

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Christopher M. Wolpert
Clerk of Court

January 13, 2020

Jane K. Castro
Chief Deputy Clerk

Mr. Mitchell R. Elfers
United States District Court for the District of New Mexico
Office of the Clerk
333 Lomas N.W.
Albuquerque, NM 87102

RE: 18-2174, United States v. Russell
Dist/Ag docket: 1:14-CR-02563-PJK-1

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's December 20, 2019 judgment takes effect this date.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert
Clerk of the Court

cc: Elisa Dimas
Mark H. Donatelli
Paul M. Linnenburger
Alicia C. Lopez
Paige Messec
Jennifer M. Rozzoni

CMW/lab

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

December 20, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MELVIN RUSSELL,

Defendant - Appellant.

No. 18-2174
(D.C. No. 1:14-CR-02563-PJK-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH, SEYMOUR, and MCHUGH**, Circuit Judges.

On July 24, 2014, a federal grand jury returned a one-count indictment against Melvin Russell for aggravated sexual abuse of C.E. in violation of 18 U.S.C. §§ 1153, 2241(a)(1), and 2246(2)(A). Prior to trial, the district court denied a Rule 412 motion filed by Mr. Russell seeking to introduce evidence of C.E.'s other sexual behavior. Mr. Russell properly preserved this issue for appeal by unsuccessfully renewing his Rule 412 motion throughout the trial. Mr. Russell also requested a lesser included offense

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

instruction for assault by striking, beating, or wounding under 18 U.S.C. § 113(a)(4).

The district court denied Mr. Russell's requested instruction, and the jury subsequently found him guilty of aggravated sexual assault. He appeals and we affirm.

I.

Background

On May 19, 2014, C.E. went to Mr. Russell's home with her friend Rochelle Cornfield and Ms. Cornfield's young daughter to see if Mr. Russell had alcohol for them. While drinking with Mr. Russell, Ms. Cornfield became very intoxicated and fell asleep with her daughter on Mr. Russell's couch. C.E. and Mr. Russell continued talking in his kitchen and, according to C.E., Mr. Russell became aggressive and began making lewd comments about C.E.'s body. He then threw C.E. on a bed, tore off her clothing, and penetrated her. During the assault, Mr. Russell choked C.E.'s neck and threatened her with a samurai sword. Ms. Cornfield's daughter began to cry and Mr. Russell stopped, after which C.E. left with Ms. Cornfield and her daughter.

C.E. was given a ride to the emergency room of the San Juan Regional Medical Center the next evening. After she requested a rape kit, Nurse Susan Eldred performed a Sexual Assault Nurse Examination ("SANE"). As part of the exam, Nurse Eldred asked C.E. if she had vaginal intercourse with another man within five days of the assault and C.E. affirmed that she had. Nurse Eldred identified thirty-two separate injuries on C.E.'s body and another seven to her genital area. She later testified that C.E.'s internal genital injuries were consistent with "very rough handling." Rec., vol. III at 1084–85. During

the examination, Nurse Eldred collected samples from C.E. for DNA testing. Later tests by the FBI found Mr. Russell's DNA on C.E.'s gluteal folds and chest. None of the swabs tested positive for Mr. Russell's semen, however, and none of Mr. Russell's DNA was found on any of the vaginal, cervical, or oral swabs.¹ C.E. was also examined by Dr. Gibbs, who observed bruises to C.E.'s face, chest, abdomen, arms, legs, and external genitalia. While Dr. Gibbs characterized C.E.'s external genital injuries as "mild and minor," he did not perform an internal pelvic exam. Rec., vol. V at 212.

During an interview with FBI agents, Mr. Russell confessed to raping C.E. At trial, the jury watched a video recording of Mr. Russell's confession. In the confession, Mr. Russell admitted that he used a sword "to make things go [his] way" and that he was a "very, very violent person." Rec., vol. IV at 177, 179.

Prior to trial in 2018, Mr. Russell filed a Rule 412 motion seeking to admit as evidence C.E.'s answer to the SANE question about her recent sexual history. He argued that the alleged prior consensual sex could have been the source of C.E.'s present genital injuries. While Mr. Russell pointed to testimony from Nurse Eldred that internal genital injuries can arise from consensual sex, he did not present testimony or other evidence that C.E.'s particular injuries could have been caused by consensual sex. The district court noted that Nurse Eldred had characterized C.E.'s injuries as being consistent with violent or rough sex and that Mr. Russell had failed to provide any evidence that C.E.'s prior

¹ Nurse Eldred testified that C.E. told her Mr. Russell wore a condom. *See* Rec., vol. III at 1085.

sexual encounter was rough or violent. Without more evidence to support his claim, the court ruled that Mr. Russell's proffered evidence was merely speculative and could not support the admittance of C.E.'s sexual history through Rule 412(b)(1)(A) or (C).

Mr. Russell also requested a lesser included offense instruction for assault by striking, beating, or wounding under 18 U.S.C. § 113(a)(4). In denying the proposed instruction, the district court determined that evidence supporting the lesser included offense was "totally lacking." Rec., vol. V at 226. It ruled accordingly that a rational jury could not convict of the lesser offense and acquit of the greater offense.

Mr. Russell raises multiple issues on appeal, and we address each one in turn.

II.

Excluded Evidence of Victim's Other Sexual Behavior

We review for abuse of discretion the district court's rulings regarding the admissibility of evidence of a victim's prior sexual behavior. *See United States v. Pablo*, 696 F.3d 1280, 1297 (10th Cir. 2012). Accordingly, we will not reverse that ruling "without a definite and firm conviction that the [district] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *United States v. Griffin*, 389 F.3d 1100, 1103 (10th Cir. 2004) (quotation marks and citation omitted). The application of Rule 412 presents a difficult challenge because district courts must balance the alleged victim's interests in preventing "the invasion of privacy, potential embarrassment and sexual stereotyping" with the defendant's interest in receiving a fair trial. *Pablo*, 696 F.3d at 1297 (citation omitted).

A. Federal Rule of Evidence 412(b)(1)(A)

“[E]vidence offered to prove that a victim engaged in other sexual behavior” is generally inadmissible. Fed. R. Evid. 412(a)(1). An exception arises when the evidence of a victim’s prior sexual behavior is offered to prove that someone other than the accused was the source of the victim’s injuries. Fed. R. Evid. 412(b)(1)(A). For the exception to apply, however, the relationship between the evidence in question and the victim’s injuries must be more than “speculative.” *Pablo*, 696 F.3d at 1299.

Mr. Russell argues that C.E.’s response to the SANE question concerning her recent sexual history should have been admitted as an alternative source of her injuries. He points to Nurse Eldred’s testimony that vaginal injuries can result from consensual sex and that C.E. could be susceptible to easy bruising because of a liver condition. He conceded in oral argument, however, that he offered no evidence concerning the nature of C.E.’s alleged prior sexual behavior.

In *Pablo*, we affirmed the district court’s exclusion of evidence that a sexual assault victim was in a state of partial undress in the presence of two other men immediately prior to the sexual assault because the evidence only had a “speculative and tenuous relationship” to the defendant’s argument. *Id.* The evidence proffered by Mr. Russell is similar because it relies completely on speculation that C.E.’s specific injuries could have been caused by prior consensual sex. Due to the lack of substantive evidence, the district court had nothing on which to consider the application of the exception urged by Mr. Russell. Under these circumstances, the court clearly did not abuse its discretion

in ruling that Mr. Russell’s evidence was too tenuous to invoke the exception in Rule 412(b)(1)(A).

B. Federal Rule of Evidence 412(b)(1)(C)

A second exception to Rule 412(a) allows a trial court to admit evidence of a victim’s prior sexual conduct when exclusion of that evidence would conflict with the defendant’s constitutional rights. Fed. R. Evid. 412(b)(1)(C). When a defendant challenges the exclusion of evidence on constitutional grounds, we review *de novo*. *United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005). While a defendant’s constitutional rights include “the right to present witnesses in his or her own defense,” this right may be subject to restrictions imposed by a trial court. *United States v. Powell*, 226 F.3d 1181, 1199 (10th Cir. 2000) (citations omitted). We apply a two-part test in determining whether a defendant’s constitutional rights were violated by the exclusion of evidence. *Id.* “First, we examine whether that testimony was *relevant*, and if so, whether the state’s interests in excluding the evidence outweighed [the defendant’s] interests in its admittance.” *Id.* (emphasis in original) (quotation marks and citation omitted). The state’s interests in excluding evidence may include preventing issue confusion and protecting the victim from “invasion of privacy, potential embarrassment, and stereotyping.” *Id.* “Second, we examine whether the excluded testimony was *material*—whether it was of such an exculpatory nature that its exclusion affected the trial’s outcome.” *Id.* (emphasis in original) (quotation marks and citation omitted).

Mr. Russell contends the district court’s exclusion of evidence of C.E.’s recent

sexual history violated his constitutional right to present witnesses in his defense. But this right is limited to situations involving relevant evidence where the defendant's interests in admittance outweigh the state's interests in exclusion. *See id.* While Mr. Russell again points to Nurse Eldred's testimony that vaginal injuries can result from consensual sex, he admittedly has no evidence that prior consensual sex could have caused C.E.'s specific injuries. Just as with his Rule 412(b)(1)(A) argument, Mr. Russell failed to provide the district court with any evidence to consider in applying the relevance test for Rule 412(b)(1)(C). Without more, his interests in admitting C.E.'s answers to the SANE questions do not outweigh the state's interest in protecting the victim's private, sensitive information.

Mr. Russell compares his case to *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991), but his analogy is unpersuasive. Begay was charged with aggravated sexual abuse of D., a minor, and he sought to prove that D.'s injuries came from another man, John Jim, by introducing testimony of a witness who saw Jim sexually assault the victim on three separate occasions preceding the alleged sexual assault by Begay. *Id.* at 517, 519. Begay made an offer of proof and supported his claim with testimony from Dr. Wagner stating that "it was impossible to determine from the physical examination alone whether D.'s symptoms were caused by Begay or during earlier incidents with John Jim." *Id.* at 519. The district court held that Dr. Wagner's testimony was inadmissible. We reversed, reasoning that "[s]ince the prosecution relied heavily on Dr. Wagner's testimony about D.'s enlarged hymenal opening . . . , the right to defend by cross-examination showing

that the conditions could have resulted from earlier conduct with another person was crucial and protected by the Rule.” *Id.* at 520 (citation omitted). *Begay* is distinguishable from the present case in significant ways. Because someone witnessed John Jim’s earlier sexual assault of D., the court in *Begay* had evidence concerning the nature of the prior sexual assault to consider when applying Rule 412(b)(1)(C). *Id.* at 522–23. Here, there is a complete absence of evidence indicating that C.E.’s prior sexual behavior could have caused her injuries. Moreover, the defendant in *Begay* made an offer of proof with testimony from Dr. Wagner saying that it was impossible to tell the source of D.’s injuries. *Id.* Conversely, Mr. Russell conceded in oral argument that he did not offer similar evidence to the district court. *Begay* is thus distinguishable from this case and does not control our decision.

Without more, the contention that C.E. had consensual sex within five days of the sexual assault committed by Mr. Russell is not admissible, and we need not address the second step of this analysis. We affirm the district court’s decision to exclude evidence of C.E.’s other sexual behavior.

III.

Lesser Included Offense Instruction

We review a trial court’s decision whether to give a lesser included offense instruction for abuse of discretion. *United States v. Toledo*, 739 F.3d 562, 568 (10th Cir. 2014). That discretion is narrowly focused “on whether there is any evidence fairly tending to bear on the lesser included offense.” *Id.* (quotation marks and citation

omitted). We “cautioned that a trial court may properly deny a defendant's request for a lesser included offense instruction only when there is *no evidence* to reasonably support that conviction.” *Id.* (emphasis in original) (quotation marks and citation omitted).

Mr. Russell’s final argument on appeal is that the district court erred by refusing to instruct the jury on the lesser included offense of assault by striking, beating, or wounding. There are four elements for determining the appropriateness of a lesser included offense instruction:

First, the defendant must make a proper request; second, the lesser included offense must contain some but not all of the elements of the charged offense; third, the elements differentiating the two offenses must be in dispute; and fourth, the evidence must allow the jury to rationally acquit the defendant on the greater charge and convict on the lesser charge.

Id. (citation omitted). The government only disputes elements three and four.

Even assuming, without deciding, that the district court erred in denying Mr. Russell’s lesser included offense instruction, any such error was harmless. The standard we apply to harmless error review turns on whether the error is constitutional. *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc). A constitutional error may be harmless if the court is “able to declare a belief that it was harmless beyond a reasonable doubt.” *Id.* (quotation marks and citation omitted). “A non-constitutional error is harmless unless it had a ‘substantial influence’ on the outcome or leaves one in ‘grave doubt’ as to whether it had such effect.” *Id.* at 1469 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Neither the Supreme Court nor the Tenth Circuit has recognized a federal constitutional right to a lesser included offense instruction in a non-

capital case. *Tiger v. Workman*, 445 F.3d 1265, 1268 (10th Cir. 2006). Accordingly, we apply the less stringent standard from *Rivera* to Mr. Russell’s claim of error concerning his proposed lesser included offense instruction. *See* 900 F.2d at 1470.

The evidence against Mr. Russell is overwhelming. He confessed to raping C.E. and he presented no evidence that his confession was coerced. He further admitted that he was a “very, very violent person” and that he used a sword “to make things go [his] way.” Rec., vol. IV at 177, 179. The severity of C.E.’s injuries support Mr. Russell’s statements. She had thirty-two separate injuries all over her body and an additional seven to her genital area. Nurse Eldred testified that C.E.’s internal genital injuries were consistent with “very rough handling.” Rec., vol. III at 1084–85. In rebutting this evidence, Mr. Russell merely offered the proposition that consensual sex can cause internal genital injuries without providing any evidence that C.E.’s specific injuries could have arisen from consensual sex. Because we conclude that any potential error by the district court in denying a lesser included offense instruction neither had a “substantial influence” on the outcome nor created a “grave doubt” as to whether it had such effect, we decline to address the merits of Mr. Russell’s argument. *See Rivera*, 900 F.2d at 1470.

