Making new meanings: the entextualisation of digital communications evidence in English sexual offences trials

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Introduction

This article uses two case studies to explore the use of digital communications evidence[1] in English sexual offences trials by applying the sociolinguistic concept of entextualisation; a concept that refers to the process by which "discourse is successively decontextualised and recontextualised, and thus made into a 'new' discourse" (Blommaert, 2005: 251-252). As part of wider concern with criminal justice responses to sexual violence in England and Wales, there has been growing attention paid to criminal justice practices relating to digital communications evidence in sexual offences cases. Criticisms have centred on excessive requests for access to victim-survivors' digital communications data, including from their mobile phones and social media, with a significant concern being that irrelevant data obtained through such requests could be used at court to undermine the credibility of victim-survivors or impugn their moral character (Big Brother Watch, 2019; Bernal, 2019; Bowcott, 2019; ICO, 2020; Smith and Daly, 2020).

There is little existing research in this area in England and Wales, and that which does exist focuses on pre-trial stages of the criminal justice process (for example, Rumney and McPhee, 2020). There is currently no empirical evidence that explores how digital communications evidence is used in practice at sexual offences trials in England and Wales, and such evidence in other Western adversarial jurisdictions remains sparce. This article presents the first such evidence available in England and therefore addresses a significant gap in knowledge and contributes to a scant national and international evidence base.

Background to digital communications evidence in rape cases

The usually private nature of sexual offences means that most cases rest on conflicting accounts given by the victim-survivor and the accused with little or no independent corroborating evidence, such as medical forensics or eyewitnesses. For this reason, digital communications evidence can help strengthen prosecution cases (Boux and Daum, 2015; Carimico et al., 2016; Dodge, 2018; Ramirez and Denault, 2019). Indeed, in

[1] For the purposes of the present analysis, 'digital communications evidence' refers generally to digital communications between individuals through mobile phones and web-based platforms such as social media and dating sites/apps.

England and Wales, Rumney and McPhee (2020) found that this had been the case in 36% of investigations where such material had been accessed, whereas it was deemed to be of assistance to the defence in 31% of cases where data was accessed. Contrastingly, a separate study (Murphy et al., 2021) in England and Wales found that digital evidence assisted the victim-survivor's case almost half (7%) as often as it did for the accused (12%), but most of the time (47%) it supported neither. The disparity between the two studies is interesting. Both used case file analysis however Murphy et al. (2021) found a higher volume of files with reference to digital evidence than did Rumney and McPhee (2020). It is unclear how the assistance of digital evidence was established in Murphy et al. (2021) as it was not the main focus of that study, however for Rumney and McPhee (2020) it was established by the researchers assessing the evidence against Crown Prosecution Service disclosure guidance and did not involve discussions with defence lawyers, who could have drawn different conclusions as to the usefulness of the evidence for trial.

Elsewhere, interviews with investigators in Canada revealed that digital communications evidence is viewed as a 'double-edged sword' because it makes investigations more intrusive (Dodge et al., 2018). Indeed, Browning (2011) warned of the privacy implications for victim-survivors with regards to digital data and referred to social media data as a "treasure trove" for defence teams. So-called 'fishing expeditions' are a noted tactic of defence lawyers in Western adversarial jurisdictions (Howell and Heberlig, 2007; Uncel, 2011; Sholl, 2013; Boux and Daum, 2015; Carimico et al., 2016; Dodge, 2018). Dodge (2018) provides examples of defence attorneys singing the praises of social media and mobile phone data as tools for achieving acquittal. Whilst it is of course imperative that relevant material is disclosed to the defence, challenges arise when access to data goes beyond what is relevant or is used in ways that undermine victim-survivors based on myths about sexual violence (Temkin and Krahé, 2008).

There have been growing concerns that irrelevant digital communications evidence can be used at court to undermine victim-survivors because its malleability can serve to help reinforce culturally embedded rape myths and victim-blaming attitudes (Boux and Daum, 2015; Powell, Henry and Flynn, 2015; Dodge, 2018; Hlavka and Mulla, 2018). Dodge's (2018) in-depth analysis of North American sexual assault cases examined how differing readings of the same piece of digital evidence, a photograph, had a significant impact on justice outcomes. Whilst the assumption that photographic and video imagery offers 'objective truth' has long been

problematised, it is one that nevertheless endures, including within a legal context where digital imagery is frequently used as 'independent' evidence (Mnookin, 1998; Mezey, 2013). As Biber (2007: 5) noted, "the law looks at photographs as if there were nothing impeding its capacity to see". Viewing photographs as neutral or objective is problematic because the meaning of a photograph is made from context and is influenced by preconceptions, prejudices, and biases (Sontag, 1978). Photographs (and videos), therefore, offer a semblance of knowledge, but not objective truth (Sontag, 1978) because the creation of the image is not a neutral act, nor is its viewing (Brayne et al., 2018). Indeed, 'viewing' is "a socially situated activity accomplished through the deployment of a range of historically constituted discursive practices" (Goodwin, 1994: 606). This has significant implications in the context of a jury trial, as was illustrated by the first Rodney King[2] trial in America, where the prosecution asserted that the video evidence spoke for itself:

