IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE DAVID JAMES, SR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80902 & 80907

RESPONDENT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 28th day of October, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Chief Deputy District Attorney

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Employee, Clark County
District Attorney's Office

TP/Seleste Wyse/jg

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CLERK OF THE COURT

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

TYRONE D. JAMES,

Defendant.

CASE NO. C265506

DEPT. VII
(ARRAIGNMENT HELD IN DEPT. LLA)

BEFORE THE HONORABLE RANDALL F. WEED, JUDGE PRO TEMPORE

THURSDAY, JUNE 24, 2010

RECORDER'S TRANSCRIPT OF HEARING RE:
ARRAIGNMENT

APPEARANCES:

For the State: JAMES J. MILLER, ESQ., Chief Deputy District Attorney

For the Defendant: BRYAN A. COX, ESQ., Deputy Public Defender

RECORDED BY: KIARA SCHMIDT, COURT RECORDER

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THURSDAY, JUNE 24, 2010

* * * * *

PROCEEDINGS

THE CLERK: Bottom of page nine James, Tyrone C265506.

MR. COX: Good afternoon.

THE COURT: Good afternoon.

MR. COX: It's a not-guilty plea. He'll be invoking as long as our trial is within a reasonable time.

THE COURT: Do you have a copy of the Information?

MR. COX: I do, sir, and I waive its reading.

THE COURT: Sir, do you understand what's happening?

THE DEFENDANT: Yes, sir.

THE COURT: What is your plea to the charges pending against you in an Information before the Court?

THE DEFENDANT: Not guilty.

THE COURT: You have a right to a jury trial within 60 days. Do you wish to go to a jury trial within 60 days?

THE DEFENDANT: Yes, sir.

THE COURT: I didn't hear you.

THE DEFENDANT: Yes, sir.

THE COURT: The defense has invoked its speedy trial right. This matter will be set for jury trial within 60 days.

THE CLERK: Calendar call, August 17th at 8:30. Jury trial, August 23rd at ten a.m. in Department 5.

MR. COX: I'm sorry, I missed the first date.

THE CLERK: Calendar call, August 17th at 8:30.

MR. COX: And trial is August --

THE CLERK: -- twenty-third at ten.

MR. COX: Thank you so much. And that's in Department 5?

THE CLERK: Five, uh-huh.

MR. COX: Thank you.

(Whereupon, the proceedings concluded)

* * * * *

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.

Kiara Schmidt, Court Recorder/Transcriber

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CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES TYRONE,

Defendant.

CASE #: C265506

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE
THURSDAY, AUGUST 12, 2010

TRANSCRIPT OF PROCEEDINGS:
DEFENDANT'S MOTION FOR DISCOVERY

APPEARANCES:

For the State: CHRISTOPHER PANDELIS, ESQ.
Deputy District Attorney

For the Defendant: BRYAN A. COX, ESQ.
Deputy Public Defender

RECORDED BY: RACHELLE HAMILTON, Court Recorder

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THURSDAY, AUGUST 12, 2010, AT 9:07 A.M.

THE COURT: All right, on Tyrone, did you all talk to each other before you --

MR. COX: We did. Can we approach, Judge?

THE COURT: Sure.

MR. COX: Okay.

[Bench conference on at 9:08 a.m.]

MR. COX: They provided me discovery of [indiscernible]. He's giving more discovery today but I didn't write it suspecting they're holding anything back, it's more --

THE COURT: No, I know you have to cover your butt.

MR. COX: Okay, that's what I was doing. Another issue is is that I didn't file a writ on the case. My client won't let me file it because he doesn't want to waive a speedy trial.

THE COURT: Okay.

MR. COX: I don't like to feel pressured but I can't, you know I can't waive his right for him. I would much rather go September 20th. The State maybe too but --

MR. PANDELIS: I will be ready on the 20th whenever --

MR. COX: It's only 30 days.

MR. PANDELIS: I would have no problem.

MR. COX: Generally you know when a client sets it -- a 60-day setting in the lower level is not going to make it in 60 days. Now I can do it in 90 easier. I can --

THE COURT: But he won't go along with it?

MR. COX: No. You know I've been doing this a long time and he will not waive 30 days.

MR. PANDELIS: [Indiscernible] there were some other arrest reports that I just got because they were never actually filed on [indiscernible] got a few more reports. I have just been having my investigator dig those up.

MR. COX: I think we can do it --

MR. PANDELIS: It might be a bad acts motion.

MR. COX: Again maybe he'd be doing a bad acts motion.

THE COURT: Well I mean I can -- can I waive it? I can't waive it for him but I can --

MR. COX: You can [indiscernible] on the Court's calendar --

THE COURT: Right.

MR. COX: September 20th is good for both of us. Oh by the way, Sandy, I'm sorry I didn't get that motion to you. She accommodated my moving the date and I didn't get your motion, I'm very sorry.

THE COURT: September 20th is not a --

MR. COX: It's not a good day?

THE COURT: It's not my criminal stack.

MR. PANDELIS: Let me grab my calendar.

MR. COX: Oh well that would be the trial date.

THE COURT: No I know, but it's not -- I mean --

MR. COX: Would you be hearing the trial?

THE COURT: No, I don't hear trials.

MR. COX: Right, it would be going to somebody else.

THE COURT: It goes to overflow. I mean I could send it to overflow then but that's not -- we're trying to keep it within the stacks but you're -- neither of you are on the track, your specialty teams, so it would be easier to have you do a trial. See

I try to keep it consistent with my stack so that people on the track don't have a problem in going to trial --

MR. COX: No, we don't have that issue.

THE COURT: So you don't have that issue?

MR. COX: No.

THE COURT: Okay. I mean so I could -- we could continue you for a calendar call --

MR. COX: It would have to be a sua sponte motion because -- on movement because I've done what I can. My client hasn't waived, but 30 days --

THE COURT: Well can you stand up and say that you have new information and --

MR. PANDELIS: I will say -- for the record we are ready. I don't want it to reflect that it's our request for a continuance because I mean we would be ready.

THE COURT: Do you want to tell me you'd be ineffective if you went forward?

MR. PANDELIS: But I have --

MR. COX: [Indiscernible].

MR. PANDELIS: I can tell you this, and I showed Bryan, I haven't had a chance to copy these yet because my investigator's printing them out, but I have a stack of police reports this thick that neither one of us has really gone through yet.