For all the foregoing reasons, we AFFIRM.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA

Judgment in a Criminal Case

V.

MELVIN RUSSELLCase Number: **1:14CR02563-001PJK**USM Number: **07066-046**Defendant's Attorney: **Mark H Donatelli, Paul M Linnenburger**

THE DEFENDANT:

- ☐ pleaded guilty to count(s) .
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☒ was found guilty on count(s) **S1 of Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count</i>
18 U.S.C. Sec.2241(a) and 18 U.S.C. Sec. 2246(2)(A)	Aggravated Sexual Abuse, Crime in Indian Country, 18 U.S.C. Sec. 1153	05/20/2014	S1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) .
- ☐ Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 25, 2018

Date of Imposition of Judgment

/s/ Paul Kelly, Jr.

Signature of Judge

Honorable Paul Kelly, Jr.**United States Circuit Judge**

Name and Title of Judge

November 8, 2018

Date

DEFENDANT: **MELVIN RUSSELL**
CASE NUMBER: **1:14CR02563-001PJK**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **235 months**.

☒ The court makes the following recommendations to the Bureau of Prisons:

FCC Tucson, AZ and the BOP Sex Offender Treatment Program.

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at on .
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to
_____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MELVIN RUSSELL**
CASE NUMBER: **1:14CR02563-001PJK**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **10years** .

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.
14. You must undergo a sex offense-specific assessment to determine the level of risk for sexual dangerousness, recidivism, and amenability to treatment and formulate treatment recommendations if treatment is necessary. You may be required to pay all, or a portion of the cost of the assessment.
15. You will waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer shall disclose the presentence report and/or any previous sex offender or mental health evaluations to the treatment provider.
16. You must submit to a search of person, property, residence, vehicles, documents, businesses, computers [as defined in 18 U.S.C. 1030(e)(1)], and other electronic communications or data storage devices or media effects, at any time, by a probation officer with reasonable suspicion concerning a violation of a condition of probation or supervised release, or unlawful conduct by the person, in the lawful discharge of the officer's supervision functions. You must inform any other occupants that the premises may be subject to searches pursuant to this condition. Failure to submit to a search may be grounds for revocation of supervision.
17. You will not have any direct or indirect contact or communication with the victim or his or her family, or go near or enter the premises where the victim or his or her family resides, is employed, attends school or treatment, except under circumstances approved in advance and in writing by the probation officer.

DEFENDANT: MELVIN RUSSELL
CASE NUMBER: 1:14CR02563-001PJK

SPECIAL CONDITIONS OF SUPERVISION

You must not use or possess alcohol.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic cannabinoids, synthetic cathinones, etc.) that impair your physical or mental functioning, whether or not intended for human consumption.

You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous mental health evaluations and/or other pertinent treatment records to the treatment provider.

You must reside in a residential reentry center for a term of (up to) 6 months. You must follow the rules and regulations of the center.

You must not communicate, or otherwise interact, with the victim(s), either directly or through someone else

You must undergo a sex offense-specific assessment to determine the level of risk for sexual dangerousness, recidivism, and amenability to treatment and formulate treatment recommendations if treatment is necessary. You may be required to pay all, or a portion of the cost of the assessment.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer shall disclose the presentence report, any previous sex offender evaluations and/or other pertinent treatment records to the treatment provider.

If recommended in the sex offense-specific assessment, you must begin attending and participating in sex offender treatment consistent with the recommendations of the evaluation. You must follow the rules and regulations of that program. The probation officer, in conjunction with the treatment provider, will supervise your participation in the program (location, modality, duration, intensity, etc.). Furthermore, you must submit to clinical polygraph examinations, as directed by the probation officer and/or treatment provider. You may be required to pay a portion or all of the cost of the assessments and treatment.

You are prohibited from viewing or possessing any material that depicts sexually explicit conduct as defined in 18 U.S.C. 2256, including images, books, writings, drawings, video games, or videos depicting actual sexual intercourse. This also includes computer or computer-generated images or pictures,

whether made or produced by electronic, mechanical, or other means. Should the sex offense-specific assessment determine this factor is not a risk, then this condition shall not be enforced.

You must not have direct contact with children under the age of 18 years without written approval of the treatment provider in conjunction with the probation officer. If you do have any direct contact with any child you know or reasonably should know to be under the age of 18 years, including your own children, without the permission of the probation officer in conjunction with the treatment provider, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous substance abuse evaluations and/or other pertinent treatment records to the treatment provider.

You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing may include urine testing, the wearing of a sweat patch, a remote alcohol testing system, an alcohol monitoring technology program, and/or any form of prohibited substance screening or testing. You must not attempt to obstruct or tamper with the testing methods. You may be required to pay all, or a portion, of the costs of the testing.

You must participate in and successfully complete a community-based program which provides education and training in anger management.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: MELVIN RUSSELL
CASE NUMBER: 1:14CR02563-001PJK

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	Assessment	JVTA Assessment*	Fine	Restitution
	\$100.00	\$	\$	\$

☒ The determination of the restitution is deferred until a later date. An *Amended Judgment in a Criminal Case* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ In full immediately; or

B ☒ \$100.00 due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

The Court finds the Mandatory Restitution Act of 1996 is applicable in this case. The Court intends to order restitution; however, restitution has not yet been determined. Therefore, the Court will establish a restitution amount and schedule at a later date.

Based on the defendant's lack of financial resources, the Court will not impose a fine or a portion of a fine. However, in accordance with U.S.S.G. 5E1.2(e), the Court has imposed as a special condition that the defendant reside at a residential reentry center. The Court concludes the total combined sanction without a fine or alternative sanction, other than the defendant reside at a residential reentry center, is sufficiently punitive.

The defendant is subject to the provisions of the Justice for Victims of Trafficking Act of 2015, which requires the Court to assess an amount of \$5,000 on any non-indigent person or entity convicted of an offense under 18 U.S.C. Chapters 77, 109A, 110, 117; or Section 274 of the Immigration and Nationality Act (8 U.S.C. § 1324). The Court finds the defendant is indigent and will not be required to pay the \$5,000 assessment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties; and (9) costs, including cost of prosecution and court costs.

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

MELVIN RUSSELL,

Defendant.

No. 1:14-cr-02563-PJK-1

ORDER ON DEFENDANT'S RULE 412 MOTION

THIS MATTER came on for consideration of Defendant's Rule 412 Motion filed April 23, 2018, (ECF No. 208) and the court heard argument from the parties in accordance with Rule 412(c)(2) on May 4, 2018. Upon consideration thereof, the Motion is not well taken and should be denied.

The court considered Mr. Russell's proffer under Fed. R. Evid. 412(b)(1)(A)-(C). Although not argued at the hearing, Mr. Russell also argues that the procedure required by Rule 412 is unconstitutional and violates due process, the right against self-incrimination, and the right to counsel as outlined in the Fifth and Sixth Amendments. ECF No. 208, at 1. He maintains that Rule 412 penalizes him by making him provide the government with attorney work-product including his trial strategy. The court finds no authority supporting the proposition; the case relied upon, Spevack v. Klein, 385 U.S.

511 (1967), held that disbaring a lawyer for the mere invocation of the Fifth Amendment privilege against self-incrimination was unconstitutional. Here, Mr. Russell is free to pursue his trial strategy, but he must do it with relevant and admissible evidence. Just as a court may place reasonable limits on cross-examination, so too may it apply procedures to ensure that the concerns of Rule 412 are satisfied. See United States v. Torres, 937 F.2d 1469, 1473 (9th Cir. 1991). Moreover, Rule 412 expressly allows admissibility when exclusion would compromise constitutional rights, Fed. R. Evid. 412(b)(1)(C), so the court finds no basis for concluding that the procedure itself violates his constitutional rights.

Mr. Russell seeks to admit evidence that the alleged victim had vaginal intercourse with someone other than Mr. Russell within five days of the incident in question. He suggests that someone else could be responsible for her injuries, particularly given her medical condition. Fed. R. Evid. 412(b)(1)(A). He also seeks to admit evidence that he had consensual sex with the alleged victim one month prior to the incident in question, ostensibly to demonstrate later consent. Fed. R. Evid. 412(b)(1)(B). He also contends that his proposed evidence satisfies Rule 412(b)(1)(C) which allows admission of specific instances of sexual behavior when exclusion would violate his constitutional rights. As became clear at the hearing, Mr. Russell also seeks to admit as impeachment evidence the alleged victim's initial statement to the SANE nurse that she had consensual sex within five days of the alleged sexual assault, in contrast to her current position that she does not remember. Rule 412 plainly applies to cross-examination of the alleged victim about past

sexual behavior. Torres, 937 F.2d at 1472–73; see also Fed. R. Evid. 412 advisory committee’s note to 1994 amendment (noting that Rule 412 bars “evidence relating to the alleged victim’s sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment.” (emphasis added)).

Based on the record to date, Mr. Russell has brought no specific evidence to the court’s attention tending to show that someone else was responsible for the alleged victim’s injuries or that the prior sexual encounter was in any way violent or rough. Fed. R. Evid. 412(c)(1)(A). The SANE nurse indicated that the injuries suggest violent or rough sex, and no evidence suggests otherwise. The defendant’s “proffered evidence bears no adequate connection” to the injuries or events in this case. See United States v. Pablo, 696 F.3d 1280, 1299 (10th Cir. 2012) (upholding exclusion where the evidence bears “only a speculative and tenuous relationship” to the claim that others may have caused the injuries). In short, the proffer comes up short, and after considering the alternative bases urged, Fed. R. Evid. 412(b)(1)(A), (C), the court concludes that exclusion is warranted.

Mr. Russell is correct that under Fed. R. Evid. 412(b)(1)(B), the court may admit evidence of his prior sexual encounter with the alleged victim if offered to prove consent. The government disputes that the prior sexual encounter was consensual, ECF No. 217, at 7, and for that reason as well as the tenuous connection between the prior sexual encounter and this alleged sexual assault (there is no evidence of bruising or physical trauma in the prior sexual encounter like there is in the present case), it seems dubious

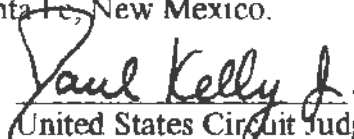
that the evidence would fall under 412's exception. See United States v. Pumpkin Seed, 572 F.3d 552, 560 (8th Cir. 2009). However, assuming that the evidence would cross 412's barrier, the court must still conduct a Rule 403 balancing test to determine admissibility. See United States v. Powell, 226 F.3d 1181, 1198 (10th Cir. 2000). The court finds that having (disputed) consensual sex once one month prior contains very little probative value to the issues presented. As mentioned above, no evidence has been presented that the prior sexual encounter resulted in injuries or bruising as in the present case, making the connection between the two encounters dubious. Indeed, Mr. Russell's varying characterization of his conduct for the present case toward the alleged victim ranges from denial to lack of memory to rape, and now consent. Finally, the evidence that the prior sexual encounter was consensual is thin at best. The court finds that this evidence would be unfairly prejudicial, confuse and mislead the jury, and be a waste of time. These dangers substantially outweigh any probative value the evidence has and so the evidence should be excluded.

Insofar as impeaching the alleged victim with her prior statement about consensual intercourse, the court believes this evidence should be excluded under Rule 412 because it does not fall into any of the exceptions. See United States v. Withorn, 204 F.3d 790, 795 (8th Cir. 2000) ("[I]mpeaching the victim's truthfulness and showing her capability to fabricate a story 'are not recognized exceptions to Rule 412.'" (quoting United States v. White Buffalo, 84 F.3d 1052, 1054 (8th Cir.1996))). Furthermore, the court is persuaded that the probative value is minimal given the circumstances of this alleged

offense. See United States v. Azure, 845 F.2d 1503, 1506 (8th Cir. 1988). The exclusion of such evidence is not arbitrary or disproportionate given the purposes which Rule 412 is designed to serve. See Pumpkin Seed, 572 F.3d at 560.

NOW, THEREFORE, IT IS SO ORDERED that Defendant's Rule 412 Motion filed April 23, 2018, (ECF No. 208) is denied.

DATED this 6th day of May 2018 at Santa Fe, New Mexico.


United States Circuit Judge
Sitting by Designation

**Evidence, Argument, and Oral Ruling of the District Court
on Mr. Russell's Renewed Motion Under Fed. R. Evid. 412,
Contained in Record on Appeal, Vol. III**

**Relevant Trial Testimony of Susan Eldred, R.N.,
and Argument and Ruling Pertaining to Same**

1 (Witness sworn.)

2 CLERK: Please be seated.

3 GOVERNMENT WITNESS SUSAN ELDRED,
4 after having been first duly sworn under oath,
5 was questioned and testified as follows:

6 DIRECT EXAMINATION

7 BY MS. DIMAS:

8 Q. Good morning.

9 A. Good morning.

10 Q. Would you please state and spell your name for the record.

11 A. My name is Susan Eldred. Susan, S-U-S-A-N; Eldred,
12 E-L-D-R-E-D.

13 Q. Ms. Eldred --

14 THE COURT: You're going to have to speak into the
15 microphone. It's on your left there, the little thing sticking
16 up.

17 Q. You can actually move that microphone around. Scoot your
18 chair up to it as much as you can.

19 A. Okay.

20 I'm a nurse.

21 Q. And how long have you been a nurse?

22 A. Just over eight years.

23 Q. And where are you currently employed?

24 A. I will be starting a new job at St. John's Hospital in
25 Tulsa, Oklahoma.

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DNM 1054

1 Q. What type of nursing will you be doing there?

2 A. I'll be working in the adult intensive care unit.

3 Q. And prior to your new employment with Tulsa, Oklahoma,
4 where did you work before that?

5 A. I worked at San Juan Regional Medical Center in
6 Farmington, New Mexico.

7 Q. And how long were you there?

8 A. I was there for six-and-a-half years.

9 Q. What did you do at San Juan Regional?

10 A. I worked in the intensive care unit there as well.

11 Q. Did you do anything else as a nurse while you were there?

12 A. I worked for another organization called Sexual Assault
13 Services of Northwest New Mexico, and I worked for them as a
14 SANE nurse.

