IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD ALEXANDER JENKINS,

Appellant.

v.

STATE OF NEVADA,

Respondent.

Case No. 83465

_____/

APPELLANT'S OPENING BRIEF

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCING

NINTH JUDICIAL DISTRICT
STATE OF NEVADA

THE HONORABLE THOMAS W. GREGORY, PRESIDING

Richard F. Cornell, Esq.
RICHARD F. CORNELL, P.C.
150 Ridge Street, Second Floor
Reno, Nevada 89501
775/329-1141
richardcornell1553@gmail.com
Attorneys for Appellant

Chelsea Mazza, Deputy DA
Douglas Co. District Attorney
PO Box 218
Minden, NV 89423
775/782-9800
cmazza@douglas.nv.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

RULES

I. STATEMENT OF THE CASE

A. ROUTING STATEMENT

As this was a jury trial on a category B felony, this appeal stays with the Nevada Supreme Court per NRAP 17(b)(2)(A). It should stay there anyway because it raises two questions of first impression: a) When, if ever, can a lewdness conviction occur when a defendant does not touch the prosecutrix skin-to-skin on her private parts? B) When, if ever, can a "cold" "Child Sexual Abuse Accommodation Syndrome" expert testify in a lewdness case?

B. STATEMENT OF PROCEEDINGS BELOW

Appellant, RICHARD ALEXANDER JENKINS, was charged by Information (AAvI: 1-4) and Amended Information (AAv1: 63-65) with four counts of Lewdness with a Child Under 16 Years of Age, a violation of NRS 201.230(1)(a) and (3), a category B felony. The alleged victim in each count was a 14-year-old child with the fictitious name of "Cory Collins," but whose actual name for our purposes is "G.W." All four counts were alleged in the same timeframe of July 1, 2018 to September 25, 2018, with Count I occurring at the Appellant's home and the other counts occurring at the Douglas County Community Center in Douglas County, Nevada. (Id.) This appeal is largely (albeit not exclusively) driven by the litigation and outcome of pre-trial motions.

The State filed a Motion to Admit Evidence of Appellant's Prior "Sexual" Acts Pursuant to NRS 48.045(3), or Alternatively Motion to Admit Evidence of Other Bad Acts Under NRS 48.045(2). (See: AAv1: 5-21) Over objection, that Motion ultimately was granted. (See: AAv2: 444-453)

Appellant objected to proffered testimony of an expert witness, Blake Carmichael, Ph.D. (See: AAv2: 432-439) After evidentiary hearing, the court below (the Honorable Thomas W. Gregory) permitted Dr. Carmichael to testify. (AAv3: 614-622)

Appellant first filed a Motion to Compel Production of Complete Video Surveillance at the Douglas County Community Center (AAv1: 73-76), and then a Motion to Suppress Manipulated Douglas County Community Center Video Surveillance Clips. (AAv2: 345-354) But the court below denied the Motion to Compel Production of Video Surveillance (AAv2: 407-408) and denied the Motion in Limine to Suppress Video Surveillance Clips (AAv2: 453-463)[1].

As referenced below, this case concerns the accusation that Appellant, a "father figure" to G.W., at various times touched G.W. on her clothing covering private parts over her buttocks, without saying anything sexually suggestive at any time. Notwithstanding, and notwithstanding her prior false allegations of sexual

[1] In fairness, Appellant also filed a Motion to Permit Evidence of Prior False Allegations of Sexual Assault by "G.W." (AAv2: 22-27) and that motion was granted. (AAv2: 440-443)

assault, the jury found Appellant guilty as charged. At sentencing, the court below imposed the maximum possible sentence of a maximum term of 480 months (40 years) with a minimum parole eligibility of 192 months (16 years).

The Judgment of Conviction was filed August 13, 2021. (AAv8: 1810-12) The Notice of Appeal was filed August 20, 2021. (AAv8: 1813-14) This Court has jurisdiction pursuant to NRAP 4(b) and NRS 177.015(3).

II. STATEMENT OF FACTS

The alleged victim, "G.W." was born September 16, 2004, meaning that she was 16-years-old on the day of her testimony and 13-14 when the alleged offenses happened. (AAv6: 1270)

G.W. lost her stepfather, Wayne, on June 9, 2018. (Id. at 1272-73) After that she grew close to the Appellant. (Id. at 1273) He was an assistant coach on the "Jobs Peak" volleyball team, for which G.W. played. (Id. at 1270-72)

She knew the Appellant through her friend, Alyssa, who was the Appellant's daughter. (Id. at 1273) They watched movies in the living room, with Appellant in the middle, and Alyssa and G.W. on either side of him. (Id. at 1278) G.W. would spend the night at the Appellant's home with Alyssa. (Id. at 1275-76)

About a month after Wayne passed, the Appellant wrapped his arm around her waist while she was leaning on him. (Id. at 1278) A few months later, he put his hand somewhere on the clothing covering her butt. She kind of scooted away

somewhat. He asked her if she felt uncomfortable and she said no. At that point she enjoyed her time with the Appellant. (Id. at 1278-79) She had gone on trips with the Appellant and Alyssa. (Id. at 1280)

When Appellant had put his hands down G.W.'s pants, he slid down "a little bit." He did not touch her vagina, but got "towards the top" of touching her vagina. (Id. at 1281)

