The district court did not admit impermissible hearsay

James next argues that the district court erred in allowing the hearsay testimony of multiple witnesses regarding what T.H. purportedly told them following the incident.[3] We disagree.

This court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Hearsay is inadmissible unless it falls within one of the exceptions to the general rule. NRS 51.035; NRS 51.065.

T.H.'s statements to her mother

Following the incident, James drove T.H. to school. T.H. immediately texted her sister about the incident, who in turn contacted their mother. At trial, T.H.'s mother testified that when she arrived at the school, T.H. was crying and "gasping for air" in the nurse's office. The State questioned the mother regarding what T.H. had told her once they left the school, and she responded:

> [T.H.] said . . . [James] came in her room and threw her onto the other bed. . . . He told her he would snap her neck if she screamed. . . . he ripped off her panties . . . took her into the living room . . . where he took his finger and inserted it in her vagina. And then he took it out and rubbed his penis across her vagina.

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[3]We reject James's argument that his rights under the Confrontation Clause were violated, as T.H. was subject to cross-examination at trial regarding her statements to these witnesses. See Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

Over James's objection, the district court admitted the mother's testimony pursuant to NRS 51.095 as an excited utterance.

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." NRS 51.095. "The elapsed time between the event and the statement is a factor to be considered but only to aid in determining whether the declarant was under the stress of the startling event when he or she made the statement." Medina v. State, 122 Nev. 346, 352-53, 143 P.3d 471, 475 (2006) (concluding that a rape victim was still under the stress of the event over a day later, when she was found crying, pale, and still in her soiled garments).

Here, the record reveals that the conversation between T.H. and her mother occurred within two hours of the assault, during which time T.H. remained visibly upset. Thus, we conclude that the district court did not abuse its discretion in permitting this testimony as an excited utterance.[4]

T.H.'s statements to a hospital nurse

James argues that testimony from the nurse who interviewed T.H. about the sexual assault was inadmissible hearsay. Because James did not object to this testimony at trial, we review for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477.

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[4]We also reject James's challenge to the admission of T.H.'s sister's testimony regarding the content of the text messages. James did not object to this testimony at trial, so we review for plain error. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Because T.H.'s statements to her sister occurred before the statements to her mother, they qualified for the excited utterance exception as well. Thus, no error occurred.

At trial, the nurse testified that protocol at the hospital involves interviewing patients about their medical and sexual history, which is used to provide treatment and to obtain evidence for a sexual assault kit. In recapping her interview with T.H., the nurse testified in detail about what T.H. had told her regarding the incident.

We conclude that the testimony was admissible under NRS 51.115, which provides a hearsay exception for statements made for the purpose of medical diagnosis or treatment.

T.H.'s statements to a police officer

During cross-examination, James asked an officer to testify as to the contents of the incident report he prepared after speaking with T.H. Specifically, James sought to confirm that both T.H. and her mother had told the officer that James's penis did not enter T.H.'s vagina. On redirect examination, the State questioned the officer on the remaining portions of his report, which included T.H.'s statements that James wore a glove to digitally penetrate T.H., and that he also rubbed his penis between the lips of her vagina. James objected to this line of questioning as hearsay, but the district court overruled his objection.

On review, the district court did not err in admitting the officer's statements. The questions at issue occurred on redirect examination, after defense counsel had already introduced evidence of the police report to impeach previous testimony regarding the extent of penetration. Because James was using portions of the report to impeach T.H. and her mother with their allegedly inconsistent statements, the State was entitled to introduce the remaining portions of the report as evidence of their prior consistent statements under NRS 51.035(2)(b) to "rebut an express or implied charge against the declarant[s] of recent fabrication."

Evidence of T.H.'s sexual history was properly excluded

James argues that the district court misapplied Nevada's rape shield law and erred by not allowing him to cross-examine T.H. about her prior sexual activity. He sought to offer this history as an alternative explanation for T.H.'s injuries and to educate the jury that she was not a virgin. We conclude that this argument lacks merit.[5]

> Nevada's rape shield law provides:
>
> > In any prosecution for sexual assault . . . , the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or

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[5]James also argues that this alleged error amounts to violations of his Due Process and Confrontation Clause rights. We disagree. "'[T]rial judges retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Jordan v. Warden, Lebanon Correctional Inst., 675 F.3d 586, 594 (6th Cir. 2012) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). Because there was no evidence presented by the prosecution that T.H. was a virgin, evidence showing she was not a virgin would have been irrelevant. Also, because defense counsel was able to present evidence of alternative injury causation, evidence suggesting T.H.'s vaginal injury may have resulted from intercourse with someone else would be repetitive. As such, the district court did not violate James's Confrontation Clause rights. See Jordan, 675 F.3d at 598. Additionally, after reviewing the record, we are not persuaded that evidence of T.H.'s lack of virginity, even if admitted, would have changed the outcome of the verdict. Therefore, we find no violation of due process. See Richmond v. Embry, 122 F.3d 866, 874 (10th Cir. 1997) ("[I[n determining whether the exclusion of testimony violated a defendant's . . . right to due process, we must determine whether the defendant was denied a 'fundamentally fair' trial; . . . looking at the record as a whole, we inquire . . . whether the evidence was of such an exculpatory nature that its exclusion affected the trial's outcome.").

> the victim has testified concerning such conduct, or the absence of such conduct . . . .

NRS 50.090 (emphases added).

A review of the record shows the State did not ask T.H. about her prior sexual conduct, and T.H. did not offer testimony insinuating she was a virgin. Thus, neither the prosecutor through questioning nor the victim through testimony placed her virginity in issue. See Johnson v. State, 113 Nev. 772, 777, 942 P.2d 167, 171 (1997) (noting that NRS 50.090 could allow for cross-examination regarding virginity if and only if the prosecution or victim "opened the door" to the victim's status as a virgin). Because no evidence was introduced to suggest that T.H. had sex prior to the assault, the only purpose of the defendant presenting this evidence would be to attack T.H.'s credibility, which is exactly what NRS 50.090 seeks to prevent.[6]

Thus, the district court did not abuse its discretion by preventing James from cross-examining T.H. about her sexual history.

The district court did not admit evidence that amounted to vouching.

James argues that the district court erred by admitting expert testimony that amounted to improper vouching. Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987) (holding that testimony

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[6]We need not analyze James's argument that evidence in violation of the rape shield law should have been introduced to explain an alternative source of injury, as his trial counsel was able to ascertain upon cross-examination of T.H.'s examining doctor that the injury was from a non-specific cause and could have been created by a nonsexual condition. As such, the jury heard evidence that explained other potential sources of injury, and nonetheless, chose to convict James.

amounting to an expert witness vouching for the truthfulness of another witness is improper).

On cross-examination of the doctor who examined T.H. at the hospital, James elicited from the doctor an admission that a number of the medical findings in her report were nonspecific as to their cause. James then asked the doctor about what, other than sexual abuse, could cause a similar injury. On redirect examination, the State asked the doctor to relay her overall impression of this case, and the doctor replied "[t]hat it was probable abuse. . . . [b]ecause the child has given a spontaneous, clear, detailed description of the events."

Because James made no objection to this line of questioning at trial, we review for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477. Here, the State did not ask the doctor to comment on T.H.'s truthfulness, and the record does not demonstrate that she did so. In fact, the doctor expressly stated that abuse cannot be conclusively determined, and she affirmed that her findings were based on both the history provided by T.H. and the medical findings of the exam. While she did draw her conclusion of probable abuse based on T.H.'s description of the events, the doctor did not testify that T.H. was telling the truth when she recounted the events. Thus, we see no error in this line of questioning.

The district court properly denied James's motion for mistrial

James argues the district court erred by not granting his motion for a mistrial after an investigating detective mentioned James's criminal past during his testimony.

During the detective's testimonial explanation of how he became involved in the case, he stated that "a check was done on the alleged suspect and he had some prior felony arrests—." The State immediately interrupted before the detective finished his sentence, and

James did not object. Later, when asked whether James had agreed to meet with law enforcement, the detective stated that James "came to the location. There was a warrant for his arrest for—." Again, the State cut him off and James did not object. After the witness left the stand, James moved for a mistrial. The district court denied James's motion, reasoning that the detective's statements were not so prejudicial so as to warrant a mistrial.

This court will not disturb a district court's determination on whether a mistrial is warranted absent a clear abuse of discretion. Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996). Although evidence of a defendant's prior arrest is generally not admissible as character evidence under NRS 48.045, "'[a] witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement.'" Ledbetter, 122 Nev. at 264-65, 129 P.3d at 680 (quoting Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005)).

Here, the record indicates that the State did not intend to elicit the information, and that the State promptly prevented the witness from completing the questionable statements. Moreover, James chose not to object to either reference, and he later declined to admonish the jury to disregard these statements in an effort to avoid further attention to the matter. Thus, there was not enough prejudice to warrant a mistrial, as it was unlikely that the jury had fully grasped the potentially harmful nature of the remarks.[7]

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[7]Even if the jury had understood the remarks, any alleged error was harmless in light of the multiple other witnesses who testified against James. Parker v. State, 109 Nev. 383, 389, 849 P.2d 1062, 1066 (1993).

The State did not commit prosecutorial misconduct

James argues that the State committed misconduct during cross-examination by asking him to comment on the veracity of other witnesses and by asking questions that called for speculation. We disagree.

Questions regarding the veracity of other witnesses

During the State's cross-examination of James, the following exchange took place:

> Q: And you heard [T.H.'s mother] say yesterday that the pitbull wasn't welcome there; she didn't know that [you were dropping it off].
>
> A: That's not true.
>
> Q: Why would she lie about that?
>
> A: I don't know. You would have to ask her that.

At this point, defense counsel objected for speculation, which the district court overruled. The State later asked James who he thought coerced T.H. and the other minor to disclose their allegations of sexual abuse.

On appeal, James argues that the State's questions regarding the credibility of other witnesses were improper under Daniel v. State, 119 Nev. 498, 517-19, 78 P.3d 890, 903-04 (2003). In Daniel, this court adopted a rule that bars prosecutors from questioning a defendant about "whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses." Id. at 519, 78 P.3d at 904.

Here, the State's initial questioning did not ask James whether the witness had lied, nor did it goad him into saying as much. Instead, the State was asking whether James was aware of the

contradictory testimony. By providing a nonresponsive answer, James invited the second question as an attempt to clarify the discrepancy. As such, the district court did not err by permitting the State to proceed with asking these questions. Moreover, any error in this regard would have been harmless in comparison to the otherwise strong evidence in support of James's guilt.

Questions calling for speculation

James argues that some of the State's questions during his cross-examination improperly called for speculation. For example, the following exchange occurred between the State and James:

> Q: Isn't it true that the reason there was no trial with the [other minor's] case is because [her mother] called Metro and relayed that her daughter would no longer cooperate?
>
> A: I don't know.
>
> Q: That was [the mother's] choice, not [the minor's] choice?

On appeal, James argues that this line of questioning amounted to error because the State's questions related to facts not before the jury. For support, James points to State v. Cyty, 50 Nev. 256, 259, 256 P. 793, 794 (1927), and argues that "[c]ourts have uniformly condemned as improper statements made by a prosecuting attorney, which are not based upon, or which may not fairly be inferred from, the evidence."

Well before the cross-examination of James, the other minor had testified that her mother still had frequent contact with James, as they shared children in common. She also testified that James was still allowed to have visitation with those children, despite her allegations. From this, an inference could be drawn that the other minor's mother was disinterested in holding James accountable for anything he may have done

to the other minor. Thus, the State's questions related to matters that could be inferred from existing evidence.

Accordingly, the district court was within its discretion in allowing the State to briefly question James in an effort to see whether he knew why the previous allegations were not prosecuted.

Use of the word "victim" does not amount to reversible error

At trial, the State and many government witnesses repeatedly referred to T.H. as a "victim." Additionally, Instruction 15 given to the jury contains the word "victim." For the first time on appeal, James contends that this referral presupposes a finding of guilt. Because James did not object to the word "victim" at trial, we review for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477.

For support, James points to other jurisdictions that prohibit use of the word "victim" where the main issue at trial is whether a crime occurred. Primarily he relies on State v. Nomura, where the Hawaii Appellate Court reasoned that "the term 'victim' is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged." 903 P.2d 718, 721 (Haw. App. 1995).

We review Nomura only as it relates to Instruction 15, since that case focused solely on a jury instruction and not on prosecution or witness characterizations. We reject Nomura, as this court has previously approved of a jury instruction containing the term "victim," specifically in the context of describing the very sexual assault corroboration requirement discussed in Instruction 15. See Gaxiola v. State, 121 Nev. 638, 647-49, 119 P.3d 1225, 1231-33 (2005).

As for use of the word "victim" by State witnesses, we note that all of James's objections relate to portions of testimony by either detectives or patrol officers. "[T]he term 'victim' to law enforcement

officers, is a term of art synonymous with 'complaining witness.'" Jackson v. State, 600 A.2d 21, 24-25 (Del. 1991). Accordingly, we decline to require law enforcement officers to alter their commonly practiced terms of art. As to the prosecutors' use of the word "victim," we rely on the Ninth Circuit Court of Appeals opinion, United States v. Gibson, which held that because evidence had been presented that the parties did suffer a loss as a result of the defendant's actions, the word "victim" as used by the prosecution was fair comment on the evidence presented. 690 F.2d 697, 703 (1982). We find Gibson instructive and hold the prosecutors made use of fair comment in describing T.H. as a "victim," since evidence had been presented that James sexually assaulted T.H. Additionally, Nevada has never held that the State's use of the word "victim" is inappropriate, and thus, there is no plain error.

The district court did not err in issuing jury instructions

James contends that the district court erred in issuing several jury instructions. We disagree.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). This court applies de novo review to issues of law, including whether a jury instruction is the correct statement of the law. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

Jury Instruction 15: "no corroboration"

At trial, the district court instructed jurors that:

> There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

As a threshold matter, James failed to object to this instruction at trial, which precludes appellate review absent plain error. Gaxiola, 121 Nev. at 647, 119 P.3d at 1232.

On appeal, James acknowledges that this court has repeatedly approved the verbatim language of this instruction. See, e.g., id. at 647, 119 P.3d at 1231-32. However, James urges this court to overturn its precedent by citing to other jurisdictions which hold that the instruction causes prejudice to defendants. See, e.g., Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003) (concluding a similar instruction was problematic because it unfairly highlights a single witness's testimony and because the technical term "uncorroborated" may mislead or confuse the jury).

Because all of the cases cited by James were published prior to our decision in Gaxiola, we decline to revisit that analysis here. Moreover, because the instruction comports with Nevada law, the district court did not commit plain error in issuing the "no corroboration" instruction.

Jury Instruction 12: "multiple acts as part of a single encounter"

In informing the jurors on when multiple offenses may arise out of a single sexual encounter, the district court issued the following instruction:

> Where multiple sexual acts occur as part of a single criminal encounter a defendant may be found guilty for each separate or different act. . . .
>
> Where a defendant commits a specific type of act constituting [a crime], he may be found guilty of more than one count of sexual assault and/or open or gross lewdness if: . . . (3) a separate object is manipulated or inserted into the genital opening of another.
>
> Only one sexual assault and/or open or gross lewdness occurs when a defendant's actions were of one specific type and those acts were continuous

> and did not stop between the acts of the specific type.

(Emphases added.)

On appeal, James relies on Crowley v. State and argues that this instruction misstated the law by telling the jurors that a single sexual assault occurs only when an accused commits a single, specific type of sexual assault. 120 Nev. 30, 33, 83 P.3d 282, 285 (2004) (holding that where one act (lewdness) is incidental to another (sexual assault), a defendant cannot be convicted of multiple acts arising from a single, uninterrupted encounter). James argues that absent this instruction, the jury would have likely found that the digital penetration was merely incidental to the subsequent penile penetration. We disagree, as this line of reasoning equates convictions of lewdness and sexual assault (which are redundant) with two separate convictions of sexual assault (which are proper). See Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981) ("[S]eparate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon.").

Here, the instruction correctly states that separate convictions are proper where "a separate object" is used to commit the different sexual acts, but that "[o]nly one sexual assault . . . occurs when a defendant's actions were of one specific type[.]" Thus, it was appropriate for the jury to decide that the digital penetration was a separate offense from the penile penetration. Further, even if, the jury had not been convinced penile penetration occurred and instead found two instances of digital penetration, the instruction would still have been legally sound, as it instructs the jury that only one conviction would be proper in that circumstance.

Jury Instruction 20: "no unanimity required"

> James argues the district court erred in issuing the following:
>
> > Although your verdict must be unanimous as to the charge, you do not have to agree on the theory of guilt. Therefore, even if you cannot agree on whether the facts established penetration by finger or penis or an unknown object, so long as all of you agree that the evidence establishes penetration for purposes of Sexual Assault on a Minor Under the Age of Sixteen.
>
> (Emphasis added.)

At trial, James objected and argued that the jury must unanimously agree on the facts in order to convict. The district court disagreed, noting that the State had pleaded multiple theories of penetration.

It is well-established that jurors do not have to agree on the preliminary factual issues which underlie a verdict, so long as they agree that the crime occurred. Tabish v. State, 119 Nev. 293, 313, 72 P.3d 584, 597 (2003). On appeal, James urges this court to overturn this precedent by citing two United States Supreme Court cases that stand for the proposition that any element of a crime which enhances a sentence must be charged and proven to a jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Blakely v. Washington, 542 U.S. 296, 301 (2004). Because the State did not seek an enhancement to James's convictions, and instead charged him with two separate counts of sexual assault pleaded in three different ways, this argument fails.[8]

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[8]James challenges two additional instructions. First, he argues that Jury Instruction 5 was improper because it contained language that the "Defendant is presumed innocent until the contrary is proved." This is substantially the same argument that this court rejected in Blake v. State,

continued on next page...

Accordingly, we reject each of James's contentions on appeal, and we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas

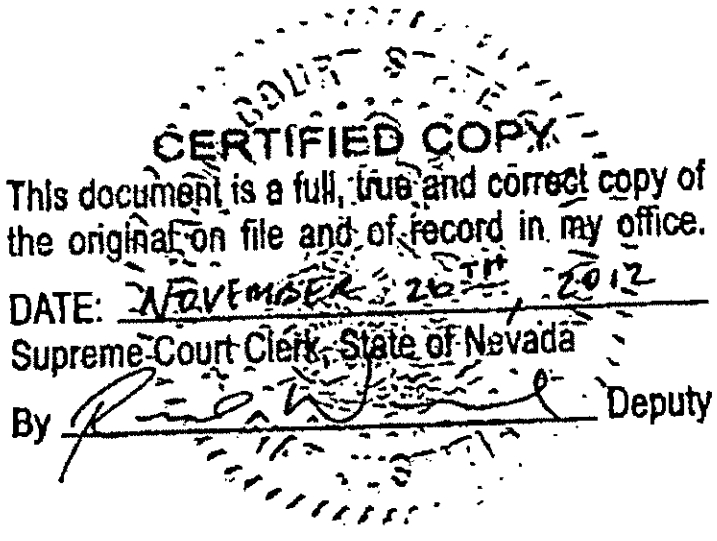
_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Linda Marie Bell, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

...continued
121 Nev. 779, 799, 121 P.3d 567, 580 (2005). Jury Instruction 5 plainly incorporates language from NRS 175.191 and NRS 175.211, and thus was proper.

Second, James challenges Jury Instruction 6, which stated: "You are here to determine the guilt or innocence of the Defendant from the evidence in the case." James argues that this language undercuts the burden of proof. This argument lacks merit, as the instruction continues to expressly state: "[s]o, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find. . . ."


CERTIFIED COPY
This document is a full, true and correct copy of
the original on file and of record in my office.
DATE: NOVEMBER 26TH, 2012
Supreme Court Clerk, State of Nevada
By Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE D. JAMES, SR. A/K/A TYRONE D. JAMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 57178
District Court Case No. C265506

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: November 26, 2012

Tracie Lindeman, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc (without enclosures):
Hon. Linda Marie Bell, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on NOV 30 2012.

HEATHER UNGERMANN
Deputy District Court Clerk

EXHIBIT 20

(48)

FILED
MAR 14 2013
CLERK OF COURT

Case No. C265506
Dept. No. VII

IN THE 8th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

Tyrone D. James Sr.
Petitioner,

v.

Warden D.W. Neven
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

10C265506
PWHC
Petition for Writ of Habeas Corpus
2306092

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: HDSP/CLARK

2. Name and location of court which entered the judgment of conviction under attack: The Clark County District Court Dept. No VII

3. Date of judgment of conviction: 02/09/2011

4. Case number: #C265506

5. (a) Length of sentence: 25 to Life

CLERK OF THE COURT
MAR 27 2013
RECEIVED

(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..... No ...✓...

If "yes," list crime, case number and sentence being served at this time: .....

.....

.....

7. Nature of offense involved in conviction being challenged: Sexual Assault.

.....

8. What was your plea? (check one)

(a) Not guilty ...✓...

(b) Guilty .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A.....

.....

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury ...✓...

(b) Judge without a jury .....

11. Did you testify at the trial? Yes ...✓... No .....

12. Did you appeal from the judgment of conviction? Yes ...✓... No .....

13. If you did appeal, answer the following:

(a) Name of court: Clark County District Court Dept. No VII

(b) Case number or citation: #C265506

(c) Result: "ORDER The Judgment of the district court AFFIRMED"

(d) Date of result: 11/30/2012

(Attach copy of order or decision, if available.)

JAMES0552

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ..... No ✓

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ✓

(5) Result: N/A

(6) Date of result: N/A

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ✓

(5) Result: N/A

(6) Date of result: N/A

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

N/A

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ...✓... No .....

Citation or date of decision: 11/30/2012 Direct Appeal

(2) Second petition, application or motion? Yes ..... No ...✓...

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No ...✓...

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: ..... 3-13 .....

.....

(b) The proceedings in which these grounds were raised: Direct Appeal .....

.....

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) "ORDER The Judgment of The District Court AFIRMED" .....

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Attorney did not present them.

.....

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) No, I am NOT.

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ✓

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Bryan Cox (Trial Attorney)

Howard Brooks, Nancy Lemcke (Direct Appeal Attorney)

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ✓

If yes, specify where and when it is to be served, if you know: N/A

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: The Court Violated Mr. James Due Process right by going Over the 60 Days of his speedy Trial And Waving his rights for Him. Sixth Amendment

Supporting FACTS (Tell your story briefly without citing cases or law.):

In Dept. V In frount of Judge Jackie Glass On Thursday, August 12, 2010 After Mr. James Invoked his rights In the Lower Court to a speedy trial. The Judge waved his right to a speedy trial for Him telling him it was in his Best interest Not to move forward. Even though he objected she Did it and put it on record. After this the DA. brought in a Unchared Bad Act. (NRS 178.556) pg. -6- Line 6-20

"And I will Like to have a evidentiary hearing."

(b) Ground TWO: Ineffective Assistance of Counsel I Allege that my state Court Conviction And or Sentence Are Unconstitational In Violation of my Sixth and Fourteenth Amendment Right + Effective Assistance of Counsel.

Supporting FACTS (Tell your story briefly without citing cases or law.): Trial Counsel Failed To have my best interest he allow courts to go over the 60 Days of my speedy trial and he did not object to the courts doing so by him doing this it allow the courts to bring in a Uncharged Bad Act that I was not charged or convicted of. The Attorney did not put in a motion for a evidentiary hearing. The Attorney allowed courts to bring in gloves from a comporomised crimescene.

3. The Trial Court's Admission of Nefertia's Allegation's Of Uncharged, Prior Sexual Misconduct Violated Mr. James' Constitutional And Statutory Rights.

4. The Trial Court Violated Mr. James' Constitutional And Statutory Rights By Refusing to Allow Defense Counsel to Cross-Examine Triaunna on The Fact that, at Some Point Prior to The Alleged Offense, Had Sexual Intercourse With Another Individual.

5. The Trial Court Erred By Refusing to Grant A Mistrial Following The Amission of Testimony That Mr. James Had A Felony Arrest Record As Well As An Active Arrest Warrant.

6. The Trial Court Erred By Admitting Testimony That Amounted to Improper Vouching.

7. The Trial Court's Admission of Triaunna's Hearsay Statement's To Numerous Witnesses Violated Mr. James' Constitutional And Statutory Rights.

8. The Prosecutor Committed Misconduct In Her Cross-Examination Of Mr. James Thereby Violating His Federal And State Constitutional Rights.

9. The Repeated Use of The Word 'Victim' By Prosecutors And Government Witnesses, As Well As The Court In A Jury Instruction's, Deprived Mr. James of his Fair Trial And Due Process Rights.

10. Double Jeopardy And Redundancy Principles Prohibit Mr. James' Multiple Convictions Arising from A Single Encounter.

11. The Trial Court Erred By Proffering Jury Instructions that Were Inaccurate, Misleading, And/OR Misstated The Law.

12. The Prosecution Failed to Present Sufficient Evidence To Sustain Mr. James' Convictions.

13. Cumulative Error Warrants Reversal OF Mr. James' Convictions Under The Fifth, Sixth And Fourteenth Amendments To The U.S. Constitution.

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES . . . . . iv, v, vi, vii

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED FOR REVIEW. 1

STATEMENT OF THE CASE. 2

STATEMENT OF THE FACTS 3

ARGUMENT 8

I. THE TRIAL COURT'S ADMISSION OF NEFERTIA'S ALLEGATION(S) OF UNCHARGED, PRIOR SEXUAL (MIS)CONDUCT VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS. 8

II. THE TRIAL COURT VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS BY REFUSING TO ALLOW DEFENSE COUNSEL TO CROSS-EXAMINE TRIAUNNA ON THE FACT THAT, AT SOME POINT PRIOR TO THE ALLEGED OFFENSE, HAD SEXUAL INTERCOURSE WITH ANOTHER INDIVIDUAL. 14

III. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL FOLLOWING THE ADMISSION OF TESTIMONY THAT MR. JAMES HAD A FELONY ARREST RECORD AS WELL AS AN ACTIVE ARREST WARRANT. 18

IV. THE TRIAL COURT ERRED BY ADMITTING TESTIMONY THAT AMOUNTED TO IMPROPER VOUCHING. 20

V. THE TRIAL COURT'S ADMISSION OF TRIAUNNA'S HEARSAY STATEMENT(S) TO NUMEROUS WITNESSES VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS. 21

VI. THE PROSECUTOR COMMITTED MISCONDUCT IN HER CROSS-EXAMINATION OF MR. JAMES THEREBY VIOLATING HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS. 25

VII. THE REPEATED USE OF THE WORD 'VICTIM' BY PROSECUTORS AND GOVERNMENT WITNESSES, AS WELL AS THE COURT IN [A] JURY INSTRUCTION[S], DEPRIVED MR. JAMES OF HIS FAIR TRIAL AND DUE PROCESS RIGHTS. 30

VIII. DOUBLE JEOPARDY AND REDUNDANCY PRINCIPLES PROHIBIT MR. JAMES' MULTIPLE CONVICTIONS ARISING FROM A SINGLE ENCOUNTER. 34

IX. THE TRIAL COURT ERRED BY PROFFERING JURY INSTRUCTIONS THAT WERE INACCURATE, MISLEADING, AND/OR MISSTATED THE LAW. 37

X. THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN MR. JAMES' CONVICTIONS. 50

XI. CUMULATIVE ERROR WARRANTS REVERSAL OF MR. JAMES' CONVICTIONS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ART. 1; SECT. 8 OF THE NEVADA CONSTITUTION. 52

CONCLUSION 53

CERTIFICATE OF COMPLIANCE 54

CERTIFICATE OF SERVICE 55

Nevada Supreme Court Docket Sheet

Docket: 57178 JAMES, SR. (TYRONE) VS. STATE

TYRONE D. JAMES, SR. A/K/A TYRONE D. JAMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 57178

Consolidated with:

Counsel

Clark County Public Defender, Las Vegas, NV \ Howard Brooks, Nancy Lemcke, as counsel for Appellant, Tyrone D. James, Sr.

Attorney General/Carson City, Carson City, NV \ Catherine Cortez Masto, as counsel for Respondent, The State of Nevada

Clark County District Attorney, Las Vegas, NV \ Steven S. Owens, as counsel for Respondent, The State of Nevada

Case Information

Panel: SNP12 **Panel Members:** Douglas/Gibbons/Parraguirre
Disqualifications:
Case Status: Remittitur Issued/Case Closed
Category: Criminal Appeal **Type:** Life **Subtype:** Direct
Submitted: **Date Submitted:**
Oral Argument:
Sett. Notice Issued: **Sett. Judge:** **Sett. Status:**
Related Supreme Court Cases:

District Court Case Information

Case Number: C265506
Case Title: STATE VS. JAMES, SR.
Judicial District: Eighth **Division:** **County:** Clark Co.
Sitting Judge: Linda Marie Bell
Replaced By:
Notice of Appeal Filed: 10/22/10 Appeal
03/07/11 Appeal
Judgment Appealed From Filed: 02/09/11

Docket Entries

Date	Docket Entries	
11/16/10	Appeal Filing fee waived. Criminal.	
11/16/10	Filed Notice of Appeal/Proper Person. Appeal docketed in the Supreme Court this day. JAMES - C265506	10-29973
02/10/11	Filed Order Re: Entry of Written Judgment of Conviction. Due 30 days.	11-04378
02/16/11	Filed District Court Order/Judgment. Certified copy of Findings of Fact Conclusions of Law and Order/Judgment filed in district court on 2/9/11. (In Response 02/10/11 Order).	11-05015
03/11/11	Filed Notice of Appeal. (Docketing statement mailed to counsel for appellant.) JAMES - C265506	11-07550

Nevada Supreme Court Docket Sheet

03/14/11	Filed Docketing Statement.	11-07662
03/14/11	Filed Request for Transcript of Proceedings. Transcripts requested: 6/24/10 (K. Schmidt), 8/12/10, 8/26/10, 9/10/10, 9/14/10 (R. Hamilton), 9/17/10 (R. Kangas), 9/21/10, 9/23/10, 12/1/10, 1/19/11 (R. Vincent).	11-07663
04/08/11	Filed Notice from Court Reporter. Rachelle Hamilton stating that the requested transcripts were delivered. Dates of transcripts: 8/12/10, 8/26/10, and 9/14/10.	11-10499
04/25/11	Filed Notice from Court Reporter. Kiara Schmidt stating that the requested transcripts were delivered. Dates of transcripts: 6/24/10.	11-12167
05/03/11	Filed Notice from Court Reporter. Renee Vincent stating that the requested transcripts were delivered. Dates of transcripts: 9/21/10, 9/22/10, 12/1/10, 1/19/11.	11-13080
07/05/11	Filed Stipulation to File Opening Brief.	11-19829
07/05/11	Issued Notice Motion/Stipulation Approved. The stipulation to extend time to file opening brief is approved. Duen date: August 8, 2011.	11-19831
08/08/11	Filed Appellant's Motion for Extension of Time Due to Missing Transcript.	11-23836
08/09/11	Filed Order Granting Motion. Appellant: Opening Brief and Appendix due: October 7, 2011.	11-23980
10/10/11	Filed Appellant's Motion for Extension of Time Due to Missing Transcript.	11-30852
10/18/11	Filed Order Denying Motion. Opening Brief and Appendix due: 30 days.	11-32172
11/17/11	Filed Appellant's Motion for Seven Day Extension of Time (Opening Brief).	11-35596
11/28/11	Filed Motion for Four Day Extension to File Opening Brief.	11-36501
12/05/11	Filed Motion to Extend Time to File Opening Brief.	11-37117
12/07/11	Filed Appellant's Motion for One Day Extension to File Opening Brief.	11-37397
12/08/11	Filed Motion for Leave to File Opening Brief in Excess of 30 Pages.	11-37546
12/08/11	Received Appellant's Opening Brief (via E-Flex) (FILED PER ORDER 12/9/11)	
12/08/11	Filed Appendix to Opening Brief Vol 1.	11-37547
12/08/11	Filed Appendix to Opening Brief Vol 2.	11-37548
12/08/11	Filed Appendix to Opening Brief Vol 3.	11-37549
12/08/11	Filed Appendix to Opening Brief Vol 4.	11-37550
12/09/11	Filed Order Granting Motions. The clerk of this court shall file the opening brief received via E-Flex on December 8, 2011. Respondent: Answering brief due: 30 days.	11-37810
12/09/11	Filed Opening Brief.	11-37811
01/09/12	Filed Respondent's Answering Brief.	12-00731
02/08/12	Filed Stipulation to Extend Time to File Reply Brief.	12-04324
02/08/12	Issued Notice Stipulation Approved. Reply Brief due March 9, 2012.	12-04326
03/09/12	Filed Appellant's Motion for Two Week Extension to File Reply Brief.	12-07812
03/12/12	Filed Order Granting Motion. Appellant: Reply Brief due: March 23, 2012.	12-07909
03/26/12	Filed Motion to Extend Time to File Reply Brief.	12-09466
03/27/12	Filed Reply Brief.	12-09604
03/27/12	Briefing Completed/To Screening.	