> "What more could you ask for? You have the videotape that shows objectively, without bias, impartially, what happened that night. The videotape shows conclusively what happened that night. It can't be rebutted." (Mydans, 1993, as cited in Goodwin, 1994: 615)

The prosecution assumed that the meaning of the video could not be contested, but the defence went on to propose alternative interpretations that led to the acquittal of three defendants and failure to reach a verdict on the fourth. Racial stereotypes that negatively frame Black masculinity permeated the trial narratives employed by the defence (Vogelman, 1993), drawing on the notion of the 'Black monster' (see Yancy, 2017). The defence played the video recording to the jury in slow motion, which enabled them to frame Rodney King in this stereotype and thus portrayed him as the aggressor (see Goodwin, 1994, for detailed analysis of how this was achieved). Digital imagery, then, provides an avenue for legal advocates to easily appeal to jurors' "habits of perception and judgement" (Feigenson, 2014: 21) that are impacted and exacerbated intersectionally by race, culture, age, class, and location (Biber, 2007: 114).

The concept of entextualisation (Bauman and Briggs, 1990) provides a helpful framework for viewing such trial practices. The processes of decontextualisation and recontextualisation within entextualisation play "a crucial role in infusing texts with power" (Briggs, 1993: 408). As Park and Bucholtz (2009) put it, entextualisation

[2] Rodney King was assaulted by four police officers in 1991. An uninvolved local resident filmed the incident and sent it to a local news agency. Four officers were tried for use of excessive force but were not convicted. The trial outcome is what triggered the 1992 riots in Los Angeles.

enables powerful social actors to "infuse the original discourse with the viewpoint of the institution so that this perspective is constructed as inevitable and natural" (p.486). This can be seen in legal institutions, and in particular the courtroom where barristers and judges hold the power in talk through the performance of their roles and the styles (see Fairclough, 2010) they adopt in performing those roles (Coulthard and Johnson, 2007; Cotterill, 2003; Conley and O'Barr, 2005), while witnesses are constrained in their ability to provide their own narrative by the question-and-answer tradition, and jurors are silenced (Stygall, 1994).

Eades (2008) noted that entextualisation is a common cross-examination strategy employed by barristers in the criminal trial genre. The process of entextualisation in criminal proceedings enables barristers to make texts[3] seem independent from the interactions in which they were originally produced (Andrus, 2015) and thus present constructed representations of those texts as objective truths (Bucholtz, 2009). In re-contextualising texts within the courtroom, barristers can make aspects of a person's identity, such as gender, race, or social class, relevant through drawing on embedded cultural narratives that, for example, were formed from racist, sexist, or classist assumptions (Blommaert, 2005; Ehrlich, 2007). Indeed, observations of US domestic and sexual violence trials have shown how defence lawyers are able to frame digital communications evidence through deeply embedded gendered and racialised narratives that enable them to cast victim-survivors as 'cunning liars' (Hlavka and Mulla, 2018; Ramirez and Lane, 2019).

Carimico et al. (2016) argued that defence lawyers frequently turn to social media accounts in order to evidence a victim-survivor's behaviour as incompatible with 'ideal victim' stereotypes. For example, Ramirez and Denault's (2019) analysis of Canadian court judgements revealed that defence lawyers used Facebook data to challenge the issue of consent by evidencing flirtatious or sexual messages and to challenge victim-survivor credibility by pointing to inconsistencies and messages supporting a 'motive for lying'. Removing digital communication data from their original context and transferring them into courtroom narratives therefore means that normative, commonplace behaviour can become incriminatory within the context of a sexual offences trial (Bluett-Boyd et al., 2013; Carimico et al., 2016; Dodge, 2018; Hlavka and Mulla, 2018). This is because the true context can be replaced with a new context that fits the narrative of the defence,

[3] When referring to 'texts', I do so in a linguistic sense (Blommaert, 2005), rather than the common shorthand for 'text messaging'. Any reference to 'text messaging' will be so stated, or more generally using the term 'messaging' or 'digital messaging'.

leaving the digital evidence open to manipulation and reinterpretation (Dodge, 2018; Hlavka and Mulla, 2018); that is, it is made possible through the process of entextualisation.

Method

The case studies analysed for this article are drawn from an observational study of six English sexual offences trials in 2019. The two cases were chosen because in both trials it was argued that the defendants had, via digital communications with the victim-survivors, made admissions of harm related to the allegations of rape and sexual assault, and these were entextualised in remarkably similar ways in both trials but with contrasting outcomes.

