

## **Case Study: Nonconsensual Sexual Penetration**

### **Background**

Jane and John are both students at USG University. Last semester, they met through Tinder and exchanged a few messages. They found each other to be physically attractive and exchanged phone numbers. John and Jane shared a class and John began sitting behind Jane during class and walking her to her car after class ended. They began texting each other frequently. The initial text messages related to coursework and were friendly in nature. John initiated almost all of the text messages. Over time, John communicated to Jane by text message that he was interested in dating her. Jane responded to John by sending a text message stating that she was not interested in dating him. Jane continued her friendship with John, but she often allowed a day or two to pass before responding to John's text messages.

A few weeks ago, John texted Jane: "girls who text the most apparently are more likely to experiment sexually. So I guess that's not you." Jane responded: "ha ha, evidently not." John texted Jane: "I'm pretty easy going and it is hard to hurt my feelings (clearly since I wait full days for you text me back)."

### **John's Invitation to Jane to Attend a Party at His Friends' House**

Jane had breakfast with last week. Although she was not interested in dating John, she agreed to meet him for breakfast because he was persistent in asking her out on dates. They drove separately to the restaurant. During breakfast, Jane invited John to her apartment to watch a movie and eat lunch. John instead suggested that Jane come to a party that Friday, at the house of John's friends, James Johnson, Shawn Smith, and Rod Lewis. Jane agreed to meet John at the party when her shift as a server at a local restaurant was finished. Although Jane still was not interested in dating John, she considered him a friend and felt comfortable attending the party because he would be there. John had previously invited Jane to a party last month, but she had declined.

### **Consumption of Alcohol by John and Jane**

On the night of the party, John began drinking at 8:00 p.m, and he continued drinking until Jane arrived around 2:00 a.m. (he consumed 4 beers). John intended to begin drinking heavily once Jane arrived at the party.

John texted Jane prior to her arrival at the party asking if she wanted to drink at the party and stating that he would get her Strawberitas. John, who was twenty-three years old, purchased Strawberitas for Jane, who was not yet twenty-one. When Jane arrived at the party, John's friends, James Johnson, Shawn Smith, and Rod Lewis, were there. Paula Phillips and Anne O'Dell arrived around the same time as Jane.

John gave Jane a Strawberita. He watched her consume one half of it, at most, while they played beer pong.

Mr. Lewis provided Jane with a 100 ml flask of Jack Daniels and a vanilla Coke. Jane drank the

Jack and Coke while they played a drinking game called Kings. She consumed almost all of the Jack and Coke. John saw Jane drink the Jack and Coke.

During the drinking game, John sat to Jane's left, and Ms. Phillips sat to her right. During Kings, cards are spread out face down around a beer can. Each player draws a card. Each card has a rule assigned to it that requires the participant to drink. The player then puts the card under the tab of the can and when the tab breaks, the player who placed the last card has to drink the beer. During the game, Jane told Ms. Phillips that she was not interested in dating John.

At some point during the game, Jane's drink (Jack and Coke) was almost empty and someone offered Jane Fireball whiskey, a cinnamon flavored whiskey, from a bottle that had already been opened. There was only a centimeter of liquid in the Fireball bottle. She declined to drink it. The bottle of Fireball was placed on the table in front of her. She then turned her head to John to speak with him, and, in response, John nodded toward the Fireball whiskey and told her, "that's for you." His friends also urged her to drink it. She again declined while still turned toward John with no view of the whiskey bottle or her Jack and Coke. The next drink Jane took out of her Jack and Coke had Fireball whiskey in it. Jane suspects that, while she was talking to John, someone else put the Fireball in her drink. It is unknown to the University whether anyone else drank the Fireball whiskey prior to or after Jane.

### **Alleged Sexual Activity**

Jane only recalled a few scenes from the evening after consuming the Fireball whiskey. She described her memory as being "like a fog." She remembers the following:

- After drinking the Fireball whiskey, the next thing Jane remembers was that John was no longer to her left and that Mr. Johnson and Ms. Phillips were trying to convince her to go out with John. Then Jane recalled John drinking more beer.
- Jane next remembers being in a bathroom by herself and vomiting. She does not recall how many times or how long she vomited. Her body felt "completely limp," and she could not feel or move her arms or legs. She recalls John being in the bathroom at some point and helping her. He was trying to sit her up on the side of the bathtub. Jane's eyes were closed. John tried to awaken her by slapping her face and saying her name "over and over and over again."
- Jane's next memory is being in a bedroom. The lights were off, she was lying on her back, and John was removing her pants. She says she does not remember telling John that he could remove her pants, kiss her, or engage in any sexual activity. The next thing she recalls is being on her back, and John being on top of her having vaginal sexual intercourse with her. Jane says "it hurt like hell," but she "couldn't move at all" or "respond to any of it." She cried out, "ow," the best that she could because it hurt. Jane dry heaved while John was on top of her having vaginal sexual intercourse with her. Then, she blacked out.