15 Q. And SANE, that's sexual assault nurse examiner, that's
16 what it stands for?

17 A. That's correct.

18 THE COURT: Excuse me.

19 (A discussion was held off the record.)

20 Q. (By Ms. Dimas) Prior to working at San Juan Regional
21 Medical Center, did you work anywhere else?

22 A. I did. I worked for St. Luke's Medical Center in Boise,
23 Idaho.

24 Q. And how long were you there?

25 A. Just under two years as a registered nurse. I also worked

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1 there before -- before I graduated from nursing school.

2 Q. Talk a little bit about your educational background.

3 A. I attended Boise State University and I got an associate's
4 degree of science and nursing, and then I continued on getting
5 credits towards my Bachelor's degree, but I haven't finished
6 it.

7 Q. And you talked about your position as a SANE nurse at San
8 Juan Regional Medical Center. What did you have to do in order
9 to become qualified to perform those types of examinations?

10 A. Just to clarify, San Juan Regional Medical Center does not
11 have a SANE program. I worked as a SANE nurse for Sexual
12 Assault Services of Northwest New Mexico.

13 Q. Thank you for clarifying. So how did that relationship
14 work with San Juan Regional Medical Center?

15 A. So San Juan Regional donated the office space for the
16 Sexual Assault Services of Northwest New Mexico, but they were
17 completely separate entities.

18 Q. Okay. We'll talk a little bit more about that in a bit.
19 I want to talk a little bit more about how you learned how to
20 perform SANE examinations.

21 A. So, I went to a training course to become a SANE nurse. I
22 came from Farmington to Albuquerque over two weekends.
23 Sixty-four credit hours of training is spread out over three
24 days. One weekend and three days a couple weeks later, and
25 then following that a few weeks later came back for a genital

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1 skills assessment lab where we learned how to do speculum exams
2 and just focused genital examine assessments.

3 Q. And so that was the hands-on portion of your training?

4 A. Yes.

5 Q. And as you performed SANE examinations, did you continue
6 to get training as you were doing that?

7 A. Yes. So following the -- following the didactic training
8 or the two weekends of classroom material and then the genital
9 skills lab, also followed an experienced SANE nurse for several
10 cases. I believe I shadowed six or seven cases with an
11 experienced nurse, and then also when I started doing my own
12 examinations for the first two or three an experienced nurse
13 followed me to make sure that -- that I had everything correct.

14 Q. Have you ever testified as an expert in court before?

15 A. As an expert, no.

16 Q. Okay. Have you ever testified in a court before?

17 A. Yes.

18 Q. How many times?

19 A. Three.

20 Q. And has it been as a SANE nurse?

21 A. Yes.

22 MS. DIMAS: Your Honor, the United States submits
23 Ms. Eldred as an expert in the field of nursing and
24 sexual-assault examinations.

25 THE COURT: I'm sorry?

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1 MS. DIMAS: The United States submits Ms. Susan
2 Eldred as an expert in nursing and sexual assault exams.

3 THE COURT: All right.

4 MR. LINNENBURGER: Subject to my previous objections,
5 Your Honor, and also lack of foundation currently.

6 THE COURT: Very good.

7 Q. (By Ms. Dimas) All right, Ms. Eldred. What exactly is a
8 SANE examination?

9 A. A SANE examination is a focused medical examination for
10 patients who present after sexual assault.

11 Q. And when you were working for the Northern New Mexico
12 organization, how would a patient be referred to you?

13 A. Sometimes the patient would call the hotline or the rape
14 crisis line directly and be referred to us from there.
15 Sometimes if they went to the hospital, the nurse from the
16 hospital would call. Sometimes law enforcement would call and
17 refer a patient.

18 Q. And when your organization would receive a call, what
19 would you do in order to provide an examination for that
20 patient?

21 A. So, I would speak to the patient and ask them if they
22 would like to have a sexual-assault exam. All exams are
23 completely voluntary. And then I would generally make an
24 appointment to see the patient as soon as possible at our
25 clinic.

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1 Q. Was there a general timeline in terms of how soon you
2 would like to see those patients?

3 A. We like to see them immediately. Definitely the protocol
4 for Sexual Assault Services of Northwest New Mexico when I was
5 on call, I needed to be available within an hour to see the
6 patient. So with a -- We would see them -- We needed to see
7 them within 96 hours after the assault.

8 Q. Why was that important?

9 A. It's important because of the effectiveness of the
10 medications that we give diminish over time. Also, their care
11 isn't -- you don't need acute care after that time period. The
12 injuries mostly have healed within that time frame --

13 Q. As part -- I'm sorry, go ahead.

14 A. -- and any -- there isn't -- if the patient was wanting to
15 collect evidence, that's not typically available after that
16 five-day period.

17 Q. What usually happens after that five-day period? Why
18 would it be difficult to collect physical evidence after that
19 time period?

20 A. It's difficult because it's -- physical evidence would
21 typically be washed away just with normal activities, bathing,
22 urinating, things like that.

23 Q. Okay. So once a patient makes a phone call in to your
24 organization, an appointment is set up, do you meet them at the
25 medical center?

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1 A. At the SANE office, yes.

2 Q. Okay. So what happens after a patient comes in and is
3 there for their examination?

4 A. So, typically when a patient comes in, they -- if it's
5 after hours, then they knock on the -- on the back door or
6 contact me by cell phone and I open the door and welcome them
7 into the clinic. If it's during business hours, they come --
8 come to the front door. And the office is in a -- it's in a
9 medical complex. There's an optometrist across the way and
10 just a -- you know, sort of like going into any -- any office.
11 They would go to the front desk and tell them -- tell the
12 person at the front desk why they were there, and then they'd
13 be shown to a comfortable sitting area, and then we would sit
14 down and talk about why they were there.

15 Q. Do you obtain consent in order to proceed with the
16 examination?

17 A. Yes.

18 Q. Why is that important?

19 A. Because all the services that are offered to patients are
20 voluntary. There's -- You can't compel a patient to have a
21 sexual-assault exam, and they have to consent to which services
22 they would like to have and which services they don't want to
23 have.

24 Q. So when a patient comes to you, they don't have to do the
25 entire exam? They can just do parts of it if they would like?

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1 A. That's correct.

2 Q. So once a patient consents to an examination, what happens
3 next?

4 A. So, the first thing that we do is I go over the consent
5 form with them line by line in detail, explain to them the
6 procedure for the examination and ask them which services they
7 would like. They sign the consent, and then go through the --
8 there's a packet that we go through in order to -- in order to
9 complete the exam.

10 So the first part of it is just talking about what
11 happened, ask open-ended questions. Can you tell me what
12 happened today? And then I write down their statement.

13 Q. Is that packet a packet that all SANE nurses in New Mexico
14 use?

15 A. It is.

16 Q. So it's not something that you came up with? It's just a
17 standardized packet?

18 A. It is.

19 Q. Okay. So you said that you ask them what happened. How
20 do you conduct that collection of their history?

21 A. I'm sorry, it's been -- it's been a couple of years since
22 I -- since I've actually taken a history. I don't work for
23 Sexual Assault Services anymore.

24 There's each page of the packet, just go through it
25 in order and ask kind of what happened. Can you tell me what

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1 happened to you today? Or --

2 Q. So why is it important to know why they're there?

3 A. Because what they tell me about what happened guides my
4 examination. The examination of a SANE nurse is specifically
5 for sexual assault. We don't identify other medical or
6 underlying conditions. So I need to know what happened so that
7 I know where to look for injuries and so that can better treat
8 them.

9 Q. So what they tell you, is that important also for any type
10 of diagnosis you might make during that examination?

11 A. Well, nurses don't make diagnoses. That's not something
12 that we -- that we do.

13 Q. But do you treat them if you need to?

14 A. Yes. So we ask about -- ask about pain. We look for
15 injuries that may not be obvious on the outside. It takes some
16 time for bruising to appear after -- after trauma sometimes, so
17 it may not be obvious when the patient first comes in, and so
18 we ask so that we can look for things that may be hidden.

19 Q. Okay. So after you're done collecting a history of what
20 happened to the patient, do you conduct the physical part of
21 the examination?

22 A. Yes. We also get a medical history. And it's just --
23 just ask the patient if they have any chronic medical issues,
24 and they can disclose that, ask them if they're taking any
25 medications, if they have any allergies, because we do give

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1 medications. We want to make sure that the patient's not going
2 to be allergic to them.

3 Q. And why is the medical history important for the assault
4 examination, their previous medical history?

5 A. Previous medical history, if they're taking any
6 medications or something that would -- that would be
7 contraindicated with the medications that we give, or if they
8 have allergies to the -- We use a special dye during the
9 genital examination, and in patients who are allergic to iodine
10 we can't use it, so it's just important to know those things
11 ahead of time.

12 Q. So walk us through a physical examination. What happens
13 first.

14 A. So the first thing that we do after -- when it's time to
15 do the physical examination, we go from the sitting area into
16 the examination room, which is across the hall. Sometimes
17 the -- if the patient has opted to have a full exam, which
18 includes photo documentation and collection of DNA or trace
19 evidence, we take their photograph with them dressed in
20 their -- in their clothes as they are, and then have them
21 disrobe and put on an examination gown. And then we do a
22 head-to-toe physical assessment, look at the scalp, see if
23 there are any injuries, on the face, and just work our way
24 down -- down the body.

25 Q. As you're doing that physical assessment, do you note any

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1 abnormalities?

2 A. We do.

3 Q. And how do you do that? I guess a better question is, how
4 do you document that in your examination?

5 A. So during the examination, look at them and talk to the
6 patient during that time, take photographs of them, of the
7 injuries if that's requested, and then we measure the --
8 measure the bruises or the -- or the abrasions and palpate
9 them, feel them, see if they're -- if they're tender, if they
10 obstruct the range of motion for the patient, see if there's
11 any problems. And then write a report. Have -- During the --
12 During the actual examination, usually write down the physical
13 description of the injury with the measurements.

14 Q. Okay. Do you also conduct a pelvic examination?

15 A. We do.

16 Q. And do you document any injuries in the pelvic examination
17 the same way that you do the full-body examination?

18 A. Yes. It's slightly different in that I don't write down
19 the injuries at the time that I'm doing the pelvic examination,
20 because I need both hands, and it's a very invasive
21 examination. We want to make it as thorough and as fast as
22 possible, so the report that's written is generally done based
23 on the -- on the photographs that I -- that I take.

24 Q. As you're doing the physical examination and the pelvic
25 examination, how do you collect physical evidence?

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1 A. So, to collect body evidence, use swabs, which are
2 basically long sterile Q-tips. Moisten one with sterile water
3 and lightly rub it along the area that I want to collect
4 evidence from, or potential evidence from, and then follow that
5 wiping a dry one on there. Then we place it in an air dryer to
6 completely -- completely dry it, and then place it in a
7 collection envelope labeled with the -- the location of the
8 collection.

9 Q. When you say "the location of the collection," are you
10 talking about the part of the body where it was collected?

11 A. Yes.

12 Q. Okay. How do you decide where to swab?

13 A. That's based on what the patient has told me during the --
14 during the narrative. You know, if she tells me that she was
15 touched on her neck or bitten on her neck, then I'll swab
16 there.

17 Q. Do you use any tools to help you decide where to collect
18 evidence?

19 A. Also during the -- during the physical examination, we use
20 what's called a torch lamp or an alternate light source,
21 because physiological materials, vaginal fluid, semen, urine,
22 things like that, they have fluorescence, so if anybody's ever
23 seen CSI where they put on their glasses and they get out the
24 light and then something glows, that's what they're doing. And
25 so -- so we actually do that. And then if there's something

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1 that fluoresces or glows, then we'll take a swab from that
2 area.

3 Q. All right. Did you have occasion to meet a woman named
4 C E on May 20th -- or, I'm sorry, May 21st of 2014?

5 A. I did.

6 Q. And how did she come to the SANE clinic?

7 A. She didn't actually come to the SANE clinic. I was
8 contacted by a nurse from San Juan Regional in the emergency
9 room. She told me that she had a patient there who had been
10 sexually assaulted and wanted to have a SANE exam. And so I
11 spoke with the patient on the phone at that time and asked her
12 directly. That's part of our policy. We can't take anyone
13 else's word for it. If the patient wants to have an exam, they
14 have to tell me personally that they want to have the exam. So
15 I spoke with her on the phone. She confirmed that she did in
16 fact want to have an exam.

17 She was in the emergency room still undergoing
18 treatment at that time, so I got ready and went into the -- to
19 the clinic just waiting for her to be discharged so that she
20 could come over to the clinic and do the exam.

21 Q. And when you say she was discharged, was she completely
22 discharged from the hospital or just discharged to come to you?

23 A. I was waiting for her to be discharged from the hospital,
24 but she didn't actually get discharged from the emergency room.
25 She was admitted to stay. Her injuries indicated that she

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1 needed to stay.

2 Q. Okay. So where did you perform the examination?

3 A. I performed the examination at San Juan Regional on the
4 third floor.

5 Q. Was that in your clinic or was that in where she was
6 staying?

7 A. It was at San Juan Regional. The clinic is completely
8 separate in a building down the street.

9 Q. So it was San Juan?

10 A. Yes.

11 Q. Did you use the standard form that you talked about
12 earlier in order to document the examination?

13 A. I did.

14 Q. Okay. Did you collect a medical history from Ms. E ?

15 A. I did.

16 Q. Did you also talk to her about what happened to her?

17 A. I did.

18 Q. And what did she tell you?

19 A. She told me that she was thrown into a room and her
20 clothes were torn off. She was very anxious and tearful. It
21 was difficult for her to talk about what happened. She
22 indicated that it was just too much. She didn't -- She didn't
23 really specify what happened. She said when he was done, she
24 went to the bathroom or -- and he watched her and then made her
25 go back into the room and it happened again and that he was

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1 more aggressive, that he was doing stuff with her -- with her
2 boobs and her neck. He -- She had indicated at some point that
3 he had choked her and that she was -- she was very afraid.