The court observation method enables researchers to observe what actually happens in court rather than relying on imperfect or biased recall from interviews or surveys with trial participants. The triangulation of court observation research with survey and interview research is important because together they help to build a nuanced and reliable evidence base (Smith, 2020). The observation method was especially beneficial for this analysis because it gave the advantage of seeing and hearing digital evidence used within the full context of the trials and in real-time, which gives the benefit of being able to consider ways in which the evidence was 'animated' by those reading or describing it (Hlavka and Mulla, 2018).

For each trial, speedwriting was used to make handwritten transcripts and additional field notes were also recorded. This resulted in an average of 112 pages of typed data per trial. An initial thematic analysis was carried out to identify narrative themes across the transcripts. Further data analysis was informed by intersectional feminism and Fairclough's (2010) dialectical-relational critical discourse analysis. This involved considering the way social practices are networked together in the context of trials; the ways in which semiosis relates to other elements of these social practices, for instance linking gendered stereotypes to social/cultural contexts using theories of sexism and patriarchy; and consideration of the features of the interactions within the chosen texts, in this case transcripts from court observations, through interdiscursive and linguistic analysis (Fairclough, 2010). This approach therefore encouraged a focus on power within discourse and enabled links to be drawn between courtroom narratives and wider cultural assumptions and discourses.

There are complex ethical considerations with court observations. Court trials fall within the public domain (Baldwin, 2008) and as such it is not necessary to gain informed consent from those involved in the trial.

Although this research might be considered covert because it was not possible to gain fully informed consent from everyone being observed during the trials (such as jurors and witnesses), it was not entirely so because I explained my presence to court staff. Spicker (2011) made an important distinction between covert and deceptive research, where covert research can be ethically justified and deceptive research cannot. I was not actively misleading participants, therefore this research was not deceptive. Additionally, I consulted specialist advocacy professionals regarding the ethical issues around consent in the project. As the trial experience is already a distressing event for the victim-survivor (Adler, 1987; Lees, 2002; Temkin and Krahé, 2008), it was the professional opinion of the specialist advocates that the semi-covert approach, that is, not seeking consent from victim-survivors, posed the least risk of undue harm. Indeed, the methods literature notes that the benefits of covert research can outweigh the potential harm to participants (Gray, 2018). Following Smith (2020), I sought permission from the judge, via court staff, to take notes in the public gallery and had an information sheet available for any participants who requested further information (though none did).

A note on the presentation of data

Extracts from the transcripts will be presented throughout the findings section. Within these, square brackets denote paraphrased speech or replace potentially identifying details (such as names or places). In some instances, the paraphrased speech is edited to give clarity to excerpts that become unclear when removed from the wider context of the full transcript. This is, of course, a process of entextualisation. Entextualisation is inherent in research practices and it is important to address this, whilst it is not possible to avoid entextualisation it is important to be mindful of it when presenting research findings. To that end, I have been careful to ensure that my paraphrasing only adds clarity.

Making new meanings in digital communications evidence

The remainder of this article uses observations from two English sexual offences trials as case studies that exemplify the ease with which digital communications data can be entextualised to fit two conflicting narratives. In both trials, the prosecution barristers argued that the defendants had admitted to the alleged sexual violence and that this had been captured in digital communications, where well-known euphemisms for sexual activity were used. Both defendants resisted the prosecutions' characterisations of the colloquial language as denoting admissions of sexual harm through offering alternative meanings to the colloquialisms.

In Trial-A the phrase was 'climbing on top of' someone and in Trial-B the phrase was 'a happy ending' (to a massage). Each phrase will be explored in turn in the specific context of each trial, followed by a discussion of the significance of rape myths and cultural narratives in the making of new meanings for the phrases.

Trial-A: "You climbed on top of me when I said no"

This trial related to one charge of rape. The victim-survivor (a woman in her early-20s) and defendant (a man in his early-30s) had been in a co-habiting relationship for several years. The relationship ended several months after the alleged rape and the victim-survivor reported to the police two months after the end of the relationship. The defence case was that sexual intercourse had occurred but that it was consensual.

The jury were provided with a printed transcript of the digital communications evidence between the victim-survivor and the defendant. The prosecution barrister drew their attention to particular parts of it through questions put to the victim-survivor. The following extract from the victim-survivor's evidence-in-chief sets out how she had confronted the defendant via digital messaging about the alleged rape:

Prosecution	Then he messages you, 'we can talk when we both get home, I've told you I'm sorry about the other morning, there's nothing else I can do', then he says, 'the text about the underwear was to wind you up on purpose'. Were both parts about the underwear?
Victim-survivor	No, the first part is about the other morning.
Prosecution	You said, 'But you shouldn't have done it in the first place, you climbed on top of me when I said no', is that in relation to the other morning?
Victim-survivor	Yeah.
Prosecution	'Don't ever do that to me again, you don't have the right […]', was that also in relation to the other morning?
Victim-survivor	Yeah.
Prosecution	'To be honest, you scare me, your anger towards me has got worse, what happens next time I say no and you're angry? I'm not having

it.' [So that's your effort to engage him in conversation about it], did he reply?