At the "rec center" the Appellant hugged her and held her for a little while and touched her clothing covering her butt on occasions, then gave her a kiss on either her cheek or her neck. (Id. at 1281-82) They basically went into the equipment room closet to hug each other. (Id. at 1282) He did "about the same thing" underneath the staircase at the rec center. (Id. at 1283) He also touched her on the clothing covering her butt outside the arcade. (Id. at 1284)

The first time she reported the incidents she had a "father-daughter" relationship with the Appellant. (Id. at 1285) She came forward and told her story to the police the second time because a volleyball coach, Marie Foster, talked to her about past experiences she had. (Id. at 1286) In her first interview of September 27, 2018, she told the police that nothing happened between her and the Appellant other than hugging. In the first interview she told the police that the Appellant never touched her on any private part of her body. (Id. at 1293) She told the police nothing sexual ever happened between her and the Appellant. (Id. at

1294) She also told the police there was never a time when the Appellant made her feel uncomfortable. She told the police she never felt the Appellant touched her inappropriately. (Id. at 1295)

In her second interview of November 1, 2018 she told the police that Appellant would "touch her butt" in the "squishy room" at the rec center and at his home, every chance he could. (Id. at 1306-07) She told the police Appellant "touched her butt" in the equipment room of the rec center but not inside her pants. (Id. at 1308-09) She claimed in that interview that she told the police Appellant touched her on "the top of her butt." (Id. at 1312)

She also claimed Appellant touched her "in the front" while in the "squishy room." (Id. at 1324) He rubbed his hands on her back, but not on her butt. (Id. at 1325) He did not rub his hand on her "front area." (Id.)

She told the police Appellant never touched her in her private areas. (Id. at 1320) She told the police that when the Appellant touched her "on the butt" while watching a movie (with his daughter), Appellant did not say anything and she did not say anything. (Id. at 1318-19) The police never asked her where exactly the Appellant touched her while she was in bed. (Id. at 1321-22)

Previously, she had claimed that her mother's boyfriend, Gage, touched her "on her butt" while they were watching videos. She said that in a note she wrote to her teacher. She claimed that Gage stuck his hands under her covers and started

touching her. But now she does not believe Gage ever did that. What she told the teacher was "a misunderstanding." (AAv6: 1327-33)

Ashley Jean Gosney played co-ed volleyball with the Appellant during the summer of 2018. (AAv4: 940-41) In the summer of 2018 she noticed the Appellant being more "interactive" with G.W. than the other players. She was touching Appellant's back, he was holding her pinky finger, and he was embracing her more than anyone else. She did not notice him acting that way with anyone else. (Id. at 942-43) She saw the Appellant and [G.W.] in a long hug and what she thought to be a kiss. (Id. at 945) She did not see the Appellant grab the girl's butt, touch her on the butt, or stick his hands down her pants. Nor did she see the Appellant touch [G.W.'s] vaginal area or her private parts. (Id. at 956-57) G.W. did not appear to be upset by Appellant's behavior. (Id. at 957)

Nick Lonnegren, then Ms. Gosney's boyfriend (AAv5: 972), saw the Appellant at the "rec center" sitting down with his back against the wall and "G.W." sitting next to him. The Appellant rubbed her back shoulder area and then she laid down on his lap. (Id. at 974-75) He did not see the Appellant acting like that with any other player, including his daughter. (Id. at 977-78) He knew the Appellant and G.W. were in the storage room for three to four minutes, but did not see what went on there. He did not witness Appellant leaving with any equipment. But he did not express his concerns with anyone until after speaking with Ashley.

(AAv5: 978-80) He never saw the Appellant touch G.W. on her butt, vaginal area, or any private area. (AAv5: 993) It did not appear to him that Appellant was trying to "hide anything." (Id. at 991) And in the physical contact between the two, G.W. initiated a lot of it. (Id. at 990-91)

Justin Williams, Sergeant with the Douglas County Sheriff's Office, looked at clips of video surveillance in the Douglas County Community Center in September of 2018. (AAv5: 1187-90) He saw Appellant and G.W. embrace each other and saw G.W. nuzzle her face into the Appellant's neck. (Id. at 1192) It appeared they exchanged a kiss on the neck or the cheek. The embrace lasted several seconds, and then the two walked away. (Id.) That action, in and of itself, is not illegal. (Id. at 1193-94) He looked only at video surveillance that the rec center provided him. (Id. at 1183)

Joe Girdner was the principal at Douglas High School in 2018 and knew the Appellant, who was a volunteer volleyball coach. (AAv5: 1207) He had a situation with the Appellant where, while coaching the girl's tennis team, G.W. walked up behind Appellant and leaned against his back and put her chin on his shoulder in an affectionate manner. (Id. at 1208-09) He learned that Appellant was a "father figure" after her stepfather had passed away and was a source of support for the family. Based on G.W.'s mother's information, it was a safe relationship. (Id. at 1209-10) Otherwise, the witness never observed any inappropriate conduct

between the Appellant and his daughter, and described the behavior between the Appellant and G.W. as not sexual in nature, but simply abnormal. (Id. at 1211-AAv6: 1212). And when G.W. was leaning on the Appellant, his hands did not do anything. He did not try to touch her or grab her. (AAv6: 1215)