4 She said that he pulled out a Samurai sword and told
5 her that he could easily chop up her body and bury it all over.
6 She said at that point she started being nice because she was
7 so afraid. And when her friend woke up, she had her -- she
8 asked her friend to take her somewhere else, to another
9 friend's house and just expressed that she was so relieved to
10 get out of there.

11 Q. After she provided this medical history to you, what did
12 you do next as part of your examination of Ms. E ?

13 A. I asked her a series of specific questions. There's a
14 detailed list in the charting about -- it's called a summary of
15 acts. So asked her specific questions about what things had
16 happened to her, if she had had a -- if the -- if the -- if
17 during her assault she'd had a penis inserted in her vagina, or
18 finger or foreign object. And she indicated that she had. I
19 asked her if she had any of those things inserted into her
20 anus, and she indicated that she had not. I asked about being
21 bitten or licked or kissed, and she indicated that she was
22 bitten on her nipples. She indicated that she was choked or
23 strangled and that -- that he had put her in a sleeper hold and
24 that she'd almost passed out, but not quite.

25 And then I also asked her questions about things that

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1 she had done after the assault. It's important for the lab to
2 know if -- So I asked her if she'd used the bathroom, if she
3 brushed her teeth, if she had had anything to eat or drink
4 since the assault. And she indicated that she had -- she had
5 urinated and I believe she brushed her teeth. I don't recall
6 exactly, but she hadn't showered. And so those -- that
7 information helps me to know where to -- where to focus and
8 look for potential evidence and for potential injuries.

9 Q. So after collecting those specific details from Ms. E ,
10 did you conduct the physical examination of her?

11 A. I did.

12 Q. And as you were conducting that physical examination, did
13 you note any injuries?

14 A. I did.

15 Q. How many?

16 A. I noted 32 separate body injuries and another seven
17 injuries to her genital area.

18 Q. And did you document those in your report?

19 A. I did. I detailed each one of those individually and I
20 also took 118 photographs.

21 MS. DIMAS: May I approach the witness?

22 THE COURT: You may.

23 Q. (By Ms. Dimas) Ms. Eldred, I'm handing you what's been
24 labeled as United States Exhibits 11 through 24.

25 THE COURT: 9 through 24?

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1 MS. DIMAS: 11 through 24.

2 THE COURT: 11 through 24.

3 Q. (By Ms. Dimas) You can take a look at those and let us
4 know if you recognize those.

5 A. (Witness complied.) I do.

6 Q. And what are those photos of?

7 A. These are some of the photographs that I took of C
8 E during her examination.

9 MS. DIMAS: Your Honor, the United States seeks to
10 admit Exhibits -- I believe 11 and 12 are already admitted, but
11 seeks to admit 13 through 24.

12 THE COURT: Any objection?

13 MR. LINNENBURGER: Subject to previous objections on
14 this witness, Your Honor.

15 THE COURT: They'll be admitted.

16 (Government's Exhibits 13 through 24 admitted into
17 evidence.)

18 MS. DIMAS: May I publish?

19 THE COURT: You may.

20 MS. DIMAS: I don't believe the screens are on.

21 THE COURT: I'm sorry, I didn't hear you.

22 MS. DIMAS: The screens aren't on.

23 Q. (By Ms. Dimas) Ms. Eldred, what is that a photo of?

24 A. That is a photo of Ms. E 's neck and chin.

25 Q. And if you could describe the injuries that are noted on

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1 there.

2 THE COURT: Can you please use the microphone?

3 MS. DIMAS: Sure. I'm sorry.

4 Q. (By Ms. Dimas) Could you please describe the injuries in
5 that photo.

6 A. She has some -- She has dark purple bruising. I can't --
7 The -- The color in the photographs isn't -- isn't great, so I
8 can't really give an accurate depiction of the color, but she
9 has several bruises along her neck and the underside of her
10 chin.

11 Q. And Ms. E , did she tell you about any specific actions
12 by her assailant regarding those particular injuries?

13 A. She talked about the -- he put her in the sleeper hold,
14 and she wasn't specific, but she said that he was doing stuff
15 to her neck.

16 Q. United States Exhibit 12. Do you recognize that, or what
17 is that a photo of?

18 A. I do. It's a different perspective on the photograph that
19 we just saw. It shows more clearly the bruise on the underside
20 of her chin.

21 Q. This is United States Exhibit 13. What is that?

22 THE COURT: Excuse me. What is the shadow that's
23 showing across there?

24 MS. DIMAS: It's this top.

25 THE COURT: Okay. That's -- If you could move that

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1 where it's not -- because it blocks off whatever you're trying
2 to show.

3 MS. DIMAS: I think the lighting in this courtroom
4 creates that shadow, unfortunately.

5 THE COURT: Okay. I guess there's nothing we can do
6 about it.

7 MS. DIMAS: Yeah. Sorry, Your Honor, I don't know
8 how to fix that.

9 THE COURT: That's all right.

10 Q. (By Ms. Dimas) I'm sorry. What was that a photo of?

11 A. It's a photograph of a bruise on her upper chest above her
12 clavicle, more on her neck than her chest. Right here
13 (indicating).

14 Q. This is United States Exhibit 14. What is that a photo
15 of?

16 A. It is a bruise on the back of her left arm.

17 Q. United States Exhibit 15. What is that a photo of?

18 A. There are several bruises along the upper portion of her
19 left breast.

20 Q. Did she talk about what her assailant did to her breasts
21 during your collection of her medical history?

22 A. She stated that he bit her nipples and did stuff to her
23 breasts.

24 Q. Did you -- Besides taking photos, did you collect any
25 physical evidence from her?

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1 A. I did. I collected swabs from both of her nipples.

2 Q. Both her left and right side?

3 A. Yes.

4 Q. This is United States Exhibit 16. And what is that a
5 photo of?

6 A. That's a picture of her right breast and also bruising on
7 her right breast.

8 Q. This is United States Exhibit 17. What is that a photo
9 of?

10 A. I believe that it's her right forearm, but with the shadow
11 it's very difficult to tell.

12 THE COURT: So if you move that podium up, since
13 you've got that on, will that change the --

14 MS. DIMAS: It will bring this along with it.

15 THE COURT: No, yeah, but the light -- it's the light
16 above it that's shining down. A little more.

17 That's better.

18 MS. DIMAS: Thank you, Judge.

19 A. So that's the inside or the anterior portion of her right
20 forearm bruising.

21 Q. (By Ms. Dimas) This is United States Exhibit 18. What
22 is that a photo of?

23 A. I believe that is her left flange. So you can see some
24 bruising along the -- along the bottom. Where you can see the
25 hospital gown, there's a scar from the nephrectomy, or kidney

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1 removal, that is noted in the -- in the history, and then
2 there's some additional bruising towards the -- towards the
3 middle.

4 Q. Did you notice any swelling in that area from your
5 recollection?

6 A. I can't tell from the photographs, but she described the
7 majority of her bruising was tender and swollen.

8 Q. Did she describe any type of pain to that area of her
9 body?

10 A. She did. She -- She said that she had pain on a scale of
11 zero to ten, where zero is no pain at all and ten is the worst
12 imaginable pain, when I first saw her in the emergency room,
13 she stated that her pain was a ten out of ten. The nurse in
14 the emergency room gave her four milligrams of morphine through
15 her IV, and after about half an hour she said that her pain had
16 reduced to an eight of ten. She complained about pain in her
17 abdomen, her back, and her pelvis, her genital area.

18 Q. When you collected her medical history, did she complain
19 of any pain prior to the assault?

20 A. I don't believe so. I don't -- I don't recall.

21 Q. What about any of these bruises that were documented in
22 your photos? Did she indicate that she had any of those prior
23 to the assault?

24 A. She did not.

25 Q. This is United States Exhibit 19. What is that a photo

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1 of?

2 A. That is her right thigh and some bruising on her right
3 thigh.

4 Q. This is United States Exhibit 20. What is that a photo
5 of?

6 A. That is also her right thigh.

7 Q. This is United States Exhibit 21. What is that a photo
8 of?

9 A. So I believe that is a photograph of a bruise on her --
10 the upper part of her buttock.

11 Q. And if you could kind of note where -- besides the large
12 bruise that's in the middle of the photo, where you noted
13 bruising.

14 A. Well, there's actually a couple of things. So, on the --
15 Oh, you can see that. So there's this bruise here where I put
16 the little green dot, and that's more towards the middle of her
17 lower back right above her gluteal cleft, or her butt crack, I
18 guess. I don't know the appropriate thing to say. And then
19 also right in this area she's got a bruise that's very
20 difficult to see because her skin is so dark, but that area
21 right there was also bruised and swollen and tender, if I
22 recall correctly.

23 Q. And for the record, you circled an area in the middle of
24 the photo that appears to be darker in that picture. Is that
25 correct?

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1 A. Yes.

2 Q. You can go ahead and press the "Clear" button.

3 A. (Witness complies.)

4 Q. Thank you.

5 This is United States Exhibit 22. What is that a
6 photo of?

7 A. It is a photo of her -- of her leg. Her knee is right
8 here, and I don't know if she was -- if she was laying facedown
9 or face up. The -- But I think that it was on the back, maybe
10 of her -- of her leg. If I could see my documentation, I could
11 tell you exactly where it is, but --

12 Q. Would looking at a copy of your SANE documentation help to
13 refresh your recollection?

14 A. It would.

15 MS. DIMAS: May I approach?

16 THE COURT: You may.

17 A. So --

18 Q. Does that help to refresh your recollection?

19 A. It does.

20 Q. And where was that bruise -- where was the location of
21 that particular injury?

22 A. It was on the outside of her right calf just below the
23 knee.

24 Q. This is United States Exhibit 23. What is that a photo
25 of?

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1 A. I believe it is a photograph of the back of her upper
2 thighs, some bruising there.

3 Q. So you took those photos as part of your physical
4 examination of her body?

5 A. I did.

6 Q. And you talked a little bit about collecting evidence by
7 her breast. Did you do any swabs of other parts of her body?

8 A. I did.

9 Q. And where was that?

10 A. I believe it was on her left buttock. I'm not -- I'm not
11 positive about that, but it was on the -- it was near the
12 gluteal fold or the -- or the bottom of her left buttock, and
13 it was an area that had the positive fluorescent --
14 fluorescence with the alternative light source.

15 Q. Okay. So after you conducted your examination of her
16 exterior body, did you conduct a pelvic exam of Ms. E ?

17 A. I did.

18 Q. And was there anything significant that you noted during
19 that exam?

20 A. There was. There were -- There were more injuries to her
21 external genital area, so her mons pubis, which is the area
22 right in front of the -- where the pubic hair grows. There was
23 some bruising there and also on the very inner aspect of her
24 upper thighs. There was also some bruising in her vaginal
25 area. It's called the anterior vestibule, which is just the

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1 top part of the vaginal area.

2 Q. You noted injuries there, as well?

3 A. I did. And on the hymen, the urethral meatus as well.

4 Q. If you could describe to the jury, where is the location
5 of the vulva in relation to the vagina?

6 A. Well, the vulva is the entire area. So if everybody can
7 see my hand. So the area -- this area of a woman's body is
8 about the size of her palm. So the entire -- entire area from
9 her clitoris to her anus is only about this big, so . . .

10 Q. Just to interrupt you, you're indicating about the size of
11 your palm?

12 A. Yes. Yes.

13 Q. Continue.

14 A. So the entire area there is called the vulva. The vagina
15 is about in the center here.

16 Q. Okay.

17 A. With the urethral meatus slightly above that and the
18 clitoris above that. So it's a very small area.

19 Q. So in relation to what you described, where was the
20 location of the injuries that you noted?

21 A. So the injuries would be -- Sorry. The injuries would be,
22 if the clitoris is here, the urethral meatus, there was dark
23 bruising there. There was also dark bruising on one side of
24 the anterior vestibule, which is right here. There was some
25 tearing up here in this area.

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1 Q. And you're indicating at the top of the vulva?

2 A. Yes. Yes. And then there was bruising on the hymen
3 itself.

4 Q. And did you photograph those injuries?

5 A. I did.

6 Q. This is United States Exhibit 24. What is that a photo
7 of?

8 A. That is a photo of bruising in the anterior vestibule, and
9 it's -- I believe I noted it from 10 to 11 o'clock maybe on the
10 charting. So this area right here, that's all bruising, and
11 abnormal. There are 16 pictures that I took of this area.
12 There was also -- You can't see it in this photograph, but
13 there was also bruising here and on this side over here.

14 Q. Did you use any tools in order to locate any additional
15 injuries in this area?

16 A. I did.

17 Q. Go ahead.

18 A. I used a special dye, it's called toluidine blue, and it
19 is a dark-blue stain. It's applied -- It comes in a little
20 vial with a cotton tip, and it's applied to the entire area and
21 then wiped off about two minutes later, and then any of the
22 areas that are still stained after the -- after the dye is
23 cleaned off are areas of broken skin. The dye sticks to the
24 nucleus in broken skin.

25 Q. And did you note any injuries based on the use of the

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1 toluidine blue?