Victim-survivor No. (Trial-A)

In their entextualisation of the messages, the prosecution and victim-survivor presented the conversation as being about rape. The prosecution's supposition was that the defendant's non-reply was an acceptance of what the victim-survivor had put to him in the messages. The prosecution argued, therefore, that this constituted an admission to (and apology for) the alleged rape by the defendant. To challenge this stance, the defence and defendant offered an alternative meaning to the victim-survivor's messages:

Defence …as far as you were concerned, what was 'the other morning' referring to?

Defendant An argument me and [victim-survivor] had where I slapped her phone out of her hand.

…

Defence …she says, 'but you shouldn't have done it in the first place', as far as you were concerned what do you think she was talking about?

Defendant The argument with the phone, the way I argue with her and stand over her. (Trial-A)

Two conflicting entextualisations of the messaging evidence had therefore taken place and the process of recontextualisation enabled these differing meanings to be presented. The prosecution explored the defendant's alternative meaning in depth during cross-examination. She pointed out that the defendant's explanation did not make sense and that 'climbing on top of someone' is a well-known term that refers to sex. The cross-examination continued in this way for some time, with the two sides attributing entirely different meanings to the same words and the prosecution repeatedly pointing out flaws in the defendant's logic, for example:

Prosecution When she said ['climbed on top of me'] why didn't you ask what she meant?

Defendant I thought it was about the argument with the phone.

Prosecution	She says, 'what happens next time you're angry and I say no', that's not about a phone. You don't ask someone for permission to slap a phone from their hands.
Defendant	It's not about the phone, it's my anger.
Prosecution	She's talking about something she had the right to say yes or no to.
Defendant	Yes.
Prosecution	[Would it not ring any alarm bells when you read it?]
Defendant	[I can't remember].
Prosecution	You knew she was talking about the rape.
Defendant	No.
Prosecution	You apologised and wanted her to forget about it.
Defendant	No. (Trial-A)

In her closing speech, the prosecution relied heavily on these messages and the defendant's seemingly illogical explanation for them, however the wider narratives in this trial provided ways for the defence to undermine the prosecution's arguments and bolster the defendant's explanation. There were similarities in the approach taken by the defence barrister in Trial-B. The content of the messaging in that trial is therefore set out below, followed by an exploration of the salience of rape myths and broader narratives in both trials.

Trial-B: "A happy ending? That's what I asked for."

Trial-B related to two charges of sexual assault, including one count of assault by penetration. Similarly to Trial-A, the defendant in Trial-B used a colloquial term associated with sexual activity in his messages when the victim-survivor questioned him about the sexual assaults. The background to this trial was more unusual than Trial-A and most sexual offences trials, because whilst the victim-survivor (a woman in her mid-30s) and defendant (a man in his mid-40s) had been romantically communicating prior to the assaults, this had happened within the context of a drawn-out deception by the defendant: in colloquial terms, the defendant had been 'catfishing' the victim-survivor. He had communicated with the victim-survivor online and via the phone having made up an alternative identity for himself. He then went to the victim-survivor's home under the pretence of being a masseur that his primary false identity had sent round to her as a gift. In the messages

after the assaults, the victim-survivor asked the defendant why the 'masseur' had digitally penetrated her, to which the defendant replied that he had asked for her to be given a "happy ending".

Defence	Later, *<reads messages>*, she asks 'but why would he massage inside my vagina?', why do you respond in the way that you do?
Defendant	[I wasn't really reading it properly, I was cooking, my son was home and my wife was upstairs, so I fleetingly read it. I thought 'what's she on about?'. I said in the messages to her, 'I asked for a full body massage] with happy ending', because I always leave a massage feeling happy.
Defence	You say, 'did he do it?'.
Defendant	Yeah cos I thought about it later like *<surprised tone>* 'well, did he do it?', I thought she was being jovial. (Trial-B)

As in Trial-A, the defendant took a well-known colloquial phrase associated with sexual activity and provided an alternative, non-sexual meaning to it. The defendant claimed that for him, talking about a 'happy ending' to a massage simply refers to a post-massage positive emotional state. The prosecution questioned this explanation in cross-examination:

Prosecution	You [as the masseur] said, 'that's what [he] paid for' after you put your fingers in her vagina.
Defendant	No, I did not say that.
Prosecution	So why then in the message did you imply that is exactly what happened? [You wrote: 'including happy ending, that's what I asked for']. 'Happy ending', why did you say that?
Defendant	At the time I was distracted. When I said that, I meant how it makes me feel happy after having a massage.
Prosecution	But you know what it means when someone says it.
Defendant	[There are many contexts, for me it means feeling happy afterwards].