Caylyn Keith, whom Appellant coached in 8th grade (AAv6: 1225-26) observed Appellant in August, 2018 put his hands on G.W.'s waist and rotated her hips as part of her volleyball serving motion. (Id. at 1227-28)

Tamera Woodbridge, the mother of G.W. (AAv6: 1237-38), became close friends with Alyssa Jenkins and the Appellant. (Id. at 1239) In the summer of 2018 G.W. had lost her stepfather, Wayne Mazafaro. G.W. seemed lost and Alyssa was her only friend. (Id. at 1242)

G.W. is a very "touchy person." She was very close to Wayne and she very much looked up to him. (Id. at 1248)

Initially when the rumors happened re inappropriate contact between G.W. and the Appellant, G.W. told her that everything was fine and the Appellant had never touched her inappropriately. (Id. at 1260)

G.W.'s allegation against Gage caused the police to investigate, but at some point they closed the investigation. (Id. at 1261-64)

Kurt Ahart, another then-employee of the "rec center" (AAv6 : 1408), saw G.W. kiss Appellant on the neck. He also saw them "playfully push" each other.

(Id. at 1412) He emphasized that the touching was "affectionate." (Id. at 1418) He had seen Appellant and G.W. interact on other occasions, and did not see anything inappropriate. (Id. at 1420) He never saw Appellant grab G.W.'s butt, touch it, or stick his hands down her pants. (Id. at 1421) He never touched her private areas. (Id. at 1422)

Erica Jenicki had a child, Bella, who played for Appellant in high school. (AAv7: 1462) On one occasion while dining at a restaurant, she saw Appellant and another young female (G.W.) seated in a way that made her feel uncomfortable. (See: Id. at 1463-66) On another occasion she felt uncomfortable seeing Appellant and G.W. at the "Silverstate Volleyball Club," as they almost seemed to have the kind of relationship as "teenagers would have." (Id. at 1466-68) But on neither occasion did she see Appellant touch G.W.'s vagina, private areas, butt, or any in other sexual manner. (Id. at 1472)[2]

Nadine Chrzanowski, an investigator for the Douglas County Sheriff's Office (AAv7: 1497), interviewed G.W. three times. (Id. at 1503) On the first interview she indicated the relationship between her and Appellant was more of a father/daughter type relationship. She used the term "family love" and "touchy." (Id. at 1503) G.W. stated there was nothing "sexualized" about their relationship. (Id. at 1508)

[2] The daughter in question, Bella Guerrazzi, repeated that testimony. See: AAv7: 1475-84.

Blake Carmichael is a clinical psychologist who specializes in child sex abuse cases. (AAv6: 1436-37)

Dr. Carmichael talked about grooming, which has several levels in a sexual relationship. These levels generally consist of establishing contact, maintaining contact, and then integrating sexual contact into the existing relationship. (Id. at 1440-41)

The idea is that as the contact becomes more sexualized or inappropriate, it may not be recognized as such by the child. (Id. at 1441-42)

He emphasized that grooming does not necessarily involve threatening a child not to tell. (Id. at 1442) He indicated that eating together or going on trips together can be part of grooming. (Id. at 1442-43) And it is possible for the child to enjoy these activities, and often times love the perpetrator for what he does. (Id. at 1443)

And he indicated that touching on the back or a kiss on the forehead that becomes more to the lower back masks the inappropriate part of the touching. (Id. at 1444)

Watching movies together can be a form of grooming. (Id. at 1445)

Dr. Carmichael indicated that there is no profile that fits child sexual perpetrators and that their activities are not always about sex. (Id. at 1447-48)

He also indicated that children react differently to the activities of such a perpetrator. (Id. at 1448) In some cases they delay disclosure. (Id. at 1449)

Children will deny sexual contact, then tell later. (Id. at 1450) Often times when the child does disclose, the child is unconvincing. (Id. at 1452)

Dr. Carmichael admitted that he had not been provided any information about this case and was not provided any reports to review. (Id. at 1456) He never interviewed anyone in this case. (Id. at 1457) He knows nothing about the nature of the allegations involved in this case. (Id.) He knows nothing about the age, name or history of the complaining child. He knows nothing about whether she has any psychological issues. He has no knowledge whether she has made a previous false allegation of sexual abuse. (Id. at 1457-58) He knows nothing about the timeline of disclosure in this case. (Id. at 1457-58) He has no idea who talked to the alleged victim before her disclosure. (Id. at 1458) He has no idea what was going on in her life at the time of disclosure. (Id.) He knows nothing about the Appellant or his family. (Id. at 1459)

In the defense case-in-chief, **Richard Jenkins** described an affectionate, physical relationship with his daughter, Alyssa. (AAv7: 1556-57) He began interacting with G.W. in the spring of 2018. (Id. at 1558) Alyssa and G.W.'s friendship increased during the summer of 2018. (Id. at 1558-59) They went river rafting and shopping together, raced remote control cars, and watched movies

together. (Id. at 1559) G.W. became closer to Appellant after her stepfather passed. (Id. at 1560) She was really clingy to everyone in the family except Appellant's girlfriend's son. (Id.) G.W. appeared to "mimic" his daughter's actions. (Id. at 1562)

Appellant went into the equipment room at the "rec center" by himself and also with Alyssa. (Id. at 1566) The "squishy room" was also G.W.'s and Alyssa's "little hang-out spot." They sat in that room without Appellant from time to time. (Id. at 1567) That room is wide open. (Id. at 1568)

When he watched movies at home, his girlfriend would watch with him, Alyssa, and G.W. (Id. at 1570) He never touched G.W.'s butt. (Id. at 1571) He never got into bed with her and Alyssa. (Id.)