THE COURT: Oh so --

MR. COX: If you ask me if I'm ready I'd say I'm doing my best but I do need an extra 30 days.

THE COURT: But you've got new information.

MR. PANDELIS: Yeah.

THE COURT: So you need to tell me you have new information.

MR. PANDELIS: Okay.

THE COURT: I'm going to tell him I know he wants to go but it's not in his best interest to go forward and continuing it 30 days is in his best interest, and that's when we're going to have to go.

MR. COX: Okay, September 20th then. Thank you.

THE COURT: We're going to give him a date off our calendar so we'll see.

[Bench conference off at 9:11 a.m.]

THE COURT: All right, so I can I have Mr. Tyrone. All right Mr. Tyrone, this is your attorney's motion for discovery and it's my understanding that the State has additional reports that are being copied and haven't been presented to Mr. Cox.

MR. PANDELIS: That's correct, Your Honor. This morning I did provide Mr. Cox with a lot of the discovery he requested in his motion. In addition to that my investigator and I have run a search on the LMRS [phonetic]. We've pulled a bunch of police reports from this stack about an inch thick. I am still copying those and I'm going to provide Mr. Cox with a copy of those reports later today. I've only had the chance to go through a few of them. Mr. Cox has not really had the chance to go through any of them.

THE COURT: All right, but as far as anything in the -- any other information in the motion has he given you all of the rest of the information that you need?

MR. COX: Yes, Judge.

THE COURT: All right. So Mr. Cox, because he's going to give you additional reports what's that's going to go as far as putting you in a position to be able to go to trial on the 23rd?

MR. COX: Judge, it makes it difficult. It makes it difficult in that sense and

also I just received the preliminary hearing transcript like in the last couple of days. I'll do my best. I think there is a danger that it'll, you know, it'll squeeze the date so much that I may not -- I may be ineffective. I'll do my best to prepare as quickly as possible. My client hasn't waived his right to speedy trial and I'm working as quickly as I can.

THE COURT: Mr. Tyrone, do you understand that your attorney is being given a stack of new information probably today that he needs to look at, and it's in your best interest to let him look at that and be prepared to go to trial on charges that involve a life sentence?

THE DEFENDANT: Yes, I understand that, and I'm ready to go forward.

THE COURT: I know you're ready to go forward but your attorney is not, so asking for, Mr. Cox, what an additional 30 days would better prepare you for this trial?

MR. COX: Thirty days would be sufficient.

THE COURT: So I understand, Mr. Tyrone, you don't want to waive but it's in your best interest, and the Court finds it's in your best interest to give your attorney an opportunity on these very serious charges that carry a life sentence to further investigate that new information. So I am going to move the trial date, and I note his objection. So the week -- I think the week of the 20th is where we wanted to go with that.

COURT CLERK: It'll be September 20th at 10 a.m. for jury trial; calendar call September 14th at 8:30.

THE COURT: Thank you, have a seat.

MR. COX: So the discovery motion is granted, Judge?

THE COURT: The motion is granted --

MR. COX: Thank you.

THE COURT: -- but it's all been taken care of as far as I understand. Thank you.

MR. PANDELIS: Thank you.

[Proceeding concluded at 9:14 a.m.]

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

RACHELLE HAMILTON
Recorder/Transcriber

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

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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.

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

---

[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]

---

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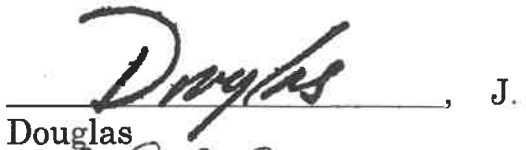
[8]James challenges two additional instructions. First, he argues that Jury Instruction 5 was improper because it contained language that the "Defendant is presumed innocent until the contrary is proved." This is substantially the same argument that this court rejected in Blake v. State,

continued on next page...

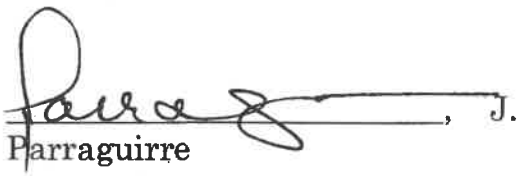
Accordingly, we reject each of James's contentions on appeal, and we

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. . . ."

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

DEC 05 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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.

Deputy District Court Clerk

RECEIVED
NOV 30 2012
CLERK OF THE COURT

RECEIVED
DEC 05 2012
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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.

Supreme Court No. 57178
District Court Case No. C265506

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.

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

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CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

MONDAY, OCTOBER 3, 2016

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS
EVIDENTIARY HEARING: EXPERT ISSUE

APPEARANCES:

For the State: STACEY L. KOLLINS, ESQ
Chief Deputy District Attorney

For the Defendant: ALINA SHELL, ESQ.

Recorded by: JILL HAWKINS, Court Recorder

INDEX OF WITNESSES

* * * * * * * * * * * * *

MONDAY, OCTOBER, 3, 2016, 9:15 A.M.

THE COURT: Morning.

MS. KOLLINS: This is 11 so.

MS. SHELL: Okay. I'm losing my mind here.

Good morning, Your Honor.

THE COURT: All right. So last I remember we were trying to make sure you got some medical expert testimony related to the expert you were able – the record you were able to get from the hospitals. How are we doing on that issue?

MS. SHELL: Your Honor, I was under the impression that today we were actually doing the evidentiary hearing. I have my expert out in the hall –

THE COURT: Okay.

MS. SHELL: -- waiting for that, so.

THE COURT: How long is it going to take?

MS. KOLLINS: That's –

MS. SHELL: I anticipate maybe a half – I would say somewhere between a half an hour and an hour, Your Honor.

THE COURT: Okay. So let me trail it to the end of the calendar 'cause I'm not going to start the testimony 'til I finish everybody else.

Ms. Kollins.

MS. SHELL: Thank you.

MS. KOLLINS: Absolutely. I just wanted to check in with the Court, let you know that I have two other court appearances and I'll be back.

THE COURT: We'll see you when you get back.

MS. KOLLINS: Thank you.

THE COURT: Bye.

[Matter trailed 9:17 a.m and recalled, 10:43 a.m.]

THE COURT: Do you have a witness?

MS. SHELL: Your Honor, I have two witnesses. I was going to call Mr. – James' prior counsel, Bryan Cox first.

THE COURT: Okay. Mr. Cox.