Nevada Supreme Court Docket Sheet

Docket: 57178 JAMES, SR. (TYRONE) VS. STATE

03/28/12	Filed Order. Appellant filed a motion for an extension of time to file the reply brief. The following day, the reply brief was received via e-flex and was inadvertently filed. We will take no action on the pending motion.	12-09848
10/31/12	Filed Order of Affirmance. "ORDER the judgment of the district court AFFIRMED." SNP12-MD/MG/RP	12-34410
11/26/12	Issued Remittitur.	12-37130
11/26/12	Remittitur Issued/Case Closed	
12/05/12	Filed Remittitur. Received by District Court Clerk on November 30, 2012.	12-37130

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition

for Writ OF Habeas Corpus (Post Conviction)
(Title of Document)

filed in District Court Case number C265506

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Tyrone James
Signature

3/6/2013
Date

Tyrone James
Print Name

Defendent
Title

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at ..... on the 6 day of the month of 3 of the year 2013

Tyrone James
Signature of petitioner

.....
Address

.....
Signature of attorney (if any)

.....
Attorney for petitioner

.....
Address

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

Tyrone James
Petitioner

.....
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Tyrone James, hereby certify, pursuant to N.R.C.P. 5(b), that on this 6 day of the month of 3 of the year 2013, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

(HDSP) Warden Neven
Respondent prison or jail official
P.O. Box 650 (HDSP)
Address
Indian Springs, Nevada 89070

Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

Clark Count District Attorney
District Attorney of County of Conviction
200 Lewis Ave Las Vegas, NV 89155-2212
Address

Tyrone James
Signature of Petitioner

Tyrone James #1063523
H.D.S.P.
P.O. Box 650
Indian Springs, NV
89070

Hasler FIRST-CLASS MAIL
03/07/2015
US POSTAGE $03.32⁰
ZIP 89101
011D12602491

JAMES 0556

PA610

EXHIBIT 21

DECLARATION OF CAROL DICKSON

Under the penalty of perjury, I, Carol Dickson, do hereby state and declare as follows:

1. My name is Carol Dickson. I am the mother of Tyrone James. Tyrone has two children (my grandchildren) with Tahisha Scott. Nefertia Charles is Tahisha's daughter. Nefertia is the sister of my grandchildren.
2. I went to watch Tyrone's trial. On the day Nefertia testified, I rode to court with Tahisha and Nefertia. My sister, Brenda James, gave me a ride home on one of the days.
3. I went to court to watch Tyrone's trial. In the mornings, before court started, I would sit outside the courtroom with Tyrone's and my family. We were in a group right outside the courtroom door. We went back to the same spot during breaks too.
4. On the day Nefertia testified, Tahisha brought to my attention that right next to us in the hall was a group of jurors just a few steps away and that they should have not been there. At first that didn't seem strange to me because I didn't know how a trial was supposed to work. But after Tahisha said something, it didn't seem right to me. The jurors were standing so close that they could have heard what we were talking about.
5. I remember Tahisha telling me she heard the victim's family talking about Tyrone and saying things like: "If he gets off we'll make sure he gets it." Tahisha didn't think the jurors should be allowed close enough to the victim's family to hear what they were saying. I didn't think it was right either.
6. It was the same thing everyday - my family was standing by the courtroom and the jurors were right next to us in hallway before court and during breaks.
7. I remember one day, we all went on a lunch break. I was walking down the hall after leaving the courtroom with some of our family. We walked past the jurors in the hallway and then walked past another group of people standing next to the jurors. Someone brought to my attention that the group of people next to the jurors was the victim's family. I had never met them before, so I didn't know who they were until then.
8. It looked to me like the jurors were close enough to the victim's family to hear what they were talking about.

9. At one point, Tyrone's lawyer came out to the hall to talk to us. It was sometime after the victim testified, because I remember asking him about the gloves - why were the gloves so important? I remember that I broke my shoe that day and was holding it in my hand while I talked to the lawyer.

10. Tyrone's lawyer never once tried to contact me before the trial. He never sent an investigator or anyone else to try to talk to me. If they had talked to me I would have told the truth about anything they asked me.

I declare under penalty of perjury the foregoing is true and correct to the best of my recollection.

Executed on 9-1-15, 2015, at Las Vegas, Nevada.

CAROL DICKSON

EXHIBIT 22

DECLARATION OF BRENDA JAMES

Under the penalty of perjury, I, Brenda James, do hereby state and declare as follows:

1. My name is Brenda James. Tyrone James is my nephew - he's my sister's son.
2. I went to court to watch Tyrone's trial on all three days.
3. I gave Tyrone's girlfriend, Lamonica, a ride to court each day. On one of the days I gave my sister, Carol, a ride home. Carol's shoe was broken on the day I gave her a ride.
4. I was with a group of Tyrone's family and friends each day in court who came to watch the trial. We all stood out in the hallway in the mornings and during breaks. We talked about the trial and other things while we were standing there. Some of us would sit and the rest stood up because there wasn't enough seats.
5. On the day before Nefertia testified, I was standing outside the courtroom in the hallway with my family. I noticed a group of jurors in the hallway about fifteen feet away from us. They were standing close enough to hear us talking.
6. On the very first day of the trial, I remember looking up and making eye contact with one of the jurors while we were out in the hallway. He was a black guy in his 30's. He looked me dead in the eye and gave me a reassuring smile as if he was trying to let me know that everything would be okay. I probably wouldn't have noticed it all, except that he looked me dead in the eye. I'm not the type of person to be that attentive or to try to communicate with people I don't know.
7. I thought the juror was looking at me and trying to reassure me because the detective had just testified about interrogating Tyrone. The detective said something in court about how he lied to Tyrone and mislead him to try to get him to confess. The juror smiled at me in a way that let me know he thought what the detective did was bull and it wouldn't turn him against Tyrone.
8. I had never been to a court case before, so I didn't know how things worked. But I thought it was odd that the jurors were out in the hallway with us. I think they were there every day. It seemed odd to me too that I saw lady jurors in the bathroom when I went in there. I thought jurors were supposed to have their own area to go to.

9. I saw the girl victim's mother in the hallway on the day the girl testified. I saw her on the last day of trial too. We had met before when Tyrone brought her to my house, so we knew each other by sight. I remember asking the girl's mom a question in the hallway during trial and exchanging a few words here and there. One time I asked her what time we were supposed to be back in court. I was just trying to say a few cordial words to let her know everything's okay, and I would be cordial towards her. BJames

10. I talked to Tyrone's lawyer before the trial. He told me the case was all hearsay and there was no physical evidence.

I declare under penalty of perjury the foregoing is true and correct to the best of my recollection.

Executed on 8-31, 2015, at Las Vegas, Nevada.

Brenda James

BRENDA JAMES

EXHIBIT 23

DECLARATION OF TAHISHA SCOTT

Under the penalty of perjury, I, Tahisha Scott, do hereby state and declare as follows:

1. My name is Tahisha Scott. I am the ex-wife of Tyrone James.
2. Nefertia Charles is my daughter. Nefertia testified at Tyrone's trial when he was accused of sexual assault against T[redacted] H[redacted].
3. On the day Nefertia testified, I was out in the hallway with Neferita and my sister, Shayla. The prosecutor came out of the courtroom and told me I could not enter, but my sister could. Nefertia went into a little room waiting to testify.
4. When court went into recess, I was sitting in the hallway on a bench right outside the courtroom. I noticed the jury walked out of the courtroom with everyone else, which I thought was kind of odd.
5. I watched Tyrone's family come out first. I saw his Aunt Brenda, Doug, Tony, and Tony's wife. They turned to the left and stood together in a group.
6. Next the jurors came out. I could tell they were jurors because of their badges. They walked to the right. Some of them hung out in the hallway area talking amongst themselves and some of them went to the bathroom.
7. Next I saw Triaunna's family walk out right behind the jurors. I recognized Triaunna's mom, Theresa, because I met her before. There was a group of men walking behind Theresa that looked like part of her family.
8. I heard the group of men in Triaunna's family making comments as they were walking out of the courtroom. I heard one of them state "He better not get off or we're going to get him." I was still sitting on the bench watching the jurors talk amongst themselves in the hall. Triaunna's family walked right past the jurors and went to the other side of the hall. I don't know if the jurors heard what Triaunna's family said, but I know that if I heard them, then the jurors might have.
9. The break was about 15 minutes long. During the whole break, Triaunna's family was on one side of the hall, the jurors were standing in the middle, and Tyrone's family was standing on the other side by the courtroom door.

10. I remember telling Tyrone's mom, Carol, that I didn't think it was right that the jurors were out in the hall right next to us. Carol said she hadn't noticed it before, but now that I mentioned it, Carol had seen the jurors out there the day before too.
11. I found out later that night that one of the jurors knew my daughter from her high school and the court was aware of it. I felt like that wasn't right because she could have prejudice against Tyrone already.
12. Tyrone's lawyer never tried to contact me. Nobody from Tyrone's defense tried to talk to me. If they had, I would have answered any questions they asked me.

I declare under penalty of perjury the foregoing is true and correct to the best of my recollection.

Executed on Sept. 1, 2015, at Las Vegas, Nevada.

Tahisha Scott

TAHISHA SCOTT

EXHIBIT 24

MARGARET A. MCLETCHIE, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300
Facsimile: (702) 425-8220
Email: maggie@nvlitigation.com
Counsel for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

TYRONE JAMES, Petitioner, vs. STATE OF NEVADA, Respondent.	CASE NO.: 10C265506 DEPT. NO.: XI **DECLARATION OF MIA JI**

Under the penalty of perjury, I, Mia Ji, do hereby state and declare as follows:

1. I have personal knowledge of the facts set forth herein, except where stated to be upon information and belief, and where so stated, I believe them to be true.

2. My name is Mia Ji. I am an employee of Margaret McLetchie, both at her former firm, Langford McLetchie, LLC and her current firm McLetchie Shell, LLC.

3. On March 18, 2015 I spoke on the telephone with Dr. Joyce Adams regarding her review of documents related to *Tyrone James v. State of Nevada* (10C265506). Dr. Adams informed me of the following:

4. Sunrise Hospital sent Dr. Adams medical records, pursuant to a court order. The hospital records pertained to an examination of T[redacted] H[redacted], performed on May 14,

2010. The hospital records were essentially duplicates of documents already provided to Dr. Adams by Ms. McLetchie.

5. The records provided by Sunrise Hospital contained no photographs or videos. The records provided by Ms. McLetchie contained no photographs or videos.

6. Dr. Adams reviewed portions of the trial transcript which indicated that a colposcopy was performed on H[redacted] on May 14, 2010.

7. When a colposcopy is performed, photographs are produced and sometimes video is produced.

8. Sunrise Hospital did not provide Dr. Adams with any photographic or video material from a colposcopy examination performed on H[redacted].

9. Sometimes during a sexual assault examination, hospital staff will also use a hand held camera to capture images of a subject's entire genital area.

10. Sunrise Hospital did not provide Dr. Adams with any photographs of H[redacted]s' genital area taken with a hand held camera.

11. Dr. Adams reviewed all documents provided to her by Ms. McLetchie and Sunrise Hospital.

12. Dr. Adams cannot complete her evaluation without viewing the photographs and any videos produced during the colposcopy and sexual assault examination of H[redacted].

13. Dr. Adams' initial review of the records indicate the following:

14. H[redacted] had a urinary tract infection (hereinafter "UTI"), a bacterial strep infection in the vagina, and Chlamydia. The UTI and the bacterial strep infection were discussed in transcripts of the expert's testimony. Dr. Adams did not recall seeing any discussion of Chlamydia in any transcripts she reviewed.

15. Usually, Chlamydia must be present for at least two weeks prior to showing up positive on a test. There is some controversy regarding whether Chlamydia could test positive immediately after contact if the other party had it and it essentially rubbed off during sex.

16. A bacterial strep infection in the vagina is commonly found in sexually active women. Dr. Adams does not know how long bacterial strep must be present in the body before it shows up positive on a test. She will research the issue.

17. Dr. Adams is skeptical that H[redacted] had any "generalized swelling." Dr. Adams needs to see the photographs to confirm this impression. Dr. Adams bases this opinion on past experience and statements she has seen about "generalized swelling" in other records/cases.

18. It is usually difficult to determine whether there is "generalized" swelling" upon one examination. Usually, there would need to be a second examination a few days later to determine whether "generalized swelling" is present.

19. "Generalized swelling" could occur from a yeast infection. There is no indication from the reports that the hospital tested H[redacted] for a yeast infection. When a yeast infection is present, the patient will usually complain of "itching." There is no indication in the reports that H[redacted] complained of "itching."

20. Usually, a person would not have "generalized swelling" from a UTI.

21. Usually, a person would not have "generalized swelling" from a bacterial strep infection.

22. Usually, a person would not have "generalized swelling" from Chlamydia.

23. Usually, a person would not have "generalized swelling" from digital penetration with a Latex glove, unless the person was allergic to Latex.

24. Usually, a person would not have "generalized swelling" from regular sexual activity.

25. Usually, a person would not have "generalized swelling" from penetration with a penis during a sexual assault, unless it was a particularly bad assault involving extreme factors such as bruising, bleeding, multiple assailants, etc.

I declare under penalty of perjury the foregoing is true and correct to the best of my recollection.

Executed on September 2, 2015, at Las Vegas, Nevada.

Mia Ji

MIA JI

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE JAMES SR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 71935

APPELLANT'S APPENDIX VOLUME III

Appeal from Eighth Judicial District Court, Clark County

The Honorable Elizabeth Gonzalez, District Judge

District Court Case No. 10C265506

MCLETCHIE SHELL LLC
Margaret A. McLetchie (Bar No. 10931)
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Counsel for Appellant, Tyrone James, Sr.

INDEX TO APPELLANT'S APPENDIX

VOL	DOCUMENT	DATE	BATES NUMBERS
IV	Appendix of Exhibits to Supplement to Supplemental Petition for Writ of Habeas Corpus	01/15/2016	PA712 – PA768
IV	Minute Order: In Camera Review	11/2/2015	PA698
IV	Minute Order: In Camera Review	03/29/2016	PA769
IV	Minutes of Hearing on Petition for Writ of Habeas Corpus	10/03/2016	PA806 – PA807
IV	Notice of Appeal	12/08/2016	PA865 – PA866
IV	Notice of Entry of Findings of Fact and Conclusions of Law and Order	11/09/2016	PA847 – PA862
IV	Order Appointing Margaret A. McLetchie as Court-Appointed Counsel	11/10/2016	PA863 – PA864
IV	Petitioner's Reply to State's Response to Supplemental Petition for Writ of Habeas Corpus and Supplement	05/31/2016	PA791 – PA805
IV	Recorder's Transcript of Hearing on Petition for Writ of Habeas Corpus	10/03/2016	PA808 – PA846
IV	Register of Actions (District Court Case No. 10C265506)	05/12/2017	PA867 – PA873
I	Second Amended Appendix of Exhibits to Supplement to Petition for Writ of Habeas Corpus (including Exhibits 1-11)	11/02/2015	PA022 – PA178
II	Second Amended Appendix of Exhibits to Supplement to Petition for Writ of Habeas Corpus (Exhibit 12)	11/02/2015	PA179 – PA407
III	Second Amended Appendix of Exhibits to Supplement to Petition for Writ of Habeas Corpus (Exhibits 13-24)	11/02/2015	PA408 – PA624

VOL	DOCUMENT	DATE	BATES NUMBERS
IV	Second Amended Appendix of Exhibits to Supplement to Petition for Writ of Habeas Corpus (Exhibit 25)	11/02/2015	PA625 – PA697
IV	State's Response to Supplemental Petition for Writ of Habeas Corpus and Supplement to Supplemental Petition for Writ of Habeas Corpus	04/21/2016	PA770 – PA790
I	Supplemental Petition for Writ of Habeas Corpus	09/04/2015	PA001 – PA021
IV	Supplement to Supplemental Petition for Writ of Habeas Corpus	01/15/2016	PA699 – PA711

CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 17th day of May, 2017 the APPELLANT'S APPENDIX VOLUME III was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

STEVEN OWENS
Office of the District Attorney
200 Lewis Avenue, Third Floor
Las Vegas, NV 89155

ADAM P. LAXALT
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

I hereby further certify that the foregoing APPELLANT'S APPENDIX VOLUME III was served by first class U.S. mail on May 17, 2017 to the following:

TYRONE JAMES, SR., ID # 1063523
HIGH DESERT STATE PRISON
P.O. Box 650
Indian Springs, NV 89070
Appellant

/s/ Pharan Burchfield
Employee, McLetchie Shell LLC

EXHIBIT 13

TRAN

ORIGINAL

FILED
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CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

TYRONE D. JAMES,

Defendant.

CASE NO. C265506

DEPT. NO. VII

BEFORE THE HONORABLE LINDA M. BELL, DISTRICT COURT JUDGE

THURSDAY, SEPTEMBER 23, 2010

TRANSCRIPT RE:
TRIAL BY JURY
DAY 3 - VOLUME III

10C265506
TRAN
Reporters Transcript
1383250

APPEARANCES:

For the State: STACY L. KOLLINS, ESQ.
CHRISTOPHER P. PANDELIS, ESQ.
Deputy District Attorneys

For the Defendant: BRYAN A. COX, ESQ.
DANIEL R. PAGE, ESQ.
Deputy Public Defenders

RECORDED BY: Renee Vincent, Court Recorder

RECEIVED
APR 29 2011
CLERK OF THE COURT

INDEX OF WITNESSES

	Direct	Cross	Redirect	Recross
STATE'S WITNESSES:				
Pamela Douglass	7	12	13	--
* * * * *				
DEFENDANT'S WITNESSES:				
Tyrone James	15	22	32/34	--
* * * * *				

CLARK COUNTY, NEVADA THURSDAY, SEPTEMBER 23, 2010

PROCEEDINGS

(PROCEEDINGS BEGAN AT 9:35:50 A.M.)

(Whereupon the following proceedings were held outside the presence of the jury)

THE COURT: Rick, could you please get Mr. Griffin.

THE MARSHAL: Mr. Griffin?

THE COURT: Yeah.

(Juror Cedric Griffin enters the courtroom)

THE MARSHAL: Here you go, Judge.

THE COURT: Good morning, sir. Have a seat.

Good morning. Mr. Griffin, there was just some concern that Mr. Cox had that perhaps you overheard a conversation he had with another lawyer this morning, and so we just wanted to bring you in and see if you overheard anything this morning when you were on your way to court.

JUROR GRIFFIN: No.

THE COURT: Okay. Any --

MS. KOLLINS: Nothing from the State, Judge. Thank you.

THE COURT: Okay. Thank you.

JUROR GRIFFIN: Okay, thank you.

(Juror Griffin exits the courtroom)

THE COURT: And let me just make a real quick record about that. It's just that Mr. Cox and Ms. Coffee came in this morning. Ms. Coffee had to be somewhere else and she just wanted to let me know that she had asked Mr. Cox --

something to the effect of, hey, did your case settle? And then they realized that the juror was nearby. She was extremely apologetic about it and, you know, obviously just was not thinking that a juror would be out and about that early in the morning.

MS. KOLLINS: Well, and I understand the conversation took place outside the courthouse across the street --

THE COURT: Right.

MS. KOLLINS: -- in front of the Courthouse Grill, so it wasn't like it was in the courthouse, in the elevator, so --

THE COURT: Right. So there was certainly no intent to do anything. But that's why we thought out of an abundance of caution we should just ask Mr. Griffin, and apparently he was not close enough or wasn't paying enough attention to ever hear what happened. Okay.

THE CLERK: Are we going to do that -- Let's do that instruction real quick.

THE COURT: Okay. Instruction. Mr. Cox, did you copy the instruction?

MR. COX: I did, Judge.

THE COURT: And do you have any objection to the instruction?

MR. COX: Judge, I do -- I do lodge objection. It's my position that the facts do need be unanimous to reach a verdict.

MS. KOLLINS: I'm sorry, I couldn't hear you, Mr. Cox.

THE COURT: He said that his position is that the facts need to be -- they do need to be unanimous.

MS. KOLLINS: Well, actually that's out of a -- that's similar to an instruction that's given in murder cases where you don't have to be unanimous as to your theory of guilt, just unanimous as to your verdict. It comes out of *Byford*. And I think

when we plead -- I mean, we have three theories of penetration in Count 3, so I think it's accurate on the law in that if they believe -- if one person thinks it was a penis and another person thinks, well, she did say, you know, she felt the head of his penis, but they did impeach her on the fact that she never saw his penis going in her. So it was pled in the alternative that way from Prelim. They did impeach her in that regard here.

So in an abundance of caution, the State believes we should instruct them that if one person thinks that that was a finger and not his penis, for whatever reason, based on their impeachment or just their reception of the evidence, that that's an accurate statement of the law. They don't all have to agree it was a penis, all have to agree it was a finger, all have to agree it was an unknown object for them to return a verdict on that count.

THE COURT: Okay. The defense objection will be noted. This is an objection to Instruction No. 20.

(Colloquy regarding copies of jury instruction packet)

THE COURT: Oh, are we doing a testifying instruction? No?

MR. COX: Judge, he's testifying today.

THE COURT: Okay.

(Speaking to the marshal) Just waiting on you out there now. Do you have everybody?

THE MARSHAL: Yes, ma'am. Ready?

THE COURT: Okay. Yeah, we're ready.

THE MARSHAL: The jury is in the courtroom.

(The jury panel enters the courtroom)

THE MARSHAL: All present and accounted for, Judge.

(Whereupon the following proceedings were held in the presence of the jury)

THE COURT: Good morning, everyone.

JUROR IN UNISON: Good morning.

THE COURT: We are back on the record in Case Number C265506, State of Nevada versus Tyrone James. Let the record reflect the presence of all of our jurors, Mr. James with his counsel, the representatives of the District Attorney's Office, and all of the court staff. ,

Ms. Kollins, your next witness.

MS. KOLLINS: Pamela Douglass, please, Your Honor.

THE COURT: And Officer Moon stepped out, so you may need to –

MS. KOLLINS: I can get her.

THE COURT: Thanks.

PAMELA DOUGLASS

Having been called as a witness and being first duly sworn, testified as follows:

THE COURT: Good morning, ma'am. Could you please state your name and then spell it first and last for the record.

THE WITNESS: Yes. It's Pamela Douglass. P-a-m-e-l-a D-o-u-g-l-a-s-s.

THE COURT: Okay. And ma'am, could you do me a favor.

THE WITNESS: Absolutely.

THE COURT: You have a slot for those -- Oh, it's already on there. Never mind. I might have to do two boxes of Kleenex, but we'll see how it goes.

/ / / / /

DIRECT EXAMINATION

BY MS. KOLLINS:

Q Good morning, Ms. Douglass. How are you employed?

A I am employed by Sunrise Hospital Pediatric Emergency Department.

Q And what do you do at Sunrise Hospital Pediatric Unit?

A I'm a pediatric emergency nurse and I also work on the sexual assault nurse examiner team.

Q How long have you been doing that?

A I've been working at Sunrise doing that for over two years.

Q Any special training that qualifies you to perform that function?

A I -- Prior to moving to Las Vegas I had forty hours of continuing education getting certified, certification as an adult and adolescent sexual assault nurse examiner, and then I also have fifty-one hours of continuing education for pediatric nurse examinations.

Q What do you do in your job regarding sexual assault examinations? What's your job?

A My job is to collect a thorough medical history, as well as the events of the sexual assault and a sexual assault history, and a complete head to toe physical exam, and also to obtain the evidence for the sexual assault kit.

Q So there's kind of three parts to it, right?

A Um-hm.

Q Is that a yes?

A Yes.

Q So there's a history portion where you gain the information of why the

person is presenting at the Peds E.R., right?

A Yes.

Q And then there's the wellness portion that you talked about, the head to toe portion?

A Yes.

Q And then finally the sexual assault examination itself?

A Yes.

Q And there's a protocol for performing that whole series of events?

A Yes, there is.

Q And you guys follow that protocol?

A Yes.

Q How many examinations have you participated in?

A Approximately fifty.

Q Calling your attention to May 14th of 2010, were you on duty in that capacity at Sunrise Hospital Peds E.R.?

A I was on duty as a nurse there, and I was the sexual assault nurse for the patient.

Q Did you have occasion to meet with a young lady by the name of T[redacted] H[redacted] on that date?

A Yes, I did.

Q The protocol that we talked about, the history, the wellness portion and the sexual assault exam, did T[redacted] go through all those stages of evaluation?

A Yes, she did.

Q Can you tell me about taking a history from T[redacted]?

A The first thing I did after the forensic interview was I took a thorough medical history from Triaunna, including any medical problems that she had. The only thing she had was borderline Diabetes. And then I proceeded to ask if she had taken any medications recently, including anything that could cause bruising or bleeding that would cause -- something that would look like an injury that could be caused from medications or a medical disorder. And then I also asked her if she had ever had any genital injuries, such as a bike accident, a straddle injury, or a previous sexual assault that would cause us to find anything abnormal. And then I also asked her if she was having any pain to any part of her body from earlier that day or also any genital pain or discharge at that time.

Q Did she report any physical pain to you?

A She did not.

Q Did you take a history of the sexual assault itself?

A Yes. After I collected my medical history, I then asked Triaunna -- I told her that I needed to collect a sexual assault history in order to know what evidence to collect and also to know what injuries to assess for when I was doing her physical assessment. And I asked Triaunna to please explain to me what had occurred earlier that morning.

Q And do you have a form at Sunrise, it's called a SCAN form, that you document that history?

A Yes, I do.

Q It's kind of a check sheet, right?

A Yes.

Q Did you fill out that check sheet regarding Triaunna?

A Yes, I did.

Q And what was the history you obtained, as reflected in your documentation that you got from Triaunna?

A The first history I got was Triaunna's narrative of what had happened that morning. And Triaunna told me that Tyrone had came into her room, pulled her chest out of her shirt and bra, and then she began to fight back, so he put his hands around her neck and then grabbed her by her wrist and drug her into the living room. After that he then proceeded to put a gloved finger inside of her. I asked her what did she mean by inside of her, and she said inside of my vagina. And then she stated that after that he placed his penis inside of lips. And I asked her which lips did she mean, and she said inside the lips of her vagina. She stated that during all this she was hitting, screaming, fighting back.

And after that she said that she was fighting so much he finally decided to stop, and then he told her to get ready for school. He drove her to school. And as he was driving her to school, he asked her if she was going to tell anybody what happened. During this part of the exam she then became tearful, very upset, and stated, no, because I was afraid he might hurt or kill me.

Q And from the narrative, do you then -- that she gave you, do you then fill out the check sheet?

A Yes, I do.

Q And in this case what was the nature of the assault that you just put in that portion of the check sheet?

A So, we also fill out a sexual assault kit check sheet as well. On that sheet basically we write, was the patient licked, were they bitten, were they

penetrated orally, vaginally, digitally. If so, by what. Was there a condom, lubricant, anything else used during the assault. So on that portion of the checklist I checked that she was penetrated with a finger, penis, both vaginally, and then there was no oral penetration or no rectal penetration.

And also on this portion I asked her if there was -- Prior to that during my medical history I asked her what she had done after the assault had occurred, such as eating, urinating, having a bowel movement, brushing your teeth. And the only thing she answered yes to was having eaten, drank, and brushing her teeth. And she had not changed her clothes.

Q And she also urinated prior to that?

A Yes, she had.

Q And did you also indicate that that was all done -- that the digital penetration was done with a gloved hand?

A Yes, I did.

Q And did you have any report of any lubricants at that time?

A There was no lubrication that she reported to me.

Q And then subsequent to that you participated in the collection of the sexual assault kit, correct?

A Yes, I did.

MS. KOLLINS: And I'm not going to make you go through that because we heard that from the doctor yesterday. I thank you, Ms. Douglass.

I'll pass the witness.

THE COURT: Thank you. Mr. Cox?

MR. COX: Thank you, Judge.

CROSS-EXAMINATION

BY MR. COX:

Q Good morning, Ms. Douglass.

A Good morning.

Q You took a fair amount of reports regarding what Ms. H[redacted] told you?

A Yes.

Q Now, is it fair to say that the accuracy of the report is dependent on whether or not the person providing the information is truthful?

A Yes, it is.

Q Okay. You have no way of verifying that?

A No, I do not.

Q Okay. Now, she described the incident and when she did that she claimed that she slapped and hit Mr. James?

A Yes.

Q And fought so much that that's what caused the incident to cease?

A Yes.

Q Okay. So she described a violent episode of fighting?

A Yes.

Q Okay. Did she say how many times she hit Mr. James?

A I did not ask her that question.

Q Was it your impression it was repeated?

A Yes.

MR. COX: Okay. I have no further questions, Judge.

THE COURT: Okay.

MS. KOLLINS: No redirect, Your Honor.

THE COURT: Anything from the jury? Okay.

(Bench conference begins)

MS. KOLLINS: That's fine.

MR. COX: I don't have any reason to oppose either question.

MS. KOLLINS: Neither does the State.

THE COURT: Okay.

(Bench conference concluded)

THE COURT: Okay, ma'am. Did you notice any bruising or redness around Ms. H[redacted]' neck?

THE WITNESS: I did not.

THE COURT: And did Ms. H[redacted] indicate to you that she ate breakfast after the assault she reported?

THE WITNESS: She had eaten lunch afterwards, because it had happened at nine o'clock in the morning.

THE COURT: Okay. Any follow-up from the State?

MS. KOLLINS: Very briefly.

REDIRECT EXAMINATION

BY MS. KOLLINS:

Q Do you recall what time your examination started or your history taking started?

A She arrived at the E.R. at 1426, I believe. Detective Tomaino and the CPS worker, Lizette Woods, did a forensic interview around 1435. They were done approximately around three o'clock in the afternoon. So I began my exam

between 3:00, 3:30, and then she left the E.R. around six o'clock that afternoon.

Q So 1426 is 2:26 in the afternoon?

A Yes.

Q And the first thing she did was be interviewed by the detective and the -- I'm sorry -- Child Protective Service worker, Lizette Woods, correct?

A Yes.

Q And then you didn't get her for her exam until three o'clock?

A No. I --

Q Or her -- the history?

