty memory, preparation, or hearsay commonly attached to courtroom testimony, text messages assume the privileged position of accurately depicting captured talk. In most instances of testimony, however, the authors themselves animate their words in court unlike text messages which can be variably contextualized by different animators (Goffman 1981).

Even as the animator performs particular utterances, they make claims about the positions and beliefs of the authors. Text messages are unique in that they reflect a record of words that have been authored and exchanged, but the prosecution and defense engage in a contest to reconcile those words within competing narratives. They deploy different bodies and rhetorical tactics to animate the texts. Most notably, the author of the text message does not necessarily animate the transcript. This stands in stark contrast to trial testimony, in which witnesses are both author and animator of their own words and experiences, and cannot quote others lest they violate rules of hearsay. By introducing text messages via different animators, attorneys create the space to question the principals’ position, beliefs, and commitment to the texted utterances (Goffman 1981). Text messages only become a form of corroborative evidence when prosecution and defense counsel suggest specific meanings in their animation. In order to prove their case, attorneys characterize the texts in ways that reinforce or cast doubt on different accounts of the sexual assault.

Attorneys and witnesses in *State v. Moore* and *State v. Lee* animated text messages in ways that often supported common cultural narratives about victimization, race, gender, sexuality, and familial norms (Bunt 2008; Crenshaw 1993; Gonzalez Van Cleve 2016; Taslitz 1999). For example, in order to establish victim credibility in each case, the ADA emphasized Anna's passivity and timidity in *State v. Moore*, while the prosecutor downplayed Tamee's agency and anger in *State v. Lee* (Konradi 2007). Myths about gender and sexuality attach to race as well, as they are inscribed on the victims and their bodies through text messaging. While white women are imbued with the traditional cultural imagery of mother, virgin, and whore, depictions of Latina women often oscillate between the poles of virgin and whore (García and Torres 2009), while black women in particular, are regularly cast only as whore: provocative, aggressive, hypersexual, "welfare queens" unworthy of their children (Flood 2012; Taslitz 1999). The historically rooted stereotypes of the "jezebel" and the "mammy" deny black women the right to their sexuality as well as protection against sexual attacks (Flood 2012). The descriptions of the victim-witnesses in the courtroom attest to the ideological standards of "womanhood" and "victimhood." In *State v. Lee*, Tamee embodied the stereotypes often applied to black women and therefore lacked collective, contextual, and consequential credibility. She presented to the jury in body, in her testimony, and in the animation of her text messages, as unknown and unsympathetic to the trier of fact (Schafran 1995) in that she was a strong, assertive, and seemingly invulnerable black woman. Because her aggressive words were preserved in the text messages, defense was able to ask her to justify them. On the stand, the police detective both pathologized "street language" and articulated Tamee's resistance to Lee's objectification and harassment, which reinforced her agency and strength but did not conform to cultural notions of "victimhood."

The prosecution used text messages to portray the defendant in *State v. Lee*, a black man, as stereotypically hypersexual, predatory, and criminal. However, Lee's testimony painted an altogether different picture of the meaning of the texts so that he, more than Tamee, acted as the dominant animator in the articulation of the messages, sanitizing his profane and threatening words. Lee called Tamee's virtue into question, drawing attention to her lack of conformity to standards of maternal care, while reinscribing his own gendered position as shared custodian of their children and beleaguered paternal caregiver. This extralegal logic ascribes particular gendered meanings that define how women should act and behave during or following sexual assault. Because of structures of patriarchy, Lee's care for his children

earns him credit during the trial, whereas mere accusations of disinterested maternal care render Tamee unsympathetic.<sup>8</sup>

Contrast this with Anna's sororal positioning illustrated by her text messages with her sister. In *State v. Moore*, Anna animated her own and Moore's text messages. Anna and her sister are given the opportunity to confer tone and inflection to the texts while simultaneously attaching additional thoughts and feelings related to them through added testimony. ADA Brooks further characterized Anna as "passive," and "naïve." These monikers conform to a feminized, vulnerable, and therefore rapeable subject. Anna is further introduced as a factory line worker, a subtle form of racialization that is reinforced by the other witnesses who testify. Unlike Tamee, Anna was subdued in body and testimony—quiet, tentative, and reserved on the witness stand. And unlike Lee, Moore did not testify providing no counterpoint to prosecution's characterization of him as predatory and insensitive.

This article focuses on recent forms of evidence introduced and animated in criminal court trials and provides a detailed analysis of how text messages are used in sexual assault cases. Unlike other forms of testimony, the author, animator, and principal of text messages are not one and the same. Through prosecutorial and defense tactics, text messages are mobilized as forms of evidence that reinforce gendered and raced norms and pit the voices of witnesses against their own testimony (Das 2006) and oftentimes their own memory (Campbell 2002). We suggest that jurors' perceptions of the content and the influence of text messages are affected as much by the animator's enactment as it is affected by the author's characterization and position—all of which hinge upon questions of corroboration and credibility. By selection of the animator (e.g., sister, defendant, detective), attorneys introduce a means through which the jury may assess the collective, contextual, and consequential credibility of witnesses.

This article demonstrates that new technology merits a fresh and in-depth look at how evidentiary decisions may transform the trial process beyond admissibility. As the primary narrators and animators of evidence in the court, attorneys maintain much of the power to frame evidence, while victim-witnesses maintain some but limited control (Orenstein 2007). Prosecutors often present the experiences of victim-witnesses in ways that jurors might find most compelling and convincing (Frohmann 1991, 1997; Hartley 2001; Konradi 2007). While attorneys addressed juror knowledge and use of cell phones and text messaging during *voir*

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<sup>8</sup> In a hallway conversation many months following the trial, one of the courtroom personnel who had been present commented to the researchers, that they had been troubled by Tamee's irresponsible mothering of her children.

*dire*, they did not attend to issues of interpretation, misconceptions, and credibility attached to said messages. Scholars have long argued that because rape myths and other extralegal factors influence the outcomes of sexual assault trials, attorneys must tackle them head on, beginning with educating the jury during *voir dire* (Taslitz 1999). These extralegal factors, particularly around race, gender, and class, have been demonstrated to impact strategies in sexual assault prosecution (Powell et al. 2017). This article suggests that variations in trial processes would likely affect attorney's evidentiary choices, selection of animators, and change the calculus regarding defendant's decisions to testify in court. The reproduction of common rape tropes via new technology also calls for renewed reflection on the impact to the victim-witness during court. Scholars have argued for victim-centered approaches to rape prosecution that yield greater control to survivors in the courtroom. Such tactics include pre-court preparation of witnesses and increased participation in the legal case (Konradi 2007; Taslitz 1999) provided the resources for advocacy. Other suggestions include sharing general information, trial plans and strategies, addressing defense attorney cross-examination practices, and challenging cultural narratives presented in trial (Konradi 2007; Taslitz 1999). Our analysis identifies the need to discuss formal rules and practices that might accompany new forms of evidence, such as text messages, as it bears upon issues of representation and credibility. Text messages seemingly settle the lacunae of "he said, she said," acting as preserved documents that can authentic conversations between trial participants in real time. However, they are highly interpretable documents that can be strategically animated by a variety of individuals to address questions of collective, contextual, and consequential credibility.

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