THE WITNESS: I get M&Ms.

THE COURT: You do, you're a witness today.

BRYAN COX

[being first duly sworn, testified as follows:]

THE COURT CLERK: And please state and spell your name for the record.

THE WITNESS: My name is Bryan Cox, B-r-y-a-n C-o-x. I'm a Deputy Public Defender.

THE COURT: You may proceed. And, sir, as you noticed there are M&Ms for witnesses. Since you are a witness not a lawyer today, you can have those. And then if you need any water or coffee, let the marshal know. There's water in the pitcher. You may proceed, counsel.

THE WITNESS: Thank you, Your Honor. Your Honor that's my son in the back row, if we don't kick him out, I'd appreciate it.

THE COURT: All right.

THE WITNESS: Thank you.

THE COURT: Are you okay watching? [Son in audience, nods]. All right. Keep going.

DIRECT EXAMINATION

BY MS. SHELL:

Q Good morning, Mr. Cox.

A Good morning.

Q How are you this morning?

A Good. Thank you.

Q Thank you for coming in. Mr. Cox how are you currently employed?

A I'm employed with the Clark County Public Defender's office. I'm an attorney.

Q And how long have you been at the Public Defender's office?

A Since December of 1999.

Q And Mr. Cox are you acquainted with a Tyrone James?

A I am. He was my client.

Q And is that Mr. James over in the jury box in the orange jumpsuit?

A I believe it is, yes.

Q Okay. Thank you. And you said that Mr. James was your client?

A Yes.

Q Okay. Do you recall approximately what year you represented Mr. James?

A Not specifically. It's been a couple of years and I've had a few cases in between.

Q If I told you that it was in 2010, would you have any reason to disagree with me?

A I would agree with you on that.

Q Okay. Great. And do you recall the nature of the charges against Mr. James?

A Yes. Mr. James was accused of sex assault.

Q Now, prior to representing Mr. James did you have any experience handling sexual assault cases?

A I did, yes. When I was first employed, we only had two attorneys that handled the really more media related sex assault cases. And so as a track deputy when I first got hired, I handled sex assault cases early on. And then after I'd been an attorney for about ten years I was moved to actually a team that specialized in only sex assault cases and I was on that team when I defended Mr. James.

Q Okay. Can you give me a ballpark estimate of how many sexual assault cases you've handled while with the Clark County Public Defender's office?

A I couldn't. It wouldn't be accurate. I just handled many.

Q Many?

A Yes. Prior to Mr. James I'm guessing – I couldn't quantify it accurately. I mean that's not a statistic I keep personally.

Q That's all right, I just was checking to see if you remember. But it's fair to say that you've represented several clients charged with sexual assault?

A Many.

Q Many. Now in those cases do you ever retain the services of an expert in sexual assault or sexual abuse?

A I have.

Q Okay. Now, did you retain an expert in this case?

A I did not.

Q Okay. And why did you not retain an expert in this case?

A This case, like others, do not turn on – I believe did not turn on physical evidence. It's very rare that you have a case that anybody can point to and say conclusively this is evidence of sex assault.

Evidentiarly, I thought it was very thin, you know. You had some redness and that was, you know, the – not – the State's own report did not conclusively indicate that there was – that's evidence of abuse. And, in fact, there was – the report itself provided alternate theories how that could – the redness could be present.

Q And do you recall what alternate theories were in that report?

A You know the urinary tract infection stands out.

Q Okay. Anything else?

A I believe there was another illness as well, but we weren't able to get into it in trial.

Q Okay.

A But I was able to use urinary tract infection in cross-examination.

Q Now, you pre stated some of my questions, so you – did the victim in this case have a sexual assault examination performed on her?

A She did, yes.

Q Okay. And I take it based on your testimony that you had a chance to review those records prior to trial?

A I did.

Q Okay. And do you recall whether you subpoenaed those?

A You know, generally, to be honest with you those are provided just without me asking or if I want them more quickly they'll provide them. But I've never had a problem in my career of the State providing those reports in – with accompanying medical reports prior to trial –

Q Okay.

A -- or even preliminary hearing.

Q Now, in reviewing those medical records do you recall whether there was any references to photographs taken during that exam?

A I'd have to see the report. I don't recall if this one did or not off the top of my head.

Q And I have a copy of the report if you'd like to look at it.

A I would, thank you.

Q Okay. If I can find it, here it is. Sorry, it's a – may I approach Your Honor?

THE COURT: You may.

MS. KOLLINS: I have it.

MS. SHELL: Okay.

THE WITNESS: Thank you.

MS. SHELL:

Q Thank you. I'll direct your attention. Now, Mr. Cox, I've handed you a copy of the medical records in this case and they are Bates labeled as part of the appendices in our case, Your Honor. It's Bates labeled James 0016 through 0076.

And, Mr. Cox, if I could just turn your attention to page 25, right up at the –

THE COURT: These are documents that we've previously filed under seal because they're medical information?

MS. KOLLINS: That is correct.

MS. SHELL: That is correct, Your Honor.

THE COURT: Okay. So you don't want to admit it for purposes of this hearing since it's sealed, but you could certainly examine him about them.

MS. SHELL: That's correct, Your Honor. I wasn't intending to admit, I just

wanted to –

THE COURT: Okay.

MS. SHELL: -- question him, refresh his recollection.

THE WITNESS: I'm on page Bate stamp 25.

MS. SHELL:

Q Okay. And do you see right up at the top there's a section that's labeled progress and procedures?

MS. KOLLINS: My apologies. My copy is not Bate stamped, so if I can just see what counsel is looking at –

MS. SHELL: Here, I'll show you.

MS. KOLLINS: -- 'cause I didn't bring their whole appendices with me. I brought the original.

THE COURT: I had Jonathan carry it in.

MS. SHELL: Unfortunate – I hate to say this, it's not the smaller appendix I've ever submitted, Your Honor.

THE COURT: I know, it's –

MS. SHELL: But it – still it's, it was a hefty load of paper, I'll agree.

THE WITNESS: I have reviewed it.

MS. SHELL:

Q Okay. And do you see up at the top there's a reference to a digital photo colposcopy?

A Yes.

Q Okay. So based on your review of the records that I handed to you, does it appear that there were photographs taken during this examination?

A Yes. Sometimes that's a video, sometimes it's still photos. It just

depends on the case and who's doing it, I think

Q Now, do you recall whether you received photos in this case?