A The history part. I quickly explained to her what would be happening in the E.R., that she would be interviewed and then what would be occurring after that interview about -- because the detective arrived five minutes after she arrived from triage to the room.

MS. KOLLINS: Nothing else, Judge.

MR. COX: I don't have any other questions, Judge.

THE COURT: Okay. Any additional questions from the jury? No?

Thank you, ma'am. You're free to go.

THE WITNESS: Thank you.

THE COURT: Ms. Kollins.

MS. KOLLINS: Your Honor, with the testimony of Ms. Douglass, the State is prepared to rest.

THE COURT: Okay. Mr. Cox.

MR. COX: Court's indulgence. Your Honor, the defense calls Tyrone James.

THE COURT: Mr. James.

TYRONE D. JAMES

Having been called as a witness and being first duly sworn, testified as follows:

THE COURT: Good morning, sir. Could you please state your name and then spell it first and last for the record.

THE WITNESS: Yes. Tyrone David James, Sr. T-y-r-o-n-e J-a-m-e-s.

THE COURT: Thank you. Mr. Cox.

MR. COX: Thank you, Judge.

DIRECT EXAMINATION

BY MR. COX:

Q Mr. James, did you touch Nefertia Charles inappropriately?

A No.

Q Now, based on the allegations she made, that she's saying happened in 2005, was there a trial?

A No.

Q Did you have an attorney?

A No.

Q Did you cooperate?

A Yes, I did.

Q Why?

A Her mother told me there was an allegation that was -- that Nefertia had said something, and that was basically it.

Q Okay. Did you touch T[redacted] H[redacted] inappropriately?

A No.

Q Did you cooperate with law enforcement when they contacted you?

A Yes, I did.

Q Why?

A Because I didn't do it.

Q Now, on occasions when you stayed the night with Theresa Allen, did T[redacted] H[redacted] treat you with hostility?

A Yes, she did.

MS. KOLLINS: Objection, leading.

MR. COX: I don't --

THE COURT: Sustained.

MR. COX: I don't think I suggested an answer in that question.

THE COURT: It's sustained. If you could rephrase, please.

MR. COX: Okay.

BY MR. COX:

Q There were -- there had been occasions when you stayed the night at Theresa Allen's home?

A Yes.

Q Did you find that -- Well, would T[redacted] H[redacted] know that you were there the next morning on occasion?

A Yes.

MS. KOLLINS: Objection, calls for speculation and leading.

BY MR. COX:

Q Okay. Would you see each other the next morning on occasion when you stayed the night?

A Yes.

Q And you'd make eye contact?

A Yes.

Q On those occasions when you saw each other the next morning, was she nice to you?

A No.

Q Now, there's been two different grandmas mentioned, a grandma mentioned that you were going to go fishing with on May 14th, and Nefertia had mentioned a grandma that she claimed could verify events -- well, that she mentioned when she mentioned the version of events from 2005. Are those two different people?

A Yes.

Q Who is Tahisha Scott?

A My ex-wife.

Q And who is her daughter?

A Nefertia Charles.

Q Now, are you divorced from Tahisha Scott?

A Yes.

Q Have you maintained contact with Tahisha Scott?

A Yes, I have.

Q Have you maintained contact with Tahisha Scott's children?

A Yes.

Q And Tahisha Scott allowed you to do that?

A Yes.

Q Was there occasions when you attended events together?

A Yes.

Q What were some of those events?

A My son's basketball games, football games. Outings at parks and stuff like that. Birthday parties.

Q And would Nefertia Charles be in attendance to those events?

A Yes.

Q Did she -- Would she be in close proximity to you at those events?

A Yes.

Q Do you know whether or not Tahisha -- I'm sorry, Nefertia Charles and T[redacted] H[redacted] know of each other?

A Yes, I believe they do.

MS. KOLLINS: Objection. Move to strike as speculative. I believe they do. Either they do or they don't.

THE COURT: Sustained. The jury is to disregard that comment.

Do you want to rephrase the question, Mr. Cox?

MR. COX: Okay.

BY MR. COX:

Q Has Denise Jordan made comments to you in which she's accusing you --

MS. KOLLINS: Objection. Hearsay; leading.

MR. COX: Judge, I'll move on to a different line of questions.

THE COURT: Okay.

BY MR. COX:

Q On May 14th, you made -- you and Theresa Allen made arrangements

for you to pay a bill?

A Yes.

Q And part of the arrangement to pay the bill was you were to pick up the bill itself?

A Yes.

MS. KOLLINS: Again, objection. Leading.

THE COURT: Sustained.

MR. COX: Okay. I apologize, Judge.

THE COURT: That's okay, Mr. Cox.

BY MR. COX:

Q Okay. As part of that arrangement, did you go to the home?

A Yes.

Q And what did you do?

A I went to the home to drop off my dog, where I was keeping it at her household, and I picked up her power bill.

Q Okay. Now, were you surprised to see somebody at the home at that time?

A Yes, I was.

Q Okay. And who were you surprised to see?

A T[redacted] H[redacted].

Q And what was she doing?

A She was ironing her clothes.

Q Okay. Did you believe that she was late for school?

A Yes, I did.

MS. KOLLINS: Objection. Leading; relevancy.

THE COURT: Sustained.

BY MR. COX:

Q Okay. As a result of you seeing her, did you offer her a ride to school?

A Yes, I did.

Q Did you in fact give her a ride to school?

A Yes, I did.

Q Now, later on did a Detective Hatchett contact you?

A Um, actually before any officer contacted me, Theresa Allen called me.

Q Okay. She contacted you --

A Yes.

Q -- and you guys talked?

A Yes.

Q But later on did Detective Hatchett call you?

A Yes.

Q Did you cooperate with him?

A Yes, I did.

Q Did he tell you anything about the allegation?

A Yes.

Q Did he tell you that you were being accused?

MS. KOLLINS: Objection. Hearsay.

THE COURT: Would counsel approach for a second.

MR. COX: Sure.

/ / / / /

(Bench conference begins)

MR. COX: I have to admit, I'm not really good at -- (indiscernible). I'm not -- I don't do a lot of it.

THE COURT: It's just, I know that most of what you do on that end of things is cross-examination.

MR. COX: I'm trying to change -- (indiscernible).

THE COURT: Just try to, like, who, what, when, where, how, what happened next.

MR. COX: Okay. I'm doing my best.

THE COURT: All right. Okay, thanks.

(Bench conference concluded)

BY MR. COX:

Q Okay. When you were with Detective Hatchett, was the accusation discussed?

A Yes, it was.

Q Okay. Now, on a previous date, not yesterday, were you present when Nefertia Charles took the stand and testified?

A Yes.

Q That was recently?

A Yes.

Q Okay. Now, the grandma that Nefertia Charles mentions, is that person present in the courthouse?

A Yes.

MR. COX: Okay. Judge, I don't have any more questions at this time.

THE COURT: Okay.

CROSS-EXAMINATION

BY MS. KOLLINS:

Q Good morning, Mr. James. How are you?

A I'm doing fine.

Q I have a few questions for you. You and I have not spoke before, correct?

A Correct.

Q You arrived at Triaunna's home at what time that morning?

A Around 9:40, 9:45.

Q You said you were surprised that she was there. You knew she didn't start school until 10:00, so why were you surprised?

A She doesn't start school at 10:00. She starts school at 9:55.

Q Well, a five minute discrepancy is what we're talking about?

A Well, yes.

Q They lived in an apartment then, correct?

A Yes.

Q And you were going to drop your Pitbull off?

A Yes.

Q And you heard mom say yesterday the Pitbull wasn't welcome there; she didn't know that.

A That's not true.

Q Why would she lie about that?

A I don't know. You would have to ask her that.

MR. COX: Objection. Calls for speculation, Judge.

THE COURT: Overruled.

BY MS. KOLLINS:

Q You heard Triaunna say that she liked some things about you yesterday, right?

A Yes, I did.

Q Did she like some things about you?

A I could say some things, yes.

Q You helped her mom out?

A Yes.

Q Paid some bills?

A Yes.

Q Drove mom to the doctor, to the attorney when she was having a bad time?

A Yes.

Q So there was things she liked about you?

A Yes.

Q So she wasn't always hostile to you?

A Uh, it depends on what subject you're trying to say on hostile.

Q Okay. Well, the subject I'm talking about now is about you paying bills and watching out for mom. She wasn't hostile to you about those topics, was she?

A No.

Q So she wasn't always hostile?

A No.

Q When did you marry Tahisha Scott?

A When did I marry Tahisha Scott? I, uh, I've been divorced from her so long, I can't say exactly off the top of my head right now. I'm sorry.

Q But you remember that you got to the house at 9:45 on May 14th, 2010?

A Yes.

Q But you don't remember when you got married?

A Like I said, I've been divorced awhile now and I put that in -- that's part of my past.

Q Okay. When did you get a divorce?

A When did I get a divorce? Me and Tahisha got a divorce in -- I'm trying to say exactly -- It was in '05.

Q Right after Nefertia called the police?

A No.

Q Didn't that happen in 2005?

A Yes, it did.

Q And isn't the reason that that case -- that there was no trial is because Tahisha Scott called Metro and told them that her daughter would not cooperate?

MR. COX: Objection. Calls for --

MS. KOLLINS: Effect on the hearer.

MR. COX: Judge, the reality is that he doesn't have a base of knowledge to answer that question.

THE COURT: Overruled.

Sir, if you know, you can answer.

THE WITNESS: I don't -- Could you repeat the question, please?

BY MS. KOLLINS:

Q Isn't it true that the reason there was no trial with the Nefertia case is because Ms. Scott called Metro and relayed that her daughter would no longer cooperate?

A I don't know.

Q That was Tahisha Scott's choice, not Nefertia's choice?

MR. COX: Judge, asked and answered, and I don't think he has a base of knowledge to answer the question.

THE COURT: Sustained.

BY MS. KOLLINS:

Q You don't know whether or not that was Nefertia's choice?

A I don't -- I don't know. I don't recall at all anything to do with that. Could I say something in regards to that?

Q There's no question pending. I'm sorry.

A Okay.

THE COURT: Sir, just go ahead and wait until she asks a question, okay.

BY MS. KOLLINS:

Q You said there had been occasions where you've been in close proximity with Nefertia?

A Yes.

Q Was that with her little brothers?

A Yes.

Q Little brother, little sister?

A Yes.

Q Those are your biological children?

A Yes.

Q She's still -- Nefertia is still a minor?

A Is she still a minor? Yes, she is.

Q Okay. And you still pay support for those two boys, or the boy and the girl?

A Yes, I do.

Q When did you ask Triaunna's mom about bringing the dog over?

A I spoke to Theresa that morning. She called me when she -- she told me she was on her way to work. She had just dropped off her daughter and her son at school.

Q Okay. So what did you ask her about the dog?

A I let her know that I was going to drop the Pitbull off at her house and that I was coming by to pick up the bill.

Q Why was it necessary to drop the Pitbull off at her house and not leave him at your house?

A Well, the reason I wasn't taking the Pitbull -- well, actually I was over at -- well, Ms. Verlene's house, she's almost like a grandmother to me. We was at her house. I was staying over there shortly, and my dog, I didn't keep it there. The only reason I took the dog with me that day before was because we went to Sunset Park and went fishing. I wanted to take the dog with me.

Q Well, why didn't you take the dog fishing? Why were you leaving it cooped up in an apartment with another dog?

A It's not cooped up in an apartment. She has an outside patio, it's an open area.

Q Well, again, why weren't you taking the dog fishing?

A That day I wasn't taking the dog fishing because usually I have to walk the dog, let the dog use the bathroom. That day I wanted to concentrate on fishing.

Q You wear size eight and a half men's tennis shoes?

A Yes, I do.

Q And had bought a pair of Air Jordan's at some point?

A Yes.

Q Okay. And that box would have remained at Theresa's apartment?

A I don't know.

Q Did you buy them when you were staying there?

A No.

Q When did you buy them?

A When I was at my grandmother's house.

Q You used gloves in your job at Caesars Palace as a porter?

A Yes. Theresa works there as well.

Q Kind of surgical looking gloves, rubber gloves?

A Um, cleaning gloves.

Q Did you ever use those gloves at home?

A No.

Q Did you offer to get Triaunna a new cell phone cover?

A No.

Q What did you talk about on the way to school?

A What did we talk about on the way to school? Nothing. She was sitting there playing and texting on her phone like she always does.

Q Was she hostile that morning?

A Was she hostile that morning? No, 'cause I offered to give her a ride to school.

Q But she was hostile the rest of the time?

A Triaunna has a real bad attitude sometimes. One minute you could be -- she'll talk to you just as polite and the next minute she's snapping at you, and that's just the way she is.

Q Did you ever discipline the kids? Did you ever discipline Triaunna?

A Do I discipline them? No.

Q So you weren't responsible for that in your relationship with Theresa, telling the kids what they could or couldn't do?

A Well, if you want to consider that disciplining, yes. The reason -- The only thing I would do is relay messages that their mother gave me to give to them.

Q What do you consider discipline?

A What do I consider disciplining? Well, what I consider disciplining is if I have to basically tell them what my rules are, what my -- that's what I consider disciplining.

Q Prior to the morning of May 14th, 2005 (sic), when was the last time you spent the night at Theresa Allen's house?

A When was the last time I spent the night at Theresa Allen's house? Approximately three weeks -- three weeks.

Q Three weeks before? So you weren't living there then?

A No.

Q When was the last time you were permanently living with Theresa Allen?

A Three weeks before that.

Q Three weeks before. Was that when you were in and out, or was that when you moved your stuff out?

A I always was in and out, and I always kept stuff at her house.

Q Were you ever together with Nefertia and Triaunna at the same place at the same time?

A No.

Q When you lived with Theresa Allen, where did Nefertia live?

A With her mother.

Q And where was that at?

A I don't know her address, but she lives with her mother.

Q Okay. Well, how far apart were they? What part of town?

A What part of town? East Las Vegas.

Q Both of them?

A Yes.

Q Would Nefertia and Tahisha Scott be invited to Theresa Allen's house for any occasions?

A No.

Q So they didn't socialize?

A No. They knew each other through Nefertia's cousin. They went to school together.

Q Did you ever seen Triaunna get real upset?

A Yes.

Q About what? What kind of stuff did you see her get upset about?

A I guess boys at school, things like that. Or one time she got real mad at me because I came in her room because she had a boy in her room.

Q Did you ever see her cry?

A Have I ever seen her cry? Yes.

Q Did you ever see her sleep with her mom?

A No.

Q Was she a good kid generally or not so much?

A She always gets into fights at school because of -- she has -- like I say, she has a bad attitude, so she always gets into confrontations.

Q How long were you in that child's life?

A Three years.

Q Do you have anything good to say about her?

A Do I have anything good to say about her? The only good thing I can say about T[redacted] H[redacted] is that -- as far as -- like I say, her attitude just was real bad. She always kept a real bad attitude towards me, so therefore the only thing I can say good about her was that she loves her mother.

Q So she had such a bad attitude about you, but she couldn't wait to get in the car and get a ride to school from you; right?

MR. COX: Objection, Judge. Argumentative.

THE COURT: Sustained.

/ / / / /

BY MS. KOLLINS:

Q Do you have anything good to say about Nefertia?

A Yes.

Q What's that?

A Nefertia is good in school. She does her homework. She's a good student. And she's a good older sister to my son and my daughter.

Q And who do you think put her up to this?

A I honestly don't know.

Q Who do you think put Triaunna up to this?

A I honestly don't know, but I know that she heard rumors from school from her cousin, from Nefertia's cousin.

MS. KOLLINS: No more questions, Judge.

THE COURT: Okay. Mr. Cox?

MR. COX: No more questions, Judge.

THE COURT: Anything from the jury? Okay. Counsel approach.

(Bench conference begins)

THE COURT: (Indiscernible).

(Speaking to the marshal) Are we waiting on another question there?

THE MARSHAL: What was that?

THE COURT: Are we waiting on another question?

THE MARSHAL: No.

THE COURT: Oh, okay.

(Bench conference concluded)

THE COURT: Okay. Sir, how did Triaunna treat you when you stayed at

her house?

THE WITNESS: Real rudely. She back-talks and she just -- it just was like she didn't want me around.

THE COURT: And what actions did she take that were hostile?

THE WITNESS: What actions did she take that was hostile towards me?

THE COURT: Right.

THE WITNESS: Like I say, the back-talk, smacking her lips, rolling her eyes.

THE COURT: Okay. Any follow-up from the State?

REDIRECT EXAMINATION

BY MS. KOLLINS:

Q How many kids do you have?

A How many kids do I have? I have three.

Q Any other teenagers?

A Yes, I have a teenage daughter.

Q Teenagers roll their eyes and back-talk?

A Yeah. Towards certain people, yes, they do.

Q So it's not unusual for a teenager to roll their eyes, back-talk, talk under their breath, do things like that?

A It depends on how they're doing it and how they're behaving.

Q Well, what do you mean it depends on how they're doing it or how they're behaving?

MR. COX: I think this calls for speculation at this point.

THE COURT: Overruled.

THE WITNESS: You said what do --

BY MS. KOLLINS:

Q I don't understand your answer. I'm sorry.

A It depends on how they carry their self when they're doing it. Yes, teenagers roll their eyes and smack their lips, true. But it's their demeanor, how they present it to a person.

Q I'm not disagreeing it's disrespectful, but it's just kind of teenage angst, isn't it? I mean, don't teenagers just go through that stage where that's how they behave?

A Some of them, yes.

Q Okay. And that's the conduct you defined by this kid as hostile?

A Well, like I said, she – she acted hostile towards me. If it would have been in a polite way, I'd say it was a polite way. If was in a nice way. Her sister didn't act that way towards me.

Q So even when you were paying bills and doing stuff for mom, she was hostile?

A She was always that way towards me. She did not like me at all.

MS. KOLLINS: No more questions, Judge.

THE COURT: Mr. Cox?

MR. COX: No, Judge.

THE MARSHAL: More questions.

(Bench conference begins)

MS. KOLLINS: I think -- (indiscernible) -- because I know -- (indiscernible). So, he opened the door and technically -- (indiscernible).

MR. COX: I agree, Your Honor.

MS. KOLLINS: I don't really want to go there -- (indiscernible).

MR. COX: Yeah -- (inaudible).

MS. KOLLINS: And I don't think he realizes what -- (indiscernible).

THE COURT: Okay. So we're not asking this one.

MS. KOLLINS: This one, I -- (indiscernible).

MR. COX: This -- the problem here is -- (indiscernible).

THE COURT: We're not asking that.

MR. COX: Yeah, I object to that one.

THE COURT: Okay. So we'll ask those. Okay.

MS. KOLLINS: And just for the record, Stacy Kollins, D.A.'s Office. As to the question from Juror No. 8, the defendant opened the door to that information on cross-examination, but I did not follow up on it purposefully.

THE COURT: Okay.

(Bench conference concluded)

THE COURT: Okay. Sir, did you ever ask Triaunna why she didn't like you?

THE WITNESS: Have I ever asked Triaunna why didn't she like me? I never really tried to talk to Triaunna like that, 'cause she was always hostile.

THE COURT: Okay. Any follow-up from the State? Any follow-up from --

MS. KOLLINS: Just a couple questions.

THE COURT: Oh, I'm sorry.

FURTHER REDIRECT EXAMINATION

BY MS. KOLLINS:

Q You had a pretty long-term relationship with Theresa Allen, right?

A Yes.

Q Was it important to you to gain the love and trust of her kids?

A It was important to me, but I just -- when I notice that a child is being that much, um, I try to avoid them because I don't want any conflict.

Q So it was important to you, but it wasn't important enough for you to go to Triaunna and try to say, hey, let's work this out?

A I have -- I have said that before, yes. I tried -- I told her, let's try to get along.

Q Okay. So when the judge just asked you the question, did you try to talk to Triaunna about why she didn't like you, the real answer was yes, not no?

A Well, she didn't ask me that question in that way.

MS. KOLLINS: I guess we can differ on that. Thank you, no more questions.

THE COURT: Okay. Mr. Cox, anything?

MR. COX: No, Judge.

THE COURT: Anything else from the jury? No? Okay.

Thank you, sir. You can go ahead and step down.

Mr. Cox?

MR. COX: The defense rests, Judge.

THE COURT: Okay.

(The Court confers with the marshal)

THE COURT: Okay. Ladies and gentlemen, we're going to take a break for just about ten minutes. Then when you come back I will -- Oh, you know what, I didn't -- Does the State have any rebuttal?

MS. KOLLINS: No, Your Honor, the State has no rebuttal case. Thank you.

THE COURT: Okay. We're going to let you go for about ten minutes. When we come back we'll read through the jury instructions, have closing arguments, and then the case will be submitted to you.

During this recess you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial, or read, watch or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including without limitation newspapers, television, the Internet and radio, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

So if you could just be back here at 10:40. Thank you.

(The jury exits the courtroom)

THE COURT: Anything we need to put on the record?

MS. KOLLINS: No. I mean, I think the bench conference on the two questions that weren't asked is already recorded, so other than that I don't think so.

THE COURT: Okay, great.

And Mr. Cox, I know you had looked at the verdict form. I just want to make sure --

MR. COX: I don't object, Judge.

THE COURT: -- you had no objections to the verdict form.

MR. COX: No, I don't have one, no.

THE COURT: And everybody has copies of the instructions.

(The Judicial Executive Assistant gives counsel copies of the Jury Instructions)

(Court recessed from 10:25:30 a.m. until 10:38:30 a.m.)

THE COURT: We're ready.

(The jury enters the courtroom)

THE MARSHAL: All present, Judge.

THE COURT: Back on the record in Case Number C265506, State of Nevada versus Tyrone James. Let the record reflect the presence of all of our jurors, Mr. James with his counsel, the representatives of the District Attorney's Office, and all of the court staff.

Ladies and gentlemen, there should be a set of jury instructions for each of you there. I'm just going to read through them and then we'll have opening -- or closing arguments by counsel.

(The Court reads the Jury Instructions aloud)

THE COURT: Mr. Pandelis.

MR. PANDELIS: Thank you, Your Honor.

CLOSING ARGUMENT

BY MR. PANDELIS:

Counsel, ladies and gentlemen of the jury. First and foremost, on behalf of the Clark County District Attorney's Office and the State of Nevada, we thank you for your service this week and your willingness to serve as jurors and to carefully consider the evidence in this case.

This case against the defendant, Tyrone James, is about one thing. On May 14th of 2010, T[redacted] H[redacted] was home alone, or so she thought, at about 9:00 a.m. when the defendant came over to her house, took her out of her bedroom by her neck, put his gloved finger into her vagina, and then put an object that Triaunna believed to be his penis and likely was his penis into T[redacted]'s

15-year-old vagina. And due to those actions the State is going to ask that you return a verdict of guilty on all five counts in this case.

Before you do that, you'll need to go back, deliberate, consider the instructions and apply the facts to the law, and you'll need to answer two questions. First, what crimes were committed, and once you determine that all the elements of the crimes are satisfied, you'll need to determine whether or not it was Mr. James that committed these crimes.

Again, there are five counts in the Information that you have before you in your instructions. Counts 1 and 2 relate to the same act, the act of digital penetration against T[redacted] H[redacted] or the defendant putting his finger into T[redacted]'s vagina. Count 1 is Sexual Assault With a Minor Under the Age of Sixteen, and that again is for the defendant inserting his finger or his fingers into Triaunna's vagina. Count 2 is one count of Open or Gross Lewdness, and again, that is for the same act of the defendant touching, rubbing, fondling T[redacted]'s vagina or even inserting his finger into her vagina.

Counts 3 and 4 relate to another separate act. Triaunna told you that after he digitally penetrated her with his gloved hand, he got on top of her, opened up her legs, and from what Triaunna could tell, the defendant then inserted his penis into her vagina. That's what Counts 3 and 4 relate to. Again, if you read the Information, Count 3 says inserting a penis and/or finger and/or unknown object into the genital opening. Now, based on Triaunna's testimony, I think it was pretty clear that it was the defendant's penis being inserted into her vagina. Triaunna told you that the defendant was over her and she could feel something that she believed the tip of his penis rubbing in-between the lips of her vagina.

But you also have that unknown object into the genital opening, and within your instructions the judge just read a few minutes ago, there's an instruction that tells you you have to be unanimous -- or that the act was committed, but you do not have to be unanimous on the theory. If some of you believe that it was a penis but others believe that it was some other unknown object or you're not absolutely certain it was a penis but you know something was inserted, as long as you all are unanimous that when Tyrone was over Triaunna something was rubbing between the lips of her vagina, as long as you're all unanimous on that, you don't have to agree on what it was that was inserted into her vagina.

And Count 4 is related to the same act; that was the defendant using his penis or finger, hand or unknown object to touch, rub, fondle the genital area. And again, that's for the specific act that occurred after the defendant digitally penetrated her with his gloved hand. After she was on the floor he spread her legs apart and put something that Triaunna believed was his penis into her vagina.

And again, Count 5 is Battery With Intent to Commit a Crime; more specifically, battery with intent to commit the crime of sexual assault. And the defendant is charged with that for his use of force or violence against Triaunna with the intent to commit sexual assault. And that was his act of grabbing her by the neck when she was in the bedroom, and I believe that he continued to grab her by the neck while she was in the living room. Triaunna -- I believe she said he grabbed her by the neck, he choked her, and that's what that count relates to.

Now, you were given some instructions on what a sexual assault is, and I'd like to go through that for you, because I know for a lay person and for attorneys it can certainly be a little intimidating. A sexual assault of a minor is

committed when a person subjects a minor under the age of sixteen to sexual penetration. And you'll notice I have the words sexual penetration highlighted. We spent a lot of time talking about sexual penetration in this case. But it's sexual penetration against the minor's will or under conditions in which the perpetrator knows or should now that the minor is mentally or physically incapable of resisting or understanding the nature of his conduct. That's sexual assault of a minor under the age of sixteen. Again, either against the child's will or under conditions that the perpetrator knows they can't really resist or understand the conduct.

But what is sexual penetration? It's a legal term that, as you can tell, there's a lot of confusion over. You'll recall Theresa Allen's testimony. She got up on the stand and she was talking about Triaunna's disclosure to her, and she told her that, yeah, my daughter told me that Tyrone put a finger inside of her vagina. And then the next question to her was: Well, was she sexually penetrated? And Triaunna said no. So clearly a lot of us aren't certain what the word sexual penetration means. When we asked Theresa to explain what sexual penetration was, she couldn't really give a good definition.

But the definition in the eyes of the law in the State of Nevada is as follows: Sexual penetration is digital penetration or any intrusion at all, however slight, of the genital opening. And I'd ask you to keep those words "however slight" in mind when looking up this instruction. It doesn't require that an object or a penis, for example, be inserted all the way into a vagina, half-way into a vagina or even an inch into a vagina. All that is required is some penetration into the genital opening, however slight that penetration may be.

Sexual penetration also includes digital penetration. Digital penetration,

ladies and gentleman, is, for example, putting a gloved finger into a vagina. And again, a tip of a penis, finger or any other object entering the genital opening ever so slightly is sufficient for penetration. Again, there's no requirement that you find it go in all the way. Recall Triaunna's testimony. She identified that her vagina has two lips, and she told you that the defendant's penis was rubbing in-between those two lips. And when you're considering her testimony, try to recall when she talked about any type of pressure or rubbing. That, ladies and gentlemen, is sufficient for penetration. That is evidence of intrusion into the genital opening, however slight. When there's rubbing in-between the lips of the vagina, that is penetration in the eyes of the law.

For there to be a sexual assault, a lot of times we think of sexual assault as very violent things. Well, they certainly can be, but physical force is not an element for sexual assault. You have that -- going back to the instruction for sexual assault, it's against the person's will or under conditions in which they really don't understand what's going on. So you don't need to find that there's physical force. There was some discussion during trial whether or not Triaunna's legs were forced apart or just opened up. The question is, were her legs opened and did the defendant put his penis inside her, not whether there was physical force used when he was doing it. And again, the question is whether the sexual assault was committed without the victim's consent or under conditions which the defendant knows or should know that the person was incapable of giving consent.

Well, we know this was committed against Triaunna's consent. She tells you she was screaming, trying to get away, but the defendant had her by the neck and she couldn't. So this was clearly against Triaunna's consent. And even --

And I'd also ask you to consider whether a 15-year-old who is subjected to this by her mother's boyfriend can really understand what is going on, and hold the victim to a 15-year-old standard. Although you or I may have acted differently, a victim is not required to do more than her age, strength, or surrounding facts and circumstances make it reasonable for her to do to manifest an opposition to the sexual assault. Maybe in a perfect world maybe Triaunna would have just ran out of the room when he first got in there, but hold her to a 15-year-old female standard that is in this type of relationship with the defendant. He's in a dating relationship with her mother.

But when you consider all the instructions and the facts, and we'll get to the facts in just a moment, it's clear that the defendant committed two acts of sexual assault here, one by inserting his finger into Triaunna's vagina and then inserting an object that Triaunna felt with the defendant's penis and rubbing it in-between her lips.

But before we get to the facts, by committing those two acts the defendant also committed two counts of Open and Gross Lewdness. Open and Gross Lewdness is an indecent, obscene or vulgar act of a sexual nature. Putting your gloved finger into a 15-year-old's vagina is certainly an indecent, obscene or vulgar act of a sexual nature, as is rubbing the tip of your penis in-between the genital opening of a 15-year-old.

Now, let's recall Triaunna's testimony. And my list of the testimony here, this is just based on my recollection, but it's up to you and your recollection. So if I mis-state anything or anything seems out of order, I have no intent to mislead you. It's just a summary of the facts. Triaunna testified that on May 14th of 2010, it's approximately 9:00 a.m., she's home alone, or so she thought. She hears a

noise in her bedroom and then she sees the defendant in her bedroom kind of peeking around the corner. The defendant suddenly jumps on top of her and then he begins to choke her. Triaunna starts to say something at that point and the defendant tells her to keep quiet or he would hurt her. And Triaunna used some pretty graphic language when describing what the defendant said to her. The defendant then forced Triaunna into the living room. Once in the living room, I believe Triaunna said that he still had -- the defendant still had his hand on her neck. Again, that's the Count of Battery.

The defendant then removed Triaunna's clothing. He got on top of Triaunna, put his gloved finger into her vagina. That's the one count of sexual assault with a minor under sixteen and the one count of open and gross lewdness, Counts 1 and 2. And then Triaunna noticed that the defendant was wearing the glove. She described the glove to you and those gloves were admitted into evidence -- or excuse me, gloves that were later found in the house were admitted into evidence.

And then after he was done digitally penetrating Triaunna, a complete separate act, he had removed his hand, he positioned himself in-between Triaunna's legs, opened up her legs, and Triaunna looked down and by the way the defendant was positioned in relation to her body, she believed it was the defendant's penis, but she felt what she believed to be the tip of his penis rubbing in-between the lips of her vagina. And again, you'll see the specific language in Count 3. It says penis, fingers, and/or unknown -- penis and/or fingers and/or unknown object. So again, you all need to agree that there was something inserted into Triaunna's genital opening for Count 3, but you do not have to agree on what it

was. But based on this testimony, something rubbing in-between the lips of her vagina, the defendant committed an additional count of sexual assault of a minor under the age of sixteen because there was sexual penetration of her vagina by an object, and it may have been slight penetration, but again, all that is required is some slight penetration, and she felt rubbing, she felt pressure, and that rubbing is sufficient for penetration. And again, there was another act of open and gross lewdness committed.