2 A. I did.

3 Q. What did you note?

4 A. I noted that there were tears in -- in the vulva.

5 Q. Were those obvious to the naked eye?

6 A. I don't recall. It would be in my documentation.

7 Q. Would you like to look at your documentation to refresh
8 your recollection?

9 A. Yes.

10 MS. DIMAS: May I approach?

11 THE COURT: You may.

12 Q. (By Ms. Dimas) Does that refresh your recollection?

13 A. It does. I did not document that they were visible to the
14 naked eye.

15 Q. Once you were done conducting the pelvic examination, what
16 did you do next?

17 A. The pelvic examination is -- or the conclusion of the
18 pelvic examination is the conclusion of the examination with
19 the patient. During the -- during the examination, swabs are
20 collected. It's all done simultaneously, and so the swabs were
21 placed in the dryer, and so just my standard practice is to --
22 is to leave the swabs in the dryer for several minutes until
23 they're dry and then put them in the envelopes and label the
24 location, seal them as required in the instructions for the
25 kit.

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1 Q. The procedures that you follow regarding evidence
2 collection, is that a standard procedure that all SANE nurses
3 follow?

4 A. It is.

5 Q. And those swabs, once you collect them, how are they
6 secured?

7 A. They're secured, they stay in my line of sight until they
8 are either transferred to law enforcement or placed in a secure
9 locker.

10 Q. And that secure locker, who has the ability to collect the
11 evidence in that locker?

12 A. There are two people at the SANE office. The executive
13 director and the clinical coordinator are able to release
14 evidence. No one else has access.

15 Q. Okay. Based on your examination of the victim in this
16 matter, did her injuries appear to be consistent with her
17 account?

18 A. They did.

19 Q. And why do you believe that?

20 A. She described very --

21 MR. LINNENBURGER: Your Honor, I'm going to object
22 and ask that we approach.

23 THE COURT: I'm sorry?

24 MR. LINNENBURGER: I'm going to object and ask that
25 we approach.

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1 THE COURT: Just state your objection.

2 MR. LINNENBURGER: Your Honor, I really believe this
3 would be more appropriate at the bench.

4 THE COURT: All right.

5 (Bench conference on the record.)

6 THE COURT: Don't be shy.

7 MR. LINNENBURGER: Your Honor, I didn't want to
8 discuss pretrial rulings in front of the jury. That's why I
9 asked to approach. My understanding of the pretrial ruling on
10 this particular witness was that it had not yet been determined
11 whether or not she could testify as to whether or not injuries
12 were consistent with particular reported conduct.

13 THE COURT: That's all she could testify to. She
14 can't go beyond that.

15 MR. LINNENBURGER: I will say that I do believe that
16 based on the testimony from this witness to date the
17 prosecution has clearly opened the door to 412 evidence.

18 THE COURT: No 412 evidence is going to be involved.

19 MR. LINNENBURGER: If I may make a record on that,
20 Your Honor?

21 THE COURT: You may make a record.

22 MR. LINNENBURGER: She testified --

23 THE COURT: You have to ask her foundation
24 questions -- How old were they? Does it look old? Could it be
25 a week old? -- if you want to make a foundation.

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1 MR. LINNENBURGER: Your Honor, she already testified
2 that --

3 THE COURT: She did not --

4 MR. LINNENBURGER: -- she asked about sex within a
5 five-day period.

6 THE COURT: She did not say anything about that.

7 MR. LINNENBURGER: She testified that they want to
8 see the judge -- I apologize -- the individual within five days
9 because after that time evidence can be lost. They're
10 specifically looking for evidence, which clearly indicates that
11 evidence of consensual intercourse may also be there, which
12 again is why the question on the form. And if they are asking
13 that it is consistent with that, the alleged injuries are
14 consistent with supposed nonconsensual intercourse, they're
15 also potentially consistent with the consensual intercourse
16 within five days, which was testified to at the Daubert
17 hearing.

18 THE COURT: I don't think -- I think she testified
19 that she wants it within that period, but nothing that said it
20 was beyond two days, I don't think.

21 MS. DIMAS: No. Your Honor, I specifically asked
22 about how soon the SANE examiner would like to see the
23 victim --

24 THE COURT: Uh-huh.

25 MS. DIMAS: -- after a sexual assault. That was the

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1 line of questioning. She provided a timeline of when they
2 would want to see them, but had nothing to do with whether she
3 asked questions regarding other consensual sexual interactions
4 besides the assault that is alleged by the alleged victim.

5 Further, the question that I asked of Ms. Eldred was
6 specifically pulled from the order provided by the Court
7 regarding the question that we were allowed to ask. It's the
8 exact language that Your Honor provided in that order, so we
9 followed that order specifically. I don't think that the door
10 has been opened.

11 THE COURT: I don't think it's been opened either.
12 You've made your record.

13 MR. LINNENBURGER: Thank you, Your Honor.

14 (Open court.)

15 THE COURT: You may proceed.

16 Q. (By Ms. Dimas) Would you like me to ask you the question
17 that I previously asked you or do you --

18 A. Please. Please.

19 Q. I believe you were answering the question as to -- I'll go
20 ahead and ask the question. Based on your examination of the
21 victim in this matter, did her injuries appear consistent with
22 her account?

23 A. They did. She described very rough handling. She was hit
24 and kicked and stomped and thrown into a room. She has -- She
25 has tender bruises, a lot of tender bruises on her body. She

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1 had genital injuries that show that she was very roughly
2 handled.

3 Q. You talked a little bit about the swabs that you used in
4 this matter. When you do examinations of alleged victims of
5 sexual assault, are you looking for semen, or are you swabbing
6 with a mind to potential evidence of a fluid like semen.

7 A. Yes.

8 Q. And in this case what did the victim tell you in regards
9 to condom use?

10 A. She stated that he used a condom.

11 Q. How would that explain whether there would be any possible
12 semen in this particular case?

13 A. So, because he used a condom, we wouldn't expect to find
14 semen in the vaginal vault or on the cervix. She stated that
15 he used a condom. She didn't -- and because of that she didn't
16 know if he'd ejaculated, so it's possible that we wouldn't find
17 semen at all.

18 Q. Okay.

19 MS. DIMAS: May I have a moment, Your Honor?

20 No further questions. Pass the witness.

21 THE COURT: Thank you.

22 You may cross-examine.

23 MR. LINNENBURGER: Thank you, Your Honor.

24

25

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CROSS-EXAMINATION

BY MR. LINNENBURGER:

Q. Good morning, Ms. Eldred.

A. Good morning.

Q. Now, you were asked some questions about your qualifications as a SANE nurse examiner. Do you recall that?

A. Yes.

Q. And you indicated that you had gone to a two-weekend training program. Is that correct?

A. That's correct.

Q. And let me back up. You have an associate's degree as a nurse; is that correct?

A. That's correct.

Q. You don't have an advanced degree as a nurse, do you?

A. That's correct.

Q. No Bachelor's, no Master's, nothing like that?

A. That's correct.

MR. LINNENBURGER: One moment, Your Honor.

Q. (By Mr. Linnenburger) And prior to attending the SANE training agenda in the spring of 2012 put on by the SANE task force, your background was more with heart disease. Is that correct?

A. It was general patient care. I did work primarily in patients who did have heart disease, but also other issues.

Q. But it was primarily heart disease; is that correct?

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1 A. No, not really. When I worked for St. Luke's, I worked on
2 a telemetry floor, so that could be anything from severe
3 illness to a broken leg. They just happened to also need their
4 heart monitored.

5 Q. You're not a certified SANE examiner, are you?

6 A. No.

7 Q. In fact, you -- the full qualifications that you have is a
8 certificate of completion from this two-weekend course. Isn't
9 that correct?

10 A. That is correct.

11 Q. And do you recall the courses that were presented in that
12 two-weekend course?

13 A. Do I remember a specific list, no.

14 Q. Do you recall being on day one given a 30-minute course on
15 introduction to SANE training?

16 A. Not specifically.

17 Q. Now, you previously provided a copy of the agenda for that
18 two-week course. Do you recall that?

19 A. I did not provide it. It was provided to the
20 U.S. Attorney by the Coalition of Sexual Assault in Albuquerque
21 because I didn't have a copy of it.

22 Q. You've reviewed that, have you not?

23 A. Not in the past year, no.

24 Q. But you have reviewed it? You have seen a copy of that
25 agenda before, have you not?

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1 A. I saw a copy of it a year ago.

2 Q. And would looking at a copy of that agenda refresh your
3 recollection as to the courses that were presented, the classes
4 that were presented in that two-weekend course?

5 A. Sure.

6 MR. LINNENBURGER: May I approach, Your Honor?

7 THE COURT: You may.

8 Q. (By Mr. Linnenburger) Now, if you could just review that
9 to yourself and let us know when you're familiar with it.

10 A. (Witness examining document.)

11 Okay.

12 MR. LINNENBURGER: May I approach, Your Honor?

13 THE COURT: I'm sorry?

14 MR. LINNENBURGER: May I approach?

15 THE COURT: You may.

16 MR. LINNENBURGER: Thank you.

17 Q. (By Mr. Linnenburger) Did that refresh your
18 recollection?

19 A. Yes, somewhat. I don't have it memorized.

20 Q. And so on the first -- day one of the classes was a class
21 in victim advocacy, was it not?

22 A. Yes.

23 Q. And the second day there was a class on male and female
24 anatomy, correct?

25 A. I don't recall specifically, but if you -- if that's what

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1 you're seeing on that form, then it was.

2 Q. Would looking at this form again refresh your recollection
3 as to that?

4 A. Yes.

5 THE COURT: She just looked at the form, so if it's
6 on the form, she saw it.

7 MR. LINNENBURGER: Yes, Your Honor.

8 Q. (By Mr. Linnenburger) And another course on the second
9 day was for sexually transmitted disease treatment and
10 pregnancy prophylaxis, correct?

11 A. Correct.

12 Q. And another course was on OSHA measures, correct?

13 A. Correct.

14 Q. And a course was on SANE documentation, correct?

15 A. Correct.

16 Q. And then the third day on that first weekend had very
17 little to do with medicine, didn't it, and it was essentially
18 your role in collecting evidence. Wasn't it?

19 A. I really couldn't say. As I said, I didn't memorize the
20 form, and the training was in 2012.

21 Q. Do you remember there being a course analysis of forensic
22 evidence on that day?

23 A. I don't recall. I -- It was six years ago, and there was
24 a lot of information presented. I couldn't tell you in what
25 order on what day it was presented.

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1 Q. But you did learn a lot about evidence collection and your
2 role in law enforcement and testifying in court during that
3 course period, didn't you?

4 A. I don't have a role in law enforcement. In fact, if you
5 look at any of the SANE documentation, it specifically says
6 that SANE nurses are not a part of law enforcement.

7 Q. Your SANE documentation does note, however, that you
8 collaborate with law enforcement; is that correct?

9 A. It is.

10 Q. And in fact, that you did collaborate with law enforcement
11 in this case, did you not?

12 A. I did not.

13 Q. You did not?

14 A. I did not speak to any law enforcement agencies.

15 Q. Your SANE form that you looked at earlier, the packet that
16 you discussed, that already had a police report number on it,
17 didn't it?

18 A. It did.

19 Q. Where did you get that if you had no contact with law
20 enforcement?

21 A. I don't recall in this particular case; however, it would
22 be typical for me in my practice if the patient reports to me
23 that they've already contacted law enforcement, to call
24 dispatch and obtain a case number.

25 Q. And so that is not in your mind contact with law

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1 enforcement?

2 A. No, it's not. There's no collaboration. It's an exchange
3 of basic information.

4 Q. And you already knew that Jerrick Curley out of Shiprock
5 had been assigned as the responding officer. Is that correct?

6 A. I probably obtained that informing from the dispatch.

7 Q. So are you saying that you filled out this form after the
8 fact, or did you fill it out as you were examining Ms. E ?

9 A. Parts of it -- The parts that are related to the medical
10 assessment are filled out during that time, but the case number
11 and things like that are not important during the physical
12 examination and would have been done later.

13 Q. And that appears right at the front of your packet, does
14 it not, under the heading "SANE Intake"?

15 A. Yes.

16 Q. And it also -- And you note your dispatch time, arrival
17 time, and patient arrival time, correct?

18 A. Yes.

19 Q. And you note any comments pertaining to the time of
20 dispatch, correct?

21 A. Yes.

22 Q. And you note whether or not the patient was accompanied by
23 anyone. Is that correct?

24 A. That's correct.

25 Q. And in this case, in fact, there were two other people in

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1 the room; is that correct?

2 A. Yes.

3 Q. And are you saying you filled all of that out later?

4 A. No.

5 Q. And on that same page there's also just below that
6 category SANE general medical history. Is that correct?

7 A. Yes.

8 Q. And are you saying you filled that out later, as well?

9 A. No.

10 Q. So you filled out part of this form that evening and part
11 of this form later, but you're not sure when. Is that your
12 testimony?

13 A. No.

14 Q. When did you fill out the remainder of the form?

15 A. I filled out the information related to the patient
16 examination at the time that I was speaking with the patient.
17 The case number and the -- and the agent in charge of the case
18 could have been at any time.

19 Q. Do you know when you spoke with law enforcement to
20 retrieve that information?

21 A. I do not. I don't know that I spoke with law enforcement.
22 She may have had a card with that information. As I said, I
23 don't recall.

24 Q. And would she have had a card with that information
25 because Officer Curley already would have spoken with her?

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1 A. I believe it states in my documentation that law
2 enforcement had previously been notified.

3 Q. But you have no idea if she had spoken with law
4 enforcement previously?

5 A. No.

6 Q. You also include on there a date and time of assault, do
7 you not?

8 A. That is generally part of the examination documentation.

9 Q. And that's under the same intake portion, the same portion
10 where you noted the case number and the responding officer,
11 correct?

12 A. If that's where it is in the -- in the documentation.

13 Q. Would reviewing a copy of your report refresh your
14 recollection?

15 A. Yes.

16 MR. LINNENBURGER: May I approach, Your Honor?

17 THE COURT: You may.

18 A. (Witness reviewing documentation.)

19 Okay. Thank you.

20 Q. (By Mr. Linnenburger) Having had your memory refreshed
21 now in that SANE intake portion, you noted the date and time
22 of the alleged assault; is that correct?