Prosecution	It means sex.
Defendant	It can.
Prosecution	So you know what it means.
Defendant	Yes.
Prosecution	So why would you choose to use that phrase?
Defendant	I was distracted. (Trial-B)

Just as in Trial-A, the defendant acknowledged the common understanding of the phrase but maintained that this was not what it meant to him. The prosecution went on to point out that the messages could be read as a confession to sexual assault:

Prosecution	You were trying to get her to see it as a good thing.
Defendant	[No]…
Prosecution	You're trying to talk her round: 'that's what I asked for'.
Defendant	I never put my fingers inside her, so no.
Prosecution	You wouldn't say that's a confession?
Defendant	It was not a confession.
Prosecution	[It was a confession and you trying to justify it.]
Defendant	No, it wasn't a justification cos nothing happened except the massage. (Trial-B)

In his closing remarks, the prosecution relied on the digital messaging as a key piece of evidence:

> "[then we have the evidence he said 'happy ending' at the time of the massage, which he denied…But significantly, why does he say 'including happy ending, that's what I asked for' in the messages? If he didn't say it at the scene, then why did he mention it after?] Well, that's easy, he can't hide from electronic messages, but he can deny saying something. So what I want you to draw from that is that this is a feeble denial and attempt to justify what he knows he has done." (Prosecution, Trial-B)

Here the prosecution barrister demonstrated the view that digital evidence can be useful in strengthening cases against defendants because it cannot be 'hidden from'. This reflects the idea that digital evidence is a

'model witness' (Dodge, 2018) in supporting victim-survivors' reports of sexual violence (see also Rumney and McPhee, 2020; Murphy et al., 2021). Indeed, it appeared to be successful in this case because the defendant was found guilty, indicating that the jury likely did not accept the defendant's entextualisation of the messages.

Nevertheless, the defendants' entextualisations in both Trial-A and Trial-B demonstrate the ease with which digital evidence can be moulded to fit opposing accounts at trial and, as is explored in the following section, to reinforce wider stereotyping (Dodge, 2018; Hlavka and Mulla, 2018). Indeed, the defence barrister in Trial-B noted the malleability of the written word in his closing remarks:

> "Now, 'happy ending', [defendant] explained what he meant by that… The written word is one dimensional, [defendant] says the question 'did he do it?' was a question of surprise, not confirmatory." (Defence, Trial-B)

Exploring the salience of rape myths and gendered cultural narratives in entextualisation

Defence counsel used a two-pronged approach to counter prosecution entextualisations by a) providing an alternative entextualisation and b) using rape myths and gendered cultural narratives to 'taint' (see Gilmore, 2017) prosecution entextualisations as well as the victim-survivors. The following discussion sets out the ways in which elements of the 'real rape' myth, that is, the expectation of victim-survivor resistance and the image of 'rapist' as a deviant 'other', interacted with broader gendered narratives to reinforce the 'new meanings' the defendants gave to the messaging and undermine the meanings given by victim-survivors. The common misconception that women routinely lie about rape was also used in this way.

The expectation of resistance from victim-survivors

The messages and related arguments from Trial-A regarding the 'climbing on top' phrase were central to the trial as a whole and were interlinked with the common rape myth that supposes victim-survivors of rape actively resist their attackers. Exploring the wider trial narrative and evidence demonstrates this.

Within her police statement and during her evidence-in-chief, the victim-survivor explained in detail exactly *how* she had said 'no', which included both verbal and physical resistance. The defence barrister cross-examined the victim-survivor extensively about the exact timing of the verbal resistance in relation to when

the defendant had 'climbed on top' and penetrated her. The defence argued that saying 'no' before the penetration took place was not an indication of non-consent, implying that the defendant could have reasonably believed the victim-survivor was consenting because she did not say 'no' after he penetrated her. Such an assertion is worrying and plainly wrong under English and Welsh law. Accordingly, the judge made clear in his summing-up that the timing of the verbal resistance does not need to be after penetration. That said, it is unclear why such a line of questioning was allowed to continue when it was arguably misleading the jury.

The *Sexual Offences Act 2003* makes no requirement for victim-survivors to have resisted, nor is it necessarily a common element of rape. Nevertheless, it is an element that bolsters a victim-survivor's story. It therefore becomes beneficial for the defence to undermine any claims of resistance, as described above in relation to Trial-A. This narrative in Trial-A drew on the persistent myth that women often offer token resistance to sex (Edwards, et al., 2011), that is, 'when women say no they really mean yes', which leads to this notion of not having resisted *enough* for it to be non-consensual. Burgin (2018) linked the token resistance myth to socio-sexual scripts that form a narrative of 'seduction' whereby upon hearing a woman's 'no' it becomes the man's role to persuade her to have sex and that this constitutes a romantic interaction. This is indeed reflected in the example in Trial-A, in that the defence had framed the victim-survivor's 'no' as being before penetration and that therefore it was not rape, the implication being that the defendant had 'successfully convinced' her to consent. Ehrlich (1998) also noted the influence of token resistance, where she identified ways in which defendants attempt to redefine consent to fit their own narrative. Again, this is precisely what the defence in Trial-A attempted to do in her interrogation of the timing of the penetration. As Ehrlich (2007) pointed out, rape myths about the 'requirement' for resistance can have a powerful impact in meaning-making, particularly because presenting a victim-survivor as sexually passive can lead to the events being understood as normative heterosexual sex.