Grabbing players – including G.W. – by the hips in order to serve the volleyball correctly is something that he has done with a number of players. (Id. at 1573)

In the incident under the stairwell he related that G.W. was emotional that day because she was missing her stepfather so badly. (Id. at 1575) He did not touch her on the butt during that incident. (Id. at 1576) There were other coaches and players 10-20 feet away from them at that time. (Id.)

He never touched G.W.'s butt while watching a movie at his house or while in the equipment room. (Id. at 1577) He did not put his hands down her pants in the equipment room or the squishy room. (Id. at 1578)

Alyssa Jenkins, over whom Appellant had full custody (AAv7: 1610), commonly sat with Appellant on his left side. G.W. would always be on the right side when she was there. (Id. at 1612) Alyssa and Appellant had a physical, affectionate relationship, hugging , squeezing, wrestling. (Id. at 1613-14) G.W. sometimes would copy her. (Id. at 1614-15) Both she and G.W. would go into the equipment room at the rec center to help set up volleyball. (Id. at 1615-16)

When the three watched movies together at her home, the question of G.W.'s "uncomfortableness" never came up. (Id. at 1617)

Christopher Field, who resided in the summer of 2018 with Appellant, his daughter, his girlfriend and her son (AAv7: 1624-25), described both Appellant and G.W. to be physically affectionate people. (Id. at 1627) G.W. would hug not only Appellant, but also everyone else in the home accept Kim Copeland's son. (Id. at 1628) On one occasion G.W. tried to hold his hand. (Id. at 1629) He felt that G.W. would copy Alyssa's behavior towards Appellant. (Id. at 1630) G.W. said that she was jealous of Alyssa's relationship with Appellant. (Id. at 1631-32) He never saw the Appellant engage in sexually inappropriate behavior towards G.W.,

such as touching her butt, touching her private areas, or putting his hands down her pants. (Id. at 1632)

Other witnesses repeated their percipient testimony to the same effect. (See: testimony of Steve Noble (AAv7: 1641-59); testimony of Destiny Shull (AAv8: 1698-1713); testimony of Daniel Hannah, (AAv7: 1593-1601))

Kim Copeland, Appellant's then-girlfriend (AAv8: 1678), gave more of the same kind of testimony. (AAv8: 1058-78) Specifically, in the summer of 2018, G.W. became more and more physically affectionate with everyone in the family except Ryan. (Id. at 1683-85) G.W. confided in her about her home life. (Id. at 1686) She claimed that her stepfather, Gage, had raped her. (Id. at 1687)

Marie Foster's testimony is discussed separately below at pp. 28-29.

III. STATEMENT OF ISSUES

A. IS THE EVIDENCE SUFFICIENT TO SUSTAIN THE JUDGMENT OF CONVICTION?

B. DID THE TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW WHEN IT ALLOWED THE STATE'S "CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME" "COLD" EXPERT TO TESTIFY?

C. DID THE TRIAL COURT ABUSE ITS DISCRETION AND COMMIT REVERSIBLE ERROR WHEN ALLOWING EVIDENCE OF UNCHARGED NON-SEXUALIZED TOUCHINGS BETWEEN APPELLANT AND G.W.? DID THE TRIAL COURT VIOLATE APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL?

IV. ARGUMENT

A. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JUDGMENT OF GUILT OF LEWDNESS WITH A 14-TO-16-YEAR-OLD MINOR CHILD AS A MATTER OF STATE AND FEDERAL LAW.

1. Standard of Review

This Court has stated a standard of review re sufficiency of the evidence, which is consistent with the federal standard of Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92 (1979): Whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt by evidence that was properly before it. This standard has also been articulated as whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Moreover, it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony. Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

Clearly, the State must prove each and every element of a crime beyond a reasonable doubt. Because of the significance that our society attaches to the criminal sanction and thus to liberty itself, this Court cannot sustain a conviction where the record is wholly devoid of evidence of an element of a crime. This Court's insistence that the State prove each and every element of a charged offense beyond a reasonable doubt serves an imperative function in our criminal justice

system: 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, 64-65, 38 P.3d 880 (2002), citing Jackson.

Famously, the Supreme Court in Jackson also stated:

> "The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. … Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." 447 U.S. at 323-24, 99 S.Ct. at 2791.

2. Argument

Appellant was charged with four counts of lewdness with a child under 16 years of age, in violation of NRS 201.230(1)(a). As the charging document alleges[3], and as the statute requires, the State must prove beyond a reasonable doubt that when the defendant touched or rubbed the child's clothed buttocks or clothed pubic area, he did so with the intent of arousing, appealing to, or gratifying his own lust (or the teenager's), passion or sexual desires.

The issue here, taking G.W.'s trial testimony as true as we must per the Standard of Review, is whether 12 reasonable jurors could conclude that Appellant acted with the proscribed lewd intent.

The answer is no.