23 A. Yes.

24 Q. And you noted that your information was that it occurred
25 from May 19th at approximately 18 o'clock, which would be

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1 6:00 p.m. to approximately May 20th at approximately
2 13 o'clock, which would be 1:00 p.m. Is that correct?

3 A. Yes.

4 Q. And did dispatch also give you that information?

5 A. I didn't speak with dispatch related to the patient. I
6 was notified of the patient by the nurse at San Juan Regional.
7 So the only information that I would have obtained from
8 dispatch in this particular case, if I did speak with them,
9 would have been the agent in charge and the case number. No
10 details of the case would have been discussed.

11 Q. So where did that information come from? Was that from
12 one of the nurses at San Juan Regional?

13 A. I'm sorry, which information?

14 Q. That the alleged assault occurred over a period of 19
15 hours from May 19th at 18 o'clock to May 20th at 13 o'clock.

16 A. That information would have been provided by the patient.

17 Q. By the patient. And do you recall, did the patient use
18 the term 18 o'clock and 13 o'clock?

19 A. I don't recall.

20 Q. Do you recall exactly what you asked her to receive that
21 information from her?

22 A. It's my practice to ask "When did this occur?"

23 Q. And did you ask her that open-ended question, "When did
24 this occur?"

25 A. It is my practice to do so.

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1 Q. But you have no specific recollection in this case of
2 having asked her that?

3 A. I do not.

4 Q. And, in fact, in the patient narrative, you did not
5 include the date and time and that it allegedly occurred over a
6 19-hour period, did you?

7 A. I did not -- She did not specify any time frames during
8 the narrative portion.

9 Q. And you've also got here on the SANE intake an address for
10 the alleged offender. Is that correct?

11 A. It is.

12 Q. And the address you wrote down is half mile west of
13 someplace and quarter mile north of the chapter house. Is that
14 correct?

15 A. It sounds correct.

16 Q. Did you know that off the top of your head?

17 A. No.

18 Q. Where would you have gotten that information? Did you
19 also get that from dispatch?

20 A. I did not, as I said before, get any information from
21 dispatch other than the agent name and the case number. That
22 information would have been provided by the patient.

23 Q. So you received all this information from the patient and
24 simply left a few lines blank and filled those in at a later --
25 at a time that you're not sure after possibly speaking with

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1 dispatch but you're not really sure. Is that correct?

2 A. I would not say that's correct, no.

3 Q. What would you say?

4 A. I would say that the information that is on there with the
5 exception of the case agent name and the case number were
6 obtained from the patient at the time that's noted on the
7 intake form, and that the only thing that was added later,
8 potentially added later would have been the case agent name and
9 the case number.

10 Q. Now, you mentioned that you had spoken to one of the
11 nurses. Which nurse did you speak with?

12 A. Dawn Stechschulte. Her last name is complicated. I have
13 a hard time pronouncing it.

14 Q. And is she the one that informed you that the alleged
15 assault occurred over a 19-hour period between May 19 and
16 May 20?

17 A. No. As I said, that information was obtained from the
18 patient.

19 Q. And did she inform you that Ms. E was being observed
20 for other issues unrelated to this assault?

21 A. No.

22 Q. And you didn't inquire as to why Ms. E was being
23 admitted into the hospital, did you?

24 A. She -- What I was told is that she was admitted based on
25 the results of her CT scan.

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1 Q. So whatever was in the CT scan was why she was being
2 admitted, is your understanding?

3 A. She was having a CT scan because of complaints of pain to
4 her abdomen and pelvis, and she was admitted based on the
5 findings of the CT scan, is my understanding.

6 Q. Have you ever seen or did you ever inquire as to the
7 findings of the CT scans?

8 A. No.

9 Q. Now, if we could go back to your training courses -- I'm
10 sorry, your training weekends. It's fair to say, is it not,
11 that a vast majority of the courses that were offered over
12 these two weekends only lasted anywhere from an hour to an hour
13 and a half. Is that correct?

14 A. That's possible.

15 Q. Well, you were there for two weekends. Do you have no
16 recollection of the training that you underwent that supposedly
17 qualifies you as a SANE nurse?

18 A. I do have recollection. I don't have specific
19 recollection of how long each portion of the -- each subject
20 was discussed. It was a very comprehensive program.

21 Q. And when you say "comprehensive," you mean a lot of
22 subjects not really in-depth on any one subject, correct?

23 A. There's a lot of subjects and there's a lot of information
24 provided, not only verbal through the -- through the training
25 program, but also there's a four-inch binder of materials that

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1 went along with it.

2 Q. Now, you got an associate's degree in nursing. I assume
3 while you were getting your associate's degree in nursing you
4 had a lot more than a four-inch binder on specific subjects.
5 Did you not?

6 A. Could you repeat -- Could you rephrase that question?

7 Q. Strike that.

8 Some of the courses that you took in that first
9 weekend included analysis of forensic evidence, evidence
10 collection, chain of custody, evidence release, stress
11 management, and forensic photography. Is that correct?

12 A. That's correct.

13 Q. And the second weekend, some of the classes that you took
14 included dynamics of child sexual abuse, child development in
15 interviewing, and child sexual abuse physical findings. Is
16 that correct?

17 A. It is.

18 Q. And also in the second weekend some of the classes you
19 took included law enforcement and sexual assault; sexual abuse
20 offenders; case scenarios; putting it together; fact, expert
21 and SANE testifying; and even a mock case skills lab. Is that
22 correct?

23 A. That is correct.

24 Q. And then your training concluded with a discussion about
25 SANE certification and the judicial process and even a mock

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1 trial. Is that correct?

2 A. It is.

3 Q. And that mock trial was half of the day, was it not?

4 A. I don't recall.

5 Q. And during that mock trial, did you practice testifying in
6 front of a jury?

7 A. I don't -- I don't believe it was set up as a jury. There
8 was -- We had people from the New Mexico court come in and do
9 interviews much like what you're doing now, and there were the
10 other participants in the course, but I don't believe that they
11 were set up like a jury.

12 Q. And the individual that you were speaking of that came in
13 to speak with you, they were led by a gentleman named David
14 Wehmeyer; is that correct?

15 A. I don't recall.

16 Q. Would looking at your agenda assist in refreshing your
17 recollection?

18 A. Well, I don't -- I don't recall him, so if it says that
19 it's there, then I believe you that that's who it was, but no.

20 Q. But you do recall, do you not, that the people that showed
21 up were with the District Attorney's Office. Is that correct?

22 A. Yes.

23 Q. And, actually, in your agenda, two of the longest courses
24 were on the judicial process and that mock trial. Is that
25 correct?

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1 A. If that's what it says.

2 Q. Would looking at a copy of the agenda refresh your
3 recollection?

4 A. Yes.

5 MR. LINNENBURGER: May I approach, Your Honor?

6 THE COURT: You may.

7 A. (Witness reviewing documentation.)

8 Q. (By Mr. Linnenburger) So I'll ask you again. Two of the
9 longest courses included in that, including two hours on the
10 judicial process and four hours on mock trial, were those two.
11 Is that correct?

12 A. Yes.

13 Q. A lot longer than a lot of the other ones that actually
14 deal with anything to do with medicine. Is that correct?

15 A. Yes.

16 Q. And you never got certified as a SANE examiner; is that
17 correct?

18 A. Yes.

19 THE COURT: Counsel, if you're getting ready to start
20 a different line, this would be a good time for your midmorning
21 break.

22 MR. LINNENBURGER: This would be a good time, Your
23 Honor. Thank you.

24 THE COURT: Ladies and gentlemen, we're now going to
25 take our midmorning recess. Please remember the admonition

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1 given to you by the Court about not discussing any aspect of
2 this case with anyone. You are not to make up your mind to any
3 fact or issue until all the evidence has been presented and the
4 case is finally submitted to you. You're not going to have
5 time to visit the scene, but I instruct you not to read, listen
6 or observe any newspaper, radio, television or Internet account
7 of the trial while it's in progress.

8 And we will be back in session at approximately ten
9 of. Okay? You may be excused.

10 (Jury out at 10:28 a.m.)

11 THE COURT: All right. We'll be in recess.

12 MR. LINNENBURGER: Your Honor, I apologize. If I
13 may ask the Court to admonish --

14 THE COURT: I'm sorry?

15 MR. LINNENBURGER: If I may ask the Court to admonish
16 the witness --

17 THE COURT: Yeah. Ms. Eldred, don't discuss your
18 testimony with anybody since you're still on the stand.

19 THE WITNESS: Yes.

20 MR. LINNENBURGER: Thank you, Your Honor.

21 (Court stood in recess at 10:29 a.m. and resumed at
22 10:49 a.m. as follows:)

23 THE COURT: You may be seated.

24 You may bring in the jury.

25 (Jury in at 10:50 a.m.)

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1 THE COURT: You may be seated.

2 Ms. Eldred, you're still under oath.

3 Counsel, you may proceed.

4 MR. LINNENBURGER: Thank you, Your Honor.

5 Q. (By Mr. Linnenburger) Now, I believe you previously
6 testified that you spoke with Dr. Greenberg prior to seeing
7 Ms. E . Is that correct?

8 A. It is.

9 Q. And did you speak with him on the phone or at the
10 hospital?

11 A. On the phone.

12 THE COURT: Can you please stay with the microphone.
13 Thanks.

14 Q. (By Mr. Linnenburger) And you specifically asked him
15 about Ms. E 's comment that she had been strangled. Is that
16 correct?

17 A. I believe that I asked him about an assessment for
18 strangulation injury.

19 Q. And what he told you is that there were no signs or
20 symptoms of asphyxiation; is that correct?

21 A. That is correct.

22 Q. And no loss of consciousness on the part of Ms. E ; is
23 that correct?

24 A. It is.

25 Q. And that he did not believe a CT scan was necessary for

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1 Ms. E ; is that correct?

2 A. For strangulation injury, yes.

3 Q. Now, you testified that you were informed that based on
4 the CT results, that she was going to be admitted. Were you
5 informed that the CT results did not indicate any internal
6 injuries?

7 A. I was not informed of any results from the CT scan.

8 Q. So you also, then, were not informed that the CT scans
9 indicated hepatic cirrhosis?

10 A. No.

11 Q. And you were also not informed, then, that they indicated
12 that she had colonitis and some swelling of the colon in
13 regards to a possible infection at the time; is that correct?

14 A. I was not informed of any results from the CT scan.

15 Q. And those are all things that can cause abdominal pain; is
16 that correct?

17 A. They could.

18 Q. Now, I believe in your report you indicated that Ms. E
19 was able to answer questions. Is that correct?

20 A. It is.

21 Q. Did she appear intoxicated to you?

22 A. She did not.

23 Q. Did you smell alcohol on her?

24 A. I did not.

25 Q. Were you ever informed by hospital staff that the blood

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1 alcohol results came back at almost four times the legal limit
2 just hours before?

3 A. No, I was not.

4 Q. Would that surprise you?

5 A. No.

6 Q. I believe you previously testified about providing
7 medications to people being -- on which you're conducting SANE
8 exams. But you're not actually allowed to prescribe any
9 medication, are you?

10 A. It is not within my scope of practice as a registered
11 nurse.

12 Q. It's also not within your scope of practice to diagnose,
13 is it?

14 A. It is not.

15 Q. And it's also not your job to investigate the cause or
16 determine reliability as to any statements provided you by
17 somebody you're examining. Is that correct?

18 A. It is.

19 MS. DIMAS: Objection, Your Honor.

20 THE COURT: It's already been answered.

21 MS. DIMAS: I'm sorry? Okay.

22 THE COURT: You're going to have to get a microphone
23 or come up and speak louder.

24 MS. DIMAS: Objection, Your Honor. Calls into
25 question the reliability and credibility of the witness.

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1 THE COURT: Overruled.

2 Q. (By Mr. Linnenburger) In fact, in your job, you just take
3 whatever the individual says and accept it, correct?

4 A. I document it.

5 Q. But you make no judgment call as to whether or not what
6 they are saying is truthful or accurate, because that's not
7 part of your job. Is that correct?

8 A. That's correct.

9 Q. You're very careful to document everything accurately in
10 your report; is that correct?

11 A. I do my best, yes.

12 Q. Because in your two-week training period they specifically
13 express to you the importance of accurately documenting
14 everything that you are told by somebody you're examining. Is
15 that correct?

16 A. Accurate documentation is essential to all nursing care,
17 so from the first day of nursing school up through all
18 continuing education it's something that's stressed as
19 important.

20 Q. And you also stress that to the individual that you're
21 examining, that it's very important that they are fully
22 truthful with you; is that correct?

23 A. I don't believe that those words are specified in any of
24 the documentation.

25 Q. But you know going in when you're giving a SANE exam, that

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1 there's a likelihood that you may be called to testify in
2 court; is that correct?

3 A. No.

4 Q. You don't know that there may be a court case that arises
5 out of it?

6 A. I know that there's a possibility. I would not say that
7 there's a likelihood.

8 Q. And you did spend some of your training on how to conduct
9 yourself in court, correct?

10 A. Yes.

11 Q. And so you didn't do anything to explore any possible
12 alternative explanations for any symptoms or potential injuries
13 Ms. E described or conduct anything like differential
14 diagnosis, did you?

15 A. No.

16 Q. But you did ask her some very specific questions and
17 documented those in your form; is that correct?

18 A. It is.

19 Q. And all of those questions under the heading on your form
20 Sexual Assault Related Medical History are very important to
21 your analysis and to document for forensics; is that correct?

22 THE COURT: What do you mean for forensics?

23 MR. LINNENBURGER: I'll back up, Your Honor.

24 Q. (By Mr. Linnenburger) Do you consider your examination in
25 part a forensic examination?

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1 A. Yes.

2 Q. Because you're documenting evidence, correct?

3 A. Potentially.

4 Q. And the questions that you ask under the heading Sexual
5 Assault Related Medical History all deal with collecting
6 evidence and what you are going to do to collect evidence and
7 how that should be analyzed; is that correct?