Count 5 is Battery With Intent to Commit a Crime. Now, a battery is a willful and unlawful use of force or violence upon another person. If Ms. Kollins came up to me and smacked me across the face, that's a battery. It's a willful act on her part. It's an unlawful use of force. She's hitting me or slapping me. But I'm not -- the State is not asking you to find the defendant guilty of just battery. We're asking you to find the defendant guilty of battery with intent to commit a crime, specifically battery within intent to commit the crime of sexual assault.

So how do we know what the defendant's intent is? We can't read his mind. Well, the instructions answer that question for you. The intent in which a person acts is done -- or the intent with which an act is done is shown by the facts and circumstances surrounding the case. So to get an idea of what the defendant's intent was when he had his hand around Triaunna's neck, you look to all the facts and circumstances surrounding this case. He entered his room -- or Triaunna's room, he removed her clothing, he took her out to the living room. In the living room I believe Triaunna said he still had his hand on her neck. And then the defendant actually did sexually assault her. He put his gloved finger into her vagina and then put his penis and rubbed it in-between the lips of her vagina. So there was actually

a sexual assault in this case.

But you're told that there is no requirement that an actual sexual assault be committed. Suppose you had a case where everything leading up to getting into the living room was done. The defendant came into the room, put his hand around her neck, removed her clothing, laid her down on the floor, spread her legs apart, but then for whatever reason stopped. You still have facts and circumstances suggesting that an act -- the defendant had the requisite intent to commit a sexual assault when he was committing that battery. Accordingly, the State is going to ask that you find the defendant guilty of battery with the intent to commit a sexual assault, because the defendant had his hand around Triaunna's neck, and in doing so he had the intent to commit a sexual assault and he did in fact commit two acts or two counts of sexual assault against Triaunna. And again, I've just gone over this. A battery was committed. He grabbed Triaunna by the neck and he had the intent to commit a sexual assault in doing so.

Now that we've gone over what crimes were committed, I told you earlier that the second question you need to answer is whether or not it was the defendant that committed these crimes. And the State is confident that after you have carefully considered the evidence, there will be no reasonable doubt that the defendant committed these crimes.

First I'd ask you to consider the defendant's access to Triaunna. It's undisputed here that the defendant was in that house that day. He tells you he was. Although he was dating Triaunna's mom for quite some time, although their relationship was still on the -- or kind of on the skids, he was still doing nice things for Theresa. He was paying her bills, helping her out with some things. I believe

he took her to an appointment just a few days before that. But he had access to Triaunna.

Consider Triaunna's testimony. Triaunna told you what the defendant did to her. And when you're considering Triaunna's testimony, consider her motivation. You're instructed that you can do that. The defendant is helping out Triaunna's mother by paying bills for the family and things like that. And consider the fact that although Triaunna admits she didn't care for the defendant, the defendant was no longer living at the house. In fact, Mr. James told you today that the last time before this particular day he had slept over at the house was three weeks before.

Consider Triaunna's -- in addition to her testimony here in court, consider her disclosure. You heard from several people regarding Triaunna's disclosure. You heard from the detectives, you heard from medical professionals. But consider her disclosure in this case and the timing of that disclosure. Consider the defendant's own statement, his own statement in his testimony here today. Consider what's motivating him. There's an old saying that you admit what you can't deny and you deny what you can't admit. It's clear the defendant was at the house that day, so he admits to that. But when it comes time to talk about the sexual assault, that never happened in the defendant's mind. But consider his motivations as well as Triaunna's motivations when considering what both of them had to tell you. Consider Dr. Vergara's testimony. She told you that when she conducted the exam of Triaunna there were findings consistent with her disclosure.

And finally, consider that there were in fact gloves found under Theresa Allen's bed that were similar to the gloves described by Triaunna. Now,

the defendant made -- or defense counsel made a big deal about these gloves being found several days later, but I'd like you to keep in mind a couple things. Where did the sexual assault happen? Well, it started in Triaunna's bedroom and ended up in the living room. It never went into Theresa Allen's bedroom. The gloves were found there. So there was really no reason to look for gloves in that room. Also consider the fact that Theresa Allen told you that after this event happened, they didn't really spend the next few nights at the house, and I believe she said they found the gloves maybe five days -- I can't remember exactly, but about five days later. She told you that the nights following the incident they were spending the night somewhere else. But when did she find the gloves? When she was going back to the house to get some extra clothes and to get some shoes, shoes that she kept under the bed, and that's when she found the gloves.

Although there is corroboration in this case in the form of what I just went over in the last slide, there's no corroboration necessary. And we went over that quite a bit in jury selection. The word of the victim is all you need in this case. If you believe Triaunna, if you believe her testimony, it does not need to be corroborated. That testimony standing alone, if believed by you, is sufficient for you to return a verdict of guilty in this case. But again, I'd ask you to consider all the other things in addition to Triaunna's testimony that point to the guilt of Mr. James.

And why do we have an instruction like that? Because as we talked about also in jury selection, sexual assault is a crime that is committed in secret. There are oftentimes no witnesses other than the person doing it and the victim. Sometimes it's just the victim's word against the defendant's word, as in addition to the corroborating evidence in this case, thankfully we have that, but in a lot of cases

there is nothing else other than the word of the victim and the defendant. Triaunna's testimony in this case is all you need to find the defendant guilty, but thankfully as I went over in the last slide, there is other evidence that corroborates what Triaunna told you.

You also heard from Nefertia Charles late yesterday. And again, you are instructed that when you consider Nefertia's testimony, you cannot consider it -- you cannot consider it as evidence of the defendant's bad character. You can consider it for the limited purpose of determining whether or not the defendant had the opportunity to commit the crimes in this case, what his motive was in this case, what his intent was when he acted in this case, and whether or not there was some type of mistake or accident in this case. But those are the only reasons you can consider Nefertia Charles' testimony with regard to this case.

Ladies and gentlemen, after you consider the evidence in this case, the State is confident that you will return a verdict of guilty, again, for the four counts representing the two separate sexual acts of the defendant putting his finger into Triaunna's vagina, that's Counts 1 and 2, and then the defendant rubbing his penis in-between Triaunna's genital lips. She told you that she felt an object that she believed to be his penis rubbing in-between her lips. That is represented in Counts 3 and 4.

And finally, Count 5 is the Battery With Intent to Commit a Crime, or specifically battery with intent to commit the crime of sexual assault. Triaunna told you that when he came into her room he grabbed her by the neck at some point and brought her into the living room. He still had his hand around her neck. That was an unlawful use of force, and while he did that he had the intent to commit a sexual

assault. And when you go back and deliberate, the State respectfully asks that you return a verdict of guilty in this case. Thank you.

THE COURT: Thank you, Mr. Pandelis.

Mr. Cox.

MR. COX: Thank you, Judge.

CLOSING ARGUMENT

BY MR. COX:

Good morning, ladies and gentlemen. Thank you for your patience. Ladies and gentlemen, Mr. Page told you on the first day, zero plus zero equals zero. When we first me you when we were doing jury selection, there was a discussion about whether or not there would be physical evidence in the case and whether or not you would be willing to find a verdict of guilt if there was no physical evidence and all you had was the testimony of the alleged victim.

Well, in fact here we are, and I'll submit to you we have no physical evidence. Do we have scratches and bruises? No, we don't. T[redacted] H[redacted] was examined by Officer Tomaino, looked at by -- it was testified that there was a CPS person with him, Lizette Woods. And finally you have Dr. Vergara. Put her in a gown, head to toe inspection at the hospital. Several hours later gives some time for bruises, if they're going to exist they're going to develop, or we can observe scratches. A medical professional, head to toe exam; nothing.

Now, this is after she claims she's been choked several times, at least more than once. She was drug through her house by the wrist. Somebody was laying on top of her, put their body on her. Forces the legs apart and put her on the floor. Now, as we know, floors can leave burns. Not present either. This is an

aspect that if present could verify what she claims, and I'll submit to you its absence puts her testimony in doubt.

She goes to the hospital, talks to Pamela Douglass. And she tells Pamela Douglass that she hit and slapped Mr. James and that there was fighting, violent fighting between us. Now, if there's violent fighting between two people, somebody is going to end up with something on their body; on their hands, on their body. Physical hands has to come in contact with something. As far as Triaunna goes, we know there's nothing. Officer Hatchett testified that he arrested Mr. James. We take our common sense into the jury room. He's stripped. Is there any testimony they found anything, any scratches or bruises? Have you heard any testimony that anything like that was detected on Mr. James? Now, I think you could feel quite confident that these prosecutors, if they had that piece of evidence would have let you know, but they did not have that.

They talk about a phone. It could have broken at any time. I'd like to think I take good care of my phone, but I'll submit to you it's got lots of dings on it itself. No idea of knowing. Did we see the phone? Do we see a broken case? We didn't even see that. The reporting of that is based on -- that aspect is based on T[redacted] H[redacted]' credibility.

Now we get to gloves. This is where the case gets a little bit frightening. We talked to Officer Tomaino, and as you recall I took exception with Officer Tomiano. When he tells somebody a lie during a discussion, it's not a lie, it's a ruse. I would submit if anybody else tells Officer Tomaino a lie, it's a lie, but that's the jargon they use. Officer Tomaino tells you we searched the house for gloves; I directed somebody to search the house for gloves. Was anything located?

No, it wasn't. Officer Meltzer gets on the stand. Hasn't been a police officer very long. Very matter of fact. Did you look around for any gloves? No, I didn't. Officer Hatchett didn't do a whole lot of anything.

Then Theresa Allen gets involved, and this is where her credibility is really demonstrated. She finds the gloves, the box of gloves under her bed where she keeps her shoes. Now, what's she's telling you is that prior to this incident she never got her shoes. Otherwise she would have seen the box. But what she's also telling you is five days after this incident she didn't get any shoes; she was wearing the same pair of shoes.

Now, you take with you -- in fact, I already mentioned it once, Instruction 10. You take your common sense and judgment with you into the jury room. Jury Instruction No. 10. If you're going to go and stay at a friend's house for a number of days, what are you going to get? Now, I'm going to get my underwear and some clothes. Ladies, you might get intimate apparel and a couple changes of clothes. Are you going to get a pair of shoes? Yes, you are. That's when she would have seen the box if it was there. But I'll submit to you it wasn't there because she put it there. She put it there to help corroborate her daughter's story.

We heard about what an introitus is. I didn't know what an introitus is. An introitus is the outside opening of a vagina. Now, Dr. Vergara took the stand and said, yes, there is -- I saw swelling, a redness. I can't remember, I think it was swelling, at the opening of the vagina. She looked at the sheet, she checked the box that said it's consistent but it can be there for other causes. Now, what other causes did we hear? We heard two specific medical findings that she found. One on that day, May 14th; one several days later when the lab results came back.

She found a urinary tract infection. Very common. It causes redness or swelling at the introitus. When the lab results come back, there's Strep Group B, and there's another word there I don't pronounce correctly, but there was a Strep Group B condition that she had. And the results were sent from May 14th, meaning she had both conditions on May 14th. Both conditions, Dr. Vergara testified, leaves redness -- I'm sorry, swelling at the opening of the vagina.

Ladies and gentlemen, this is not a case that has physical evidence. And so we are left with the credibility of T[redacted] H[redacted]. Ladies and gentlemen, that takes us to Jury Instructions 8 and 15. Jury Instruction 8 talks about the credibility of a witness, motives and fears, and whether or not they've lied about material facts. And if they do -- in the last paragraph: "You may disregard the entire testimony of that witness or any portion of the witness' testimony which is not proved by other evidence." Going to Instruction 15, that's the one that Mr. Pandelis talked about, and what they're asking you to do is to rely completely on T[redacted] H[redacted]' testimony. Why? Because there's no other evidence.

The State will claim and has claimed that T[redacted]H[redacted] has consistently told the same story. I submit to you that she has not. Now, what's one key piece of evidence that we don't have? That's those text messages. I don't know about you, but we've got to use our common sense. I think I've got my text messages from my kid texting me last week in my phone. Something that can easily be brought in, something that can be shown to you. We could have seen what that message was when she contacted her sister or her friend; what was said. We don't have that.

Now, I'll submit to you that she did not allege that she had been

sexually assaulted. And how can I -- how can I boldly stand before you and say that? Look at the behavior of the people that received it. Denise Jordan. Did she call the police? If your sister tells you, I've just been raped, what's your sister going to do? They're going to call the police. She leaves class. She sees a police officer. Now, if I leave class I think I'd be a little scared, and here's the officer here. He didn't have a gun. I remember campus police having guns. I guess that was a long, long time ago. But he had a badge. Opportunity there. Why are you out of class, Denise? I've got an excuse. My sister has been raped. Help me. Does she say that to the officer? No.

Theresa Allen. We already know about the gloves. I submit to you that she does not have credibility. She tells you that she wants -- she completely -- I have to ask you, does what she say is logical and does it make sense? Let's get to brass tacks here. He's going to go pay a bill, and he says I went to go get the bill. I asked her, Do you pay with the bill? Do you send a check with the bill with it? You know, the document from the power company that tells you how much you owe and what your customer number is and what your address is. She said, yes, I do. When you go to pay it in person, is that what you do? Yes, I do. But she expected him to go pay her bill without that information, and even though he had a key she claims he wasn't supposed to be in the house. Lots of discussion brought up about a dog. You know what, ladies and gentlemen, you know, he had a key to the place. There's a place for the dog to be. I'll submit to you this case is not about a dog.

Now, Theresa Allen took the stand and we asked her very specifically, Did you tell the police that he wasn't allowed to be in the house? She said yes, I told the police during the 9-1-1 call. Now, I even played that thing all the way over

again and we all heard the same thing. Not one word mentioned about Tyrone James is not supposed to be in my house. Even after listening to the whole thing all over again, she says, well, I told them. Well, it's there. You're going to take the 9-1-1 call into the jury room with you.

The gloves shows that Theresa Allen lacks any credibility. You just don't not get shoes before something like this happens, and you don't wait five days to get shoes again. I don't think any one of us believe that she went five days without changing her shoes, because that's where she said she kept her shoes.

Let's look at Theresa Allen's behavior after receiving the call. This is evidence that she did not allege sexual assault early on. What was her behavior? She talks to T[redacted] H[redacted]. What does Theresa Allen do? If your daughter tells you I've been raped, what are you going to do? You're going to call the police. The original message, I'll submit to you her behavior indicates it was another allegation, something that perhaps was not criminal, or she simply did not believe T[redacted] H[redacted].

We all heard the 9-1-1 call. Theresa Allen testified, I talked to T[redacted] H[redacted] about everything she's alleging. Now, we could split hairs about, well, there's a legal definition of penetration; what is penetration is confusing. I asked her, wait a minute, just penetration, what does that mean? Now, she finally got flustered because I guess she didn't want to cooperate or she didn't think she was going to give an answer that would bolster the State's case, and she says, well, I just don't know what penetration is. Well, she was sure the day when she called 9-1-1 that Triaunna did not say there was penetration. So I'll submit to you the behavior and that call alone indicate that there was a version that was told and it

did not include penetration.

And when it comes to the text messages, we all played a game when we were kids, I think it was called the telephone game, where if I gave a message to this gentleman and asked him to tell several people next to him the same message, how quickly does it change when it gets to the third or fourth person. It just changes. Things spin out of control. And I'll submit to you that's what happened here.

After the 9-1-1 call and prior to going to the hospital and talking to Officer Tomaino, that's when we get the allegation of penetration. And that's when we get gloves made of lubricant. I don't know if anyone in the courtroom understood what she was talking about. Now, at first when I was talking to Officer Tomaino, I was asking him, did you look for lubricant? The State asked similar questions. Come to find out what Triaunna means the gloves are made out of lubricant. Ladies and gentlemen, I don't think any of us understand it. It is what it is.

Then we go to Mr. James. Is his version logical and does it change? We know that he's a hundred percent cooperative. If he has bruises on his body, all he has to do is be hidden for a short amount of time and let himself heal up. What does he do? They call him up; he goes down. He goes down and submits himself for questioning, submits himself for obvious examination if you show up in person. He does both. He's going fishing with grandma. Now, is that something you can make up?

He arranges to pay the bill. He goes down and gets the bill. Now, I don't know about you, but who knows this school starts that late in the day for a high school kid? He -- The evidence indicates he did not have any idea she was going to be home. And I'll submit to you both parties were surprised when they saw

the other person there. Now, she claims she's asleep. If she was really asleep, she wouldn't be making any noise. He would have got the bill. There's no way that he could have known she was even there.

Why does -- What evidence indicates why T[redacted] H[redacted] uses the allegation of gloves? Gloves that are found five days later. Because she knew it was an allegation that would not leave evidence. She could make the allegation; she knows that it's not going to leave evidence.

Mr. James gives a logical version of events. He goes over, he arrives to get the bill, she's ironing her clothes. That's logical. She's getting ready for school. No evidence she was late for school. If she was late for school, that's documented. We could have brought in a record saying that the teacher reported her tardy. No evidence that she was late for school. The evidence is -- we don't have contrary evidence that she was late.

He talked to the officer. Notwithstanding Officer Tomaino told him there were marks that weren't actually there, he maintains his innocence.

And ladies and gentlemen, that brings us to Nefertia Charles. When I think of Nefertia Charles, I think of -- I think of an incident in history going back to Massachusetts, an incident that took place in Massachusetts in which 150 people were arrested and imprisoned. At least five of those people accused died in prison. All twenty-six who were accused, went to trial and were convicted. Two courts convicted twenty-nine people of capital felony witchcraft. Nineteen of the accused, fourteen of them were women, five men were hanged. One man who refused to enter a plea was crushed to death under stones. He was pressed. That was the Salem witch trials that took place in 1692 to 1693. The Salem witch trials began

with the allegation of two girls, Betty Paris and Abigail Williams. They cried, they wailed, they flopped on the ground. They convinced people that things had been done to them. Horrific things. People believed it without any corroboration.

Ladies and gentlemen, we have to look to the credibility of the people making the allegation. Nefertia Charles' allegation is five years old. The one incident reported had a person that could corroborate what she claims happened. She says grandma came in. Grandma came in and saw him in my room. We also hear that that same grandma was present when Nefertia Charles testified recently. Did the State call the grandma to take the stand to corroborate her story, to corroborate that one incident, the one incident that can be corroborated? No, they did not. You cannot assume that it could be corroborated.

I don't think there's any doubt that Mr. Pandelis and Ms. Kollins, if they had evidence, would withhold it from you. Here we do not have evidence that can corroborate the version. The one thing, the one person that can corroborate any of that is not called. Five years ago there was no trial, there was no investigation. He did not have an attorney. And I'll submit to you he did not have justice.

Ladies and gentlemen, I like to go hiking and camping. And quite frankly, I'm afraid of bears. Luckily we don't have bears in Nevada, but I kind of avoid places where there are bears. Male bears are large and if they're hungry they can come after you, but I don't fear papa bear as much as I fear mama bear. Mama bear is dangerous. Do you know why mama bear is dangerous? Because she has cubs. And it doesn't matter if mama bear is hungry. All that mama bear cares about is protecting her cubs. And if she senses that you're placing her cubs in danger, then you're in danger, and the only hope you have is outrunning the person next to you.

Tahisha Scott obviously had knowledge, at least some, of what Nefertia claims happened. In the last five years, Nefertia Charles, Tahisha Scott and my client have had social interaction. Nefertia Charles has been in places with Mr. James. No allegation that she refused or shied away from him. She was in close proximity. If Tahisha Scott, her mom, believed that he had sexually assaulted her daughter, would she ever let him within a mile of Nefertia Charles? I'll submit to you, no. And I'll submit to you also there's no indication or we don't have evidence that Nefertia Charles ever told her mom, I don't want to go places where Tyrone James is. The behavior is not consistent with something like that happening.

Now, here is the danger of this trial. We have the allegation of T[redacted] H[redacted]. It lacks any evidence, lacks credibility. We know that there was an original version where there was no penetration. I'll suggest to you based on the conduct, the version may even be claimed a third time. The behavior suggests that. We have gloves that were placed there five days later. With that in mind, ladies and gentlemen, we don't have evidence, we don't have credibility.

Then we have Nefertia Charles that comes from five years -- something from five years ago. The danger is you cannot use that case to say I believe he committed this crime, even though there's no evidence, because she says something happened in 2005. You have to look at the limiting instruction given by the judge and mentioned by the district attorney. And you have to -- you have to refrain from using her allegation in that manner.

Now, as I mentioned from the very start, zero plus zero equals zero. The allegation as to T[redacted]H[redacted] doesn't have evidence, it doesn't have credibility. This allegation is old, never mentioned again, recanted. Her behavior is

not consistent with it. It is zero as well. You cannot take two stories and say, well, both of them don't lack any credibility, but if you put them together, we may have something out of this. No. You must refrain from that instinct if you have it. You have to look at this case. Did he sexually assault T[redacted] H[redacted]? Does the evidence show that? Is there credibility in the story? No. That is why, ladies and gentlemen, the only just verdict we can have in this case is a verdict of not guilty on all counts. Thank you.

THE COURT: Thank you, Mr. Cox.

Ms. Kollins.

REBUTTAL CLOSING ARGUMENT

BY MS. KOLLINS:

Good morning again, ladies and gentlemen. I would like to reiterate the gratitude expressed by my co-counsel. Thank you again for your time over the last couple days. I think we met our schedule, so hopefully we can get you on to the rest of your lives after today.

I'm not going to talk to you about Salem witch trials or mama bears, but what I'm going to start with is this, though. At the beginning of this trial you took an oath, and you took an oath to follow the instructions as they were given. And you cannot selectively follow them, you must follow all of them. You can't adopt some of them and disregard others. You were chosen for this panel for a reason, after questioning.

T[redacted] H[redacted] does not need your sympathy. All she needs is a little justice this week, and that's why we're here. What she deserves, and what Instruction No. 10 tells you you can use is the unequivocal application of your

common sense in this case. I asked every person or almost every person if you would hold a child or a kid to a kid's standard, and you would take into consideration their ability to communicate, their language skills, their developmental level, their education, their ability to relay events, and yes, their consistency. And I'm going to ask you to hold Triaunna to that standard.

But I want you to think about and really think about what this kid went through. A very startling, traumatic event to her. Imagine an adult that gets in a car accident. You leave here today, somebody gets in a car accident. Not one of you, just another individual. They have to tell the police officer how it happened. Well, the light was yellow. Well, maybe it was red. They may have to tell their insurance company. Then they have to tell their spouse. Three days from now they have to tell a friend. Are they going to reiterate, even the most educated perceptive adult -- and that was a startling event, a traumatic event, that car accident -- are they going to relay everything perfectly chronologically in the same language every time to every person? And I submit to you they won't.

And when you take that type of analysis and you review what Triaunna has had to say, given her education level, her language skills, her ability to articulate, hold her to a kid's standard. Don't expect her to describe events the way a 30-year-old adult might. She's not. She's a 15-year-old kid, and I submit to you was nervous when she came in here. There are fourteen of you that she's never seen before. There's a judge up here she's never seen before. There are members of this audience that she has never seen before. I submit to you she did the best she could with her language skills to articulate for you what happened.

They made a big deal about -- And I'll give you one example. She

described the gloves as lubricant. I submit to you that kid didn't know what that was. She didn't know what it was. Mr. Cox kept asking her. It had nothing to do with a tube of lubricant, adult sex lubricant. That's what she thought the gloves were called. And he went back and forth with her, back and forth with her. Really pointless, actually. It just really showed you that that is what her communication and knowledge levels are.

Instruction No. 8 talks about credibility, and it gives you a bunch of things that you should measure when you assess credibility. Mr. Cox would have you believe that this child held such disdain for his client that she waited three years and calculated the perfect twenty minute opportunity on a school morning to frame him for sexually assaulting her. She was that calculated, that fore-thinking, that instead of doing it two years ago when she was hostile and she hated him and she was a smart-mouthed teenager, she waited until he was out of the house for three weeks and calculated this one fifteen minute opportunity to ruin his life. That's what Mr. Cox would have you believe.

Is that credible? Is that plausible? Does that -- does the evidence show and her ability to testify show that she has the mental wherewithal to calculate the outcome of this case? Here's how smart she has to be. I am going to make up a sexual assault because I don't like him. I want him out of our life. So how am I going to get the news out? I'm going to get a ride to school from him, and then who am I going to -- what am I going to do? I'm going to text message my 14-year-old little sister because that will make it work. That's the perfect plan. Why not just call mom? When I get on the cell phone, call mom, start crying. No, I'm going to text message my sister and I know this will all come out the way I want it to.

The manner of her disclosure coupled with her demeanor at that disclosure is something that you can all assess when determining what she says happened is credible. In the defense perfect world, this kid had to be able to calculate that a single text message to her sister would result in her ultimate goal, getting rid of the defendant. Why not call mom? Why not just call the police herself? No, she had to calculate that she knew that's what would happen.

He had been -- When you look at the credibility instruction it talks about the relationship of the parties. He had been in and out of mom's life. We know at least out of the house for three weeks. The fact that he was paying a bill on that day, and this is the day she's going to choose to falsely accuse him of touching her.

There was a lot of to-do made about how she disclosed. Well, you know what, she didn't wait until she got to school. Guess what? She was home alone with him. Did you see that girl? Her waist is about eight inches. She's itty-bitty, teeny-tiny. Was she supposed to stay in the residence with the perpetrator and try to make a phone call in front of him where he had physical access to her, where he could continue to overpower her? You can't fault her for getting herself to a place of safety and say that that means she's lying. She got herself to a place where she was safe and she could talk, away from him.

You know, she probably didn't like him. I don't think we can disagree with that. Her father figure was incarcerated and had been, and mom is with somebody else and she doesn't like it. That's not an unusual circumstance. There are numerous blended families where one kid doesn't get along with the new step-parent figure. But when called on the carpet about what her behavior was, it was

nothing more than teenager talk-back. Is that hostile? I submit to you that's nothing beyond teenage angst, and that's not a basis to vitiate her credibility and what she says happened in this case.

I submit to you that her conduct subsequent to this disclosure is something that you can look at to assess her credibility. Her mom was on the phone with her and said she was crying in a manner that she did not routinely hear from her child. I submit to you a mother can recognize pain or injury in their own child by the tone of their voice, by their actions, by their demeanor, and her mom recognized that something was seriously enough wrong with her that she said go to the office and I'll be there. The other conduct subsequent to this disclosure that you can use to assess her credibility is her mom said she slept in the bed with me. My 15-year-old daughter did not want to be home, and she slept in bed with me. Something frightened her to the point that she slept in bed with me. It's a behavior that I have not seen in my daughter. That's what the evidence shows. It's what mom said, that's a behavior I have not seen. A very visceral reaction to a startling event.

Now, under the defense theory this child was so calculating that this is something she planned, was the crying hysteria at school and the subsequent actions where she slept with mom. And then they stayed gone from the house for a couple weeks, and then they went back and they shared the couches in the living room. She's that -- Is she that smart? Is she that calculating? I submit to you she's not, and those things need to be assessed by you when you think about her credibility in what she had to tell you happened.

Was she fortuitous enough that Nefertia would come forward? Was

that just luck on her part? Certainly no evidence in the record that those two girls collaborated to come in here and speak about what this man did to them. There's no evidence of that in the record. Because they knew of each other does not show that there was any communication such that there was some kind of conspiracy between these two kids to come in here and talk about what this man did.

The physical symptomology, was she just fortu-- She didn't know she had a urinary tract infection and she certainly didn't know she had Strep B. She made this up just at a time where she knew she would have physical symptomology? She was just fortuitous enough to have some medical corroboration? The swelling is consistent with penetration, abrasion, blunt force trauma. It's also consistent with her medical condition. But it is not inconsistent with what she had to tell you happened, that he put a gloved finger with latex, which many people are reactive to, in her vagina, and that he put his penis and rubbed it between the lips of her vagina.

You saw the legal definition of penetration. It is breaking the plane of the lips of the vagina. It is not in the introitus. It is breaking the plane of the outer lips of the vagina. That is sufficient under the law to find evidence beyond a reasonable doubt of penetration. Whether you like it or not, whether you think that's what penetration should be or not, that's what the law says. And you all made a promise to follow that law.

There's been a lot of talk about we should have seen bruises, we should have seen this, we should have seen that. How much strength do you think it takes that man to overpower that itty-bitty little girl? I submit to you not a lot. I submit to you not a lot at all. And he's pretty smart. You heard him talk today. He's pretty smart, he's a smart guy. Not going to let anybody trip him up. Not going

to let me make him answer backwards, get himself in trouble. You think he's going to injure that child to the point where people can see that something's been done to her? You think he's going to really knock her around? No, because then they're going to know and everyone is going to know. It doesn't take him much. He's a stocky guy. Put a hand on that kid and control her. She's what, five foot two, maybe ninety pounds on a good day. It doesn't take him much to overpower her and it doesn't take him enough force to overpower her to leave a bruise, and I submit that's what the evidence shows.

Mr. Cox talked about that there was this violent fight. What I say is not evidence, what Mr. Pandelis says isn't evidence, what Mr. Cox, Mr. Page say, not evidence. Violent, I submit to you, was Mr. Cox's word on cross-examination, not the nurse's word. He said, was there a violent struggle. She said yes. It's an adjective. I can be violent throwing a pen down, I can be violent punching somebody in the face. There are degrees of violence. I would submit to you that was his word, not hers. So the fact that there aren't bruises and cuts on that child does not mean what she says happened to her did not happen. And I'll point you back to the instruction that says physical corroboration is not required. And Triaunna's voice, if believed by you beyond a reasonable doubt is sufficient. Triaunna's voice.

He talked about, well, there should have been some things -- my client was strip-searched and there was no scratches. There is no evidence in this record anywhere that his client was strip-searched, photographed, or anything of the sort, nor is there any evidence in this record that he consented to that. So to say that his client was strip-searched and he had no marks, look at your notes. That's my

recollection. I didn't elicit any of that information from either of the police officers that I had testify.

Where's the broken cell phone case? Oh, well, there is the absolute linchpin to the case, when a broken cell phone case produced in this courtroom makes you believe that child more than you do right now. A broken cell phone case.

There was a lot of discussion about Theresa Allen and the actions that she took. (And I'm sorry, I have a cold, I have to have a drink. Excuse me. And I'm certain you've all heard me hacking all week and it's been very pleasant for you). Why did Theresa Allen call the defendant first? Maybe she called him first because maybe she wanted to salvage the relationship. He was paying a bill for her. Maybe she didn't want this to be true. Maybe the fact that the man that you've had in your life for three years around your kids, maybe you don't want that relationship to go away. Maybe this is shocking to you. I submit it was shocking to her. I think the evidence shows that. I was surprised, I was hurt. You don't want it to be true for your relationship, but you also don't want it to be true for your child. So if you think that was a bad decision on her part to call the defendant first, I submit to you Triaunna is not responsible for the bad decisions any of the adults in this case made.

The whole shoes under the bed thing that he was talking about. She left the house for four days, she went back to get some more clothes. By her testimony, she needed more shoes. I mean, if she took two -- you know, some of us can take ten pairs of shoes for two days and it wouldn't be enough; you know, some of us could take one. She went back and she looked for shoes. She found the box. At the time Mr. Cox is suggesting that she went back in an effort to frame his client

with these gloves, he was paying her bills. He had just paid a bill. He had just done something nice.

We need the text messages. That's what Mr. Cox said, we need the text messages. You know what, I wish Detective Tomaino would have preserved those in some fashion. At the inception of this case he had been on sexual assault for five months. Should he have? It would have been nice. Would the existence of those text messages make you believe Triaunna more? Triaunna came in here and told you she texted her sister. Her sister came in here and told you she received a text from Triaunna; contacted mom.