- What Jane felt when she woke up later in the morning was “something completely different” than being hung over, which she had previously experienced. Whiskey, which is what Jane typically drinks when she drinks alcohol, has never made her sick. Jane has often drunk whiskey and beer in one night and has never become sick. Before the incident with John, Jane had never thrown up due to alcohol consumption.

John’s recollection is as follows:

- Because John began drinking beer at 8:00 p.m. and continued for another six hours until Jane arrived at 2:00 a.m., and then started drinking more heavily, he says that he was “pretty drunk” during the early morning hours. After Jane stopped throwing up, John escorted her from the bathroom into the bedroom and began kissing her at 4:30 or 5:00 a.m., when he was still “pretty drunk.”
- John acknowledges that Jane vomited “a lot” within thirty minutes before John initiated sexual activity with her. John saw vomit in the toilet and saw Jane sitting on the floor of the bathroom against the bathtub. John put his hand on her back when they entered the bedroom. Jane kept saying she was sorry for vomiting. John asked her if she was okay and she responded that she was. John says that shortly after she threw up, he asked her if she wanted to go to the bedroom, and she said “yes.”
- John stated Jane laid down on the bed, and John laid next to her. He turned to her, she looked at him, and they started kissing. He took his shirt off first, and she took off her shirt and bra, and he took off her pants, and he began kissing her. She seemed “a bit tipsy.”
- John says that Jane didn’t say anything after he took off her pants and initiated sexual intercourse with her, which led him to believe that she consented to the actions. In fact, John says that he had difficulty inserting his penis into Jane’s vagina, and that she repositioned him to penetrate her.

Mr. Lewis heard noises coming from the bedroom that sounded like John and Jane having consensual sex.

### **Jane Contacts Katie for Help**

When Jane woke up the following day, she found herself lying naked at the base of the bed. She began looking for her clothes, found everything but her bra, got dressed, and left. John did not say anything to Jane. Jane drove to her apartment and took a shower because she smelled like vomit. She had a lesion on her neck two inches in diameter, still felt sick to her stomach, and felt dizzy and nauseous.

Jane went back to bed and later texted her roommate, Katie, and asked to talk to her. Katie was at her family’s house and she told Jane to come over. When Jane arrived around 8:00 p.m. she appeared distant, and Katie says that she could tell that something had happened. Jane told Katie that she went to a party with John and his friends and that she drank a Strawberita and had Fireball. She told her she remembered playing drinking games, remembered that she was in the bathroom throwing up, and remembered John removing her pants and having sex with her with his hand over

her mouth. That night Katie took Jane to get Plan B (emergency contraceptive) and a pregnancy test because Jane was not on birth control. Katie remembers seeing a bruise on Jane's body that night.

Jane reported what happened to the Office of Student Conduct in hopes that it would prevent future sexual assaults.

### **Communications Between John and Jane After the Alleged Incident**

Around 1:00 p.m. the following day John sent Jane a text, "Well I don't remember much from last night. Did you throw up in the bed? If you did it's totally cool."

Jane responded: "I have no clue. I remember next to nothing about last night." She then texted John asking: "did we sleep together? I definitely woke up with no clothes on."

John responded: "I mean I assume we slept together because we woke up together and we were both naked."

Jane did not respond to any more of John's texts from the following day. John texted Jane again earlier this week. Jane did not respond to those texts.

Jane did not attend the class that she had with John Monday. Yesterday, Jane texted John, "how did your swim meet go?" because she wanted to find out when he would be back in class. She said she was driving herself crazy wondering when she would run into him in class. She also wanted to speak to him in person to find out what happened that night. John responded via text: "holy crap. You are alive."

Yesterday, Jane asked John to talk after class. Jane told John that she did not consent to having sex with him. John said only that he was sorry and that he did not intend for her to feel upset. John indicated that he believed that she had consented to sex. Jane and John did not communicate with each other after this.