A I didn't, no.

Q You did not. And did you attempt to obtain those photos?

A No, I didn't.

Q Okay. Have you requested – are you familiar with what a colposcope is?

A I believe so, yes.

Q Okay. Based on your layman's understanding what is a colposcope?

A It's a camera that takes or videos of a girl or woman's vagina on the outside, and – mainly the entire. It's designed to penetrate the vagina to preserve the image of the state it was in at the time the photos are taken.

Q Okay. And in prior cases where you've represented clients charged with sexual assault have there been colposcope photos in those cases?

A Yes.

Q And have you requested photos in other cases?

A The ones I requested I think were video.

Q Okay.

A I think – well, maybe the photos accompanied it, but I have had videos sent to my own expert to review.

Q But you did not do that in this case?

A I did not, no.

Q And do you recall why you didn't do that in this case?

A I, from the top of my head, this case didn't turn on I believe physical evidence. The conclusions were not conclusive as to sex assault and the report

itself provided an alternative explanation. I believed from my experience that the nurse examiner would admit that it was not conclusive evidence of sex assault and that the urinary tract infection would be responsible for it. And, if I recall, I was successful in getting that evidence in.

Q Okay. Now with regards to – now, we keep talking about the conclusions that the doctor reached. Do you remember the name of the treating physician?

A I don't, no.

Q Okay. Now, with regards to the doctor's conclusions do you recall what her conclusions were about whether the victim in the case had been sexually assaulted? And I specifically would ask you to look at James 53 through 54. Do you see something that says genital anal medical exam findings up at the top?

A Yes.

Q Okay. Great.

A I've seen it.

Q Okay.

A I'm sorry, what was the question?

Q Do you recall what her – the doctor's conclusions were regarding whether the victim had been sexually assaulted?

A Well the report refreshes my memory and it is that nonspecific finding, swelling. And on – the probable abuse does not indicate physical, it indicates a spontaneous accusation, which to me does not reflect physical abuse. It does not refer to the physical findings at all.

Q It doesn't refer to the physical findings?

A Well, on page – based on 53 that is as to the specific. As to the

physical it's nonspecific and it circled swelling. And then on, based on 54, the probable abuse has nothing – from my reading of it and from my memory it had nothing to do with physical evidence. It has to do with what the examiner thought that because the girl had made a spontaneous – I'm just reading it here – spontaneous –

Q Um-huh.

A -- clear, detailed description that that indicated probable abuse, but that didn't turn on any physical findings of the examination.

Q Okay. Now, in the sexual assaults case – assault cases that you've handled previously, have you ever run into a report with similar conclusions?

A That's not uncommon. This finding is not uncommon.

Q And in those cases have you ever, where you've had a report which reached similar conclusions, have you ever retained the services of an expert?

A I'd have to look. Quite frankly, there's very few cases where, like I indicated, that there's physical findings where any professional could point to and say this is evidence of sex assault. But I have on previous cases had colposcopes examined, photos examined or a doctor testify or a nurse testify.

Q Okay. But that didn't happen in this case?

A It didn't, no.

Q Okay. Now, as you indicated this case went to trial, correct?

A It did.

Q Okay. And do you recall what you did to prepare for trial, specifically the cross-examination of the treating physician in this case?

A Well, I was lead counsel. If my memory serves me, I'm the one that handled that witness because I thought it was more key. You know, to be honest

with you, you know, at that point in my career I had enough experience that I knew which questions to ask and I had a good idea of what the answers would be. And if I remember right at trial it unfolded as I'd expected. I don't believe the case turned on physical evidence.

Q What do you believe the case turned on?

A Just the – prior to going into trial I thought our case was very strong with only the one girl complaining. Before trial, this judge allowed another girl to come and testify. Once that happened I thought that was very unfair that we had another case that a girl testified. And I believe her case was dismissed. Came in and I thought that the jury looked to that, but I can't look to the minds of what the jurors were thinking, but I thought that was a very unfair turn in the case. And, unfortunately, Mr. James was convicted.

Q Now, I just have a couple of more questions for you. Do you have any kind of medical training?

A No.

Q Do you have any training in interpreting medical reports?

A Just in my career, looking at them, I have had physicians or a physician's assistant assist me in looking through medical reports to indicate, you know, what I'm looking for. Reading the handwriting can be difficult sometimes, quite frankly. The best evidence I've gotten from medical reports that I didn't see was understanding what medications were and weren't prescribed. And I've also been to seminars where the key topics were, you know, preparing and handling sex assault cases.

Q Now, just one more question, well, it actually ends up being two questions. In sex assault cases where you don't retain an expert, have you ever just

consulted with an expert about a case?

A Yes, I have consulted experts in lots of cases. At that point in my career, you know, I had other attorneys I would consult with on my team that also just handled sex assault. And I would have, I don't know if I did in this case or not, but I've had friends who were with medical training review it just to see what they thought. In this case I concluded that I did not need an expert. That I could bring my own defense through the State's witness.

MS. SHELL: Okay.

Your Honor, I'll pass the witness at this time.

THE COURT: Cross-examination.

MS. KOLLINS: Very briefly, Judge.

CROSS-EXAMINATION

BY MS. KOLLINS:

Q Mr. Cox was it your understanding that there was a definitive finding of sexual abuse in the report provided by Dr. Vergara in this case?

A There was no definitive finding. It was probable and I believe at trial she admitted that it was probable and there was an alternative explanations.

Q And part of that probable abuse finding was the history coupled with the swelling, correct?

A Yes.

Q And that is not unusual in your experience?

A No, it's not unusual.

Q So part of that probable cause or likely abuse finding that is usually coupled – a history based on – plus physical findings, correct?

A Yes, and I do find, quite frankly, that nurse examiners or doctors will

generally put a probable finding just in deference to the report. And the reality is is that findings could be consistent with sex assault and not findings, they'll say not findings are consistent with sex assault. Findings are very rarely conclusive.

Q And in your experience doing these types of cases is it true that most findings in sexual assault examinations are nonspecific?

A The vast majority, yes.

Q Very rarely will you get a case with such a thing as a transected hymen or bleeding or bruising, something that is evidence of an acute sexual assault?

A Bleeding, very rare. That would be something to really stand out. But from my training, just a transected hymen by itself without bleeding or where they're indicating that there's fresh tear around the transected hymen, that can occur naturally in a young woman and through athletics or through no explanation at all. And I've never found a medical professional that can say that because the hymen is torn that that is evidence of sex assault by itself.