The whole Nevada Power bill thing, she said that all she needed was the name and the address, that there was no paper bill required; that she had not had any conversation with the defendant that morning; that he was supposed to go to her house. A big deal was made -- and we just kind of respond to these arguments as they're made, so these are just from my notes -- about school starting at ten o'clock. No school starts at ten o'clock. I think that's what Mr. Cox said. Well, his client knew that school started at 9:55. There are staggered school schedules all over this valley. What does that have to do with what happened in that house that morning? Absolutely nothing.

And Triaunna was sophisticated enough to know that if she said gloves were used there would be no evidence. Triaunna was that sophisticated. And then sophisticated enough to enlist her mom to find gloves consistent with what she had talked about under her bed in a location where none of these things happened, because she knew there would be no evidence left if there were gloves. Is that child that sophisticated? What you saw on the stand from that child, is she

that sophisticated to enlist her mom? I submit to you in these cases when you're assessing credibility of a child, some of the things we've gone through today, the truth is in the details. And I submit to you the glove detail is a detail that you can't make up.

Isn't it equally as plausible that a sexual perpetrator would put a glove on his hand before he touched a child, hoping not to leave anything. But if you buy Mr. Cox's theory, the kid enlisted her mom and they planted the gloves under the bed five days later. She's that sophisticated.

One of the aspects of credibility is someone's demeanor on the stand. And we spent a lot of time talking about that in jury selection and whether or not you believed that every kid or every victim would act the same, and all of you agreed that you did not expect the same reaction from everyone. Some kids like Triaunna is very closed, very difficult to get her to respond. She wasn't -- she didn't use a lot of big words, she didn't use a lot of big sentences. She did not become emotional. I submit to you she was nervous. And contrast that with Nefertia, who sobbed and at least had tears streaming for a great portion of her testimony. I submit to you, where do those tears come from, if they didn't come from trauma? What happened in this courtroom that would make her so overcome with that emotion, were she not relaying to you something that she had been through?

That girl, I submit to you at the hands of her mom, Tahisha Scott, has been around this man, who is the biological father of two of Tahisha Scott's kids. I asked him today if he continued to pay child support for those children, and he does. Those are his biological kids. Nefertia is not his biological child. And she's still a minor. She has no choice in what access her mother gives her. Her mother.

There was no other case. That investigation was thwarted. I submit to you there are parents that trade their kids for perpetrators and money. It happens.

Triaunna sat here and she told you about that man putting his finger in her vagina, taking her out to the living room, his hand around her neck, his penis in her vagina between the lips; penetration, however slight, and she told you that. And she told you that in the best words she could.

Nefertia was here for a very limited purpose, and that was for you to use what happened to Nefertia in an effort to measure the defendant's motive, intent, opportunity in this case. The absence of mistake or accident that this would happen again. That's why Nefertia was here.

MR. COX: Judge, I object to the last characterization of the limiting instruction.

THE COURT: Overruled.

BY MS. KOLLINS:

Triaunna told her mom, finger in my vagina, penis in my vagina. Mom gets on the phone. Obviously mom does not have an understanding of what penetration is when she says he put his finger in her, and then when the operator says was there penetration, she says no. Mom's relay is not what we're using to prove this case beyond a reasonable doubt. We're using the consistent relay of the facts of this case by that child. And she has said it repeatedly: Put his fingers in my vagina, put his penis in my vagina. He put his hand around my neck. I submit to you, again, Triaunna's voice is enough for you to convict this defendant of each and every count charged in the Information.

The standard in this state is beyond a reasonable doubt. It is the standard used in every criminal case in every criminal courthouse, in every state,

in every jurisdiction to secure a criminal convictions. If you walk through the credibility statute and you look at this child's behavior and you look at her statements, I submit you the State has offered you sufficient evidence to find the defendant guilty beyond a reasonable doubt of all five counts. I thank you again for your time.

THE COURT: Thank you, Ms. Kollins.

Okay. The clerk will now swear the officer to take charge of the jurors and alternate jurors, and then we will select our two alternates.

(The clerk administers the oath to the officer

to take charge of the jury deliberations)

THE CLERK: Alternate number one will be Juror Number 5, Alisa Price. Alternate number two will be Juror Number 15, Vernon Zobian, Jr.

THE COURT: Okay. Folks, if you'll just go with Officer Moon.

(The jury exits the courtroom to begin deliberations

at the hour of 12:13:30 p.m.)

THE COURT: Okay. Mr. Pandelis, could we get a copy of your PowerPoint, just so we have it for the record.

MR. PANDELIS: Exactly. I think I have one for you.

THE COURT: And is there anything else we need to take care of right now?

MS. KOLLINS: No.

MR. COX: Do you want a photo of my white board presentation?

MS. KOLLINS: I doubt it will be necessary. I'll leave you my number, but after three I'll be gone.

THE COURT: Okay. So Mr. Pandelis will be able to handle it.

MR. PANDELIS: Yeah. I'll leave you my number.

THE COURT: Okay.

(Court recessed from 12:14:35 p.m. until 2:13:15 p.m.)

(Whereupon the following proceedings were held outside the presence of the jury)

MR. COX: What's the request that they have?

THE COURT: Yeah, here's the question.

MR. COX: Okay.

THE COURT: Which I think we'll be able to resolve fairly easily.

MS. KOLLINS: Are we going on the record?

THE COURT: Are we on, Renee?

COURT RECORDER: Yeah.

THE COURT: It's: Why would Tahisha Scott sign the consent to search form for the apartment at 207 Lamb?

MS. KOLLINS: Tahisha Scott did not sign the consent form, Theresa Allen did. Tahisha Scott is the wrong mom.

MR. COX: There's -- You've got Tahisha, Theresa, Nefertia --

MS. KOLLINS: Tahisha is Nefertia's mom.

THE COURT: Right.

MR. COX: We've got a lot of "tias" in this case.

MS. KOLLINS: So she had nothing to do with the consent to search there.

MR. COX: Tyrone, Tyronica.

MS. KOLLINS: I don't know how you'd fix that because -- I mean, I guess that means a read-back, unless somebody mis-spoke, and I don't recall that.

MR. COX: I think she's talking about the van.

THE COURT: She signed -- Right.

MR. COX: Tahisha Scott signed for the van.

THE COURT: She signed --

MR. PANDELIS: She signed for the van.

MS. KOLLINS: She's not at the 207.

MR. COX: But not for the apartment. There was -- Was there even a consent to search signed for that?

MR. PANDELIS: No. But mom gave -- I mean, mom came in here and told you that she had a consent to search --

MS. KOLLINS: So they're looking at -- they're looking at the consent form that was in that evidence bag, I assume.

THE CLERK: I hope not. We did not open those.

THE MARSHAL: It was on the -- it was on the outside.

MR. COX: Well, okay. Obviously they're just confused. So I don't know if the best thing to do --

THE COURT: Could you bring --

MS. KOLLINS: Could we resolve it by opening the bag?

THE COURT: Could you bring the bag?

THE MARSHAL: That bag they were looking at? Okay.

MS. KOLLINS: Because she may have been the owner of the van. And she could have signed the van, and maybe he filled out the front of the evidence bag incorrectly. But that was not from testimony.

THE COURT: I think the -- There was an odd assortment of things in that

bag, wasn't there? I mean, there was the consent form, but then there was --

THE CLERK: And the shirt.

MR. PANDELIS: I think the shirt.

MS. KOLLINS: And the clothing.

THE CLERK: A girl's night shirt.

THE COURT: Oh. So that was --

MS. KOLLINS: I can't tell you why they were contained within the same envelope.

THE COURT: That's -- I just --

MS. KOLLINS: That is unusual.

THE COURT: -- recall thinking that that was sort of an odd assortment of things in the bag.

MS. KOLLINS: The only thing I can attribute it to is that those were the things that Tomaino collected. I mean, he collected the clothes from Sunrise and then he -- there was a written consent to search on the van. It was verbal as to the house, is my understanding.

MR. COX: That's the way I remember it, too.

(The marshal hands evidence bag to the Court)

THE COURT: Thank you.

MR. COX: I don't remember there being something signed on the house. That was Theresa's house.

MR. PANDELIS: Yeah. Theresa Allen gave verbal consent to search the house.

MS. KOLLINS: Right. Is it filled out incorrectly?

THE COURT: Yeah, I see why there's -- honestly, I see why there's confusion. I think --

MS. KOLLINS: May I approach and look at the bag?

THE COURT: You may.

(Counsel approach the bench)

THE COURT: Maybe if we mark the contents --

MR. PANDELIS: Consent to search card signed by Tahisha Scott.

MS. KOLLINS: That's a consent to search card --

MR. COX: For the van.

MS. KOLLINS: -- from the van.

THE COURT: I understand that, but if you look at the front of that envelope, you can't tell that from that.

MS. KOLLINS: No.

THE COURT: Because it has the address.

MS. KOLLINS: Because it has 207 Lamb.

THE COURT: Right. And it just says Consent to Search. So I think that that's the confusion.

MS. KOLLINS: Do you have a problem supplementing that fact or opening that bag?

MR. COX: I don't want to open it.

MR. PANDELIS: Well, would you have a problem supplementing by saying the consent to search was for the van?

MR. COX: Yeah, that's fine. Yeah. I think that's correct -- to me, that corrects their misconception.

MS. KOLLINS: That's accurate.

MR. COX: I don't want to start opening things. I would rather just clear it up by saying the consent to search signed by Tahisha was for the van.

THE COURT: Okay. Okay.

MR. COX: And do you want to take it a step further and say the consent to search on the apartment was given by Theresa orally?

MS. KOLLINS: Certainly.

MR. COX: I mean, that clears it up.

MR. PANDELIS: Yeah. I'm fine with both of those.

THE COURT: Do we need to --

MS. KOLLINS: That was -- that was in the testimony.

THE COURT: I would prefer to limit this to the question that they've asked, which is just that the consent to search form --

MS. KOLLINS: Okay, that's fine.

THE COURT: Okay. So how are we going to word this?

MR. COX: So, Tahisha Scott gave consent to search Tyrone James' van.

MS. KOLLINS: It wasn't his van, though, it was Tahisha Scott's van.

MR. PANDELIS: Yeah.

MS. KOLLINS: She wasn't the owner -- He wasn't the owner.

MR. COX: Oh. Okay. That's why I kept mentioning van, and it wasn't his van. Okay.

MR. PANDELIS: Should we -- If weren't not including --

MS. KOLLINS: Well, that's fine. Because otherwise we're going to have to do a playback.

MR. PANDELIS: But should we put something in there that -- you know, not necessarily saying that Theresa Allen gave verbal consent to search the house, but just saying the consent to search -- Scott's consent had nothing to do with the search of the house?

THE COURT: How's this? (Holds up note for counsel to read)

MR. PANDELIS: Perfect.

MR. COX: Yeah.

MS. KOLLINS: Yes.

THE COURT: Okay. Okay, so it will read: Tahisha Scott signed the consent to search form for the van, not 207 Lamb.

MR. COX: Yes.

MR. PANDELIS: Perfect.

THE COURT: Okay. And everybody is in agreement with that?

MR. COX: Yeah. It answers the question and clears up a factual misconception.

THE COURT: Okay. And that's not supplementing the evidence, it's just making --

MS. KOLLINS: It's clarifying the tag that's contained on the outside of the evidence bag --

THE COURT: Right.

MS. KOLLINS: -- because the evidence bag attributes the 207 Lamb address to Tyrone James, and then underneath there it just says: Number 1, blue night shirt. Number 2, consent to search card by Tahisha Scott. And I think there's been an inappropriate inference drawn that that consent to search card --

THE COURT: And I'm actually --

MS. KOLLINS: -- refers to the above address.

THE COURT: -- going to say for the apartment at 207 Lamb.

MS. KOLLINS: Okay.

THE COURT: Okay. (Holds up note for counsel to read)

MS. KOLLINS: (Reading) Tahisha Scott signed the consent to search form for the van, not for the apartment at 207 Lamb. Perfect.

MR. COX: Yeah, that's fine.

THE COURT: Okay. Here.

(The Court hands the note and the evidence bag to the marshal)

MR. COX: Is this for me right here?

THE CLERK: Yeah, that's the amended jury list that shows the alternates.

MR. COX: Okay, thanks.

THE MARSHAL: Now, do I bring this back after they read it?

THE COURT: Oh, you know what --

THE CLERK: Just bring it back after.

THE MARSHAL: You've got to put this in the record.

THE CLERK: You can leave it in there. Tell them leave it with the evidence.

THE COURT: Or we can make a photocopy and keep the original.

THE CLERK: Yeah, because I have to mark that question as a Court's exhibit.

THE MARSHAL: Right. All right.

THE CLERK: I just want to leave it in there with them.

THE COURT: Okay.

(Court recessed from 2:20:20 p.m. until 3:06 p.m.)

THE MARSHAL: The jury is in the courtroom.

(Whereupon the following proceedings were held in the presence of the jury)

THE COURT: Okay. Back on the record in Case Number C265506, State of Nevada versus Tyrone James. Let the record reflect the presence of our twelve jurors and two alternate jurors; Mr. James with his counsel, Mr. Cox, and the representative of the District Attorney's Office.

Okay. Ladies and gentlemen, has the jury selected a foreperson?

FOREPERSON BARR: Yes, Your Honor.

THE COURT: And ma'am, has the jury reached a verdict?

FOREPERSON BARR: Yes, Your Honor.

THE COURT: Could you please hand the verdict form to the marshal? Thank you. The clerk will now read the verdict out loud.

THE CLERK: District Court, Clark County, Nevada. The State of Nevada, Plaintiff, versus Tyrone D. James, Defendant. Case Number C265506, Department Number VII.

VERDICT

We, the jury in the above-entitled case, find the defendant, Tyrone D. James, as follows:

Count 1 -- Guilty of Sexual Assault With a Minor Under the Age of Sixteen.

Count 2 -- Guilty of Open or Gross Lewdness.

Count 3 -- Guilty of Sexual Assault with a Minor Under the Age of Sixteen.

Count 4 -- Guilty of Open or Gross Lewdness.

Count 5 -- Guilty of Battery With Intent to Commit a Crime.

Dated this 23rd day of September, 2010, April Barr, foreperson.

Ladies and gentlemen of the jury, are those your verdicts as read, so say you one, so say you all?

JURORS IN UNISON: Yes.

THE COURT: Does either side wish to have the jury polled?

MR. COX: I would, Judge.

MR. PANDELIS: No, Your Honor.

THE CLERK: Cedric Griffin, are those your verdicts as read?

JUROR GRIFFIN: Yes.

THE CLERK: Natalie Duggan, are those your verdicts as read?

JUROR DUGGAN: Yes.

THE CLERK: Jessica Higgs, are those your verdicts as read?

JUROR HIGGS: Yes.

THE CLERK: Sean Grupe, are those your verdicts as read?

JUROR GRUPE: Yes.

THE CLERK: Jennifer Mills, are those your verdicts as read?

JUROR MILLS: Yes.

THE CLERK: Susan Winters, are those your verdicts as read?

JUROR WINTERS: Yes.

THE COURT: April Barr, are those your verdicts as read?

JUROR BARR: Yes.

THE CLERK: Heather Lynn Egan, are those your verdicts as read?

JUROR EGAN: Yes.

THE CLERK: Lindsey Johnston, are those your verdicts as read?

JUROR JOHNSTON: Yes.

THE CLERK: Kimberley Johnston, are those your verdicts as read?

JUROR JOHNSTON: Yes.

THE CLERK: Elizabeth Mitchell, are those your verdicts as read?

JUROR MITCHELL: Yes.

THE CLERK: Rudy Araujo, are those your verdicts as read?

JUROR ARAUJO: Yes.

THE COURT: Okay. The clerk will now record the verdict into the minutes of the court.

Ladies and gentlemen, I want to thank you for your time and your attention for the past three days. We've all said this, we know that everybody is very busy and that it's difficult to take time out of your lives, and we really do appreciate that. We appreciate your attention to this case.

I'm going to ask for just a couple more minutes of your time to see -- not to talk about the case, but just to see what we can do to improve what we do for jurors in the future. So if you could just all go with Officer Moon and I'll be there in a moment.

(The jury exits the courtroom)

THE COURT: We need to set a sentencing date.

THE CLERK: December 1; 8:45.

(The Court confers with the clerk)

THE COURT: Okay. Mr. James will remain in custody until the time of sentencing. The case is referred to Parole & Probation for a Pre-Sentence Report.

MR. PANDELIS: Your Honor, the State will be dismissing Counts 2 and 4.

They're the lesser-included Open or Gross counts. We'll just do that at sentencing, I guess.

THE COURT: We can just take care of that at sentencing.

MR. PANDELIS: Okay, thank you.

THE COURT: Obviously he can't be sentenced on both anyhow, so.

Okay, thank you.

MR. PANDELIS: Thank you.

MR. COX: Judge, will we be able to go back as well to see the jury, or should we just wait downstairs?

THE COURT: You know what, if you go down to the third floor --

MR. COX: Okay. All right.

THE COURT: -- they'll come down and I'm sure they'll be happy to talk to you.

MR. COX: Okay.

THE COURT: I always encourage them to give any feedback that they have.

MR. COX: Okay. I'll go downstairs.

(PROCEEDINGS CONCLUDED AT 3:11:20 P.M.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

4/28/11

Date

EXHIBIT 14

VER

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
SEP 23 2010 3:09 pm
BY, TINA HURD, DEPUTY

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- TYRONE D. JAMES, Defendant.	CASE NO: C265506 DEPT NO: VII

10C265506
VER
Verdict
946399

VERDICT

We, the jury in the above entitled case, find the Defendant TYRONE D. JAMES, as follows:

COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16

(please check the appropriate box, select only one)

☒ Guilty of Sexual Assault with a Minor Under the Age of 16

☐ Not Guilty

COUNT 2 – OPEN OR GROSS LEWDNESS

(please check the appropriate box, select only one)

☒ Guilty of Open or Gross Lewdness

☐ Not Guilty

COUNT 3 – SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16

(please check the appropriate box, select only one)

☒ Guilty of Sexual Assault with a Minor Under the Age of 16

☐ Not Guilty

//

COUNT 4 – OPEN OR GROSS LEWDNESS

(please check the appropriate box, select only one)

☒ Guilty of Open or Gross Lewdness

☐ Not Guilty

COUNT 5 – BATTERY WITH INTENT TO COMMIT A CRIME

(please check the appropriate box, select only one)

☒ Guilty of Battery With Intent to Commit a Crime

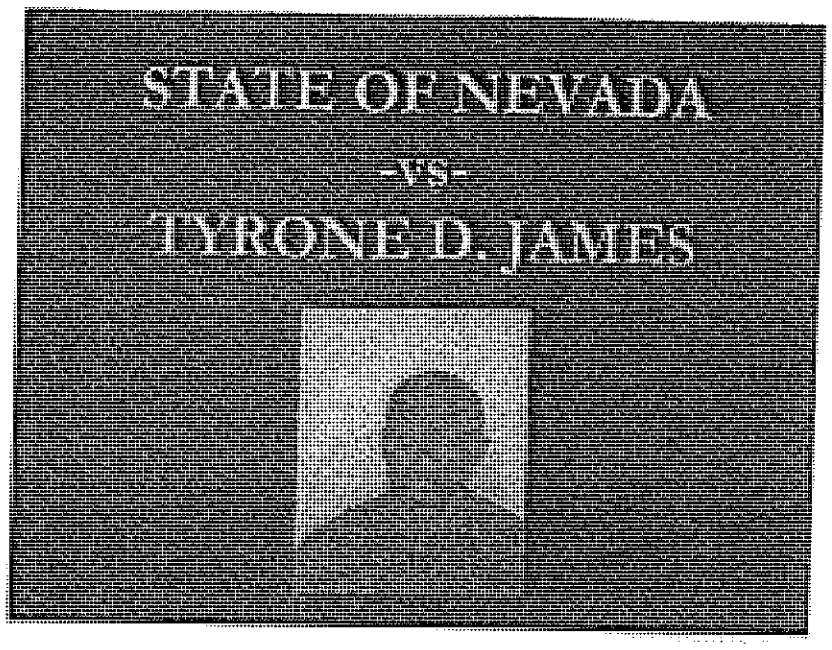
☐ Guilty of Battery

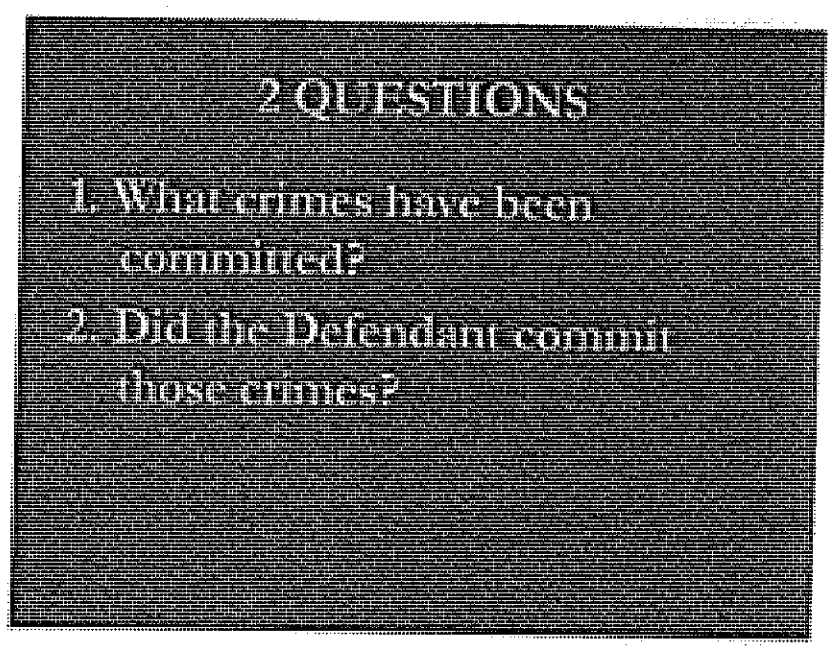
☐ Not Guilty

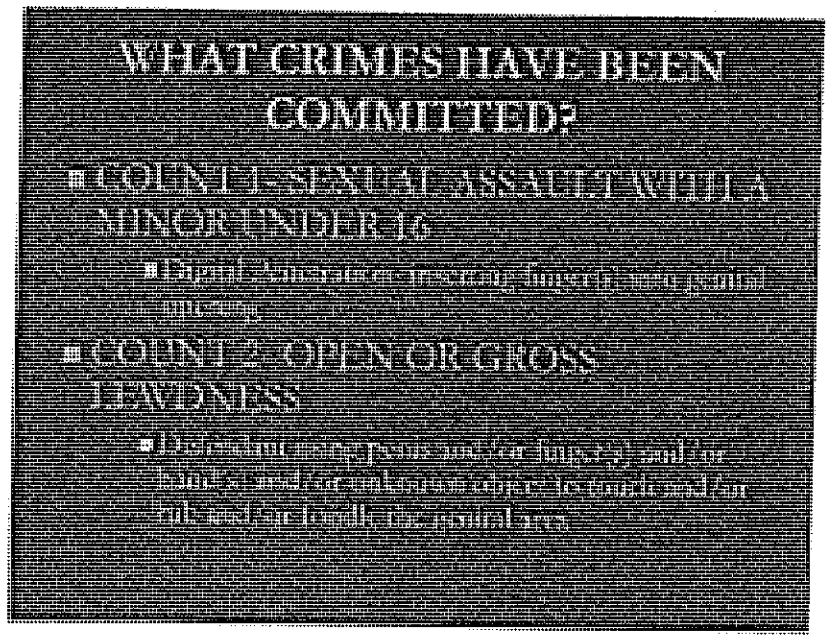
DATED this 23 day of September, 2010

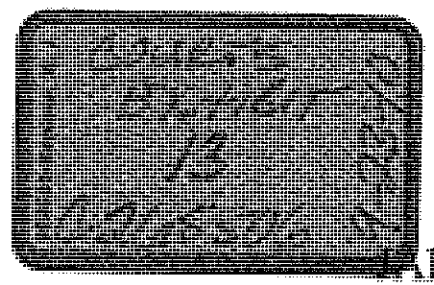
April Bass
FOREPERSON

EXHIBIT 15


STATE OF NEVADA
-VS-
TYRONE D. JAMES


2 QUESTIONS
1. What crimes have been committed?
2. Did the Defendant commit those crimes?


WHAT CRIMES HAVE BEEN COMMITTED?
COUNT 1 - SEXUAL ASSAULT WITH A MINOR UNDER 16
COUNT 2 - OPEN OR GROSS LEWDNESS



WHAT CRIMES HAVE BEEN COMMITTED?

- COUNT 3- SEXUAL ASSAULT WITH A MINOR UNDER 16
  - Inserting penis and/or finger(s) and/or unknown object into genital opening.
- COUNT 4- OPEN OR GROSS LEWDNESS
  - Defendant exposed penis and/or finger(s) and/or hand(s) and/or unknown object to touch and/or rub and/or fondle the genital area.

WHAT CRIMES HAVE BEEN COMMITTED?

- COUNT 5- BATTERY WITH INTENT TO COMMIT A CRIME
  - Use of force or violence against the victim with the intent to commit a sexual assault by grabbing the victim by the neck.

SEXUAL ASSAULT OF A MINOR UNDER SIXTEEN

- A person who subjects a minor under sixteen to sexual penetration against the minor's will or under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of Sexual Assault of a Minor under Sixteen Years of Age.

SEXUAL PENTRATION

- "Sexual Penetration" includes digital penetration, or any intrusion, however slight of the genital opening.
- "Digital Penetration" is the placing of one or more fingers into the genital opening.
- Tip of a penis, finger or any other object entering the genital opening even so slightly is sufficient.
- Pressure or rubbing = Penetration.

USE OF FORCE NOT REQUIRED

- Physical force is not necessary in the commission of a sexual assault.
- The crucial question is whether the act of sexual assault was committed without the victim's consent or under conditions in which the defendant knew or should have known the person was incapable of giving consent or understanding the nature of the act.
- Victim is not required to do more than her age, strength, surroundings, facts and attending circumstances make it reasonable for her to do to manifest opposition to a sexual assault.

OPEN OR GROSS LEWDNESS

- Any indecent, obscene or vulgar act of a sexual nature that:
  - Is intentionally committed in a public place, even if the act is not observed; or
  - Is committed in a private place, but in an open manner, as opposed to a secret manner, and with the intent to be offensive to the observer.

TRIAUNNA'S TESTIMONY

- May 14, 2010 at approximately 9:00 a.m.
- Triaunna home alone
- Heard a noise in bedroom and then saw the Defendant in her bedroom
- Defendant jumped on top of Triaunna and began choking her
- Defendant told Triaunna to keep quiet or her would hurt her

TRIAUNNA'S TESTIMONY

- Defendant forced Triaunna into the living room
- Once in living room, the Defendant continued to choke Triaunna
- Defendant removed Triaunna's clothing
- Defendant got on top of Triaunna and inserted his finger into her vagina
- Triaunna noticed that the Defendant was wearing a glove

TRIAUNNA'S TESTIMONY

- Defendant then positioned himself in between Triaunna's legs
- Triaunna then felt something rubbing between the lips of her vagina

BATTERY WITH INTENT TO COMMIT A CRIME

- Battery is the willful and unlawful use of force or violence upon another person. (Instruction 17)
- Battery committed with the intent to commit a sexual assault. (Instruction 18)
- The intent with which an act is done is shown by the facts and circumstances surrounding the case.
- No requirement that an actual sexual assault be committed.

BATTERY WITH INTENT TO COMMIT A CRIME

- A battery was committed – Defendant willfully grabbed Trauma by the neck
- Defendant had the intent to commit sexual assault

DEFENDANT COMMITTED THESE CRIMES

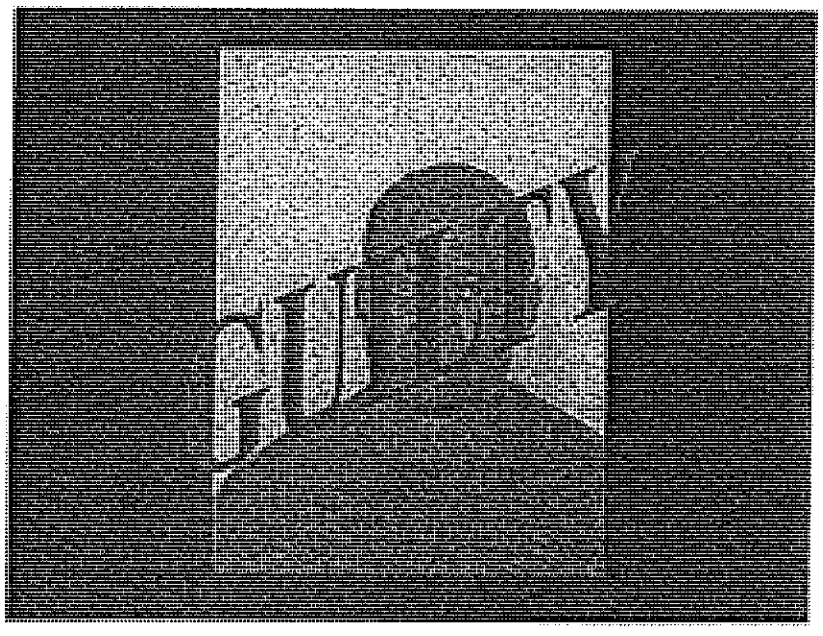
- Arrest to Trauma
- Defendant's Statement
- Trauma's testimony
- Dr. Yeager's testimony
- Trauma's disclosure
- Gloves found under bed

NO CORROBORATION NECESSARY

- There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.
- No witnesses to a crime that is committed in secret
- Trumaine's testimony alone is enough to find the Defendant guilty!

NEFERTIA CHARLES

- Opportunity
- Defendant's Motive
- Defendant's Intent
- Absence of Mistake or Accident



6

EXHIBIT 16

REGISTER OF ACTIONS
CASE NO. 10C265506

State of Nevada vs Tyrone James

§	Case Type:	**Felony/Gross Misdemeanor**
§	Date Filed:	**06/21/2010**
§	Location:	**Department 11**
§	Cross-Reference Case Number:	**C265506**
§	Defendant's Scope ID #:	**1303556**
§	Lower Court Case Number:	**10F09328**
§	Supreme Court No.:	**57178**
§		
§		

PARTY INFORMATION

Defendant **James , Tyrone D**

Lead Attorneys
Robert L Langford
Retained
7024716535(W)

Plaintiff **State of Nevada**

Steven B Wolfson
702-671-2700(W)

CHARGE INFORMATION

Charges: James , Tyrone D	**Statute**	**Level**	**Date**
1. SEXUAL ASSAULT	200.366	Felony	01/01/1900
1. SEXUAL ASSUALT	200.364	Felony	01/01/1900
2. OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
3. SEXUAL ASSAULT	200.366	Felony	01/01/1900
3. SEXUAL ASSUALT	200.364	Felony	01/01/1900
4. OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
5. ASSAULT AND BATTERY	200.400	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

12/01/2010 **Sentencing** (8:45 AM) (Judicial Officer Bell, Linda Marie)
12/01/2010, 01/19/2011

Minutes

12/01/2010 8:45 AM

- Chris Pandelis, DDA, present for the State of Nevada. - Bryan Cox, DPD, present with Deft. James. Mr. Pandelis advised they need an amended PSI report. Mr. Cox advised they probably need 35 days and advised he was notified yesterday they left a count off. Colloquy. COURT ORDERED, matter CONTINUED 45 days. Court requested Mr. Pandelis clearly note what needs to be amended. CUSTODY CONTINUED TO: 1-19-11 8:45 AM

01/19/2011 8:45 AM

- Christopher Pandelis, DDA, present for the State of Nevada. - Bryan Cox, DPD, present with Deft. James. Conference at the bench. Mr. Pandelis advised Counts 2 & 4 should be dismissed as they were intended to be lesser-included offenses of Counts 1 & 3. COURT ORDERED, Counts 2 & 4 DISMISSED. DEFT. JAMES ADJUDGED GUILTY OF COUNTS 1 & 3 - SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16 (F) and COUNT 5 - BATTERY WITH INTENT TO COMMIT A CRIME (F). Matter argued and submitted. COURT ORDERED, in addition to the $25.00 Administrative

Assessment fee and $150.00 DNA Analysis fee including testing to determine genetic markers, Deft. SENTENCED to the Nevada Department of Corrections (NDC) as follows: Count 1 - to a MAXIMUM term of LIFE with a MINIMUM parole eligibility of TWENTY FIVE (25) YEARS; Count 3 - to a MAXIMUM term of LIFE with a MINIMUM parole eligibility of TWENTY FIVE (25) YEARS, CONCURRENT with Count 1; Count 5 - to a MAXIMUM term of LIFE with a MINIMUM parole eligibility of TWO (2) YEARS, CONCURRENT with Counts 1 & 3. 250 DAYS credit for time served. COURT FURTHER ORDERED, a special SENTENCE OF LIFETIME SUPERVISION is imposed to commence upon release from any term of probation, parole or imprisonment and Deft. is to register as a sex offender in accordance with NRS 179D.460 within 48 hours after sentencing or prior to release from custody. Court advised, before Deft. is eligible for parole, a panel must certify Deft. does not represent a high risk to reoffend based on current provisions at the time. BOND, if any, EXONERATED.

