

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

DWIGHT CONRAD SOLANDER,

Respondent.

Electronically Filed
Dec 17 2015 12:54 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

CASE NO: 67710

APPELLANT'S REPLY BRIEF

**Appeal From Findings of Fact, Conclusions of Law and Order Granting,
In Part, Defendant's Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CRAIG A. MUELLER, ESQ.
Mueller Hinds & Associates
Nevada Bar #004703
600 South 8th Street
Las Vegas, Nevada 89101
(702) 940-1234

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar No. 012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE.....	1
ARGUMENT	1
I. THE DISTRICT COURT ERRED IN FINDING THE INSERTION OF A CATHETER INTO A GENITAL OPENING CANNOT CONSTITUTE SEXUAL ASSAULT AS A MATTER OF LAW	1
CONCLUSION	6
CERTIFICATE OF COMPLIANCE.....	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Page Number:

Cases

<u>Attorney Gen. v. Nevada Tax Comm’n,</u>	
124 Nev. 232, 240, 181 P.3d 675, 680 (2008).....	2
<u>Consumer Prod. Safety Comm’n v. GTE Sylvania,</u>	
447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).....	2
<u>Manning v. Warden,</u>	
99 Nev. 82, 84, 659 P.2d 847, 848 (1983).....	4
<u>McNair v. State,</u>	
108 Nev. 53, 55-56, 825 P.2d 571, 573 (1992)	5
<u>Polk v. State,</u>	
126 Nev. Adv. Rep. 19, 233 P.3d 357, 359-60 (2010)	3
<u>State Dep’t of Bus. & Indus. v. Check City P’ship,</u>	
130 Nev. Adv. Rep. 90, 337 P.3d 755, 756 (2014)	2
<u>Winnerford Frank H. v. State,</u>	
112 Nev. 520, 525-26, 915 P.2d 291, 294 (1996)	4

Statutes

NRS 200.364	2, 3, 4, 5
NRS 200.364(5)	2, 3, 4
NRS 200.366	1, 2, 3, 4, 5
NRS 200.366(5)	4, 5
NRS 230.366	3

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

DWIGHT CONRAD SOLANDER,

Respondent.

CASE NO: 67710

APPELLANT'S REPLY BRIEF

**Appeal from Findings of Fact, Conclusions of Law, and Order Granting,
In Part, Defendant's Petition for Writ of Habeas Corpus
Eighth Judicial Court, Clark County**

STATEMENT OF THE ISSUE

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THE
INSERTION OF A CATHETER INTO A GENITAL OPENING CANNOT
CONSTITUTE SEXUAL ASSAULT AS A MATTER OF LAW

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THE INSERTION
OF A CATHETER INTO A GENITAL OPENING CANNOT
CONSTITUTE SEXUAL ASSAULT AS A MATTER OF LAW

In his Answering Brief, Dwight contends the district court properly dismissed Counts 7-8, 19, and 30-36 because the forcible insertion of a catheter into the genital openings of A.S. (10/21/01), A.S. (1/23/03), and A.S. (7/25/04) cannot constitute sexual assault as a matter of law. Dwight makes several arguments in his attempt to justify the court's actions: 1) Applying the plain language of the statute would produce absurd results; 2) NRS 200.366 requires a sexual motivation by its plain

meaning; 3) The subsequent statutory amendment to NRS 200.364 shows the legislature always intended to exempt medical instruments from the definition of sexual penetration. These arguments are without merit.

Dwight first argues the plain language of NRS 200.366 and NRS 200.364 should not be applied because it would produce absurd results. RAB pp. 6-9. However, even Dwight acknowledges that the plain language of a statute is where statutory analysis begins. Indeed, the Nevada Supreme Court has held on multiple occasions that it will not look beyond the unambiguous plain language to other canons of statutory construction. See State Dep't of Bus. & Indus. v. Check City P'ship, 130 Nev. Adv. Rep. 90, 337 P.3d 755, 756 (2014); Attorney Gen. v. Nevada Tax Comm'n, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008); Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980). Here, the language of NRS 200.364(5) is clear that sexual penetration includes **any** intrusion, no matter how slight, of the genital or anal openings of a victim, and therefore, analysis of other canons of statutory construction is unnecessary.

Further, Dwight entirely ignores the State's argument that requiring the penetration of genital openings to be sexually motivated would lead to absurd results as well as Subsection C of the State's Opening Brief, wherein the State contended Dwight's argument raised issues of fact, not law, to be considered, if at all, by a jury. Specifically, in the State's opening brief before this Court, it argued that Dwight's

hypothetical examples were distinguishable from the instant case based on issues of fact surrounding *mens rea*, consent, and the defense of necessity. These arguments directly rebut Dwight's claim that applying the plain language of NRS 200.364 and NRS 200.366 as the State contends would lead to absurd results. However, instead of addressing the State's lengthy analysis on this point, Dwight merely regurgitates the same hypothetical examples provided in his Petition and specifically discussed in the State's Opening Brief. Under Polk v. State, 126 Nev. Adv. Rep. 19, 233 P.3d 357, 359-60 (2010), Dwight's failure to address the State's arguments that his hypothetical examples are factually distinct from the instant case and his Petition raised issues of fact, not law, should be construed as a confession of error.¹