Q Without a history, right?

A Yes.

Q Okay. So in this case given that the only nonspecific finding that Dr. Vergara saw was some swelling, what was your strategy as a defense attorney?

A That I can – I believe, if I'm not mistaken, our office has handled Vergara, if not me personally other attorneys. And I believed in – that we would be able to get the conclusions out that I needed to at trial and that is that this is not conclusive. That there are other explanations why the redness is there and it's not conclusive of sex assault. And if I remember correctly, Vergara did in fact testify that it wasn't conclusive. And that the urinary tract infection alone could explain the

redness.

Q So you had an alternate explanation for the swelling, the urinary tract infection?

A Yes, it was provided to me. Yes.

Q Okay. And you did cross-examine her on that?

A I did.

MS. KOLLINS: Okay.

Your Honor, I would ask that the Court take Judicial Notice of pages 150 through I think the last page of her testimony is 182 from the second day of trial. If the Court needs another copy, I have that as well.

THE COURT: Is that in the supplemental appendix?

MS. SHELL: Your Honor –

MS. KOLLINS: Well, it's on file as court – it's a transcribed –

THE COURT: I know. But I'm also asking it, is it in the supplemental appendix?

MS. SHELL: It is in the appendix, Your Honor. It's at – it starts at Bates label James 0292 and final examination ends at James 0324.

THE COURT: Okay. I'm there. Thank you.

MS. KOLLINS:

Q Now, the child also had chlamydia is that correct?

A Yes.

Q And that was something that was not permissible at trial pursuant to Rape Shield, is that correct?

A That's correct.

Q Okay. So strategically, even if you wanted to, based on the Court's

ruling, you could not bring up that alternate explanation for anything?

A I wasn't able to but with the urinary tract infection I believed I had something that was very understandable to even male jurors.

Q And relatable?

A Yeah.

Q Defense counsel or post-conviction counsel asked you about the existence of photographs and why you didn't obtain those. Based on your knowledge of this report and your ability to cross-examine Dr. Vergara regarding the UTI, what would photos have done for you?

A Well to be honest with you, you know, we – if I request them, they don't go to me in the case I've had to request them, because they're – they fall under, of my understanding they're the same category as child porn. And so in the case I requested it, they've gone directly to my expert. But, you know, in this case if there's redness I think I would have seen redness. And I don't know what medical training I would need to see – to tell what – redness doesn't tell you what caused it.

Q More accurately in this case there was swelling, is that correct –

A Yes.

Q -- and not redness? Is that correct?

A Redness, swelling, yes.

Q Did you believe that the findings in this case were based on digital penetration?

A No.

Q Strategically, why did you not get an expert just one more time for the Court.

A Well, at trial if – my goal is to get the pertinent evidence in front of a

jury effectively and persuasively. If – there are situations where more witnesses is not a good thing, it can detract and it can draw attention to. I never believed this case turned on physical evidence. I still don't believe it turned on physical evidence. And for me to spend an inordinate amount of time on it or call a expert to highlight it, I think it would draw undue attention to it. I believed that I could get the State's own expert to admit that it wasn't conclusive and if my memory is right I believe I was successful in that.

Q If you recall, did you get Dr. Vergara to admit that there was an alternate explanation for the swelling, that being the UTI?

A That's my memory. I haven't reviewed that transcript but that's my memory from trial.

Q You have not reviewed that transcript for today?

A I haven't no.

Q If you had it to do over again, based on the facts of this case would you hire an expert under these circumstances knowing your ability to cross-examine Dr. Vergara?

A I wouldn't no.

MS. KOLLINS: No more questions, Your Honor.

THE COURT: Any redirect.

REDIRECT EXAMINATION

BY MS. SHELL:

Q Mr. Cox just a brief question. Now, you said that you felt that you were able to elicit an alternative explanation from Dr. Vergara, is that correct?

A Yes.

Q Okay.

A Or have her explain her explanation of the report and show the jury that there was evidence in her report indicated – explaining this redness or swelling.

Q And, again, you have no medical training, correct?

A You know what it just – just, you know, the – I think the First Aid merit badge as a Boy Scout is as far as it goes, but, yeah.

Q Okay. So if the doctor testified that the redness was caused by – do you recall that there was a strep B infection in this case?

A I remember a, an STD and I remember a urinary tract infection. I don't remember anything more specific than that.

MS. SHELL: Can you give me just one second, Your Honor, I apologize. Page 65. May I approach, Your Honor?

THE COURT: You may.

MS. SHELL: All right.

Mr. Cox, I'm going to hand you your examination of Dr. Vergara and we're on – I'm sorry, can you tell me what the Bate's label is on that?

THE WITNESS: The Bate stamp?

MS. SHELL:

Q Yes.

A Is 307.

Q Okay. 307, Your Honor.

Now in looking at that can you recall that there was a strep infection involved in this case? Hopefully, I've pointed you in the right direction.

A I'm on page – I'm just reading 307 right now.

Q And it goes on to – it goes through to Bate's 310.

A Would you like me to go to 310 now?

Q Well, I was just hoping you could look at it and refresh your recollection about whether there was a strep –

A I see that on page 308.

Q Okay. Now, if you look at page – if I could turn your attention to Bate's 309, which is page 167 of the testimony from trial day 2. If you look at lines – starting at line 19, you ask the doctor whether the strep B infection could cause redness at the introitus. Do you see where I am?

A On page 308?

Q Yeah, 309 at line 19.

A Oh, excuse me.

Q I'm sorry.

A Okay. I've read that. I'm sorry. Go ahead.

Q And she tested – you asked her whether the strep B infection could cause redness at the introitus, correct?

A Yes.

Q And she testified that it would?

A Yes.

Q Now –

A On line 21.

Q Thank you. And someone with any – with no medical training, did you have any ability to examine her or to challenge her on that?

A That she concluded that the strep can cause the swelling and redness?

Q That's correct.

A I don't know why I would because that provides my defense.

Q Okay. Fair enough.

A I don't know, I think I'd want to challenge that finding.

MS. SHELL: Fair enough.

Your Honor, I have no further questions.

THE COURT: Anything else, Ms. Kollins?

MS. KOLLINS: No, ma'am.

THE COURT: Thank you, Mr. Cox. Have a very nice day.

THE WITNESS: Thank you.