Returning to the digital messaging, then, the defence narrative that drew on the notion of token resistance served to undermine the prosecution's entextualisation of the 'climbing on top' messages as being about rape by providing the jury with an avenue to accept the prosecution's meaning but still consider that the defendant had a 'reasonable belief' in consent. That is, by implying that the verbal resistance of saying 'no', and the

timing of it, was consistent with normative heterosexual sex. In constructing this narrative (and the alternative entextualisation), the defence took advantage of the victim-survivor's imprecise use of language within the digital messages. It is common for victim-survivors to use imprecise language when talking about sexual violence because their word choices are shaped by the cultural narratives that blame and shame women for being victimised (Brown, 2013). The victim-survivor was, therefore, doubly undermined by cultural narratives, first in their influence on her choice of words, then by enabling those words to be recast as meaning something other than rape (be that consensual sex or an argument). In contrast, the victim-survivor in Trial-B used far more precise language in her messages confronting the defendant, making it harder for the defence to apply a convincing alternative entextualisation.

The enduring myth that women routinely lie about rape

In both trials the victim-survivors were portrayed by defence counsel as cunning liars; a common tactic in rape trials (see for example Smith, 2018). In Trial-A, the defence suggested that the victim-survivor felt scorned or jealous of the defendant's new girlfriend and presented this as a motive for lying. The idea that women are inherently untrustworthy and deceitful and therefore lie about rape has been around for centuries (Jordan, 2004; Bourke, 2007). Women were also historically thought of as conniving and cunning in their 'false allegations' (Bourke, 2007). Previous court observation studies have highlighted that digital communications evidence is used as a mechanism by which to introduce or reinforce the 'women lie' narrative (Hlavka and Mulla, 2018; Ramirez and Lane, 2019). Indeed this was also observed in Trial-B, where defence counsel suggested that a gap in messaging between the victim-survivor and the defendant, which was taking place in the hours after the assault, provided an opportunity for her to be influenced by a friend:

Defence	[There is an 11-minute gap].
Victim-survivor	Yes.
Defence	Then that's where you claim he had massaged inside your vagina?
Victim-survivor	Yes.
Defence	Did you speak to anyone in those 10 minutes?
Victim-survivor	Maybe.
Defence	Did you speak to [friend A]?

Victim-survivor No, that was later.

Defence <*long pause*> but maybe [friend B]?

Victim-survivor Yes. (Trial-B)

By first identifying a gap in the communications and determining that it was after that gap that the victim-survivor 'claimed' (note the negative connotation of this word choice) the defendant had sexually assaulted her, the defence was able to cast suspicion on the gap. There is no confirmation of communication nor any evidence of it, merely a suggestion from the defence that there *could* have been and an acknowledgement from the victim-survivor that there *could* have been. Yet to an observer, such as jurors, this could easily have added weight to the accusation that the victim-survivor was lying, by leaning on cultural narratives that position women as untrustworthy and conniving. This was also bolstered by portrayals of the victim-survivor as provocative for sending sexual messages:

> "[there has been a lot of sexual banter, sexually charged, sexual discussion. We have messages directly after…then there's a gap of 11 minutes, then she says] 'but why did he massage inside my vagina?'. Her evidence is that she may have spoken to one of her friends between." (Defence, Trial-B)

Gendered narratives of women's sexualities intersect with classed notions of what counts as 'respectable' (Skeggs, 1997). In the above example the defence barrister pointed the jury to his earlier characterisation of the victim-survivor as 'promiscuous' and linked that to his implicit suggestion that she was influenced in making her allegation after speaking to a friend. His closing remarks demonstrated how easy it is to form a 'women lie' narrative with regard to even those who bear close resemblance to the 'ideal victim', where he used words and phrases with clear negative connotations: "exaggeration", "embarrassed", "play the victim", "vindictive". This relied on the gendered and classed narratives that posit that women lie about rape in order to avoid shame (Clark, 1987; Sanday, 1997; Stevenson, 2000; Bourke 2007). For example, Bourke noted a historic belief that "even 'respectable women' [could] 'imagine themselves the victims of a man's sexual passion'" (2007: 33). The connotation of 'exaggeration' in the defence counsel's closing speech reflected the idea that women 'imagine themselves the victims'.