Dwight next argues, similar to a claim Janet made in her Answering Brief, that because "sexual" appears in NRS 200.366 to describe the type of penetration prohibited, NRS 200.366 requires a sexual motivation or intent. RAB p. 9-11. This argument completely disregards NRS 200.364(5), which does not simply define

¹ In fact, Dwight even acknowledges, though perhaps unintentionally, that Judge Adair determined an issue of fact in granting his Petition, stating: "Judge Adair rightfully decided that medically ***intended*** use of catheters does not constitute sexual assault within the meaning of NRS 230.366." RAB p. 8 (emphasis added). It has always been the State's position that the forced insertion of catheters into the victims' genital openings accompanied with threats to mutilate the victims with a razor blade was not "medically intended" but instead intended to serve punitive purposes. Despite the difference in opinion between the parties as to the defendants' intent accompanying the forced catheterization of the victims, all parties should be able to agree the question of intent is certainly an issue of fact for the jury.

“penetration,” but instead defines “sexual penetration,” as: “any intrusion, however slight, of any part of a person’s body or any object manipulated or inserted by a person into the genital or anal openings of the body of another.” Thus, it is actually Dwight who is attempting to read words out of the relevant statutes as he completely ignores the term “sexual” as it appears in NRS 200.364(5). Because NRS 200.364(5) defines both the adjective “sexual” as well as the noun “penetration” as any intrusion, however, slight, of the genital or anal opening of another, the plain language of the statutes preclude any alternative definition of “sexual” as an element of intent.

Further, Dwight completely ignores Supreme Court precedent holding that NRS 200.366 is a general intent crime. Winnerford Frank H. v. State, 112 Nev. 520, 525-26, 915 P.2d 291, 294 (1996); Manning v. Warden, 99 Nev. 82, 84, 659 P.2d 847, 848 (1983). Indeed, nothing in NRS 200.364(5), defining the disputed terms “sexual penetration,” requires a sexual motivation or intent to accompany the penetration of the genital or anal openings of the body of another. The statutory definition of “sexual penetration” makes clear the legislature intended to criminalize the penetration of and by “sexual” organs, and declined to require a sexual motivation or intent.

Finally, Dwight contends the subsequent amendment to NRS 200.366(5) demonstrates the legislative intent that NRS 200.364 “does not apply to medical

devices, such as catheters.” RAB p. 11-13 (emphasis added). First, this argument too is belied by plain language. The most recent version of NRS 200.366(5) provides that sexual penetration excludes “any such conduct for medical purposes.” (emphasis added). Thus, contrary to Dwight’s claim, the applicability of NRS 200.364 does not center on the type of “device,” inserted into a genital opening, but instead on the purpose, or intent, accompanying the penetration. Certainly, the fact that a medical device is inserted would go toward the purpose for which the penetration occurred, but it would not be the penultimate test. Otherwise, perpetrators such as the defendant in McNair v. State, 108 Nev. 53, 55-56, 825 P.2d 571, 573 (1992), would escape criminal liability completely merely by wearing surgical gloves.

Further, as contended by the State in its Opening Brief and ignored by Dwight, the subsequent amendment to NRS 200.364 clearly raises an issue of fact, not law. Whether a certain penetration was for medical purposes or not depends on the facts and circumstances as offered to a jury. As even the most recent amendment to NRS 200.366(5) indicates that the purpose for which the penetration occurred is an issue of fact for the jury, it was improper for the district court to decide the issue and grant Dwight’s Petition.²

² Curiously, Dwight also appears to imply that the most recent amendment to NRS 200.366(5) was the result of legislative awareness of and a consequent countermeasure against the charges in the instant case. Dwight suggests the legislature

CONCLUSION

Based on the foregoing, and the State's Opening Brief, the State respectfully requests the district court's decision to grant, in part, Dwight's Petition be REVERSED and the relevant charges be reinstated.

Dated this 17th day of December, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Chris Burton*

CHRIS BURTON
Deputy District Attorney
Nevada Bar #012940
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

added the medical exception to check an overreaching District Attorney's Office. Not only is this speculative argument unsupported with any factual or legal authority, it immediately evaporates with a simple examination of the legislative minutes, which indicate the Clark County District Attorney's Office ***supported*** the medical exception amendment. See, e.g., Minutes of the Subcommittee of the Senate Committee on Judiciary, 78th Sess. 11-12 (May 8, 2015) (statement of Chief Deputy District Attorney James Sweetin).

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 1,255 words and does not exceed 15 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of December, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
District Attorney
Nevada Bar #001565

BY /s/ Chris Burton

CHRIS BURTON
Deputy District Attorney
Nevada Bar #012940
Office of the Clark County District Attorney
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 17, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

CRAIG A. MUELLER, ESQ.
Counsel for Appellant

CHRIS BURTON
Deputy District Attorney

BY /s/ E.Davis

Employee,
Clark County District Attorney's Office

CB//ed