[3] AAv1: 1-4; 63-65

To our knowledge, this Court has not addressed the question of whether a defendant can violate NRS 201.230 when he touches the alleged victim not skin-to-skin, but on clothing that covers the buttocks and the pubic area, and he touches the alleged victim on or near those areas.

However, other courts in the country have. There is a split of authority. Some courts hold that sexual abuse of a minor cannot be proven when there is no evidence of touching of the defendant's or the victim's actual private parts. See: People v. Yugtkin,110 N.Y. Supp.3d 714, 716 (N.Y.A.D. 2019). However, we would expect this Court to agree with this position: a lewd touching can occur through a victim's clothing, and does not depend on contact with bare skin or "private parts" of either the defendant or the victim. People v. Martinez, (1995) 11 Cal.4th 434, 444, 45 Cal.Rptr.2d 905, 910, 903 P.3d 1037, 1042. However, the test for determining prohibited intent is not whether the child is offended, but whether a reasonable person would objectively and unhesitatingly view the touching as irritating or disturbing. Touching that is innocuous on its face, such as a warm embrace among relatives, does not violate the statute – regardless of the defendant's intent or the child's reaction. See: People v. Clotfelder (2021) 65 Cal.App.5th 30, 279 Cal.Rptr.3d 487, 502-03. Accord: Commonwealth v. Vieira, 133 N.E.3d 296, 303n.12 (Miss. 2019) [definition of "indecent" has objective element]; State v. Godley, 760 S.E.2d 285, 291 (N.C. App. 2014) [same].

Thus, the proscribed lewd intent cannot be proven merely by the touching alone[4]. Rather, the determination of whether an act is committed with the prohibited lewd intent on the defendant's part depends on the nature and quality of the contact, judged by community standards of morality and decency, in light of all of the surrounding circumstances. See: State v. Squiers, 896 A.2d 80, 85 (Vt. 2006); Simuro v. Shedd, 176 F.Supp.3d 358, 376-77 (D.Vt. 2016). Ultimately, in the absence of a sexual touching, the statute requires, under all of the circumstances, a knowing commission of a sexual act such that the child sees or senses that a sexual act is taking place. State v. Interiano, 868 So.2d 9, 15-16 (La. 2004).

A case on point, most applicable to ours, is People v. Ostrowski, 914 N.E.2d 558, 567-68 (Ill. App. 2009). The defendant was a grandfather who kissed his granddaughter publicly on her lips several times, after he crawled on top of her while she lying down next to the grandfather. These kisses were not "French kisses," their bodies were not "pressed together," and there was no evidence of fondling, groping or rubbing on the child's body. The Illinois Court of Appeals held that under those circumstances a rational juror could not find beyond a reasonable doubt that the defendant's acts were the purpose of sexual gratification or arousal. See: 914 N.E.2d at 571.

[4] If it were otherwise, the statute as so construed would be unconstitutional per Sandstrom v. Montana, 442 U.S. 510 (1979).

That is what we have here. The fact that Appellant was a "father figure" to G.W. does not establish sexual intent. See: Peterson v. Ruppright, 452 F.Supp.3d 735, 740-41 (N.D. Ohio 2020). Rather, the fatally missing pieces of evidence are: the lack of any statement suggesting a sexual intent on either the Appellant's or G.W.'s part; the lack of fondling, rubbing or "grinding;" and the lack of "escalated behavior." In fact, on this record it appears Appellant did much the same thing as Gage; but Gage was not prosecuted, while Appellant is in prison for a minimum of 16 years based on "the degree of offense" to G.W. personally. That is a legally improper basis upon which to find the Appellant guilty, as stated above.

At very best, the charges that makes more sense to our fact pattern are either attempted lewdness or misdemeanor battery– although again, the nature of Appellant's and G.W.'s "touchy" relationship and lack of a sexual intent by all rights should defeat those charges as well. But whether this Court agrees or disagrees, that does not matter. As stated in Jackson, the due process standard applies even to one who is not morally blameless.

Accordingly, this Court need not reach the other assignments of error here. It should reverse with directions to dismiss the charges with prejudice. Otherwise:

B. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW WHEN IT ALLOWED THE STATE'S "COLD" "CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME" EXPERT TO TESTIFY.

1. Standard of Review

This Court reviews the district court's decision to allow expert testimony for an abuse of discretion. Perez v. State, 129 Nev. 850, 856, 313 P.3d 862, 866 (2013).

The State switched "Child Sexual Abuse Accommodation Syndrome" (C.S.A.A.S) experts[5] and filed a Notice of Intent to Offer the Testimony of Dr. Blake Carmichael. (AAv2: 416-425) He was there to testify regarding the dynamics of child sexual abuse victims, including but not limited to conduct of the child before, during and after the abuse; and defender dynamics, including behavior-types and conduct. He was expected to testify regarding disclosures of child sexual abuse by the child, including but not limited to the timing of disclosure, delayed disclosure, and how disclosure is made. He was further expected to testify regarding the impacts of child abuse on children, including but not limited to physical, social and emotional responses that a child may have.