THE COURT: Thank you for being here watching [to gallery].

MS. SHELL: And, Your Honor, I'm going to go pull –

THE COURT: Ready for the next witness.

MS. SHELL: -- pull my expert. I'll go get her.

THE WITNESS: [Enters courtroom].

THE COURT: Yeah, keep coming.

MS. SHELL: Right up there.

THE COURT: No, just keep –

COURT MARHSAL: To the bench.

THE COURT: -- keep walking.

THE WITNESS: Oh, all right.

THE COURT: You'll see a metal handrail and then come up the stairs –

THE WITNESS: Um-huh.

THE COURT: -- and then this young lady [indicating] will swear you in.

THE WITNESS: All right.

JOYCE ADAMS

[being first duly sworn, testified as follows:]

THE COURT CLERK: Please state and spell your name for the record.

THE WITNESS: Joyce Adams, J-o-y-c-e A-d-a-m-s.

THE COURT: And, ma'am, you'll notice there's an M&M dispenser there, there's water in the pitcher. If you need some coffee let the marshal know.

THE WITNESS: Water is good.

DIRECT EXAMINATION

BY MS. SHELL:

Q Good morning, Dr. Adams.

A Good morning.

Q Dr. Adams, how are you currently employed?

A I'm a consultant with a program in Sacramento, California, that's funded by the State. It's called the California Clinical Forensic Medical Training Center. And I coordinate a training program for nurses and doctors who do child sexual abuse evaluation. We do it twice a year.

Q And did you go to medical school, Dr. Adams?

A Yes, I did.

Q And where did you go to school?

A I went to the University of Kansas School of Medicine.

Q And after medical school did you do a residency?

A Yes, I did.

Q Okay. And what was – where did you do that residency?

A Well, I did part of it in Kansas City at the medical center in pediatrics. And then part of it I transferred to New York to Monte Fiore Hospital in the Bronx in New York City and finished out my residency there.

Q And during the residency did you have any particular emphasis –

what was your residency in let me ask it that way?

A Well, it was in pediatrics, so it was all of pediatrics. Taking care of children from birth to age – we actually went up to age 21 at the hospital in New York.

Q That's a very large child.

A Yes.

Q Now, while you were doing your residency in social – you said pediatrics?

A Pediatrics. In New York the program was called the Residency in Social Pediatrics. It was just organized a little bit different and gave us exposure to social issues that our patients might be struggling with, helped us understand the communities that we worked in and some cultural sensitivity issues.

Q Now, when you were doing your residency in pediatrics, did you develop an interest in a particular area of pediatrics?

A Well, during my residency training my particular area of interest was adolescent medicine, actually taking care of teenagers. My interest in learning about sexual abuse and the medical evaluation of sexual abuse came a couple of years after I started my job in Kansas City as a pediatrician.

Q So have you – so it sounds like you have an interest – you had a particular interest in researching sexual abuse, is that correct?

A That's correct.

Q Okay. Now have you personally conducted sexual assault examinations?

A Yes, I have.

Q And on children?

A Yes, all ages of children.

Q All ages. And can you estimate how many sexual assault examinations you've conducted during your career?

A Probably between 3 and 4,000.

Q And I hate to date you this way but when did you start your residency after medical school?

A In 1977.

Q Okay. Have you – so you've done – you conducted sexual assault examinations. Have you published any scholarly works on sexual assault examination?

A Yes, I have.

Q Okay. And can you estimate how many publications you've had during your career?

A Altogether around 40 and, let me see 38 of those were on the topic of sexual abuse evaluation.

Q All right. And have you previously testified as an expert witness in the area of sexual abuse?

A Yes, I have.

Q Okay. And can you estimate how many times you've testified as an expert witness in that area?

A Somewhere around 300, 350 times.

Q Dr. Adams are you familiar with a medical device called a colposcope?

A Yes.

Q Okay. What is a colposcope?

A A colposcope is basically a magnifying device, like a microscope, that's on a stand and the way it's used in sexual abuse evaluations, it also is equipped with a camera. Either started out in early days a .35 millimeter camera. And we'd – used a ring flash on the camera in order to get better photos of the external genital tissues.

Q Now are colposcopes still something that are commonly used to conduct sexual assault examinations?

A They're used in some areas more than others. With the advent of high quality digital cameras that can take both still images and videotapes, video images, the colposcopes are used less often now than they were in the early days.

Q Now, I've retained you as an expert witness in this case, correct?

A Yes.

Q And did you prepare a report in this case?

A Yes, I did.

MS. SHELL: Okay.

Your Honor if I may approach and provide her with a copy of her report just in case she needs to refer to it?

THE COURT: You can.

MS. SHELL: Did you –

MS. KOLLINS: I have it. Thank you.

MS. SHELL: And Your Honor this was submitted as part of the supplemental appendix and it's Bate's labeled James 650 through 653. Now –

THE COURT: So it's with the jury, so it's the last number?

MS. SHELL: Yes, 653, Your Honor.

THE COURT: Thank you.

MS. SHELL:

Q Now, Dr. Adams, in preparing your report did you review any materials?

A Yes, I did.

Q Okay. And do you recall – and if you need to look at the report to refresh your recollection go ahead and do that, but do you recall what materials you reviewed in this case?

A Yes. I reviewed – well, there was a court order authorizing me to be retained. But I reviewed police reports from the case. I reviewed medical records. I reviewed a copy of the transcript of the testimony given in the trial by Dr. Theresa Vergara; and, also, a copy of the testimony that the young woman, TH, gave during the trial.

Q So you reviewed, as you said, you reviewed the medical records in this case, correct?

A Yes.

Q And in reviewing those medical records do you recall whether the doctor indicated that she used a colposcope in that – in the examination?

A Yes.

Q Okay. And she also indicated that she took photos with the colposcope?

A Yes.

Q Now were you ever able to see photos that were taken?

A No.

Q And would that have assisted you in preparing the report?

A Yes.

Q Okay. And can you briefly explain to us why that is?

A It would have assisted me in determining whether in my opinion there was any generalized swelling of the genital tissues. The doctor reported that but without good photo documentation I don't know that there was swelling. I would take her word for it, I guess. But to give a second opinion about a medical finding I need high quality photos to look at.

Q Now without being able to look at those photographs, do you believe based on your review of the materials that you've looked at, that the generalized swelling that the doctor reported was clinically indicative of sexual abuse?