These narratives of suspicion were further reinforced by both defence counsel through the entextualisation of messages sent by the victim-survivors, where both counsel attached considerable meaning to single characters. In Trial-A, this character was a question mark, which the victim-survivor had sent following her messages confronting the defendant to which he had not replied. In her closing remarks, the defence asked the jury to consider the question mark:

> "[[victim-survivor] doesn't get a reply, she sends another message, clearly agitated and frustrated]." (Defence, Trial-A)

The defence said that the sending of a question mark "clearly" signified agitation and frustration, giving a sense of certainty to something that was ambiguous. Similarly, in Trial-B, defence counsel asked the jury to consider a message in which the victim-survivor sent two emojis:

> "Can I ask you to consider very carefully what [prosecution] has asked you to do. [He read the last messages, I just invite you to consider the very last one]: a laughing emoji followed by a monkey covering its eyes." (Defence, Trial-B)

This was in the aftermath of the sexual assault where the victim-survivor had confronted the defendant about the digital penetration (what the defendant had referred to as a "happy ending"). The defence was therefore asking the jury to read a suspicious meaning of those two emojis, implying that a 'true' victim-survivor would not have sent such a message to the person who had sexually assaulted them. The defence ignored that it is not uncommon for victim-survivors to exhibit a 'friend' response in the aftermath of an assault (see Lodrick, 2007) and that this victim-survivor had been subjected to a drawn-out deception that undoubtedly caused her confusion in her untangling of the events that had occurred. Moreover, placing such significant meaning to single characters or emojis is inconsistent with the understanding that ironic use of emojis and other mood indicators is common in contemporary digital communications (Jones and Haffner, 2012; Hayes et al., 2016). Indeed, emojis are often misinterpreted in digital messaging (Miller at al., 2016; Tigwell and Flatla, 2016; Annamalai and Salam, 2017; Miller et al., 2017).

Making excuses for defendants through gendered narratives

Narratives excusing the defendants in both Trial-A and Trial-B were deployed by defence counsel as part of their two-pronged approach to undermine digital communications evidence. In Trial-A this involved focusing

on the defendant's lack of educational attainment as a means of bolstering the validity of his alternative meaning. In Trial-B the defence focused on portraying the defendant as a 'good man' as a means of distancing him from his admitted deceptions, thereby attempting to increase the credibility of his alternative meaning.

"He's not good with words"

The defence barrister in Trial-A drew attention to an instant in the trial where the defendant had said he is "not good with words". She linked this to the messaging the prosecution had said constituted an admission to rape:

Defence	[One final thing, in your interview, the officer is asking you about who the aggressor was, and you admit it can be you a lot of the time]. You also say that you're not very good with words.
Defendant	Yes.
Defence	You've had trouble with this 'climbing' phrase.
Defendant	Yeah.
…	
Defence	And what did you mean when you said you're not good with words?
Defendant	I'm not good at explaining myself, I don't understand big words. I didn't do well at school.
Defence	Did you ever climb on top of [victim-survivor] and have sex with her against her will?
Defendant	No.
Defence	We close our case. (Trial-A)

In linking the defendant's proclamation that he is not good with words to the digital communications, the defence cast doubt on the veracity of one of the prosecution's key pieces of evidence. The implication was that the defendant was not admitting to rape because he did not understand what the victim-survivor had said as he was uneducated. This provided a way for jurors to accept the defendant's explanation even if it seemed illogical to them. This narrative about the defendant's intelligence therefore made it easier for the

jury to accept the new meaning given to the victim-survivor's words by the defendant, which in turn bolstered his claim to innocence. The prosecution resisted this narrative in her closing remarks:

> "Of course, you will be told that the defence do not have to prove anything, which is true, but if [defendant] gives an explanation that beggars belief, that perhaps insults your intelligence, then you can take that into account. […] The messages support [victim-survivor's] claims, whereas his explanation doesn't make any sense. You have probably all got your own way of expressing 'get out of my face', <*gives some examples*>, but you would never say, even if you were stupid, even if you're not good with words, 'don't climb on top of me' to express that. It is perfectly clear what [victim-survivor] means, it is plain. […] You have heard here that [defendant] is perfectly able to express himself with his limited vocabulary. [He has shown himself to be arrogant, he insults your intelligence. His narrative does not fit]." (Prosecution, Trial-A)

In response, the defence barrister continued to draw on the intelligence narrative through her closing speech by making a direct comparison of intelligence between the defendant and the victim-survivor: "but bear in mind this is a young man, maybe not as bright as [victim-survivor]". The victim-survivor was portrayed by both prosecution and defence as bright and intelligent with a good grasp of English. Contrasting the defendant's level of intelligence against that of the victim-survivor arguably played into deeply embedded gendered narratives of women as manipulative liars and the myth that women often lie about rape (Jordan, 2004; Bourke, 2007). The implication being that women, and this victim-survivor in particular, cannot be trusted, in contrast to the "stupid" man who is not intelligent enough to lie convincingly to a jury. The narrative is also reflective of Lees (2002) argument that defendants are cast as 'unknowing' in order to bolster their innocence. Overall, the defence narrative and the reinterpretation of the meaning of 'climbing on top' of someone seemed to be convincing for the jury, as this defendant was acquitted.

"He's a good man"

The defendant in Trial-B made excuses for his intentional deception of the victim-survivor in stating that he wanted to carry on talking to her because it made him feel good about himself:

> Prosecution [Page X of transcript, you are maintaining the charade].