The defense filed a Motion in Limine to preclude this testimony and sought a hearing per Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008). (AAv3: 562-570) The defense argued there was simply too great an analytical gap between the data and the opinions offered, citing General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997). Further, the defense pointed out that Dr. Carmichael had not

[5](See: AAv1: 66-72; 84-86)

interviewed any of the parties and/or complainants, nor had he offered any kind of report. Thus, the State appeared to be using Dr. Carmichael as a means impermissibly to vouch for the child's credibility by explaining away inconsistencies in her stories and timing of disclosures. The defense argued that not only is that unreliable, but it does not rely on scientific principles and methods, but rather is based on assumptions, generalizations, and methods by which the proposed expert has no particularized information pertaining to this case.

There was in fact a motions hearing with a run of Dr. Carmichael's anticipated testimony. (See: AAv3: 571-613)

In the trial court's order (AAv3: 614-622), the Court found that Dr. Carmichael's specialized knowledge associated with grooming and its impact would assist the jury in assessing the prior bad acts which the trial court was allowing. The Court found Perez to be functionally indistinguishable. The Court found the relevance of the testimony not to be substantially outweighed by unfair prejudice, as long as Dr. Carmichael did not render a specific opinion that the child's conduct is specific to child sexual abuse.

Per Richmond v. State, 118 Nev. 924, 929-32, 59 P.3d 1249 (2002), this issue is preserved for appellate review.

2. Argument

Simply but bluntly put, Mr. Jenkins is in prison for a minimum of sixteen years courtesy of Dr. Carmichael. Pursuant to his testimony, the jury was able to conflate unusual but facially innocent touchings, with no statements of sexual intent, into lewdness. Based upon his testimony, there are an awful lot of men in this state, with fond feelings towards a child, who should be in prison for a lengthy period!

The comments of Justices Douglas, Pickering, and Cherry in the partial dissent of Perez really should carry the day here. Such testimony is questionable to begin with regarding a teenaged victim who is able to testify regarding her motivations without difficulty (such as G.W.). Perez, 129 Nev. at 865-66, 313 P.3d at 871. And the testimony is unfairly prejudicial where it serves primarily to augment the alleged victim's testimony. Id.,129 Nev. at 866, 313 P.3d at 872-73.

Those comments align with this Court's holding in Hallmark, although Hallmark was a "biomechanic expert" case and this one is a "C.S.A.A.S expert" case. It's not that the witness isn't qualified to hold an opinion; both Dr. Carmichael and Dr. Bowles in Hallmark were. It's that such an expert's testimony does not fairly assist the jury (per NRS 50.275) when it is highly speculative and is not based on the specific facts of the case at issue. Hallmark, 124 Nev. at 502.

The holdings in other jurisdictions regarding "C.S.A.A.S. experts" amply demonstrate why the partial dissent in Perez should carry the day to this fact-specific case.

Per State v. Starks, 492 P.3d 326 , 332 (Ariz. App. 2021) [reversed and remanded], it's not that a "C.S.A.A.S. expert" cannot be a "cold expert," such as Dr. Carmichael was; it's that when a cold expert testifies about common legal activities of sexual abuse perpetrators, without being able to tie them to the specific activities of the defendant on trial, such may constitute inadmissible profile evidence. Profile evidence may never be offered as substantive proof of the defendant's guilt.

Per State v. Etzel, 488 P.3d 783, 791 (Or. App. 2021) [reversed and remanded], testimony that a perpetrator engaged in facially innocent acts that **could be** grooming is inadmissible. That is too speculative to establish "grooming."

Finally, a C.S.A.A.S. witness's testimony should be limited to rebut specific misconceptions regarding a victim's reporting of sexual abuse, and should be directed towards the defense's specific attacks on the victim's credibility suggested by the evidence. See: People v. Bowker (1988) 203 Cal.App.3d 385, 391, 249 Cal.Rptr. 886, 890 [harmless error]; People v. Wells (2004) 118 Cal.App.4th 179, 188, 12 Cal.Rptr.3d 762, 769 [harmless error].

Here, Mr. Jenkins does not contend that G.W. should not be believed because she delayed reporting or initially denied improper touching. We know why her second report happened: the comments to G.W. by Marie Foster. See pp.28-29, *post*.

Rather, his contention always has been that G.W. should not be believed because she misinterpreted Appellant's non-sexualized touchings – just as she misinterpreted the innocent Gage's similar acts. And the notion that Appellant would molest G.W. while his daughter, Alyssa, was 3 feet away is highly improbable. Likewise, the notion that Appellant would molest G.W. at the "rec center," where numerous people would easily discover them, is also highly improbable.

And to testify about facially innocent behaviors, and say they "could" be grooming, without contextualizing them to the facts of the case, makes for the unacceptable result that innocence can be transmogrified into guilt based on speculation.

Should the court find the evidence to be sufficient, it nevertheless should reverse based on this Ground. Truly, a "cold expert" such as Dr. Carmichael does not assist a reasonable jury per NRS 50.275 when he creates the possibility that purely innocent conduct can fit the acts of a pedophile.

C. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN ALLOWING EVIDENCE OF UNCHARGED NON-SEXUALIZED TOUCHINGS BETWEEN APPELLANT AND G.W. IN SO DOING, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

1. Standard of Review

On the one hand, the admissibility of prior bad acts evidence is within the discretion of the trial court and its decision will not be disturbed on appeal unless it is manifestly wrong. Phillips v. State, 121 Nev. 591, 601, 119 P.3d 711 (2005).