MS. KOLLINS: Objection. She can't testify to a legal conclusion.

THE COURT: Overruled. You can answer.

THE WITNESS: Swelling is a very nonspecific finding, which means it can be caused by lots of different things. And in the context of sexual assault, swelling without accompanying signs of trauma, such as bruising or bleeding really doesn't have any significance with respect to abuse.

MS. SHELL:

Q Now, in reviewing your report, I mean, I'm sorry, in reviewing the medical report prepared by Dr. Vergara were there any other conditions noted in Dr. Vergara's report that might have caused the swelling that she reported?

A Well, there were other conditions that she was found to have. One was a bladder infection or a urinary tract infection and one – a result came back after the examination of a positive test for chlamydia, which is a sexually transmitted infection. That was obtained from a swab from the cervix and showed that there was chlamydia. So it's possible that either one of those could have caused some inflammation in the genital tissues.

Q Now, did you also – well, let me ask you this question first. Now, you said that if you had – I don't want to mischaracterize your testimony, so let me see if I can remember what you said.

So Dr. Vergara reported that there was generalized swelling correct?

A Correct.

Q And now had you been the victim's treating physician in this case and observed swelling, what would your protocol have been?

A To take photographs. Multiple photographs at different magnifications, which you can do with a colposcope and to have the patient come back in a week at least to see –

Q And what – oh, sorry.

A -- to see if what looked like maybe swelling was still there. And if it's still there after a week, it's not swelling. Swelling would be something that would be gone by then.

Q If it's not swelling what else could it possibly be?

A Just the normal appearance of her genitalia. There can be a fuller look to external genitalia in some women.

Q Now did you – I believe you also testified that you reviewed Dr. Vergara's testimony in this case?

A Yes.

Q Okay. Now, do you recall – and I can refresh your recollection if you need it with a copy of the transcript – but do you recall that she testified that the generalized swelling she observed could have been caused by digital penetration? Do you recall reading that?

A Yes.

Q Okay. And do you agree with that conclusion?

A I have never seen that even in cases where patients described digital penetration. I've never seen swelling. It's unlikely in my opinion that that would cause swelling.

Q And she also testified that the swelling that she observed could have been caused by penal insertion. Do you agree with that conclusion?

A I don't think you can say one way or the other that it was caused by that.

MS. SHELL: I just have – Your Honor, if I may approach, I'd like to –

THE COURT: Yeah.

MS. SHELL: I'm going to show her the medical records again.

MS. KOLLINS: Is there a question pending?

MS. SHELL: There is a question pending. I just thought I'd save myself the trip and walk up there.

MS. KOLLINS: Okay.

MS. SHELL:

Q So I'm going to ask you a question. If you can't remember, go ahead and look at that.

A Okay.

THE COURT: And which Bate's numbers did you give her to refresh her memory?

MS. SHELL: This is Bate's 16 through 76, Your Honor.

THE COURT: Okay. Thank you.

MS. SHELL:

Q Now, Dr. Adams, are you familiar with something called the Adams

Classification System?

A Oh, yes.

Q Okay. And what is the Adams Classification System?

A Well, it's a term that I have tried to get people to stop using, because it was never meant to be used in a forensic medical setting. It's a table that I developed, first published back in 1992, which was sort of to help people who are doing child abuse exams kind of get on the same page as far as mainly what the various things that you see during an examination, what they mean. What things are normal?

Q Um-huh.

A What things are caused by other conditions? What things we can say absolutely are caused by trauma? And, what infections, sexually transmitted infections should be considered highly indicative of sexual contact?

In the first versions of the table there were two parts. Part one was a list of the physical findings in different sections regarding possible significance with respect to abuse. And, part two was an overall assessment of the likelihood of abuse. And, that's where the possible, probable, definite categories came from.

Q And do you recall whether a version of the classification system was used by the treating physician in this case?

A It appeared that it was because it was part of the medical record.

Q And do you – now you mentioned that you revised the – I believe you said the original version –

A Yes.

Q -- of the – so was that system revised at some point?

A Yes, it was.

Q Okay. And when did you revise that system?

A It was in – 2005 was the first publication of the revised version, which got rid of part two.

Q And why did you get rid of the – now the part two is the conclusions portion?

A Right. The overall assessment, yes.

Q Okay. And why did you eliminate the second part of that classification system?

A Well, I found out that people were using it as a way to diagnose sexual abuse and write it down in the medical report. This is – I even have reviewed some medical documents where the conclusion is at the bottom sexual abuse according to Adams criteria.

And that's not what this tool was meant to do. It was to help coordinate people who are doing research on sexual abuse to kind of all talk the same language when they're comparing are there injuries seen in this type of case more than this type of case; based on the history from the child and other factors. So that's why it was removed.

Q But in this case it appears, based on your review of the medical records that the prior version of the classification system was implemented by the doctor?

A Yes.

MS. SHELL: Okay.

I'll pass the witness, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. KOLLINS:

Q Rarely is any nonspecific finding definitive of abuse, correct?

A What? Excuse me.

Q Rarely is a nonspecific finding definitive of sexual abuse?

A By definition it's not definitive.

Q Okay. So if you have a nonspecific finding, yourself, doing 3 or 4,000 exams, would call it just that; just like Dr. Vergara did, a nonspecific finding, right?

A Correct.

Q And when you do your sexual assault examinations and you have a nonspecific finding and you have a detailed disclosure, do you make note in your medical report of that detailed disclosure?

A Yes.

Q Is that part of your clinical observation?

A It is. If I'm the one getting the disclosure, yes.

Q Okay. So you take that into account before you write any clinical notes?

A Well, it's part of the clinical notes, yes.

Q Okay. So with or without that four part criteria, that chart that you say you've revised, a doctor is still free to include a nonspecific finding and the disclosure in their conclusions, correct; with or without that chart?

A That's correct.

Q Okay. No doctor, no matter how many examinations you've done could ever say definitively there was or was not sexual abuse, based on a nonspecific finding?

A Correct.

Q Okay. You said on direct examination that you have never seen swelling and I believe the doctor concluded redness, being the result of digital penetration?

A The cases that I see where the allegation is digital penetration almost a hundred percent of the time are completely normal.

Q Okay. Is it possible that the friction from digital penetration could cause a nonspecific finding, such as swelling and redness?

A So could wiping yourself real hard with the toilet tissue or rubbing yourself in the bath with a rough cloth, so –

Q So any type of friction could cause that –

A If it's extensive and prolonged –

Q Okay.