8 A. I would need to review that particular section in order to
9 answer that question.

10 MR. LINNENBURGER: May I approach, Your Honor?

11 THE COURT: You may.

12 MR. LINNENBURGER: Is it okay if I just leave a copy
13 with her so I don't have -- Is it okay if I just leave a copy
14 with her if he needs to see it -- Can I just leave a copy with
15 her?

16 THE COURT: Sure. It's the easiest way.

17 MR. LINNENBURGER: Thank you, Your Honor.

18 A. (Witness examining documentation.)

19 Could you ask the question again?

20 Q. Yes. Excuse me. All the questions that appear under the
21 heading Sexual Assault Related Medical History on your form,
22 you ask those specifically because they deal with how you are
23 going to conduct your forensic examination and how any evidence
24 that you are able to obtain is to be analyzed; is that correct?

25 A. Some of it is. It not entirely correct.

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1 Q. Are there any questions in that portion that do not relate
2 to how you will be conducting your examination or how any
3 evidence that you retrieve can or should be analyzed?

4 A. That question had a lot of parts. So, the question that
5 we ask about alcohol consumption is possibly related to
6 drug-facilitated sexual assault or -- and it's also important
7 to know for administration of medications.

8 Q. And is that the only question in that portion?

9 MS. DIMAS: Objection, Your Honor. May we approach?

10 THE COURT: State your objection.

11 MS. DIMAS: I'm concerned about the area that this --

12 THE COURT: Come up to the microphone, please.

13 MS. DIMAS: I am concerned about the area that this
14 question is getting into, that it could potentially get into
15 issues that have already been dealt with pretrial regarding
16 certain orders about evidence that may or may not come in.

17 THE COURT: Counsel wouldn't do that. I'm going to
18 overrule that at this time. You wouldn't violate any of my
19 Court orders, would you?

20 MR. LINNENBURGER: I have not asked any of the
21 questions that I have been told not to ask, Your Honor.

22 THE COURT: Very good.

23 Q. (By Mr. Linnenburger) Is that the only question in that
24 area that does not relate -- potentially does not relate to
25 guiding your forensic analysis and/or how any evidence you

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1 obtain should or should not be analyzed?

2 A. Honestly, I don't know how the evidence is analyzed.

3 That's entirely up to the crime lab. I document what the
4 patient has told me. Some of the information, if the patient
5 has urinated or had a bowel movement, sometimes with urogenital
6 trauma, they're unable to urinate or have a bowel movement
7 afterwards depending on their condition, so really everything
8 that we ask -- the questions primarily are for the physical
9 examination, and the forensic examination goes along with it.

10 Q. And that applies to all the questions in this section; is
11 that correct?

12 A. No. I don't imagine that whether she --

13 MS. DIMAS: Objection, Your Honor. This is exactly
14 what I just objected to. He continues to ask this question.

15 THE COURT: Overruled. Just, I don't understand your
16 objection. She's getting ready to answer it and it's not
17 anything that has been prohibited.

18 MS. DIMAS: Her -- I know what her answer is going to
19 be, and it pertains exactly to what has been prohibited.

20 THE COURT: Well, let's hear the answer, and then we
21 can move to strike it if that's the case.

22 What was your question?

23 MR. LINNENBURGER: I believe I asked if her previous
24 statement applies to all of the questions in this part of the
25 form.

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1 THE COURT: Okay. And what is your answer to the
2 question?

3 A. Could you tell me what my previous -- what the previous
4 question was and the answer to that? There's -- I mean,
5 there's a lot going on there.

6 THE COURT: I don't remember what the question and
7 what your answer was several questions ago. Just answer the
8 question he asked you. Is everything in that form for purposes
9 of your medical efforts? And you said not all of them.

10 A. It's the -- Their medical -- the medical exam and the
11 forensic exam go together.

12 MR. LINNENBURGER: And I'll rephrase my question,
13 Your Honor.

14 Q. (By Mr. Linnenburger) Every question within the sexual
15 assault-related medical history you believe to be relevant to
16 your medical and forensic examination. Is that correct?

17 A. Medical and forensic, yes.

18 MR. LINNENBURGER: Your Honor, may we approach?

19 THE COURT: You may.

20 (Bench conference on the record.)

21 MR. LINNENBURGER: Your Honor, I was just trying to
22 get a simple "yes" or "no" answer, and I apologize, but --

23 THE COURT: Why don't you ask her if X question deals
24 with the medical?

25 MR. LINNENBURGER: Well, Your Honor, the issue is, is

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1 that --

2 THE COURT: I want to know what the issue is that
3 you're trying to finesse.

4 MR. LINNENBURGER: I believe I have now made a
5 sufficient record and showing that the question of whether or
6 not she had consensual intercourse within the previous five
7 days, that being vaginal, she considers relevant to her medical
8 and forensic examination. She previously testified that one of
9 the reasons that they need to conduct this within five days is
10 because after five days injuries can heal; i.e., injuries left
11 over from sex that occurred within that five-day period can
12 still be present.

13 Clearly, the issue in this case is going to be
14 whether or not penetration occurred in this instance. I have
15 clear evidence suggesting that it did not in that there is no
16 DNA of my client on the vaginal swabs and the cervical swabs,
17 and I have a right to present my defense, and I do believe that
18 being continued to -- continually being denied to being allowed
19 to ask that question is violating my client's Sixth Amendment
20 rights and his rights to due process, and so I would ask the
21 Court to reconsider its Rule 412 ruling.

22 THE COURT: Counsel.

23 MS. DIMAS: So it's my understanding that he wants
24 the witness to testify about the question on her SANE
25 examination about when -- if she had consensual sex within the

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1 five days prior to the sexual assault.

2 THE COURT: And what did she say?

3 MS. DIMAS: And she said that she did.

4 THE COURT: Okay.

5 MS. DIMAS: And that's the exact basis of the 412
6 hearing that this courtroom had last Friday specifically
7 excluding that information. Regardless of whether defendant
8 thinks that he's established any type of basis for that, it's
9 already been excluded regardless of what his basis is as part
10 of the SANE examination. This wasn't provided as a reason in
11 order to be able to get into the examination, and it's also not
12 an exception as part of 412 in order to be able to get into
13 this particular area.

14 THE COURT: Okay.

15 MS. DIMAS: We also --

16 THE COURT: Why don't you make a tender of what
17 evidence you want to get in so the record is clear.

18 MR. LINNENBURGER: Your Honor, I simply want to ask
19 this witness as appears on her form, and this is Bates number
20 542. Her form was -- Her SANE examination form was previously
21 admitted at a Daubert hearing, so it is part of the record, and
22 on page 3 of that form she has a question "Consensual
23 intercourse within the previous five days?" question mark. She
24 marked "Yes." There's a follow-up "Of what nature?" She
25 marked the box for "Vaginal."

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1 And this provides me, as I stated previously in
2 regards to 412, a possible alternative explanation for the
3 injuries that the Government is going to rely upon, and this
4 witness has already testified that the injuries, the reason
5 they want -- one of the reasons they want to see them within
6 five days is that injuries can heal after the 96 hours.

7 And that's my proffer, Your Honor.

8 THE COURT: And your proffer is accepted and we'll
9 move forward from that.

10 MS. DIMAS: So is that, I mean, he's going to be able
11 to ask that question?

12 THE COURT: No. He just made a proffer.

13 MS. DIMAS: Okay. Okay. Thank you.

14 MR. LINNENBURGER: Thank you, Your Honor.

15 (Open court.)

16 Q. (By Mr. Linnenburger) Now, you previously testified that
17 Ms. E informed you that she had showered before you
18 examined her. Is that correct?

19 A. I did just look at that in the chart. I believe
20 previously I said that she had not showered. I was mistaken.

21 Q. And in fact she did tell you that she had showered before
22 she came in; is that correct?

23 A. That's what I documented.

24 Q. Did you ask her where she had showered?

25 A. No.

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1 THE COURT: You might need her later?

2 MR. LINNENBURGER: Your Honor, in the event that the
3 door is opened by the Government to 412 evidence, I may need
4 her to --

5 THE COURT: Okay. We'll have her --

6 MR. LINNENBURGER: -- for that one follow-up question
7 unless I would also be willing to, if the Government would
8 simply stipulate to her prior testimony from the Daubert
9 hearing in which she answered that question, I believe, being
10 read into the record.

11 MS. DIMAS: What particular question?

12 MR. LINNENBURGER: Whether or not she was asked
13 the -- Ms. E if she had had consensual sexual intercourse
14 during the last five days and that her answer was yes, vaginal.

15 MS. DIMAS: That's fine with the United States. She
16 does have a flight to catch back to Tulsa, Oklahoma, so we
17 would prefer not to --

18 THE COURT: So you can stipulate to that?

19 MS. DIMAS: Yes, if the door is opened.

20 MR. LINNENBURGER: Okay. That's fine, Your Honor.

21 THE COURT: Thank you.

22 (Open court.)

23 THE COURT: This witness may be excused. Please call
24 your next witness.

25 MS. DIMAS: The United States calls Jerrick Curley.

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Relevant Testimony of C.E.

- 1 Q. Do you have family around that area?
- 2 A. Yes.
- 3 Q. Do you have any children?
- 4 A. Yes.
- 5 Q. What are their names?
- 6 A. K S and H S .
- 7 Q. And where do they live?
- 8 A. In North Carolina.
- 9 Q. Ms. E , where were you living in 2014?
- 10 A. In Nenahnezad.
- 11 Q. I'm sorry, could you repeat that?
- 12 A. Nenahnezad.
- 13 Q. Is that in New Mexico?
- 14 A. Yes.
- 15 Q. Is it close to Fruitland?
- 16 A. It's in the Fruitland area. It's just a small community.
- 17 Q. Okay. Is that where you were living in May of 2014?
- 18 A. Yes.
- 19 Q. And who were you living with?
- 20 A. A friend of mine.
- 21 Q. What was his name?
- 22 A. Tyrone Tallman.
- 23 Q. How long had you known Tyrone?
- 24 A. About 15 years.
- 25 Q. At that time, did you know a person named Melvin Russell?

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1 Q. Now, you testified that you in 2014, that you were living
2 in the Fruitland area with a gentleman by the name of Tyrone.
3 How long were you living with Tyrone?

4 A. About five, five years.

5 Q. And in 2014, was that towards the beginning of the five
6 years or towards the end of the five years?

7 A. Towards the end of the five years.

8 Q. And you told the FBI that you had been living with Tyrone,
9 did you not?

10 A. Yes.

11 Q. And do you know if they ever came out and spoke with him?

12 A. No.

13 Q. When had you left the home with Tyrone prior to May 19th?
14 Did you leave that day?

15 A. Yes.

16 Q. Did Tears come over to Tyrone's house that day?

17 A. Yes.

18 Q. Did she arrive that day or had she been there for a while?

19 A. She arrived that day.

20 Q. When she arrived, did she bring anything with her for
21 anybody to ingest?

22 A. She brought -- She brought beer.

23 Q. Do you remember how much beer?

24 A. No.

25 Q. And you drank a good number of those beers, did you not?

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1 THE COURT: Thank you, Counsel.

2 Any redirect?

3 MS. DIMAS: Yes.

4 REDIRECT EXAMINATION

5 BY MS. DIMAS:

6 Q. Ms. E , you've had several meetings with the United
7 States Attorney who -- the two individuals, myself, Ms. Dimas,
8 as well as Mr. Spindle; is that correct?

9 A. Yes.

10 Q. And what have we always told you regarding your only job
11 in testifying today?

12 A. Was to tell the truth.

13 Q. Has anybody ever told you to make any untruthful
14 statements today?

15 A. No.

16 Q. You were asked some questions about your friend Tyrone,
17 the individual who you lived with for a while. Can you
18 describe Tyrone?

19 A. In what manner?

20 Q. What is he like? I'm sorry, let me strike that. Let me
21 rephrase the question.

22 Does Tyrone like women?

23 A. No. He's -- He's gay.

24 Q. You were asked some questions about the people you were
25 hanging around with on the day of the incident. Did you ever

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DNM 1226

Relevant Testimony of Special Agent Brad Michael

1 between what you hear and what you read, you must be guided
2 solely by the video and not the transcript. If you cannot
3 determine from the video where the particular words were spoken
4 or who is speaking them, you must disregard the transcript
5 insofar as those words are concerned. The transcript is
6 intended only to be an aid to you, and you were given the
7 direction to decide whether to use a transcript or not. You
8 have discretion to do so.

9 Okay. You may proceed.

10 MR. SPINDLE: Thank you, Your Honor. I was waiting
11 until all the jurors had a copy of the transcript. They're
12 going around right now.

13 (Playing video.)

14 MR. SPINDLE: No further questions, Your Honor. We
15 would ask if the Court can instruct the jurors to pass the
16 transcripts to the side.

17 THE COURT: Please pass the transcripts to the side.

18 You may cross-examine.

19 CROSS-EXAMINATION

20 BY MR. LINNENBURGER:

21 Q. Good afternoon, Agent Michael.

22 A. Good afternoon.

23 Q. Good to see you again.

24 A. Nice to see you too.

25 Q. Now, you have pretty extensive training as an FBI agent.

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1 "Yeah, that's it," but he didn't say if there was anything else
2 in there. I assumed it was just the sword.

3 Q. You were asked questions and you indicated individuals
4 that you had spoken with and that you had started with
5 interviewing Ms. E . Do you recall that?

6 A. Yes.

7 Q. And during her interview --

8 MR. LINNENBURGER: Sorry, Your Honor.

9 Q. (By Mr. Linnenburger) During her interview, you told her
10 that the way that science was now, that you'd be able to know
11 if they had had sex. Is that correct?

12 A. I don't recall that specifically, but I may have. I know
13 the interview is recorded, so if it's a question, I guess we
14 can have it, but . . .