On the other, the general presumption is that uncharged bad acts are inadmissible. And uncharged bad act evidence is potentially highly prejudicial. Tavares v. State, 117 Nev. 725, 731, 732, 30 P.3d 1128 (2001)

The State filed a Motion to Admit Evidence of Defendant's "Prior Sexual Acts" Pursuant to NRS 48.045(3) or Alternatively, Motion to Admit Evidence of "Other Bad Acts" Under NRS 48.045(2). (AAv1: 5-21) Appellant opposed that Motion. (AAv1: 28-41) The parties held an evidentiary hearing. (See: AAv1: 87-AAv2: 344) The trial court entered its Order at AAv2: 444-453.

The Court agreed with Appellant that the uncharged acts between Appellant and G.W. could not come into evidence per NRS 179D.097 because there was no evidence of specific sexual offenses attempted, completed or conspired to.

However, the district court agreed with the State that the prior interactions between Appellant and G.W. were admissible based on Bigpond v. State, 128 Nev.

108, 116, 270 P.3d 1244 (2012), because G.W.'s credibility is a central issue in the context of the relationship between her and the Appellant, and it is relevant as being a possible explanation for G.W.'s inconsistent reporting. Thus, the trial court found that the prior acts between G.W. and Appellant were relevant to motive, intent, plan and a relationship between the Appellant and G.W. However, the trial court found the prior acts alleged against a different young girl with the initials of "B.G." was "not probative for non-propensity purposes." Thus, to that extent, the trial court denied the State's Request to Admit Other Bad Act Evidence.

Per Richmond the issue is preserved.

2. Argument

It was based on this ruling that Tamara Woodbridge, Ashley Gosney, Nicholas Lonnegren, Joe Girdner, Caylyn Keith, Kurt Ahart, Erica Jenicki and Bella Guerrazzi were permitted to testify.

Unquestionably, Judge Gregory was correct relative to NRS 48.045(3), since nothing that any of those witnesses saw even remotely established a "sexual offense" within the meaning of NRS 179D.097. NRS 48.045(3) indeed requires that the prior acts constitute sexual offenses for purposes of showing a propensity in a criminal prosecution to commit a sexual offense. Franks v. State, 135 Nev. 1, 432 P.3d 752, 755 (2019)

The more difficult issue here is whether all of those witness were properly permitted to testify pursuant to NRS 48.045(2). We submit the answer is "no," because of the district court's severe misreading of Bigpond.

In Bigpond, the prior acts consisted of crimes, to wit, batteries that Bigpond perpetrated on the same victim, which resulted in judgments of conviction and resulted in the enhanced misdemeanor into a felony. Bigpond, 128 Nev. at 110-11. The State wished to present the prior convictions in order to explain the relationship between the victim and Bigpond, and provide a possible explanation (i.e., motive) for the victim's recantation. (Id. at 111)

In Randolph v. State, 136 Nev.Ad.Op. 78, 477 P.3d 342 (2020), this Court made clear that when balancing the probative value against the danger of unfair prejudice, courts consider a variety of factors: the strength of the evidence as to the commission of **the other crime**, the similarity between **the crimes**, the interval of time that has elapsed between **the crimes**, **the need for the evidence**, **the efficacy of alternative proof**, and the degree to which the evidence probably will rouse the jury to overmastering hostility. Randolph, 477 P.3d at 349.

Thus, firstly under NRS 48.045(2), the uncharged acts must be something that is prosecutable. They were in Bigpond. Here they were not.

Bigpond certainly did not overrule either Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993) or Cipriano v. State, 111 Nev. 534, 541-53, 894 P.2d

347, 351-52 (1995), overruled on other grounds, State v. Sixth Judicial District Court, 114 Nev. 739, 743, 964 P.2d 48, 50-51 (1998).

In Taylor, this Court reversed a lewdness with a minor child conviction, where the evidence of the prior act was a child sitting on the defendant's lap. That is not an act involving proscribed sexual conduct or sexual aberration. Rather, the State merely presented an apparently innocent act as though it were a bad act without providing any nexus between the bad act and the elements of the offense charged in the case.

In Cipriano, the bad act consisted of the defendant grabbing his stepson by his shoulder and making vulgar comments, when the charge was kissing the defendant and touching her on her vaginal area and breasts outside her clothing. This Court held that the prejudice outweighed the probative value because the uncharged acts were too dissimilar to the charged acts.

Secondly, not only did Bigpond not even discuss Taylor or Cipriano, much less overrule these cases, but Bigpond must be limited in light of Randolph: There must be a need for the uncharged "misconduct" evidence in order to establish G.W.'s motive to make inconsistent reports. But that evidence was established by the testimony of Marie Foster, a non-percipient witness to the uncharged acts.