Return to Register of Actions

EXHIBIT 17

JOC

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE D. JAMES
#1303556

Defendant.

CASE NO. C265506

DEPT. NO. VII

10C265506
JOC
Judgment of Conviction
1232103

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366, COUNT 2 – OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210, COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366, COUNT 4 - OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210, COUNT 5 - BATTERY WITH INTENT TO

//

//

COMMIT A CRIME (Category A Felony) in violation of NRS 200.400; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16 (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 2 – OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210; COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16 (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 4 - OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210; COUNT 5 - BATTERY WITH INTENT TO COMMIT A CRIME (Category A Felony) in violation of NRS 200.400; thereafter, on the 19TH day of January, 2011, the Defendant was present in court for sentencing with his counsel BRYAN COX, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and a $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO LIFE with a MINIMUM parole eligibility of TWENTY-FIVE (25) YEARS; AS TO COUNT 3 - TO LIFE with a MINIMUM parole eligibility of TWENTY-FIVE (25) YEARS, COUNT 3 to run CONCURRENT with COUNT 1; AS TO COUNT 5 – TO LIFE with a MINIMUM parole eligibility of TWO (2) YEARS, COUNT 5 to run CONCURRENT with COUNTS 1 & 3, with TWO HUNDRED FIFTY (250) DAYS credit for time served. COUNTS 2 & 4 – DISMISSED.

FURTHER ORDERED, a SPECIAL SENTENCE of LIFETIME SUPERVISION is imposed to commence upon release from any term of imprisonment, probation or parole.

ADDITIONALLY, the Defendant is ORDERED to REGISTER as a sex offender in accordance with NRS 179D.460 within FORTY-EIGHT (48) HOURS after sentencing or prior to release from custody.

DATED this 2 day of ~~January~~ Feb, 2011.

LINDA BELL
DISTRICT JUDGE

EXHIBIT 18

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE DAVID JAMES, Appellant, vs. THE STATE OF NEVADA, Respondent.	NO. 57178

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

DAVID ROGER
CLARK COUNTY DISTRICT ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

CATHERINE CORTEZ MASTO
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES . . . . . iv, v, vi, vii

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED FOR REVIEW. 1

STATEMENT OF THE CASE. 2

STATEMENT OF THE FACTS 3

ARGUMENT 8

I. THE TRIAL COURT'S ADMISSION OF NEFERTIA'S ALLEGATION(S) OF UNCHARGED, PRIOR SEXUAL (MIS)CONDUCT VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS. 8

II. THE TRIAL COURT VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS BY REFUSING TO ALLOW DEFENSE COUNSEL TO CROSS-EXAMINE TRIAUNNA ON THE FACT THAT, AT SOME POINT PRIOR TO THE ALLEGED OFFENSE, HAD SEXUAL INTERCOURSE WITH ANOTHER INDIVIDUAL. 14

III. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL FOLLOWING THE ADMISSION OF TESTIMONY THAT MR. JAMES HAD A FELONY ARREST RECORD AS WELL AS AN ACTIVE ARREST WARRANT. 18

IV. THE TRIAL COURT ERRED BY ADMITTING TESTIMONY THAT AMOUNTED TO IMPROPER VOUCHING. 20

V. THE TRIAL COURT'S ADMISSION OF TRIAUNNA'S HEARSAY STATEMENT(S) TO NUMEROUS WITNESSES VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS. 21

VI. THE PROSECUTOR COMMITTED MISCONDUCT IN HER CROSS-EXAMINATION OF MR. JAMES THEREBY VIOLATING HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS. 25

VII. THE REPEATED USE OF THE WORD 'VICTIM' BY PROSECUTORS AND GOVERNMENT WITNESSES, AS WELL AS THE COURT IN [A] JURY INSTRUCTION[S], DEPRIVED MR. JAMES OF HIS FAIR TRIAL AND DUE PROCESS RIGHTS. 30

VIII. DOUBLE JEOPARDY AND REDUNDANCY PRINCIPLES PROHIBIT MR. JAMES' MULTIPLE CONVICTIONS ARISING FROM A SINGLE ENCOUNTER. 34

IX. THE TRIAL COURT ERRED BY PROFFERING JURY INSTRUCTIONS THAT WERE INACCURATE, MISLEADING, AND/OR MISSTATED THE LAW. 37

X. THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN MR. JAMES' CONVICTIONS. 50

XI. CUMULATIVE ERROR WARRANTS REVERSAL OF MR. JAMES' CONVICTIONS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ART. I, SECT. 8 OF THE NEVADA CONSTITUTION. 52

CONCLUSION 53

CERTIFICATE OF COMPLIANCE 54

CERTIFICATE OF SERVICE 55

TABLE OF AUTHORITIES

PAGE NO.

Cases

Aesoph v. State, 102 Nev. 316 (1986)..... 28

Apprendi v. New Jersey, 530 U.S. 466 (2000)..... 44, 45, 46

Arredondo v. Ortiz, 365 F.3d 778, 782 (9th Cir. 2004) 16

Batin v. State, 118 Nev. 61, 65, 38 P.3d 880, 883 (2002)..... 51

Benton v. Maryland, 395 U.S. 784, 794 (1969) 34

Big Pond v. State, 101 Nev. 1, 3 (1985)..... 52

Blakely v. Washington, 542 U.S. 296, 304-305 (2004)..... 44, 46

Blockburger v. U.S., 284 U.S. 299 (1932),..... 34

Bolden v. State, 124 P.3d 191, 194 (Nev. 2005) 51

Braunstein v. State, 118 Nev. 68, 75, 79 (2002) 10, 12, 36, 43

Bryant v. State, 114 Nev. 626, 629 (1998) 51

Burke v. State, 624 P.2d 1240 (Alas. 1980) 38

Burke v. State, 624 P.2d 1240, 1257 (Alas. 1980)..... 39

California v. Trombetta, 467 U.S. 479, 485 (1984) 15

Carie v. State, 761 N.E.2d 385, 386 (Ind. 2002)..... 31, 39

Carl v. State, 100 Nev. 164, 165 (1984) 51

Chambers v. Mississippi, 410 U.S. 284, 302 (1973)..... 15

City of Las Vegas v. Walsh, 124 P.3d 203, 207 (Nev. 2005)..... 23

Collier v. State, 101 Nev. 473, 480 (1985) 31

Cortinas v. State, 195 P.3d 513 (Nev. 2008). 49

Coty v. State, 97 Nev. 243 (Nev. 1981). 19

Crane v. Kentucky, 476 U.S. 683, 690 (1986) 15, 16

Crawford v. State, 121 Nev. 746, 749 (2005) 44

Crowley v. State, 120 Nev. 30 (2004) 36

Cunningham v. California, 127 S. Ct. 856 (2007) 44

Daniel v. State, 119 Nev. 498, 512 (Nev. 2003) 19, 26

Deeds v. State, 97 Nev. 216, 217 (1981) 38

Drummond v. State, 86 Nev. 4, 6 (1970) 23

Ebeling v. State, 120 Nev. 401 (2004) 37

Estelle v. McGuire, 502 U.S. 62, 72 (1991) 33

Gaxiola v. State, 119 P.3d 1225 (2005) 26, 37, 42

Givens v. State, 99 Nev. 50, 56 (1983) 35

Hicks v. Oklahoma, 447 U.S. 343 (1980) 13

Hutchins v. State, 110 Nev. 103, 109 (1994) 38, 40

In re Winship, 397 U.S. 358, 364 (1970) 33, 51

Ledbetter v. State, 129 P. 3d 671, 677 (Nev. 2006) 8

Ludy v. State, 784 N.E.2d 459 (Ind. 2003) 31, 39, 40, 41

Marvelle v. State, 114 Nev. 921, 931 (1998) 20

McIntosh v. State, 113 Nev. 224 (1997) 35

McNelton v. State, 115 Nev. 396, 405 (Nev. 1999) 19

Michigan v. Lucas, 500 U.S. 145, 149 (1991) 16

Miller v. State, 105 Nev. 497 (1989) 17

Napoli v. Supreme Court of New York, et. al., 40 A.D. 2d 159, 161; 338 N.Y.S.2d 721 (N.Y. App. 1972) 19

Payne v. Tennessee, 501 U.S. 808 (1991) 34

People v. Cahan, 282 P.2d 905, 912 (Cal. 1955) 52

Pointer v. Texas, 380 U.S. 400, 401 (1965) 23

Richmond v. State, 118 Nev. 924, 932-33 (2002). 10, 11

Riggs v. District of Colombia, 581 A.2d 1229 (D.C. Ct. App. 1990) 48

Ring v. Arizona, 536 U.S. 584, 602, 609 (2002) 44

Rock v. Arkansas, 483 U.S. 44, 55-56 (1987) 16

Rosky v. State, 111 P.3d 690, 697 (2005) 8, 9

Rowland v. State, 118 Nev. 31, 38 (2002) 32

Rudin v. State, 120 Nev. 121, 141 (2004) 18

Salazar v. State, 119 Nev. Adv. Rep. 26; 70 P. 2d 749, 751 (2003) 34

Salazar v. State, 70 P. 2d 749, 751 (2003). 34

Schad v. Arizona, 501 U.S. 624 (1991) 44

State v. Beck, 32 Kan. App. 2d 784, 787, 88 P.3d 1233 (2004) 48

State v. Combs, 116 Nev. 1178, 1179, 14 P.3d 520 (2000) 34

State v. Cyty, 50 Nev. 256, 259 (1927) 28

State v. Grey Owl, 316 N.W.2d 801, 805 (S.D. 1982) 40

State v. McConnell, 106 P.3d 1148, 1150 (Kan. Ct. App. 2005) 48

State v. Nomura, 903 P. 2d 718 (Haw. App. 1995) 32

State v. Wilkerson, 278 Kan. 147, 158, 91 P.3d 1181, 1190 (2004) 47

Summitt v. State, 101 Nev. 159 (1985) 17

Tabish v. State, 119 Nev. 293 (2003) 44

Taylor v. Illinois, 484 U.S. 400, 409 (1988) 15

Taylor v. Kentucky, 436 U.S. 478, 485 (1978). 47

Townsend v. State, 103 Nev. 113, 119 (1987) 20

Turner v. State, 111 Nev. 403 (1995) 39

U.S. v. Andujar, 49 F.3d 16, 24 (1st Cir. 1995) 50

U.S. v. Booker, 543 U.S. 220, 243-244 (2005) 44

U.S. v. Deluca, 137 F.3d 24, 34-35 (1st Cir. 1998) 50

U.S. v. Isom, 886 F.2d 736, 738 (4th Cir. 1989) 50

U.S. v. Kojayan, 8 F.3d 1315, 1321 (9th Cir. 1993) 28

U.S. v. Mendoza-Acevedo, 950 F.2d 1, 4-5 (1st Cir. 1991). 50

U.S. v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989) 50

U.S. v. Young, 470 U.S. 1, 18-19 (1985) 29

United States v. Booker, 543 U.S. 220, 243-244 (2005) 44

Vipperman v. State, 96 Nev. 592, 596 (1980) 16

Walker v. Fogliani, 83 Nev. 154, 157 (1967). 52

Walker v. State, 116 Nev. 442, 445 (2000) 9

Washington v. Texas, 388 U.S. 14,15, 19, 23 (1967) 15

Webb v. Texas, 409 U.S. 95, 98 (1972) 15

Whalen v. United States, 445 U.S. 684, 688 (1980) 34

Williams v. State, 118 Nev. 536, 50 P.3d 1116, 1124 (2002) 34

Witherow v. State, 104 Nev. 721, 725 (1988). 52

Misc. Citations

ABA Standards for Criminal Justice, Standard 3-5.8(a) 28, 29

J.R. Kemper, Annotation, *Prejudicial Effect of Trial Judge's Remarks, During Criminal Trial, Disparaging Accused*, 34 A.L.R. 3d 1313, 1319 (1970) 31

Statutes

NRS 48.045 ..... 8, 10, 12, 13

NRS 50.090 16

NRS 51.035 23

NRS 51.095 24

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE DAVID JAMES,	)	NO. 57178
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

A. Statute which grants jurisdiction to review the judgment: NRS 177.015.
B. Judgment of Conviction filed 02/09/11; Notice of Appeal filed 03/11/11.
C. This appeal is from a final judgment entered 02/09/11.

ISSUES PRESENTED FOR REVIEW

I. THE TRIAL COURT'S ADMISSION OF NEFERTIA'S ALLEGATION(S) OF UNCHARGED, PRIOR SEXUAL (MIS)CONDUCT VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS.

II. THE TRIAL COURT VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS BY REFUSING TO ALLOW DEFENSE COUNSEL TO CROSS-EXAMINE TRIAUNNA ON THE FACT THAT, AT SOME POINT PRIOR TO THE ALLEGED OFFENSE, HAD SEXUAL INTERCOURSE WITH ANOTHER INDIVIDUAL.

III. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL FOLLOWING THE ADMISSION OF TESTIMONY THAT MR. JAMES HAD A FELONY ARREST RECORD AS WELL AS AN ACTIVE ARREST WARRANT.

IV. THE TRIAL COURT ERRED BY ADMITTING TESTIMONY THAT AMOUNTED TO IMPROPER VOUCHING.

V. THE TRIAL COURT'S ADMISSION OF TRIAUNNA'S HEARSAY STATEMENT(S) TO NUMEROUS WITNESSES VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS.

VI. THE PROSECUTOR COMMITTED MISCONDUCT IN HER CROSS-EXAMINATION OF MR. JAMES THEREBY VIOLATING HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

VII. THE REPEATED USE OF THE WORD 'VICTIM' BY PROSECUTORS AND GOVERNMENT WITNESSES, AS WELL AS THE COURT IN [A] JURY INSTRUCTION[S], DEPRIVED MR. JAMES OF HIS FAIR TRIAL AND DUE PROCESS RIGHTS.

VIII. DOUBLE JEOPARDY AND REDUNDANCY PRINCIPLES PROHIBIT MR. JAMES' MULTIPLE CONVICTIONS ARISING FROM A SINGLE ENCOUNTER.

IX. THE TRIAL COURT ERRED BY PROFFERING JURY INSTRUCTIONS THAT WERE INACCURATE, MISLEADING, AND/OR MISSTATED THE LAW.

X. THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN MR. JAMES' CONVICTIONS.

XI. CUMULATIVE ERROR WARRANTS REVERSAL OF MR. JAMES' CONVICTIONS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ART. 1, SECT. 8 OF THE NEVADA CONSTITUTION.

STATEMENT OF THE CASE

On or about May 26, 2010, prosecutors charged Mr. James with two counts of Sexual Assault with a Minor Under Sixteen Years of Age and one count of Battery With Intent to Commit a Crime. App. 6-7. Following a preliminary hearing on the same, prosecutor's added an alternative charge of Open or Gross Lewdness. App. 30. On June 24, 2010, Mr. James pled not guilty to the charged crimes. App. 182-184. On September 21, 2010, the trial of this matter commenced, after which jurors convicted Mr. James as charged. At sentencing, the trial court dismissed Counts 2 and 4, sentencing Mr. James to, *inter alia* life in the Nevada Department of Prisons on the remaining charges. App. 848-852.

STATEMENT OF THE FACTS

The instant allegations.

In May of 2010, Appellant Tyrone James was involved in a relationship with Theresa Allen. App. 608-21. Ms. Allen had two teenage daughters, Triaunna Holmes and Denise Jordan. App. 608-21. Neither girl liked Mr. James. App. 560; 598. Neither girl liked the fact that Ms. Allen was carrying on a relationship with Mr. James, nor did either girl like Mr. James staying at the family's house. App. 560; 598-99; 620.

On or about May 13, 2010, the Mr. James and Ms. Allen had a discussion in which Mr. James offered to pay Ms. Allen's power bill. App. 621; 781-82. Accordingly, the following day, May 14, 2010, Mr. James stopped by Ms. Allen's home, dropped off his dog, and picked up her power bill to take it to the power company for payment. App. 782. When he arrived at Ms. Allen's residence, Mr. James found fifteen year old Triaunna ironing her clothes. App. 782. Believing her to be late for school, Mr. James drove Triaunna to school and dropped her off. App. 783. He then went to the power company and paid Ms. Allen's power bill, a receipt for which he obtained and later gave to Ms. Allen. App. 648; 655; 781-82.

Triaunna, who admittedly did not like Mr. James because she felt he was trying to "take her stepdad's place," had told a wildly different version of events regarding what happened that morning. App. 560. She claimed that she awoke to find Mr. James peeking around the corner into her bedroom. App. 546-50. She explained that her mother had already left earlier in the morning to take her younger siblings to school. App. 548-49. Triaunna claimed that, upon encountering Mr. James, she tried to call her

mother, but Mr. James took her cell phone. App. 552. According to Triaunna, Mr. James then jumped on top of her, put his hand around her neck, and threatened her to be quiet. App. 553. He then held her down with one arm and pulled off her underwear with the other, App. 554-57.

Triaunna testified that Mr. James drug her into the living room by the arm, then forced her to lay down on the floor, placing his hand(s) around her neck once again. App. 554-55. She claimed that he then put his finger in her vagina for "just seconds" while wearing white "balloon type" "lubricating" gloves. App. 555-58. According to Triaunna, Mr. James then took his penis and, while continuing to hold her by the neck, rubbed it between her vaginal lips – again, "just for seconds." App. 557-59. He then told her to sit on the couch. App. 559-60. Triaunna then dressed herself, after which Mr. James returned her cell phone and drove her to school. App. 560.

Triaunna claimed that she accepted the ride to school because she was worried that he would "kill her if she told." App. 560-61. Once at school, Triaunna told no authority figure of the alleged assault. App. 578-79. She testified that she texted her sister, Denise, purportedly disclosing the rape. App. 562. Interestingly, Denise claimed that she simply "walked out of class" after receiving Triaunna's text. App. 602. Thereafter, the school police apprehended her and took her to the Dean's office. App. 602-03. Once back at school, Denise contacted her mom and revealed Triaunna's story. App. 603; 562. Ms. Allen then called Triaunna. App. 626. During the phone call with her mother, Triaunna disclosed her allegations of assault. App. 626.

Ms. Allen then called Mr. James, who denied the allegations. App. 633. He agreed to meet Ms. Allen at her home. App. 633. When he arrived at Ms. Allen's residence, Triaunna confronted him directly. App. 634. Again, Mr. James denied the allegations, accusing Triaunna of lying. App. 634. Ms. Allen then called police. App. 635-36. She told the 911 operator that Triaunna had been assaulted, but that Triaunna denied any penetration. App. 636-37; 650. Indeed, both Triaunna and Ms. Allen denied that Mr. James penetrated Triaunna's vagina with his penis when they were initially interviewed by police. App. 665.

After meeting with police, Ms. Allen took Triaunna to the hospital for a sexual assault examination. App. 637-38. Dr. Theresa Vergara, who examined Triaunna, found no bruising to her external genitalia, but found "generalized swelling to the area and the vaginal area," including the introitus. App. 691. Dr. Vergara explained that this could have been caused by either trauma or a urinary tract infection; and that testing revealed Triaunna to be suffering from such an infection. App. 691; 698-700. Dr. Vergara found no bruising on Triaunna's body, despite Triaunna's claim(s) of a violent assault. App. 692.

Several days after reporting the matter to police, Ms. Allen purportedly found a shoe box under her bed containing latex gloves. App. 639. Apparently, officers who searched Ms. Allen's residence shortly after she reported the offense failed to locate the box containing the gloves. App. 652; 675. But Ms. Allen claimed to have found the box several days later. App. 639-40. Ms. Allen testified that she recognized the gloves as having belonged to Mr. James when he worked for Caesar's Palace. App. 640.

The prior bad act evidence.

Triaunna had an acquaintance by the name of Nefertia Charles. App. 792; 572. The girls knew each other through Nefertia's cousin. App. 792; 572. Prior to his relationship with Ms. Allen, Mr. James was married to Nefertia's mother; the couple had two children in common. App. 720-22. Nefertia testified that, one night while her mother and Mr. James were married, Mr. James came in to her bedroom and took her to another room, expressing concern that someone was 'touching' her. App. 723. According to Nefertia, Mr. James instructed her to lay down, removed her pants and underwear, and inserted his fingers in her vagina. App. 723-26. Nefertia asked him to stop and he did. App. 727. She never mentioned this purported encounter to anyone. App. 727.

Nefertia claimed that, on another occasion sometime after this, she was wrestling with Mr. James when he told her to "go get in the shower." App. 728. Nefertia agreed but told Mr. James she wanted to be left alone. App. 728. Mr. James assured her he would not bother her and he locked the bathroom door for her. App. 728-29. According to Nefertia, Mr. James then unlocked the door with a hanger, entered the bathroom and instructed her to put her foot on top of the bathtub. App. 729. When she complied, Mr. James put his finger inside her vagina. App. 729. Mr. James then instructed her to get out of the shower. When she complied, Mr. James picked her up, laid her on the floor, and climbed on top of her. App. 730. According to Nefertia, Mr. James then tried unsuccessfully to place his penis in her vagina. App. 730. Nefertia claimed that, during this encounter, she screamed repeatedly for her sister, but that her sister was a "heavy

sleeper" and did not respond. App. 730-31 Nefertia claimed Mr. James put his hand around her neck with a "firm grip" but that he was not trying to choke her. App. 731-32.

Nefertia also told jurors that, prior to the shower incident, Mr. James came into her bedroom one night around midnight, "jerked her out of bed," and took her into another room. App. 732. Nefertia claimed that Mr. James tried to pull her pants down, but she resisted. App. 732. According to Nefertia, Mr. James managed to get her pants down and tried unsuccessfully to put his penis inside of her. App. 732. Nefertia claimed that she would have screamed for help, but Mr. James threatened to kill her family if she called out. App. 734. She testified that Mr. James' penis slipped from her vagina to her butt, after which she told Mr. James to stop. App. 734-35. Mr. James complied. App. 735. Again, like with the other incidents, Nefertia never mentioned this alleged encounter to anyone.

Finally, Nefertia testified that, one night when Mr. James' mother was staying with their family, Mr. James came into her bedroom and again tried to pull her pants down. App. 736. According to Nefertia, this caused her bunk bed to hit the closet doors, making a noise. App. 736-37. Mr. James' mother came in the bedroom to see what was happening, and Mr. James jumped off of the bed and hid in the closet. App. 737. According to Nefertia, Mr. James' mother called out to her mother. App. 738. Nefertia's mom responded and told Mr. James to leave the house. App. 738-40. Nefertia's mom later summoned police. App. 740.

No charges were ever filed against Mr. James relating to Nefertia. App. 740. Nefertia only told authorities about the last incident. App. 741-43. She never disclosed

the other purported encounters. App. 741-43. Nefertia justified her lack of disclosure by expressing concern for her younger siblings, Mr. James' natural children. App. 741. Nefertia claimed that she was "worried they would hate her" if she disclosed the full extent of Mr. James' abuse. App. 741. But she was unconcerned with the fact that her younger siblings continued to have contact with Mr. James on a regular basis. App. 743-46. Moreover, despite Nefertia's claim that her grandmother witnessed the one incident she disclosed to authorities, prosecutors never called her grandmother to testify, despite her apparent availability as a witness.[1] App. 746.

ARGUMENT

I. THE TRIAL COURT'S ADMISSION OF NEFERTIA'S ALLEGATION(S) OF UNCHARGED, PRIOR SEXUAL (MIS)CONDUCT VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS.

Over defense objection, the trial court allowed prosecutors to present evidence of Nefertia's allegations. App. 63-67; 192-245. The admission of this testimony violated Mr. James' Due Process, Fair Trial, and statutory rights. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 3, 8; NRS 48.045.**

NRS 48.045(2) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absences of mistake or accident.

"A presumption of inadmissibility attaches to all prior bad act evidence." **Ledbetter v. State**, 129 P. 3d 671, 677 (Nev. 2006) (quoting **Rosky v. State**, 111 P.3d 690, 697

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[1] At the pretrial hearing regarding the admissibility of Nefertia's allegation(s), Nefertia's grandmother was present in the courthouse but not called as a witness. App. 746.

(2005)). "The principle concern with admitting this type of evidence is that the jury will be unduly influenced by it and convict a defendant simply because he is a bad person." **Ledbetter**, supra, at 677 (quoting **Walker v. State**, 116 Nev. 442, 445 (2000)). The presumption of inadmissibility may be overcome only after a finding by the trial court, outside the presence of the jury and prior to the admission of the evidence, that the bad acts are: (1) relevant; (2) established by clear and convincing evidence; and (3) more probative than prejudicial. **Ledbetter**, at 677.

Relevance.

Prosecutors claimed Nefertia's testimony was relevant to (1) "establish Defendant's [sic] motive to sexually molest T[redacted] H[redacted]," and (2) "illustrate what this Defendant's intent was, and still is, which is to engage is [sic] sexually abusing young girls under the age 16 [sic], for his own sexual gratification, whenever he feels like it." App. 56. Prosecutors further argued that "evidence that Defendant [sic] engaged in the prior conduct of attempting to sexually abuse Nefertia and grabbing her neck in a choking manner when she was twelve certainly dispels any attempt by Defendant [sic] to argue that his conduct toward Triaunna in the instant case was some sort of accident or mistake." App. 57. Finally, prosecutors contended that "the prior incident involving Nefertia clearly illustrates Defendant's [sic] grand opportunity to sexually abuse Triaunna, in the same strikingly similar fashion that he attempted to abuse Nefertia." App. 57.

The lower court agreed with this, ruling:

> Okay. Under the three prong test, whether the act is relevant; clearly the act is relevant. In the instant case there's a 15 year old girl who is the daughter of a woman that he's dating and has a relationship with. There's digital penetration and choking and an attempt to put a penis in the vagina. In the case that we just had Nefertia testified to there is a relationship with your client and the mother of – of Nefertia, and there's digital penetration, there's attempt penis to vagina penetration, and then there's choking. Very similar behavior, similar with young teenage girls or preteenage girls. Therefore it's clearly relevant to the crime charged proven by clear and convincing evidence…

App. 131-32. The lower court later added, when asked by defense counsel: "How about intent?... Absence of mistake or accident, motive. I think it fits under all of those things. I think it fits under all of those. He happens to have an affinity for young girls, he happens to get into relationships with their mothers, and he finds a way to have access to them… So I'm granting the motion. It's coming in." App. 131-33.

The lower court's basis for admitting Nefertia's exceedingly prejudicial testimony ran afoul of this Honorable Court's jurisprudence governing prior sexual bad acts. "Evidence of other acts offered to prove a specific emotional propensity for sexual aberration" is inadmissible. **Braunstein v. State**, 118 Nev. 68, 75 (2002). Evidence of other sex crimes must be analyzed pursuant to **NRS 48.045**, which provides for the admission of bad act evidence to prove, *inter alia*, motive, intent, absence of mistake, common scheme or plan, etc.

"The motive exception [to the general rule excluding bad character evidence] generally applies to establish the identity of the criminal, or to prove malice or specific intent. The motive exception may also be applicable where the charged crime was motivated by a desire to hide the prior bad act." **Richmond v. State**, 118 Nev. 924, 932-33 (2002). Neither identity, malice, intent, nor concealment of prior misconduct was an

issue before the instant jury. Mr. James defended the instant allegations by denying the alleged incidents occurred. He did not argue that some lesser contact occurred; that the sexual contact occurred but was unintended or an accident; or that Triaunna mistakenly identified him as the perpetrator. Moreover, the government did not assert that Mr. James was motivated to sexually abuse Triaunna as part of an attempt to conceal his alleged misconduct involving Nefertia. Thus, the prior bad act allegations involving Nefertia did not establish motive, intent, or absence of mistake, as the trial court found.

Nor did it establish some 'common scheme or plan.' "This exception requires that 'each crime should be an integral part of an overarching plan explicitly conceived and executed by the defendant.'" **Richmond**, at 933 (internal citation omitted). "'The test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime." Id. (internal citations omitted). "[A] sexual assault at the same location and perpetrated in the same manner" as the sexual assault at issue is not sufficient to establish a common plan. Id. At 934. Accordingly, an allegation(s) that a defendant moved from "one location to another, taking advantage of whichever potential victims came his/her way," does not establish a "single, overarching plan,' but, rather, a series of "independent crimes" unplanned "until each victim was within reach." Id.

Under **Richmond**, the instant bad act evidence did not establish some common scheme or plan. Like the scenario contemplated by the **Richmond** Court, the instant allegations depicted an individual who committed a series of opportunistic, independent acts. As **Richmond** made clear, such a series of arguably similar acts does not a

'common scheme or plan' make. Thus, the allegations involving Nefertia did not establish a 'common scheme or plan' sufficient for admission under **NRS 48.045.**

Nefertia's testimony did, however, serve a purpose. And that purpose was to establish – as the prosecution argued and the trial court found – that Mr. James 'was motivated to sexually molest Triaunna'; that he intended to 'sexually abuse young girls for his own sexual gratification, whenever he feels like it'; and that 'he happens to have an affinity for young girls, he happens to get into relationships with their mothers, and he finds a way to have access to them.' See State's Motion to Admit Evidence of Bad Acts, App. 56-57. In other words, the Nefertia evidence demonstrated sexual propensity.

Yet this Court prohibits precisely this. As set forth above, evidence of prior sexual misconduct is not admissible to establish sexual propensity. See **Braunstein v. State**, 118 Nev. 68 (2002) (prior sexual bad acts not admissible to show sexual propensity). Quoting *McCormick on Evidence*, the **Richmond** Court explained:

> Unlike the other purposes for other-crimes evidence, the sex-crime exception flaunts the general prohibition of evidence whose only purpose is to invite the inference that a defendant who committed a previous crime is disposed to ward committing crimes, and therefore is more likely to have committed the one at bar. Although one can argue for such an exception in sex offenses in which there is some question as to whether the alleged victim consented (or whether the accused might have thought there was consent), a more sweeping exception is particularly difficult to justify. It rests either on an unsubstantiated empirical claim that one rather broad category of criminals are more likely to be repeat offenders than all others or on a policy of giving the prosecution some extra ammunition in its battle against alleged sex criminals.