A -- possibly.

Q So the friction of a finger could cause that?

A Well, I think it's unlikely.

Q Okay. But it could?

A I've never seen it.

Q Okay. And the friction of a penis could cause a child's genital area to be red or swollen?

A Potentially.

Q With or without the photos you could never conclusively conclude sexual abuse happened or didn't happen?

A That's not my job to conclude.

Q Okay. But my question is with or without the photos you could never definitively say there was no sexual abuse or there was sexual abuse?

A Correct.

Q The table that you developed in 2005, that was published in a scholastic publication or that –

A Well, it was first published in a – actually, I wanted to get it out as soon as possible, so it went out in the newsletter of the American Professional Society on the Abuse of Children, 'cause it's widely distributed to doctors and nurses who do sexual assault exams.

Q Okay.

A It was later then in the publication in the Journal of Pediatric and Adolescent Gynecology in 2007.

Q And when the – when you – it first began being used it had to be adopted by every jurisdiction, correct?

A No, it didn't have to be adopted by any jurisdiction.

Q Then how does it come into use? Other than its publication in a newsletter and in a professional journal, how does it come into use in a particular hospital or CAC or other entity that does sexual assault examinations of children?

A It's somebody's decision to use it –

Q If they know –

A -- as part of the medial records.

THE COURT: You can't interrupt Ms. Kollins. You got to let her finish. Okay.

MS. KOLLINS:

Q If they know about it?

A If they want to – I mean if they know about it it's the particular hospital or CAC's, they would be the one making the decision to use it.

Q They would have to adopt it as part of their protocol in some fashion?

A They wouldn't have to; but if they decided to do it, they could do it.

Q The sexual assault examinations that you perform are those – do those cases go to court?

A Yes.

Q And you're subpoenaed on behalf of the prosecution?

A Yes.

Q How many times have you testified on behalf of the prosecution in those cases?

A About – I would say, out of say 350 overall or overall 80 percent of the time I've testified for the prosecution.

Q And those – some of those cases resulted in convictions?

A Some.

Q And some of those cases with nonspecific findings?

A Yes.

MS. KOLLINS: Okay.

No more questions, Judge.

THE COURT: Anything further?

MS. SHELL: I just have two very quick questions.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MS. SHELL:

Q Just for the record you and Ms. Kollins both used an acronym CAC. I don't know what that stands for.

A Oh, Children's Advocacy Center. Child Advocacy Center.

Q Okay. Thank you. I just wanted to be sure for the record. Now, Ms. Kollins also asked you about whether digital penetration could cause the swelling and redness that Dr. Vergara observed. Do you remember that?

A Yes.

Q And do you remember saying it could be, but if it was extensive and prolonged?

A Yes.

MS. SHELL: Okay. Right.

No further questions, Your Honor.

THE COURT: Anything else, Ms. Kollins?

MS. KOLLINS: No, ma'am.

THE COURT: Thank you, ma'am. We appreciate your time.

Any additional witnesses?

MS. SHELL: No, I'm done, Your Honor.

THE COURT: Would you like to argue?

Ms. Kollins, you have any additional witnesses?

MS. KOLLINS: I do not, Your Honor.

THE COURT: Thank you, ma'am. Have a nice day.

THE WITNESS: Thank you.

THE COURT: Argue?

MS. SHELL: Your Honor, I don't know if – if Your Honor is not inclined, I actually have another matter in Federal Court that I have to get to. I think that we've sufficiently briefed the issue.

THE COURT: Ready for me to rule? 'Cause it was well-briefed and we had excellent testimony today from a number of different sources –

MS. SHELL: Your Honor –

THE COURT: -- so I'm happy to rule if you're ready.

MS. SHELL: -- I am –

THE COURT: Otherwise, if you got to get to Federal Court, I understand.

MS. SHELL: Your Honor, I feel that we briefed it sufficiently and I think that if I started talking about it I would just be talking about what I've already written down and Your Honor has already read that.

THE COURT: Okay.

Ms. Kollins is that okay if you guys just submit it on the briefing?

MS. KOLLINS: I'm prepared to submit it, Your Honor.

THE COURT: Based upon the information that's both been presented in the very lengthy, well-documented appendix and the testimony that's been presented, it does not appear that the lack of the actual expert nor the lack of obtaining the photographs were sufficient to cause Mr. Cox to be ineffective; for that reason the petition is denied.

MS. KOLLINS: Thank you, Your Honor.

THE COURT: Ms. Kollins, can you please prepare findings?

MS. KOLLINS: I will, Your Honor. Thank you.

THE COURT: Anything else?

MS. SHELL: Your Honor, I would just ask that we be appointed –

THE COURT: Excellent job.

MS. SHELL: Oh, thank you, Your Honor. I ask that we be appointed to represent Mr. James in his appeal of this?

THE COURT: Usually you just continue in that position –

MS. SHELL: Okay.

THE COURT: -- unless something happens, so.

MS. SHELL: All right. Your Honor, I just wanted to – you know, my –

THE COURT: I will –

MS. SHELL: -- my partner sometimes gets on me if I don't ask, so.

THE COURT: Yeah. So to the extent that you need an order signed by me to appoint you –

MS. SHELL: Um-huh.

THE COURT: -- I would be happy to sign it after Drew approves it.

MS. SHELL: All right. Thank you very much, Your Honor.

THE COURT: But it seems like it would be a waste of taxpayer resources to have a new person do the appeal after we've gone through this lengthy process.

Ms. Kollins.

MS. KOLLINS: I just had a question about an unrelated matter that we have scheduled in here –

THE COURT: Yes.

MS. KOLLINS: -- on Wednesday, are we still good?

THE COURT: We are.

MS. KOLLINS: Okay. That's all I need to know. Thank you.

THE COURT: Is it Wednesday? Yes, it's Wednesday, 10/5 at 10:00 a.m.

MS. KOLLINS: Yes, ma'am.

THE COURT: Thank you. Anything else?

MS. KOLLINS: I just – no, I have out-of-staters so I wanted to make sure we're still good.

THE COURT: Are they coming or are we video conferencing 'em?

. . .

MS. KOLLINS: This one's coming from California.

THE COURT: Okay.

[Proceedings concluded, 11:37 a.m.]

* * * * * * *

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

Debra Winn

DEBRA WINN, Court Transcriber