Ms. Foster was a volleyball coach at Douglas County High School and Northern Nevada Juniors in 2018. (AAv6: 1374) Ms. Foster talked to G.W. in the

fall of 2018 in connection with her application for a scholarship to play for NNJ. (Id. at 1378-79) After that she gave G.W. some private coaching. (Id. at 1380) G.W. opened up to Coach Foster about the Appellant, and Ms. Foster revealed that she herself was a survivor of sexual abuse. (Id. at 1381-82) She strongly recommended to G.W. that she get into therapy, and told her she should not be afraid to report the incidents to law enforcement. (Id. ta 1382) She also recommended that to Tamera Woodbridge, G.W.'s mother. (Id.) The day after G.W. disclosed her story, Ms. Foster called the Douglas County Sheriff's Office and reported her statements to Investigator Chrzanowski. (Id. at 1389-90) She did that because she is a mandated reporter. (Id. at 1390-91) She told G.W. during the conversation that she was "the perfect victim." (Id. at 1391)

That is why G.W. changed her story. The uncharged acts of the Appellant were irrelevant to that issue, and that fact alone makes this case easily distinguishable from Bigpond.

Thirdly, to make matters worse, these witnesses were permitted to testify to their own internal feelings of "creepiness" and the like, as their editorialized responses to what they saw between the Appellant and G.W. The sheer volume of those kinds of comments clearly made their testimonies more prejudicial than probative.

Ms. Gosney was "alarmed" enough to ask "Alex" to watch Appellant and G.W. as well, and she talked to her husband about it. (AAv4: 951-52) She felt she had to report what she saw to the Rec Center. (Id. at 953)

Nick Lonnegran thought the behavior was "inappropriate" (AAv5: 972), and he thought "someone" would report it. (Id. at 973) He reported what he saw to another Rec Center employee. (Id. at 981)

Joe Girdner suspended Appellant's employment based on what he saw (AAv5: 1208-09), and reinstated him only after speaking with Tamera. (Id. at 1210)

Caylyn Keith described what she saw as making her feel "really uncomfortable," to where she reported what she saw to another head coach. (AAv6: 1227-28) She felt police "should be involved." (Id. at 1229)

Kurt Ahart and Scott Doerr confronted Appellant over his "odd behavior." (AAv6: 1411-12) Appellant apologized and said he would stop. (Id. at 1410)

Erica Jenicki described Appellant's behavior in the restaurant as "concerning" and "inappropriate," to where she took photos of it. (AAv7: 1413-15) She thought it was "flirtatious," and it made her "uncomfortable" to watch. (Id. at 1468)

And bringing home the unfairness of the situation was the number of times the jury was subjected to the video clips "preserved" by the Rec Center. Not only

did the Rec Center not preserve everything, but (of course) turned over to Sergeant Williams and Investigator Chrzanowski only the "most damning evidence."

The issue is not whether the uncharged acts were proven by clear and convincing evidence. It is whether the prejudice of the acts outweighed their probative value. With the great number of witness characterizations and video clip viewings, prejudice was what was clearly and convincingly proven!

And of course the uncharged acts became the centerpiece of the State's closing argument. The prosecutor stressed the video clips (See: AAv8: 1768, 1769, 1770, 1772, 1773, 1774) – even while admitting the clips did not capture criminal conduct. (Id. at 1772.) And she stressed Ms. Jenicki's photos. (Id. at 1775) There simply is no room here for a "harmless error" argument!

By itself, then, or in cumulation with the other trial errors, the Judgment of Conviction must be reversed.

V. CONCLUSION

The undersigned abides by this rule of criminal appellate practice: Don't argue insufficient evidence unless it's really there; but if you think it's really there, make it your first issue.

Hence, here it is the first issue.

And this case begs the question: How do you take unusual, arguably inappropriate but inarguably non-criminal behavior, and transmogrify it into sex offenses worthy of 16-40 years in prison?

Here's the recipe: First, you find a C.S.A.A.S. expert, don't tell him anything about the case, and have him explain how pedophiles can engage in facially innocent, even kind and loving acts – acts that sound suspiciously like the defendant's in part.

Next, have the entity where many of the interactions between the defendant and the teenager occurred splice together "the most unusual" or "the most inappropriate" security video clips, destroy the rest, and have witness after witness describe how shocked and disgusted they are – at the sight of these non-criminal activities.

In this way the jury can overlook the improbabilities in the teenager's changed story, and the judge can put away the defendant for 16-40 years.

This conviction should not stand. Reversal – preferably with directions – should happen.

DATED this ___ day of February, 2022.

Respectfully submitted,
RICHARD F. CORNELL, P.C.
150 Ridge Street, Second Floor
Reno, Nevada 89501
By: _____
Richard Cornell

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28(e), and NRAP 32(a)(8):

I have read the Appellant's Opening Brief before signing it; to the best of my knowledge, information and belief, the Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e), in that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)-(6). Specifically, the brief is 2.0-spaced; it uses a mono-spaced type face which is Times New Roman14-point; it is in a plain style; and the margins on all four sides are at least one (1)inch.

The Brief also meets the applicable page limitation of Rule 32(a)(7), because it contains less than 14,000 words, to wit: 7,392 words.

DATED this 3rd day of February, 2022.

*/s/RichardCornell*_____
Richard Cornell, Esq., #1553

CERTIFICATE OF MAILING

The undersigned certifies that they are an employee of Richard F. Cornell, P.C., and that on the 3rd day of February, 2022, they served a true and correct copy of the foregoing document upon the necessary party(ies), as set forth below, by way of the court's E-flex filing system:

Chelsea Mazza, Deputy District Attorney
Douglas County District Attorney's Office
cmazza@douglas.nv.gov

DATED this 3rd day of February, 2022.

*/s/KathrynOBryan*_____
Kathryn O'Bryan, Employee