Richmond, supra, at 933 (citation omitted). Thus, Nefertia's testimony was not relevant to establishing any of the statutorily proscribed exceptions to the general prohibition against bad character evidence.

Clear and convincing proof.

The lower court found that Nefertia's testimony amounted to clear and convincing evidence of prior sexual misconduct. Yet a review of her testimony reveals quite the contrary. Nefertia never told authorities about most of the allegations to which she ultimately testified. Indeed, despite the severity of the newly-created allegations, she never desired that Mr. James be prosecuted. In fact, she was content to see her younger siblings continue in their regular visitation(s) with Mr. James, the man she later claimed to be a rapist. In short, her behavior undercut her tales of abuse to such an extent as to render her uncorroborated, unsubstantiated allegations inadequate clear and convincing proof of any misconduct.

Probative vs. prejudicial value; reversible error.

The allegations involving Nefertia were highly prejudicial and, as set forth above, probative of nothing other than sexual propensity. Accordingly, the lower court violated Mr. James' statutory and constitutional rights by admitting the prior sexual misconduct evidence. **NRS 48.045; U.S.C.A. V, XIV; Nev. Const. Art. 1, Sect. 8**; See also **Hicks v. Oklahoma**, 447 U.S. 343 (1980) (arbitrary denial of state created liberty interest amounts to Due Process violation).

The improper admission of Nefertia's testimony warrants reversal. It goes without saying: there is likely no more prejudicial a piece of evidence than evidence of sexually aberrant behavior in a trial involving allegations of sexually aberrant conduct. Nothing says 'guilty verdict' like 'he has done it before.' Which is precisely why this

Court expressly prohibits the admission of sexually aberrant bad acts as evidence of sexual propensity.

Had jurors been left to evaluate Triaunna's testimony in the absence of Nefertia's allegation(s), the verdicts may have been very different. When Triaunna's mother first called police, she told the 911 operator that Triaunna did not disclose penetration. Only later, when Triaunna was interviewed by authorities, did the penetration allegation surface. Triaunna claimed that Mr. James choked her several times; that he drug her through the house by the arm and/or wrist; and that he laid on top of her and forced her legs apart. But she had no bruises, scratches, floor burns, or other injuries to corroborate this. Additionally, Triaunna claimed to have texted Denise with her story of abuse. But prosecutors never admitted the text messages. Triaunna claimed that she told her sister of the rape allegation(s), but neither she nor her sister called police. Indeed, neither girl alerted authorities -- at their school or otherwise -- immediately following the alleged incident. Thus, jurors likely would not have convicted Mr. James based on the case involving Triaunna, alone. Nefertia's testimony was the perfect antidote to all that ailed Triaunna's story. As such, the improper admission of Nefertia's testimony warrants reversal.

II. THE TRIAL COURT VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS BY REFUSING TO ALLOW DEFENSE COUNSEL TO CROSS-EXAMINE TRIAUNNA ON THE FACT THAT, AT SOME POINT PRIOR TO THE ALLEGED OFFENSE, HAD SEXUAL INTERCOURSE WITH ANOTHER INDIVIDUAL.

Prior to Triaunna's cross-examination, defense counsel sought permission to question Triaunna about the fact that, at some point preceding the alleged assault, she

had been sexually active with her boyfriend. App. 566-71. She reported as much to the SANE nurse who examined her. App. 566-71. Citing rape shield prohibitions, the trial court denied the request. App. 566-71. The trial court's refusal to allow this line of inquiry to explain away the swelling observed by Dr. Vegara, the clinician who examined Triaunna after the purported assault, violated Mr. James' constitutional and statutory rights. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8; NRS** .

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." **Chambers v. Mississippi**, 410 U.S. 284, 302 (1973). Precluding a defendant from presenting evidence tending to exculpate offends Sixth Amendment jury trial, right to counsel, and confrontation clause guarantees. See **Washington v. Texas**, 388 U.S. 14,15, 19, 23 (1967); see also **Taylor v. Illinois**, 484 U.S. 400, 409 (1988) (providing that the right of a defendant to present evidence "stands on no less footing than any other Sixth Amendment right"). It also abrogates Fourteenth Amendment Due Process guarantees. See **Webb v. Texas**, 409 U.S. 95, 98 (1972); **Crane v. Kentucky**, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause... or... the Sixth Amendment, the constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (quoting **California v. Trombetta**, 467 U.S. 479, 485 (1984)). As this Court has noted: "'The Due Process Clauses in our constitutions assure an accused the right to introduce into evidence any testimony or

documentation which would tend to prove the defendant's theory of the case." **Vipperman v. State**, 96 Nev. 592, 596 (1980) (internal citations omitted).[2]

"[A] defendant's right to present a defense includes the right to offer testimony by witnesses..." **Arredondo v. Ortiz**, 365 F.3d 778, 782 (9th Cir. 2004) (internal citations omitted). See also **Taylor**, supra, 484 U.S. at 409 (holding that the Sixth Amendment confers upon an accused "the right to have the witness' testimony heard by the trier of fact."). In fact, the rules of evidence must not impede a defendant's constitutional right to present his theory of defense. See **Rock v. Arkansas**, 483 U.S. 44, 55-56 (1987) ("restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve... a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify,"); accord **Michigan v. Lucas**, 500 U.S. 145, 149 (1991). "In the absence of any valid state justification, exclusion of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." **Crane v. Kentucky**, 476 U.S. 683, 690-91 (1986).

The 'valid state justification' advanced by prosecutors (and adopted by the trial court) for denying the requested inquiry was **NRS 50.090**, Nevada's Rape Shield Law.

NRS 50.090 reads:

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[2] Decades of U.S. Supreme Court jurisprudence reinforces this. See, e.g., **In re Oliver**, 333 U.S. 257, 273 (1948) (holding that a defendant's right to his "day in court" is "basic in our system of jurisprudence" in includes "as a minimum, a right to *examine the witnesses against him, to offer testimony* and to be represented by counsel." (emphasis added); See also **Crane v. Kentucky**, 476 U.S. 683, 687, 690 (1986); **California v. Trombetta**, 467 U.S. 479, 485 (1984); **Webb v. Texas**, 409 U.S. 95, 98 (1972); **Washington v. Texas**, 388 U.S. 14, 19 (1967); **Taylor v. Illinois**, 484 U.S. 400, 408 (1988); **Rock v. Arkansas**, 483 U.S. 44, 55 (1987); **Chambers v. Mississippi**, 410 U.S. 284, 294 (1973).

> In any prosecution for sexual assault... the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim.

However, this Court has allowed the introduction of evidence of prior sexual conduct when such conduct is not offered merely to assail the complainant's credibility. See **Summitt v. State**, 101 Nev. 159 (1985) (allowing evidence of prior sexual experience of 6 year old victim to show prior, independent knowledge of similar acts constituting the basis for the charge(s) at issue); See also **Miller v. State**, 105 Nev. 497 (1989) (allowing extrinsic evidence to show that sexual assault complainant made prior false accusations of sexual abuse).

And that is precisely what Mr. James sought to do here. Defense counsel did not want to inquire as to Triaunna's entire sexual history in order to conduct a general assassination of her character and chastity. Rather, he sought to rebut the prosecutor's contention, proffered as early as Opening Statement, that the sexual assault purportedly perpetrated by Mr. James caused the swelling to Triaunna's introitus. App. 566. According to defense counsel, Triaunna admitted to having been sexually active with her boyfriend at some point prior to the alleged attack. App. 566. To the extent that this may have explained away the swelling, Mr. James was entitled to ask about it. The failure to allow Mr. James to advance his innocence theory by eliciting evidence explaining away the main physical finding in the instant matter violated his constitutionally secured right(s) to present a defense, as outlined above.

This constitutionally significant error warrants reversal. Had defense counsel been allowed the line of inquiry he sought, he may have been able to explain away the vaginal swelling. The vaginal swelling was the primary, if not the only, significant physical finding noted by Dr. Vegara. Dr. Vergara testified that the swelling was consistent with the trauma alleged by Triaunna. Another explanation for the swelling, such as consensual sexual intercourse, may have vitiated this finding. Had the jury heard such a compelling alternate explanation for the vaginal swelling, the verdicts may have been very different. Accordingly, the trial court's refusal to allow defense counsel to question Triaunna about her prior sexual encounter(s) with her boyfriend amounts to reversible error.

III. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL FOLLOWING THE ADMISSION OF TESTIMONY THAT MR. JAMES HAD A FELONY ARREST RECORD AS WELL AS AN ACTIVE ARREST WARRANT.

At trial, Det. Timothy Hatchett testified that he assisted Det. Tomaino in apprehending Mr. James. App. 672. Det. Hatchett explained that officers first conducted a 'check' on Mr. James that revealed he "had some prior felony arrests." App. 672. Det. Hatchett later added that, at the time Mr. James was stopped for questioning regarding the instant case, "There was a warrant for his arrest..." App. 673. Following the admission of this testimony, defense counsel requested a mistrial. App. 678-80. The trial court denied the motion. App. 679. This amounted to error requiring reversal.

"A... mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." **Rudin v. State**, 120 Nev. 121, 141 (2004) (adjudicating defense mistrial request). "Whenever the ends of justice

might otherwise be defeated, it is the duty of the trial judge to declare a mistrial." **Napoli v. Supreme Court of New York, et. al.**, 40 A.D. 2d 159, 161; 338 N.Y.S.2d 721 (N.Y. App. 1972).

Evidence of a defendant's arrest record is not admissible, even when a defendant places his character at issue by proffering good character evidence. **Daniel v. State**, 119 Nev. 498, 512 (Nev. 2003) ("An arrest shows only that the arresting officer thought the person apprehended had committed a crime, assuming that the officer acted in good faith, which will usually but not always be the case. An arrest does not show that a crime in fact has been committed, or even that there is probable cause for believing that a crime has been committed. The question, accordingly, should not have been asked."); See also **McNelton v. State**, 115 Nev. 396, 405 (Nev. 1999) (holding that evidence of defendant's prior arrest not admissible under NRS 48.045(2)); **Coty v. State**, 97 Nev. 243 (Nev. 1981).

Under the authority outlined above, the trial court had no choice but to declare a mistrial. Evidence of Mr. James' arrest record and/or pending arrest warrant(s) was not admissible. This evidence was exceedingly prejudicial. The instant case came down to Mr. James' word against Triaunna's. The assault on his character occasioned by the arrest references diminished his credibility and, correlatively, the integrity of his defense. This exponentially increased the likelihood of conviction. Thus, the trial court had no choice but to grant the mistrial request, the denial of which now warrants reversal.

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IV. THE TRIAL COURT ERRED BY ADMITTING TESTIMONY THAT AMOUNTED TO IMPROPER VOUCHING.

On cross-examination of Dr. Vergara, the physician who examined Triaunna following her abuse disclosure(s), defense counsel asked about the significance of certain aspects of Triaunna's examination as noted in Dr. Vergara's report. App. 694-701. On re-direct examination, the prosecutor asked Dr. Vergara the follwing: "And there's another page of your report that Mr. Cox I don't believe spoke about on cross-examination where you draw conclusions about abuse. And I believe that would be your page 4 of 4." App. 706. The prosecutor then asked Dr. Vergara for her "overall conclusion in this case," to which Dr. Vergara responded: "That it [sic] was probable abuse." App. 706. When asked to explain the basis for this opinion, Dr. Vergara responded: "Because the child has given a spontaneous, clear, detailed description of the events." App. 706. With this, Dr. Vergara improperly vouched for Triaunna.

Testimony that amounts to "vouching" is irrelevant and inadmissible. **Townsend v. State**, 103 Nev. 113, 119 (1987) ("...It is generally inappropriate for either a prosecution or defense expert to directly characterize a putative victim's testimony as being truthful or false...This was improper since it invaded the prerogative of the jury to make unassisted factual determinations..."); **Marvelle v. State**, 114 Nev. 921, 931 (1998) (citations omitted) ("It has long been the general rule that it is improper for one witness to vouch for the testimony of another, and this court has held several times that an expert is not permitted to testify to the truthfulness of a witness.").

By opining that Triaunna gave a "spontaneous, clear, detailed description of events," such that her accounting supported the conclusion that abuse was "probable,"

Dr. Vergara vouched for Triaunna's credibility. She *de facto* opined that Triaunna's accounting was credible. Under the authority outlined above, this was improper. It was also exceedingly prejudicial. Given the lack of physical evidence corroborating Triaunna's allegations, this case came down almost entirely to Triaunna's word against that of Mr. James. Triaunna was fortunate enough to have a well-respected doctor opine that the abuse she alleged was 'probable' given the clear and detailed nature of her accounting. Mr. James, by contrast, was not-so-fortunate enough to have an investigating detective inform jurors that he had a felony arrest record. Given these circumstances, Dr. Vergara's improper opinion testimony was likely well-more than enough to tip the scales in favor of conviction on the charged crimes. Accordingly, the admission of the improper vouching testimony described above warrants reversal.

V. THE TRIAL COURT'S ADMISSION OF TRIAUNNA'S HEARSAY STATEMENT(S) TO NUMEROUS WITNESSES VIOLATED MR. JAMES' CONSTITUTIONAL AND STATUTORY RIGHTS.

Over defense objection, the trial court allowed Ms. Allen testify as to what Triaunna purportedly told her about the alleged assault when she called her at school. App. 628; 632. Specifically, Ms. Allen testified that Triaunna initially indicated that Mr. James "tried to hurt her." App. 628. Ms. Allen explained that that later, while they were driving home, Triaunna described the incident involving Mr. James as follows:

> She said she was in her room laying down and Tyrone came in her room and threw her onto the other bed, and she tried to grab for her phone. He threw it, breaking her case. He told her he would snap her neck if she screamed or say [sic] anything. Then she said he ripped off her panties and drug her into the – well, took her into the living room, threw her on the floor, where he took his finger and inserted it in her vagina. And then he took it out and rubbed his penis across her vagina.

App. 632. Triaunna's sister, Denise, also gave an accounting of Triaunna's disclosure(s): "She told me that he came into our room and he grabbed her and that her phone fell or something, and then her pants was [sic] down or something like that. And he – they went – he took her to the living room and then he put his finger in her and he had his penis over or something." App. 601. And so did SANE nurse Pamela Douglas:

> The first history I got was Triaunna's narrative of what had happened that morning. And Triaunna told me that Tyrone had came into her room, pulled her chest out of her shit and bra, and then she began tofight back, so he put his hands around her neck and then grabbed her by her wrist and drug her into the living room. After that he then proceeded to put a gloved finger inside of her. I asked her what did whe mean by inside of her and she said inside of my vagina. And then she stated that after that he placed his penis inside of lips. And I asked her which lips did she mean and she said inside the lips of her vagina. She state that during all this she was hitting, screaming, fighting back. And after that she said that she was righting so much he finally decided to stop, and then he otld her to get ready for school. He drove her to school. And as he was driving her to school, he asked her if she was going to tell anybody what happened. During this part of the exam she then became tearful, very upset, and stated, no, because I was afraid he might hurt or kill me.

App. 773. And so did, over defense objection, LVMPD Officer Meltzer[3]:

> Q: And in that Incident Report is it true that you in fact stated that the victim told you that the defendant was wearing gloves?
>
> A: Yes, sir.
>
> Q: And in that Incident Report is it also true that the victim – you stated that the victim told you that the defendant pulled her down to the ground and took off her panties?
>
> A: Yes, sir.
>
> Q: and is it true that the victim also told you that it's reflect in your Incident Report that the defendant put on of his fingers –
>
> MR. COX: Objection, hearsay, Judge.
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> ...

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[3] Admittedly, Officer Meltzer's description of Triaunna's accounting came on re-direct examination, after defense counsel cross-examined him regarding the fact that both Triaunna and her mother reported that Mr. James' penis did not go insider Triaunna's vagina. App. 664-65.

THE COURT: ... I'm going to overrule the objection.

...

Q: Officer, in your Incident Report it's reflect that Triaunna told you that Tyrone put one of his fingers inside of her vagina. Is that what she told you that day?

A: Yes, sir.

Q: And did Triaunna also tell you, as reflected in your Incident Report, that he pulled out this penis and rubbed it on the outside of her vagina?

A: Yes, Sir.

Q: And finally, that Triaunna told you that she otld Tyrone to stop and to get off of her?

A: Yes, sir.

App. 666-68.

The above-referenced testimony amounted to hearsay, the admission of which violated Mr. James' constitutional and statutory rights. The Sixth Amendment to the U.S. Constitution states that: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him..." **U.S.C.A. VI; XIV**. The Sixth Amendment right to cross-examine witnesses is fundamental to a fair trial and was made applicable to the states via the Fourteenth Amendment. **City of Las Vegas v. Walsh**, 124 P.3d 203, 207 (Nev. 2005) (quoting **Pointer v. Texas**, 380 U.S. 400, 401 (1965); **Drummond v. State**, 86 Nev. 4, 6 (1970)).

Codifying the above-referenced Sixth Amendment conscripts, **NRS 51.035** (the hearsay rule) excludes from evidence hearsay testimony. "Hearsay" is defined as an out of court statement "offered in evidence to prove the truth of the matter asserted." **NRS 51.035**. Triaunna's statements to each of the individuals described above were out-of-court declarations offered for the truth of the matter asserted therein: that Mr. James

assaulted her. Accordingly, each of the challenged statements amounts to hearsay under **51.035**.

The trial court admitted Triaunna's statements to her mother as 'excited utterances,' an exception to the hearsay definition. **NRS 51.095** defines an 'excited utterance' as "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition..." Ms. Allen testified that Triaunna reported that Mr. James 'hurt her' while on the telephone at school. This was well after the alleged assault occurred, after Triaunna had arrived at school and had begun her daily routine. Triaunna's second, more detailed accounting of the alleged assault occurred even later, when Ms. Allen was driving Triaunna home from school.

While Ms. Allen indicated that Triaunna was crying and scared at the time of her disclosures, this, alone, does not mean that Triaunna was laboring under the 'stress or excitement' of the alleged attack, as is required for the statement to constitute an excited utterance. Given the time that had elapsed between the purported attack and the disclosures at issue, and given Triaunna's apparent ability to go about her daily school routine prior to receiving the phone call from her mother, Triaunna's demeanor may have been the product of recounting the alleged incident, rather than the incident itself. Accordingly, absent additional evidence that Triaunna was, indeed, still laboring under the stress/excitement of the alleged assault, prosecutors failed to establish that her hearsay statements to Ms. Allen qualified for admission under **NRS 51.095**.

The improper admission of Triaunna's statements, collectively or individually, warrants reversal. As set forth above, this case came down to Triaunna's word against that of Mr. James. Luckily for prosecutors, jurors heard Triaunna's version of events again and again and again. Not only did the repetition help sear Triaunna's accounting into the minds of jurors, but it helped vitiate the problems otherwise engendered by her inconsistent disclosures. Absent the admission of Triaunna's numerous hearsay statements, the resulting verdicts may have been very different. As such, this Court must reverse.

VI. THE PROSECUTOR COMMITTED MISCONDUCT IN HER CROSS-EXAMINATION OF MR. JAMES THEREBY VIOLATING HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS.[4]

1. Questions calling for comment on the veracity of other witnesses.

Mr. James testified that on the morning of the alleged assault, he stopped by Ms. Allen's home to drop off his dog and pick up Ms. Allen's power bill. Ms. Allen contradicted this, at least in part, testifying that she did not allow the dog at her residence. The prosecutor cross-examined Mr. James on this discrepancy, asking him:

> Q: You heard mom say yesterday the Pitbull wasn't welcome there; she didn't know that.
> A: That's not true.
> Q: Why would she lie about that?
> A: I don't know. You would have to ask her that.

App. 785-86. Defense counsel then interposed an objection, which the trial court overruled. App. 786. Emboldened, the prosecutor later asked Mr. James "who he thought" put Nefertia and Triaunna "up to" disclosing their respective allegations of

[4] **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8.**

abuse. App. 394. With this each of the inquires described above, the prosecutor asked Mr. James to comment, in some form or fashion, on the veracity of Ms. Allen, Triaunna, and Nefertia. This amounted to misconduct.

A prosecutor may not ask a defendant to comment on the veracity of other witnesses. **Daniel v. State**, 119 Nev. 498, 519 (2003) (prohibiting prosecutor from "asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses."); **Gaxiola v. State**, 121 Nev. 638, 654 (2005) (reiterating rule announced in *Daniel* prohibiting prosecutor from asking witness if another witness lied). By contrasting Ms. Allen's testimony with Mr. James', and then asking Mr. James to speculate as to why Ms. Allen would 'lie,' the instant prosecutor invited comment on Ms. Allen's credibility. The same is true of the questions regarding Triaunna and Nefertia. By asking Mr. James who put each girl 'up to' disclosing the allegations of abuse, the prosecutor invited comment as to why each girl falsified evidence. Under the authority cited above, this amounted to misconduct.

The error occasioned by the instant misconduct warrants reversal. The prosecutor's questions inaccurately conveyed the notion that belief in Mr. James required rejection of other witnesses. See **Daniel v. State**, supra, at 518-19 (citing *State v. Flanagan*, 801 P.2d 675, 679 (N.M. Ct. App. 1990) in noting: "In asking whether other witnesses were mistaken, the impression communicated to the jury may be that either the witness or the defendant is lying. This is especially true in a criminal case where the defendant is forced to characterize numerous witnesses, including police officers, as

'incorrect' or 'mistaken' in order for his or her testimony to be credible."). In a case that came down to Mr. James' word against Triaunna's, such erroneous and improper prosecutorial messaging helped ensure rejection of Mr. James' accounting in favor of conviction on the charged crimes. Thus, the prosecutor's misconduct in forcing Mr. James to comment on the veracity of other witness warrants reversal.

2. Questions calling for speculation.

In addition to asking for comment on the veracity of other witnesses, the above-referenced questions called for speculation. But they were not the only questions the prosecutor asked which called for such speculation. The prosecutor asked Mr. James to explain why no charges were ever filed in the matter involving Nefertia, a matter far outside the scope of his knowledge. Specifically, the prosecutor asked:

> Q: And isn't the reason that that case – that there was no trial is because Tahisha Scott called Metro and told them that her daughter would not cooperate?
>
> MR. COX: Objection. Calls for –
>
> MS. KOLLINS: Effect on the hearer.
>
> MR. COX: Judge, the reality is that he doesn't have a base of knowledge to answer that question.
>
> THE COURT: Overruled. Sir, if you know you can answer.
>
> A: I don't – Could you repeat the question, please?
>
> Q: Isn't it true that the reason there was no trial with the Nefertia case is because Ms. Scott called Metro and relayed that her daughter would no longer cooperate?
>
> A: I don't know.
>
> Q: That was Tahisha Scott's choice, not Nefertia's choice?
>
> MR. COX: Judge, asked and answered, and I don't think he has a bse of knowledge to answer the question.
>
> THE COURT: Sustained.
>
> Q: You don't know whether or not that was Nefertia's choice?
>
> A: I don't – I don't know. I don't recall at all anything to do with that…

App. 787-88. The trial court's admission of this line of inquiry amounted to error.

The prosecutor's questions called for speculation. But, like the 'comment-on-the-veracity' questions described above, it is not the *answer* to the question that presents a problem, it is the message conveyed by the question itself. And the message here was that that the prosecutor knew something others did not: that no charges were filed in the case involving Nefertia because Nefertia's mother did not want Nefertia to cooperate; not because law enforcement determined Nefertia's allegations to be unworthy of criminal prosecution. This amounted to misconduct.

"Courts have uniformly condemned as improper statements made by a prosecuting attorney, which are not based upon, or which may not fairly be inferred from, the evidence." **State v. Cyty**, 50 Nev. 256, 259 (1927)). "When a lawyer asserts that something in the record is true, he is, in effect, testifying. He is telling the jury: 'look, I know a lot more about this case than you, so believe me when I tell you X is a fact.' This is definitely improper." **U.S. v. Kojayan**, 8 F.3d 1315, 1321 (9th Cir. 1993); **ABA Standards for Criminal Justice**, Standard 3-5.8(a) ("the prosecutor should not intentionally misstated the evidence or mislead the jury as to the inferences it may draw."). By asking a question loaded with facts not before the instant jury, and in a manner suggestive that those facts were true, the instant prosecutor violated this mandate.

The prosecutor also violated her duty to refrain from interjecting her personal opinion(s) regarding the state of the evidence. Following U.S. Supreme Court precedent, this Court has consistently held that prosecutors "must not inject their personal beliefs and opinion into their arguments to the jury." **Aesoph v. State**, 102 Nev. 316 (1986)

(citations omitted). This is because "The prosecutor's... personal opinion... carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence." **U.S. v. Young**, 470 U.S. 1, 18-19 (1985). See also **SCR 173(5)** (lawyers must not "[i]n trial... state a personal opinion as to the justness of a cause... or the guilt or innocence of an accused."); **ABA Standards for Criminal Justice**, **Standard 3-5.8(b)** ("The prosecutor should not express his or her personal belief or opinion as to... the guilt of the defendant."). By asking a series of questions that conveyed the prosecutor's personal belief regarding Nefertia's allegations, the prosecutor violated this mandate, as well.

The trial court's abject refusal to curtail the above-referenced misconduct warrants reversal. The prosecutor improperly solicited comment from Mr. James on the veracity of witnesses who testified against him. Further, the prosecutor improperly conveyed that the case involving Nefertia would have been prosecuted but for the intervention of Nefertia's mother. These improprieties left jurors with the wildly prejudical misapprehension that Mr. James could not be believed; that Nefertia and Triaunna should be believed; and that Nefertia was so credible that her case would have been prosecuted but for her mother's unseemly intervention. In a case which came down to the credibility of the accused versus that of his accusers, this improper messaging was devastating. But for the misconduct outlined above, the jury verdicts may have been very different. Thus, the prosecutor's improper cross-examination of Mr. James warrants reversal.

VII. THE REPEATED USE OF THE WORD 'VICTIM' BY PROSECUTORS AND GOVERNMENT WITNESSES, AS WELL AS THE COURT IN [A] JURY INSTRUCTION[S], DEPRIVED MR. JAMES OF HIS FAIR TRIAL AND DUE PROCESS RIGHTS.

At trial, prosecutors as well as several government witnesses referred to Triaunna as a 'victim.' Det. Daniel Tomaino testified: "It identified that a *victim* was at I believe home right at that point in time. A patrol was out with the *victim* at the time, and they stated that she had been a *victim* of sexual assault possibly by a Tyrone James." App. 504 (emphasis added). Later, the prosecutor asked Det. Tomaino: "Did you give any directives to the patrol officer that was at the residence regarding the child *victim*?" App. 504 (emphasis added). And again the prosecutor used the term victim, asking Det. Tomaino: "Was that information you gleaned from the *victim*?" App. 527 (emphasis added).

The government's use of the term 'victim' in reference to Triaunna continued with other witnesses. Responding Officer Erik Meltzer referred to Triaunna as the 'victim' on at least two occasions, as did the prosecutor during Officer Meltzer's direct and re-direct examinations. App. 661; 663; 666. Detective Hatchett also used the term 'victim' during his testimony. App. 672; 675-76. Punctuating this, the trial court instructed jurors that: "There is no requirement that the testimony of a *victim* of sexual assault be corroborated..." App. 150 (Instruction No. 15) (emphasis added).

The repeated use of this term presupposed a finding of guilt, thereby depriving Mr. James of his constitutionally assured Fair Trial and Due Process rights. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8.** Whether Triaunna was, indeed, a victim was the sole issue at trial. The prosecutor's use of the term 'victim' amounted to a *de facto*

interjection of that prosecutor's personal opinion that Mr. James was guilty of the charged crimes. This is improper, as "an injection of [a prosecutor's] personal beliefs... detracts from the 'unprejudiced, impartial, and nonpartisan role that a prosecuting attorney assumes in the courtroom." **Collier v. State**, 101 Nev. 473, 480 (1985). Likewise, by referring to Triaunna as a 'victim,' various investigating officials essentially opined that Triaunna had, indeed, been victimized by Mr. James as she claimed. Such vouching, as set forth above, is improper. See **Townsend v. State**, supra; **Marvelle v. State**, supra.

Finally, by using the term 'victim' in at least one jury instruction, the trial court implied that a crime had been committed; that there was, in fact, a victim; and that Mr. James' contention to the contrary lacked merit. The trial court occupies a position of considerable knowledge, wisdom and authority in the eyes of the jurors. Accordingly, the court has an obligation to refrain from words and/or conduct that gives the appearance of endorsing a particular litigant's position:

> Essential to the concept of a fair trial is the requirement of complete neutrality on the part of the presiding judge, ... and in criminal trials [the judge] should exercise the greatest care to avoid prejudicing the cause of the state or of the accused by his language or his conduct.

J.R. Kemper, Annotation, *Prejudicial Effect of Trial Judge's Remarks, During Criminal Trial, Disparaging Accused,* 34 A.L.R. 3d 1313, 1319 (1970). The instant trial court's use of the term 'victim' throughout the jury instructions did just what is prohibited, by departing from the required impartiality. See also **Carie v. State**, 761 N.E.2d 385 (Ind. 2002) (Dickson, J., dissenting; subsequently adopted by **Ludy v. State**, 784 N.E.2d 459 (Ind. 2003) ("By referring to the complaining witness as 'the victim,' the

instruction implies to the jury that the trial judge accepts as truthful the complaining witness's contentions regarding the alleged incident. The trial court thereby improperly expresses approval of the State's case and invades the province of the jury.").

Other courts have disapproved of the use of the 'term' victim for this very reason. For example, in **State v. Nomura**, 903 P. 2d 718 (Haw. App. 1995), the Hawaii Appellate Court found that reference to a complaining witness as a "victim" impermissibly invaded the sacred province of the jury and, as such, constituted error.[5] Id. The **Nomura** Court reasoned that: "The term 'victim' includes a 'person who is the object of a crime.' The term 'victim' is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged." Id. The **Nomura** Court went on to note that, with respect to the jury instruction(s) referencing the complaining witness as a 'victim,' such "... is inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged." Id.

Although counsel did not specifically object to the use of the term 'victim', this Court should review the matter for plain error. See **Rowland v. State**, 118 Nev. 31, 38 (2002) (plain error review proper where the error affects the defendant's substantial rights, if the error "either (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings."). Additionally, when an erroneous instruction infects the

[5] The Nomura Court found that the error was harmless in magnitude. Id.

entire trial, the resulting conviction violates due process. **Estelle v. McGuire**, 502 U.S. 62, 72 (1991). The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. **In re Winship**, 397 U.S. 358, 364 (1970). Jury instructions relieving the government of this burden violate a defendant's Due Process rights. **Francis v. Franklin**, 471 U.S. 307 (1985); **Sandstrom v. Montana**, 442 U.S. 510 (1979).

The use of the word 'victim' by investigating officials, the prosecutor, and/or the trial court, either in whole or in part, violated Mr. James' Due Process rights by infecting the trial and minimizing the prosecution's proof burden. Whether Triaunna was, indeed, a 'victim' was a determination left solely to jurors. The repeated use of that term implied that Mr. James perpetrated crimes upon Triaunna, and that guilty verdicts were but a foregone conclusion and mere formality. Given the inconsistencies in Triaunna's disclosures as well as the lack of physical evidence corroborating her allegations, the implicit 'victim' suggestion was more than enough to tip the credibility scales in favor of the prosecution. And when those scales tipped – even ever so slightly – the result was conviction on all of the charged crimes. Thus, the improper use of the term 'victim' by the trial court, the prosecutor, and multiple government witness amounts to reversible error.