Defendant	Yes, I wanted to carry on talking to [victim-survivor].
Prosecution	[…] didn't you think at this stage you should come clean?
Defendant	[I was confused, didn't know what to do, didn't know whether we'd continue talking].
Prosecution	You could have said, 'it was me, but I was hoping you might like me'. You didn't think of that?
Defendant	No.
Prosecution	You continued the charade because you knew you had done something wrong.
Defendant	No, never, I just wanted to carry on talking to her cos it makes me feel good about myself. (Trial-B)

This is reflective of gendered narratives of male entitlement that are rooted in patriarchy and place men's needs (including sexual urges) as of higher importance than women's and position women as responsible for nurturing men's feelings (Hill and Fischer, 2001). The defendant's earlier explanation, in which he stated that he "didn't read it properly" because he was distracted by his home life, drew similarly on narratives that served to excuse him and distance him from the prosecution's portrayal of him as 'rapist'. Turning to the wider narratives in this trial demonstrates this.

Throughout the trial, the defendant was portrayed by the defence as a 'good man'. This started when the defence asked the victim-survivor directly about the defendant's character:

Defence	You wouldn't describe what happened to you as good?
Victim-survivor	No.
Defence	[You wouldn't say the person that did it was nice?]
Victim-survivor	He was nice to me. Not aggressive, not angry. (Trial-B)

The defence drew on a false dichotomy of people as either wholly good or wholly bad (Nilsson, 2019), implying that "nice" people do not perpetrate rape, which ignores the complexity of human beings and that everyone is capable of doing both good and bad things. The argument that 'good men don't rape' is a fallacy that stems from pervasive rape culture (Jozkowski, 2016). The 'good man' narrative drew on the damaging portrayals and

stereotypes about rapists which position them as a deviant 'other' (Jozkowski, 2016). Such portrayals are persistently reinforced through the media (Kitzinger, 2009; O'Hara, 2012). Franiuk et al. (2008) have argued that men's endorsement of the 'real rape' myth is a way for them to distance themselves from rapists, thus creating a counter-narrative of 'good men don't rape'. Pascoe and Hollander (2016) argue that the 'good men don't rape' narrative shifts focus away from structural inequalities and problematic actions and attitudes. The narrative thereby attempts to shift the focus onto individual characteristics. In the context of this trial then, the 'good man' narrative attempted to distinguish the defendant from the deviant 'other' of the 'real rape' myth.

The defence continued with this narrative throughout the trial, with eight character references from family (including his wife) and friends of the defendant being read into evidence. The references framed the defendant consistently as "a family man", as "a kind, caring and gentle man", as a "helpful" and "happy" man. All expressed their absolute shock at the allegations, with one saying that they trusted the defendant "wholeheartedly". The defence also used multiple aspects of the defendant's personal life to construct an overarching sympathy narrative. These included asking about the defendant's disabled child, his troubles at work, and the difficulties in his marriage. By bringing his wife and child into his explanation about the use of the term 'happy ending', then, the defendant attempted to align himself with this image of him as a 'good, family man' and reminded the jury of the difficulties he had been having at home.

Conclusion

This article has explored the entextualisation of digital communications evidence in English sexual offences trials, using two trials as case studies. Both Trial A and Trial B provided examples of how easily digital evidence can be manipulated at trial to suit two completely opposing stories. Removing digital communications from their original contexts provides opportunity for them to be reframed to fit competing narratives at trial and be reinforced by rape myths and broader cultural narratives that serve to undermine victim-survivors. Such entextualisations also serve to reinforce those broader narratives and thus they were both produced by *and* reproduced rape myths and gendered narratives. Defence counsel were therefore able to employ a two-pronged strategy that relied on rape myths and gendered narratives to create alternative entextualisations *and* undermine opposing entextualisations.

Not only were defendants' digital admissions of harm challenged and reinterpreted, but also victim-survivors were cast as suspicious based upon single characters within the messaging. While the defendants were given opportunity to present their alternate meanings as the messages were put to them in cross-examination, the aspersions cast against victim-survivors were saved for closing remarks. This had the effect of silencing victim-survivors, further compounding the ways in which the adversarial trial already tightly constrained their ability to give their accounts (see Matoesian, 1993; Jordan, 2012).

The ease with which conflicting meanings for defendants' admissions of harm can be produced and reinforced by culturally embedded gendered narratives and rape myths demonstrates the difficultly there is for victim-survivors in seeking justice. It demonstrates that the bar is incredibly high for victim-survivors' credibility and that there is a lot of work to be done both inside and outside of the courtroom to address the impact of extra-legal factors by, for example, increasing the levels of scrutiny given to digital evidence throughout the criminal justice process. Offender-centric policing such as that explored by Rumney and McPhee (2021) could also work to combat the effect of narratives outlined within this article through focusing investigators attention on the steps taken by alleged perpetrators to establish consent and could be especially useful in cases like these where there are arguable digital 'confessions' and expressions of male entitlement.

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