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VIII. DOUBLE JEOPARDY AND REDUNDANCY PRINCIPLES PROHIBIT MR. JAMES' MULTIPLE CONVICTIONS ARISING FROM A SINGLE ENCOUNTER.

Jurors convicted Mr. James of Sexual Assault for penetrating Triaunna with his finger (Count 1); as well as Sexual Assault for penetrating Triaunna with his "penis and/or finger(s) and/or unknown object" (Count 3); and Battery With Intent to Commit a Crime for "grabbing.. Triaunna... by the neck" with the intent to commit sexual assault (Count 5). App. 137-38; 160-61. These multiple charges arising from a single alleged encounter violated Double Jeopardy and redundancy principles. **U.S.C.A. V, XIV; Nev. Const. Art. 1, Sect. 8.**

The Double Jeopardy Clause of the United States Constitution provides no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." **U.S.C.A. V.** This protection applies to the states through the Fourteenth Amendment and Article 1, Section 8, of the Nevada State Constitution. **Benton v. Maryland**, 395 U.S. 784, 794 (1969) *overruled on other grounds,* **Payne v. Tennessee**, 501 U.S. 808 (1991), **State v. Combs**, 116 Nev. 1178, 1179, 14 P.3d 520 (2000).

The Double Jeopardy Clause of the United States Constitution prohibits multiple punishments for the same offense. **Whalen v. United States**, 445 U.S. 684, 688 (1980); **Williams v. State**, 118 Nev. 536, 50 P.3d 1116, 1124 (2002), cert. denied, 537 U.S. 1031 (2002). Nevada follows the test set forth in **Blockburger v. U.S.**, 284 U.S. 299 (1932), to determine whether an accused may be convicted of multiple convictions for the same act or transaction. **Salazar v. State**, 70 P. 2d 749, 751 (2003). Under **Blockburger**, a

defendant cannot be convicted of both a greater and a lesser included offense. **McIntosh v. State**, 113 Nev. 224 (1997) (citing **Givens v. State**, 99 Nev. 50, 56 (1983)).

Mr. James' multiple convictions arising from the single purported encounter violate Double Jeopardy principles as, under the facts alleged, Mr. James could not have committed the Sexual Assault without committing the Battery. Prosecutors alleged that Mr. James held Triaunna down in order to penetrate her. As such, under the facts as charged by the government, the allegations giving rise to the Battery charge was part of a single course of conduct directed at a single purpose – vaginal penetration. Thus, Mr. James could not have committed the instant Sexual Assault without committing the attendant Battery With Intent to Commit a Crime. Accordingly, under **Blockburger**, Mr. James' Battery conviction violates Double Jeopardy principles.

The Battery conviction also violates redundancy principles. Even where duplicitous charges amount to separate offenses under **Blockburger**, such charges cannot stand if they are "redundant convictions that do not comport with legislative intent." **Salazar**, supra, at 751 (internal citations omitted). In determining whether convictions are redundant:

> The issue... is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions... The question is whether the material or significant part of each charge is the same even if the offenses are not the same. *Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.*

Salazar, supra, at 751 (emphasis added).

Here, the Battery conviction punishes the same act as the Sexual Assault: holding Triaunna down in order to penetrate her. Thus, under **Salazar**, the Battery conviction is redundant to the Sexual Assault conviction and, accordingly, cannot stand.

Likewise, Double Jeopardy and Redundancy principles prohibit Mr. James' dual Sexual Assault convictions. This Court has considered Double Jeopardy/Redundancy prohibitions in the context of multiple sex offenses arising from a single sexual encounter involving a minor complainant. In **Braunstein v. State**, 118 Nev. 68, 79 (2002), this Court concluded that "the crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand." Accordingly, this Court requires reversal for "'redundant convictions that do not comport with legislative intent.'" Id (internal citations omitted).

In **Crowley v. State**, 120 Nev. 30 (2004) this Court reversed multiple convictions arising out of a single encounter factually similar to the case at bar. In **Crowley**, the defendant, during a single encounter with a 13 year old male victim, rubbed the victim's penis on the outside of his pants; rubbed the victim's penis on the inside of his pants; then pulled the victim's pants down and performed oral sex on him. Id. at 34. This Court reversed Crowley's lewdness convictions, reasoning that:

> By touching and rubbing the male victim's penis, Crowley sought to arouse the victim and create willingness to engage in sexual conduct. Crowley's actions were not separate and distinct; they were a part of the same episode. Because Crowley intended to predispose the victim to the subsequent fellatio, his conduct was incidental to the sexual assault and cannot support a separate lewdness conviction. Therefore, we concluded that Crowley's convictions for sexual assault and lewdness with a minor are redundant, and we reverse the conviction for lewdness with a minor.

Id.

Under **Crowley**, Mr. James' dual Sexual Assault convictions cannot stand. Like **Crowley**, the initial digital penetration was part of a single course of conduct designed to predispose Triaunna to the additional sexual contact. The encounter was singular and uninterrupted. Thus, under **Crowley**, Mr. James' dual Sexual Assault convictions stemming from the single alleged sexual encounter cannot stand. See also **Gaxiola v. State**, 119 P.3d 1225 (2005) (lewdness conviction for fondling minor victim's penis redundant to sexual assault conviction for penile-anal penetration); **Ebeling v. State**, 120 Nev. 401 (2004) (lewdness conviction for defendant's penis touching minor victim's buttocks redundant to sexual assault conviction for subsequent penile-anal penetration).

IX. THE TRIAL COURT ERRED BY PROFFERING JURY INSTRUCTIONS THAT WERE INACCURATE, MISLEADING, AND/OR MISSTATED THE LAW.

1. The 'no corroboration' instruction.

The trial court instructed jurors that:

> There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

Jury Instruction 15 (App. 150). While this Court has approved this jury instruction,[6] the Court should revisit the issue in the context of the instant case.

a. The instruction presupposes the complainant is a "victim".

By stating that the "testimony of a victim" need not be corroborated, the instruction informed the jury that the district court determined that a crime had been committed and that there was, in fact, a victim. Whether or not there was a "victim" in

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[6] **Gaxiola v. State**, 119 P.3d 1225, 1233 (Nev. 2005).

this case was a material fact to be decided by the jury; not to be pre-determined by the inappropriate wording of a jury instruction. As set forth more fully in the preceding argument, the fact that this came from the trial court made the improper suggestion(s) occasioned by the instruction all the more problematic.

b. The instruction unfairly focused the jury's attention on, and highlighted, particular a witness' testimony.

The proposed instruction singled out the complainant's testimony as somehow *special* and deserving of particular emphasis and consideration. "It is for the jury to determine the degree of weight, credibility and credence to give to testimony and other trial evidence,..." **Hutchins v. State**, 110 Nev. 103, 109 (1994). "...[W]here there is conflicting testimony presented at a criminal trial, it is within the province of the jury to determine the weight and credibility of the testimony." **Deeds v. State**, 97 Nev. 216, 217 (1981).

At least two other jurisdictions have rejected the instant instruction on this basis. Discussing a similar instruction[7] the Alaska Supreme Court held:

> This instruction is the obverse of a cautionary instruction concerning the victim's testimony and, instead of suggesting that the victim's testimony be treated with caution, it alerts the jury to the fact that nothing more than the victim's testimony is necessary to convict.
>
> In our view, to instruct that the victim's testimony need not be corroborated by other evidence unduly emphasizes the lack of a need for corroboration without similarly indicating that other witnesses' testimony

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[7] The instruction at issue in *Burke* read: "[I]t is not essential to a conviction of a charge of rape that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence." 624 P.2d 1257. This instruction is less prejudicial than that at issue here, in that it does not speak of the "victim" and simply states that other evidence is not "essential" to a conviction. The instant instruction mandated that: "[the victim's] testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty."

> need not be corroborated. Particularly where the defendant has given a statement or taken the stand, it would be prejudicial to indicate that the victim's testimony need not be corroborated without similarly indicating that the defendant's testimony need not be corroborated. Thus we conclude that the instruction should not have been given.

Burke v. State, 624 P.2d 1240, 1257 (Alas. 1980).

Similarly, the Indiana Supreme Court rejected an instruction which stated: "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." **Ludy v. State**, 784 N.E.2d 459, 461 (Ind. 2003). The **Ludy** Court found that:

> [a]n instruction directed to the testimony of one witness erroneously invades the province of the jury when the instruction intimates an opinion on the credibility of a witness or the weight to be given to his testimony.

Additionally, "[b]y training the jury's attention on the complaining witness's testimony, the instruction communicates the trial judge's apparent determination of credibility." **Carie v. State**, 761 N.E.2d 385, 386 (Ind. 2002) (Dickson, J. dissenting).

Moreover, this Court has disapproved of the previously given "Lord Hale" instruction[8] which cautioned jurors about the difficulty of disproving an allegation of sexual assault, and the same should be done with the instant instruction. Both instructions are founded on the same impropriety: assumptions as to the veracity of the complaining witness. One (the Lord Hale instruction) assumes that the complainant could fabricate a charge which the defendant would have difficulty disproving, and the

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[8] See **Turner v. State**, 111 Nev. 403 (1995) (quoting the "Lord Hale" instruction as:

> A charge such as that made against the defendant in this case is one, which, generally speaking, is easily made, and once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant are usually the only witnesses. Therefore, the prosecuting witness[']s testimony should be examined with caution.).

other (the uncorroborated victim instruction) assumes that the victim should be believed, even if there is no corroborating evidence. If one of these instructions is improper, the other should be considered equally improper, as both unduly emphasize assumptions which the jury should not, and need not, make.

c. The instruction derives from an appellate standard of review of sufficiency of the evidence and is not proper as a jury instruction.

This Court has repeatedly held that the uncorroborated testimony of a victim is sufficient to uphold a sexual assault conviction. See, e.g., **Hutchins**, supra. Certainly, an appellate court can reach this conclusion. But this language does not translate into a jury instruction. As the **Ludy**, supra, Court explained:

> When reviewing appellate claims that the evidence is insufficient to support the judgment, reviewing courts frequently confront cases in which most or all of the facts favorable to the judgment derive from the testimony of a single person, often the victim of the crime. In discussing this issue, our appellate opinions observe that a conviction may rest upon the uncorroborated testimony of the victim...
>
> But a trial court jury is not reviewing whether a conviction is supported. It is determining in the first instance whether the State proved beyond a reasonable doubt that a defendant committed a charged crime. In performing this fact-finding function, the jury must consider *all* the evidence presented at trial.... To expressly direct a jury that it may find guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligation to consider all the evidence....
>
> The mere fact that certain language or expression [is] used in the opinions of this Court to reach its final conclusion does not make it proper language for instructions to a jury.

Ludy, supra, 784 N.E.2d at 461-62. (citations and annotations omitted). See also **State v. Grey Owl**, 316 N.W.2d 801, 805 (S.D. 1982) ("...the corroboration exception provided for in **State v. Dachtler**, supra, was not a matter for jury determination but rather designed to provide a standard in testing the sufficiency of evidence for

submission of a particular case to the jury; this standard is also used to aid the trial court in determining the propriety of a new trial, and for judicial review...")

Thus, although the uncorroborated testimony of a complainant in a sexual assault case may be sufficient to sustain a conviction when a defendant challenges the sufficiency of the evidence on appeal, this principle of appellate review is not appropriate for an instruction to the jury.

d. The use of the technical term "uncorroborated" in the instruction might have misled or confused the jury.

As the **Ludy** Court noted, the meaning of the term "uncorroborated" is not likely to be self-evident to a juror:

> Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness's testimony, and ignore evidence that conflicts with the witness's version of events. Use of the word "uncorroborated" without a definition renders this instruction confusing, misleading, and of dubious efficacy.

Ludy, supra, 784 N.E.2d at 462. Accordingly, based on the foregoing, this court should not countenance the trial court's use of the 'no corroboration' instruction.

The error occasioned by the 'no corroboration' instruction warrants reversal. The problems it engendered were particularly acute in the instant case. This case involved little, if any, evidence to corroborate complaining witness' testimony. The 'no corroboration' instruction helped rectify this deficit, as well as the deficit(s) occasioned by the inconsistencies in Triaunna's disclosures. Without this instruction, the jury's verdict(s) likely would have been very different. Thus, the trial court's use of

the above-referenced 'no corroboration' instruction amounts to reversible error. **U.S.C.A. VI, XIV; Nev. Const. Art. 1, Sect. 3, 8.**

3. The 'multiple acts as part of a single encounter' instruction.

Attempting to inform jurors as to when multiple offenses may arise out of a single sexual encounter, the instant trial court instructed the jury:

> Where multiple sexual acts occur as part of single criminal encounter a defendant may be found guilt for each separate or different act of sexual assault and/or open or gross lewdness. Where a defendant commits a specific type of act constituting sexual assault and/or open or gross lewdness, he may be found guilty of more than one count of sexual assault and/or open or gross lewdness if:
>
> (1) there is an interruption between the acts which are of the same specific type; or
>
> (2) where the acts of the same specific type are interrupted by a different type of sexual assault; or
>
> (3) For each separate object manipulated or inserted into the genital opening of another.
>
> Only one sexual assault and/or open or gross lewdness occurs when a defendant's actions were of one specific type and those acts were continuous and did not stop between the acts of that specific type.

App. 147 (Instruction 13). This instruction misstated the law.

Multiple acts arising out of a single, uninterrupted encounter, where some acts are incidental to others, cannot result in multiple convictions. **Crowley**, supra; See also **Gaxiola**, supra (lewdness conviction for fondling minor victim's penis redundant to sexual assault conviction for penile-anal penetration); **Ebeling**, supra (lewdness conviction for defendant's penis touching minor victim's buttocks redundant to sexual assault conviction for subsequent penile-anal penetration). The trial court's instruction that "only one sexual assault occurs when a defendant's actions were of one specific type of sexual assault and those acts were continuous and did not stop between the acts of that

specific type" is not only incomprehensible, it runs afoul of this Court's holdings in **Crowley**, **Gaxiola**, and **Ebeling**. As those cases make clear, the acts need not be of "one specific type of sexual assault" in order to constitute a single offense. See, e.g. **Gaxiola**, (fondling victim's penis and subsequent penile-anal penetration part of single offense of sexual assault); **Ebeling**, (touching penis on victim's buttocks and subsequent penile-anal penetration part of single sexual assault). Thus, the trial court erred by telling jurors that a single sexual assault occurs only when an accused commits a single, specific type of *sexual assault*.

But for this errant language, the verdicts would have been different. Had the trial court properly instructed jurors as to when a sexual assault amounts to one continuous offense, the jury likely would have found that the initial digital penetration was merely incidental to, and in furtherance of, successive alleged penetration. Such a finding would have resulted in only a sexual assault conviction. Thus, the trial court's errant instruction guiding the jury's consideration of multiple charges arising from a single sexual encounter warrants reversal.

4. The 'no unanimity required' instruction.

Over defense objection, the trial court instructed jurors that:

> Although your verdict must be unanimous as to the charge, you do not have to agree on the theory of guilt. Therefore, even if you cannot agree on whether the facts established penetration by finger or penis or an unknown object, so long as all of you agree that the evidence establishes penetration for purposes of Sexual Assault on a Minor Under the Age of Sixteen.

App. 155 (Instruction 20); 767-68. This amounted to error.

This Court recently held that, under **Schad v. Arizona**, 501 U.S. 624 (1991) (plurality opinion) and **Tabish v. State**, 119 Nev. 293 (2003), "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." **Crawford v. State**, 121 Nev. 746, 749 (2005), *citing* 501 U.S. at 632 (internal citations omitted). Despite this Court's rejection of the position advanced herein, counsel urges this Court to reconsider the matter.

In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the United States Supreme Court held that Due Process requires that any fact increasing the maximum penalty for a crime, other than a prior conviction, be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The Supreme Court has since applied this rule to facts subjecting a defendant to the death penalty (**Ring v. Arizona**, 536 U.S. 584, 602, 609 (2002)); facts permitting a sentence in excess of the "standard range" under Washington's Sentencing Reform Act (**Blakely v. Washington**, 542 U.S. 296, 304-305 (2004)); facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines (**U.S. v. Booker**, 543 U.S. 220, 243-244 (2005)); and judge-determined facts exposing a defendant to a sentence in excess of the statutory maximum under California's determinate sentencing scheme (**Cunningham v. California**, 127 S. Ct. 856 (2007)). "Every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment." **Blakely**, 124 S. Ct. at 2543. The core holding of the **Blakely** and **Apprendi** decisions is that any fact subjecting a defendant to heightened punishment amounts to an element of an offense which must be charged and proven to a jury. See, e.g., **Blakely**, 542 U.S. at 306; **Apprendi**, 530 U.S. at 495.

First, the unanimity issue here, unlike the First Degree Murder cases in which this instruction is typically used, was fact-based and not liability-based. The issue here was proof of an essential *fact*, not theory of liability. And proof of that fact was critical. Prosecutors charged Mr. James with two counts of Sexual Assault: one for ditigally penetrating Triaunna; and another for penetrating her with a "penis and/or finger(s) and/or unknown object." If jurors determined the second alleged penetration to have been digital, this may have altered the jury's determination regarding the propriety of dual Sexual Assault convictions. See 'Multiple Acts as Part of a Single Encounter' jury instruction argument, supra. Under this scenario, jurors may have determined that the instant encounter amounted to a single course of conduct for which Mr. James could be convicted of only one Sexual Assault count.

Second, this Court's rule that jurors need not be unanimous as to a single liability theory, as applied to a *specific factual element* of a charged crime, effectively deprived Mr. James of the customary procedural protections that apply to elements of crimes. The question in **Apprendi** was whether the Constitution requires that a jury find beyond a reasonable doubt any fact increases the maximum possible prison sentence. 530 U.S. at 469. Permitting jurors to convict of Sexual Assault based on conflicting facts violates **Apprendi** because the prosecution has not proven all facts legally essentially to the crime and, correspondingly, punishment.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

> accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S.C.A. VI, XIV. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to punishment,' and the judge exceeds his proper authority." **Blakely**, 124 S. Ct. at 2537 (*quoting* 1 J. Bishop, Criminal Procedure § 87, at 55 (2d ed. 1872)). In this case, Instruction 20 allowed jurors to convict of two counts of Sexual Assault, even if some jurors believed that Mr. James penetrated Triaunna with only his finger. The refusal to require unanimity regarding such a critical factual finding violates the spirit of the Sixth Amendment and **Apprendi** as the prosecution's failure to successfully prove conduct beyond digital penetration may have resulted in a single Sexual Assault conviction.

Which is precisely why the error occasioned by Instruction 20 compels reversal. The errant instruction allowed jurors to convict Mr. James of two counts of Sexual Assault when some or all of the jurors may have concluded that Mr. James' finger was the only object used to penetrate Triaunna. And with such a finding, the jury's redundancy analysis may have resulted in only one Sexual Assault conviction. Thus, this Court must reverse.

5. The use of the term 'until' versus 'unless.'

The trial court instructed the jury that: "The defendant is presumed innocent *until* the contrary is proved. This presumption places on the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense..." App. 140 (Jury Instruction 5)

(emphasis added). The use of the word 'until' improperly lessened the prosecution's proof burden in violation of Appellant's federal and state constitutional rights. **U.S.C.A. VI, XIV; Nev. Const. Art. 1, Sect. 8.**

The presence of the word "until" regarding the presumption of innocence improperly suggested a lower prosecutorial proof burden by intimating that proof of guilt is a foregone conclusion. The United States Supreme Court has recognized the significance of the presumption of innocence instruction:

> While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen may well draw significant additional guidance from an instruction on the presumption of innocence. Wigmore described this effect as follows: 'In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i.e.*, no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases.' Wigmore 407.

Taylor v. Kentucky, 436 U.S. 478, 485 (1978). The use of the word "until" connotes an inevitability to a guilty verdict by suggesting that the prosecution would ultimately satisfy the burden of overcoming the presumption of innocence.

Other states have rejected use of the word 'until' in favor of something less suggestive, such as 'unless,' in similar instructions. In **State v. Wilkerson**, 278 Kan. 147, 158, 91 P.3d 1181, 1190 (2004), the Kansas Supreme Court agreed that "unless" would improve upon "until" in a jury instruction on the presumption of innocence,

although the Court refused to reverse on the facts of the case.[9] A subtle distinction exists between the words 'until' and 'unless,' given the natural usage of the words in common language. **State v. Beck**, 32 Kan. App. 2d 784, 787, 88 P.3d 1233 (2004). Webster's Third New International Dictionary 2513 (1968) defines "until" as "used as a function word to indicate movement to and arrival at a destination...limit or stopping point" and, "used as a function word to indicate continuance (as of an action, condition, or state) up to a particular time." Webster's defines "unless," on the other hand, as "under any other circumstance than that; except on the condition that; if...not." Id. at 2503.

In **Riggs v. District of Colombia**, 581 A.2d 1229 (D.C. Ct. App. 1990), a civil court evaluated the connotation of "unless" in the context of the burden of proof. The **Riggs** court explained "[t]he primary meaning of the word 'unless' is 'under any other circumstance than that: *except on the condition that*.' The words that follow "unless" therefore constitute an exception to the general rule..." Id. at 1249. (citation omitted) (emphasis in original).

Deletion of the word 'until,' as requested by defense counsel, or use of a more conclusion-neutral word such as 'unless' would have resulted in an instruction that more fairly and accurately described the prosecution's proof burden: "The defendant is presumed innocent *except on the condition that* the contrary is proved." Such a wording more accurately describes this important constitutional concept and comports with Due

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[9] Additionally, the Kansas burden-of-proof instruction generally includes the phrase "unless *you are convinced*." Id (emphasis added). The inclusion of those last four words, which Nevada's instruction lacks, clarifies that the government's burden is not a foregone conclusion. This distinguishes the Kansas cases which have refused to reject the entire Kansas instruction despite the Kansas high-Court's preference for the word 'unless.' **State v. McConnell**, 106 P.3d 1148, 1150 (Kan. Ct. App. 2005).

Process. This Court should not sanction jury instructions that diminish this presumption by conveying to jurors that a person is only innocent *until* the government has presented its case. Thus, the trial court's use of the word "until," which connoted certainty and inevitability, thereby minimizing the prosecution's burden, in an unfair and unconstitutional fashion, amounts to error.

The erroneous instruction warrants reversal. Given the lack of evidence to corroborate Triaunna's story, jurors easily could have rejected the prosecution's case in favor of acquittal(s) on all charges. Had the trial court not instructed the jury in a manner that conveyed a sense of inevitability regarding proof of Mr. James' guilt, the verdicts may have been very different. Accordingly, this Court must reverse.

6. Guilt/innocence language.

The trial court instructed jurors that they were tasked with determining Mr. James' guilt, rather than whether the prosecution met its proof burden. Specifically, Jury Instruction No. 6 stated: "You are here to determine the guilt or innocence of the Defendant from the evidence in this case. You are not called upon to return a verdict as to the guilt or innocence of any other person..." App. 141. The use of the 'guilt or innocence' language to convey jurors' *true* task – adjudicating whether the government met its proof burden – abrogated Mr. James' Federal and State constitutional rights. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 3, 8.**

The 'guilt or innocence' language improperly undercut the presumption of innocence and the prosecution's proof burden by misleading jurors to believe that they could convict where the evidence, though inadequate to prove guilt beyond a reasonable

doubt, nonetheless indicated that the defendant may not have been 'innocent.' **U.S. v. Deluca**, 137 F.3d 24, 34-35 (1st Cir. 1998); **U.S. v. Mendoza-Acevedo**, 950 F.2d 1, 4-5 (1st Cir. 1991). Within our criminal justice system, the difference between 'not guilty' and 'innocent' is more than semantics. **U.S. v. Mocciola**, 891 F.2d 13, 16 (1st Cir. 1989) (quoting **U.S. v. Isom**, 886 F.2d 736, 738 (4th Cir. 1989) ("A verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence..."). Trial courts must "...be wary of the risks of misunderstanding in the 'guilt or innocence' comparison." **Mendoza-Acevedo**, supra, at 4-5. Accordingly, the instant instructions, which misarticulated the jury's function in a way that infringed upon other constitutional mandates, was improper. **U.S. v. Andujar**, 49 F.3d 16, 24 (1st Cir. 1995).

The error occasioned by the 'guilt or innocence' language warrants reversal. As set forth above, Triaunna's story was devoid of corroborative physical evidence, and wanting in consistency. Any misapprehension of the jury's function – especially a misapprehension that minimized the government's proof burden – would have easily tipped the scales in favor of conviction. Thus, the trial court's use of the 'guilt or innocence' language amounts to reversible error.

X. THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN MR. JAMES' CONVICTIONS.

"The Due Process Clause of the United States Constitution 'protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged.'"[10] **Bryant v. State**, 114 Nev. 626, 629 (1998) (quoting **Carl v. State**, 100 Nev. 164, 165 (1984) (further internal citations omitted)). The relevant inquiry in reviewing the evidence supporting a jury's verdict is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" **Bolden v. State**, 124 P.3d 191, 194 (Nev. 2005) (internal citations omitted).

The prosecution failed to present sufficient evidence to sustain Mr. James' convictions. Triaunna failed to give precisely consistent accountings of the alleged assault. Other than the vaginal swelling (which may have been attributable to something other than the alleged encounter with Mr. James, such as Triaunna's urinary tract infection) and the suspiciously late-discovered gloves, prosecutors presented little, if any evidence corroborating Triaunna's allegations: no evidence of bruising on either Triaunna or Mr. James; no copies of the alleged text messages, telephone records, etc..

Additionally, Triaunna's testimony was insufficient to establish the penile penetration alleged in Count 3. Triaunna testified, with respect to that charge, that Mr. James: "rubbed [his penis] inside of my vagina like between the lips." App. 557. She added that she felt the "tip of his head going in," just at the "inside of [her vaginal] lips, just rubbing up and down." App. 558. This failed to establish the vaginal penetration

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[10] The requirement of proof beyond a reasonable doubt serves "to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." **Batin v. State**, 118 Nev. 61, 65, 38 P.3d 880, 883 (2002) (citing In re Winship 397 U.S. 358, 363 1970)).

necessary to sustain a Sexual Assault conviction. Thus, prosecutors failed to present sufficient evidence to sustain Mr. James' convictions. Accordingly, they cannot stand.

XI. CUMULATIVE ERROR WARRANTS REVERSAL OF MR. JAMES' CONVICTIONS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ART. 1, SECT. 8 OF THE NEVADA CONSTITUTION.

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. **Big Pond v. State**, 101 Nev. 1, 3 (1985). In evaluating cumulative error, this Court must consider whether "the issue of innocence or guilt is close, the quantity and character of the error and the gravity of the crime charged." Id. Even where the State may have presented enough evidence to convict in an otherwise fair trial, where one cannot say without reservation that the verdict would have been the same in the absence of cumulative error, then this Court must grant a new trial. **Witherow v. State**, 104 Nev. 721, 725 (1988).

Viewed as a whole, the combination of errors in this case warrants reversal of Mr. James' convictions. Triaunna's inconcistencies coupled with scant physical evidence corroborating her allegations made this a close case on the charged crimes. "It is a proud tradition of our system that every man, no matter who he may be, is guaranteed a fair trial." **People v. Cahan**, 282 P.2d 905, 912 (Cal. 1955). "[N]o matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated." **Walker v. Fogliani**, 83 Nev. 154, 157 (1967). Accordingly, the nature and magnitude of the error in this case compels a cumulative error reversal.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court reverse his convictions entered below.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: _____
NANCY L. LEMCKE, #5416
Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 7th day of Dec, 2011.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
NANCY L. LEMCKE, #5416
Deputy Public Defender
309 South Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of December, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
STEVEN S. OWENS

NANCY L. LEMCKE
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

TYRONE D. JAMES
NDOC No. 1063523
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY _____
Employee, Clark County Public Defender's Office

EXHIBIT 19

10C265506

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE D. JAMES, SR. A/K/A TYRONE D. JAMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 57178
District Court Case No. C265506

FILED
NOV 30 2012
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 31st day of October, 2012.

10C265506
CCJA
NV Supreme Court Clerks Certificate/Judgr
2041481

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this November 26, 2012.

Tracie Lindeman, Supreme Court Clerk

By: Rory Wunsch
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE D. JAMES, SR. A/K/A TYRONE D. JAMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57178

FILED

OCT 31 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault of a minor under 16 years of age and one count of battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant Tyrone James was accused of sexually assaulting 15-year old T.H., the daughter of a woman with whom he was in a relationship at the time.[1] James was convicted of the above crimes after a jury trial.

On appeal, James argues that the district court erred by: (1) improperly admitting evidence of a prior bad act, (2) admitting impermissible hearsay, (3) excluding evidence of T.H.'s sexual history, (4) admitting evidence that amounted to vouching, (5) denying his motion for mistrial, and (6) allowing the State to commit prosecutorial misconduct. James also argues that (7) use of the word "victim" amounts to reversible

[1]As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

error, and (8) the district court improperly issued multiple jury instructions.[2] We reject James's arguments and affirm.

The district court did not err in admitting evidence of a prior bad act

James argues that the district court's admission of evidence regarding his uncharged, prior sexual misconduct against a minor female was improper under NRS 48.045(2).

The determination of whether to admit or exclude evidence of prior bad acts rests within the sound discretion of the district court and will not be disturbed absent manifest error. Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). In order to overcome the general presumption of inadmissibility, the district court must conduct a hearing

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[2]James raises two additional arguments. First, he challenges the sufficiency of the evidence supporting his convictions, arguing that T.H.'s testimony was not reliable. We disagree, as a view of the record in the light most favorable to the prosecution indicates that T.H.'s testimony was consistent and that the State presented sufficient evidence from which any rational trier of fact could have found guilt beyond a reasonable doubt. Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

Second, James argues that double jeopardy and redundancy principles protect him from multiple convictions arising from a single encounter. For reference, the jury convicted James of two counts of sexual assault: one for penetrating T.H. with his finger, and the other for using his "penis and/or finger(s) and/or unknown object." He was also convicted of battery with intent to commit a crime for grabbing T.H. by the neck. James's argument fails, as it is well-established in Nevada that "separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon." Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981); see also Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127-28 (2006) ("We discern no error in maintaining the separate charges of sexual assault and battery with intent to commit a crime.").

outside the presence of the jury and determine that: (1) the prior act is relevant to the crime charged for a purpose other than proving propensity, (2) the act is proven by clear and convincing evidence, and (3) the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. Bigpond v. State, 128 Nev. ___, ___, 270 P.3d 1244, 1250 (2012).

First, the evidence of James's prior sexual misconduct with a minor was properly admitted to support T.H.'s subsequent allegations, as it shed light on his motive to engage in sexual contact with young girls for his own gratification, as well as his opportunity to do so. Ledbetter v. State, 122 Nev. 252, 262, 129 P.3d 671, 678 (2006) (noting that "whatever might motivate one to commit a criminal act is legally admissible to prove motive under NRS 48.045(2)" (internal quotations omitted)). Second, the previously assaulted minor testified consistently regarding the details of the prior incident in both the pretrial hearing and during trial, resulting in clear and convincing evidence that the prior act of sexual assault did indeed occur. Finally, any danger of unfair prejudice based on the other minor's testimony did not substantially outweigh the evidence's probative value. See Ledbetter, 122 Nev. at 263, 129 P.3d at 679 (concluding that "[t]he probative value of explaining to the jury what motivated [the defendant], an adult man who was in a position to care for and protect his young stepdaughter . . . from harm [but who] instead repeatedly sexually abuse[d] her over so many years[,] was very high").

Thus, we conclude that the district did not abuse its discretion in admitting the other minor's testimony regarding James's prior bad act.