15 Q. You said that it was recorded. Would -- Have you seen a
16 transcript of that recording?

17 A. Not in a while.

18 MR. LINNENBURGER: Your Honor, may I approach?

19 THE COURT: You may.

20 Q. (By Mr. Linnenburger) And if you would look through that
21 and see if that is an accurate representation --

22 A. Do you know about where?

23 Q. I apologize, what was that?

24 A. Do you know about where in this thing --

25 Q. Well, first if you'd look through that --

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1 A. Okay.

2 Q. -- and let us know if that is an accurate transcript of
3 the interview that you conducted with Ms. E .

4 A. Yes. I've recently watched the interview, but I didn't
5 read transcripts about it, so . . .

6 MR. SPINDLE: Your Honor, I don't know what defense's
7 intent is with this, but if he's trying to get this witness to
8 authenticate this exhibit, he can't possibly be expected to
9 remember every word that was spoken four years ago.

10 THE COURT: I don't even know what it is he's looking
11 at.

12 MR. SPINDLE: I think it appears to be a transcript
13 of the interview with Ms. C E . If it's just for
14 impeachment purposes, the United States isn't objecting. But
15 if it's asking to authenticate the entire thing for admission,
16 we are objecting. He can't possibly be expected to remember
17 everything.

18 THE COURT: Okay. Well, we'll find out shortly.

19 A. I'm not seeing the thing about science yet, but I don't
20 doubt that I did say it.

21 Q. (By Mr. Linnenburger) Does it appear to be an
22 accurate --

23 A. It does, yes.

24 Q. Now, if you would turn to page 21 at the bottom over
25 onto --

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DNM 1257

1 A. Okay.

2 Q. -- the top of page 22 and read that to yourself and then
3 let us know if that refreshes your recollection.

4 A. Okay. Yes.

5 Q. And so I'll ask you again, you told her, did you not, that
6 the way science was now, that you would be able to tell if the
7 two had sex?

8 A. I said, "You know, Jerrick and I have done, you know, a
9 lot of these cases, and the way science is now --" and she
10 interjects "uh-huh" "-- we'll be able to tell whether, you
11 know, he, you know, had sex with you."

12 So yes, I said that. I said it, though, in the
13 context of, if you read on, explaining the difference between
14 sex and consensual sex and rape, and that science may be able
15 to tell us whether they had sex, but science can't tell us
16 whether it was consensual or not.

17 Q. And what you mean by that, what you meant by that, do you
18 mean the results of the SANE examination and DNA evidence?

19 A. Correct.

20 Q. Because the science can't tell you that if sex occurred,
21 whether or not it was consensual; is that correct?

22 A. In most of cases, yeah, I'd say.

23 Q. Now, we just saw approximately a five-snippet video of an
24 interrogation of Mr. Russell. Mr. Russell was actually there a
25 heck of a lot longer that day, wasn't he?

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**Additional Argument Under Rule 412
and Ruling Pertaining to Same**

1 MR. LINNENBURGER: Thank you, Your Honor.

2 As we stated in our Rule 412 motion, while
3 we disagree with the lawfulness of Rule 412, we are
4 abiding by it in good faith, because it is a rule.

5 I believe that the proposed evidence
6 clearly falls within the established exceptions under
7 412.

8 I know that the government now, within the
9 last few days, has received conflicting information
10 from the alleged victim as to whether or not the
11 statement that she provided to the SANE nurse, that
12 she had had consensual sexual relations, vaginal
13 intercourse, with another unnamed individual within
14 the five days prior to this incident -- or I'm sorry,
15 the five days prior to the exam at the hospital,
16 which was actually about a day after this incident --
17 that there is a reason that that question is on the
18 SANE examination form.

19 And it is because, clearly, that is
20 relevant to the examination. It is relevant to a
21 determination of, both in this case injuries and what
22 possible causes may be, as well as explanations for
23 other evidence, were it to be -- although it was not
24 located in this case -- semen and/or DNA evidence.

25 And so I believe that --

1 THE COURT: We don't have that in this
2 case, correct?

3 MR. LINNENBURGER: Correct, Your Honor.
4 There was no semen, and at least the vaginal and
5 cervical swabs did not provide any DNA other than the
6 alleged victim's, of course.

7 And so I think for that reason, and
8 particularly in light of the somewhat unique
9 circumstances of this case, in that we are dealing
10 with a woman who has chronic anemia, who had
11 established liver issues at the time, and we believe
12 there will be medical evidence presented to show that
13 those particular issues can affect ease of bruising
14 and --

15 THE COURT: What evidence do you propose to
16 present --

17 MR. LINNENBURGER: Simply --

18 THE COURT: -- just to back up any of that?

19 MR. LINNENBURGER: Her statement to the
20 SANE nurse, that she had had consensual vaginal
21 intercourse within a period of five days of this
22 incident.

23 THE COURT: But that accounts for -- do you
24 have any evidence that accounts for any bruising or
25 any tearing or any -- anything --

1 MR. LINNENBURGER: I believe --

2 THE COURT: -- other than the fact that
3 maybe there was intercourse five days earlier?

4 MR. LINNENBURGER: Within five days. It's
5 not necessarily five days out, Your Honor.

6 The question posed to her was within five
7 days. It may have been less. At this point we're --
8 we can't be sure, because that information was not
9 provided by the SANE nurse, and we have not yet had
10 an opportunity to question the woman in this case.

11 But there is a medical expert who -- it has
12 been stipulated that he is a medical expert, and I
13 understand that the government now no longer wishes
14 to call him. However, we also have him under
15 subpoena.

16 THE COURT: Who is that?

17 MR. LINNENBURGER: Dr. Greenberg. And I
18 anticipate that his testimony will be that her
19 specific medical conditions could potentially mean
20 that if she were bruised through vaginal intercourse,
21 that those bruises may take longer to heal, that they
22 may stick around longer.

23 That if there was some tearing, that
24 because she is going to have problems with blood
25 coagulation, much more so than a regular -- a healthy

1 individual, in part from her anemia, in part from her
2 liver disease, and in part from her documented
3 extreme use of alcohol in the days immediately in
4 between -- in that five-day period.

5 I anticipate that that's what his testimony
6 would be.

7 And so I think there are clearly -- we will
8 clearly be able to present enough to at least raise
9 the possibility that those particular injuries, the
10 injuries which the government, I suspect, will rely
11 on to show that there was penetration in this case.
12 We have a possible --

13 THE COURT: Your client has admitted there
14 was penetration.

15 MR. LINNENBURGER: I'm sorry, Your Honor?

16 THE COURT: Your client has admitted there
17 was penetration by him. So I mean, where are you
18 going? I don't understand where you're going with
19 this.

20 MR. LINNENBURGER: Well --

21 THE COURT: It's not going to show that
22 he -- you know, he's not being charged with causing
23 bruises on somebody.

24 MR. LINNENBURGER: Your Honor, the jury is
25 free to disregard my client's statement. They do not

1 have to take his statement, his admission.

2 If they were required to accept that, we
3 wouldn't have a trial. And so I think solely because
4 there's an admission at some point on the record,
5 that that doesn't foreclose that we can argue to the
6 jury that Mr. Russell did not penetrate her, and that
7 another individual had, and had -- was potentially
8 the cause of those specific injuries.

9 In addition to that, I think we have also
10 now jumped into 412(b)(C), in that it would violate
11 Mr. Russell's constitutional rights, because we now
12 have a material relevant statement from the victim
13 that will contradict a statement that I expect she
14 will make at trial, in that, again, I propose that
15 there is a reason that that question is posed by a
16 SANE nurse, and it is because that is considered
17 relevant and material to the examination; i.e., that
18 if there has been other intercourse, that it may
19 provide alternative explanations. It may guide them
20 on how they need to do things.

21 And if the victim is now saying that that
22 statement was incorrect, or that that statement was
23 false, that is clearly a prior inconsistent
24 statement. It's standard impeachment material. And
25 it would be highly relevant to our defense, in

1 that --

2 THE COURT: All right. I understand your
3 position.

4 Let me hear from the government now.

5 MR. LINNENBURGER: Thank you, Your Honor.

6 MS. DIMAS: Thank you, Judge.

7 Your Honor, the United States asserts that
8 here, when defendant filed his 412 motion, he simply
9 asserted what he is going to provide as evidence
10 regarding this alleged consensual relationship, in
11 relationship to the injury sustained by Jane Doe.

12 But it doesn't appear that his proffer of
13 evidence is sufficient, especially in the face of the
14 other evidence that the United States provided to the
15 Court to evaluate his assertions.

16 Specifically, the United States provided to
17 the Court testimony in the form of transcripts -- not
18 testimony, but transcripts from two of the
19 government's other witnesses, Rochelle Cornfield and
20 Virgil Brewster.

21 These are two individuals that were with
22 the alleged victim on the day prior to the incident
23 with the defendant. They also saw her the day after
24 the incident.

25 Both of them confirm that they saw bruises

1 on the alleged victim the day after the assault.
2 Rochelle Cornfield confirmed that those bruises were
3 not present on the alleged victim the day before.

4 The defendant's basis for introduction of
5 these injuries is essentially to show that these
6 injuries were caused by the previous consensual
7 sexual interaction that the alleged victim admitted
8 to on her SANE exam. However, there is yet to be any
9 evidence to demonstrate that those injuries did
10 actually occur before the assault by the defendant.

11 The United States did speak with the
12 alleged victim about her statement to the SANE nurse,
13 that there was some type of consensual sexual
14 interaction within the five days preceding the
15 assault.

16 Based on her recent statement, she did say
17 that she did not recall having consensual intercourse
18 within those five days.

19 The United States understands that under
20 normal circumstances this could potentially be
21 impeachment evidence.

22 However, there has been case law that has
23 talked about these exact same types of situations,
24 where an alleged victim has contradicted herself
25 regarding prior sexual contact.

1 And because impeachment isn't an exception
2 under 412 to allow admission, we would argue to the
3 Court that her inconsistent statement shouldn't be
4 allowed under 412, because it still is a prior sexual
5 act under 412, that the government -- that we assert
6 isn't admissible here.

7 Even if the defendant is trying to admit
8 this evidence under 412(b)(1)(C), when you -- when
9 the Court does the balancing test as to whether his
10 rights are violated, versus the other legitimate
11 interests that are at hand here in the criminal trial
12 process, because there hasn't been that relationship
13 established between the prior consensual interaction
14 and the bruises sustained by Jane Doe, it appears
15 that the defendant is just trying to admit this
16 evidence to essentially embarrass the victim and also
17 confuse the jury as to whether these bruises are
18 actually attributed to the defendant or not.

19 The defendant is also trying to make,
20 essentially, contradictory theories. And while the
21 defendant is entitled to put on whatever theories he
22 would like to, it doesn't make sense under 412.

23 When you look at the exceptions regarding
24 how this type of evidence can be admitted, you can
25 admit it to show that other prior sexual contact may

1 be the source of semen or physical injuries or you
2 can admit it to show consent.

3 The defendant seems to be trying do the
4 same thing. And that kind of contravenes the point
5 of 412. He's kind of throwing the kitchen sink at
6 the Court here, trying to get in whatever he can.

7 It doesn't really seem to make sense, when
8 you look at the evidence in this case, that Jane Doe
9 would have had previous sexual -- a previous sexual
10 encounter, that the injuries she sustained would have
11 been from these -- from this previous sexual
12 encounter, and then she would, then, have had
13 consensual sex with the defendant despite the pain
14 and the injuries that she had experienced from the
15 previous encounter.

16 Because the defendant hasn't established
17 any type of proffer that would show that these
18 bruises are related, besides general reference to her
19 medical history, without actually showing that those
20 bruises were there before the assault, it seems that
21 the Court should not admit those under 412 because it
22 just has not met the standard.

23 Thank you, Your Honor.

24 THE COURT: Thank you.

25 Do you have anything further?

1 MR. LINNENBURGER: Very briefly,
2 Your Honor.

3 THE COURT: Thank you.

4 MR. LINNENBURGER: Your Honor, we are
5 entitled to, if we desire, to present conflicting
6 theories to the jury. And if they decide that one or
7 both provide a reasonable doubt, then so be it.

8 In that regard, I understand that any
9 discussion as to whether or not a consensual sexual
10 interaction occurred on the day of this incident may
11 open the door to previous possible incidents, as they
12 mentioned in their response, that is a decision for
13 us to make at this point.

14 I would note that this case is very
15 different from other previous cases, in that we are
16 dealing with an alleged victim that has, as of the
17 date of this incident, had established medical issues
18 that directly relate to things such as bruising,
19 swelling, and healing.

20 And that separates it from, I think, all
21 cases that the government has cited.

22 And I would just note, finally, that in USC
23 v. Begay -- the cite for that is 937 F.2d 515, a 10th
24 Circuit case from 1991.

25 When the government uses medical evidence

1 and then argues that it supports that penetration
2 occurred, which is clearly what they are going to do
3 with the SANE exam in this case, that similar
4 evidence of consensual relations, previous consensual
5 relations, was admitted in that case. And the Court
6 noted that a defendant is always entitled to -- under
7 Subsection C -- always entitled to present evidence
8 that is relevant, material, and favorable to his
9 defense.

10 And this is clearly relevant and material.
11 It is why the SANE nurse asked the question.

12 It is favorable to our defense because it
13 provides a potential alternative explanation for
14 those possible signs of penetration.

15 Thank you, Your Honor.

16 THE COURT: Okay. The Court has not seen
17 any evidence. You've got speculation, you hope, and
18 I'm not going to permit that evidence to be admitted.

19 You will have ample opportunity to
20 cross-examine the SANE nurse on what -- and any
21 doctors that testify about this incident.

22 Okay. I also have some questions. I had
23 asked everybody to try to narrow down the list of
24 witnesses that we've got. And it seems that the list
25 keeps getting longer and longer.

**Argument of Defense Counsel and Oral Ruling of the District Court
On Mr. Russell's Renewed Motion Under Fed. R. Evid. 412,
Contained in Record on Appeal, Vol. V**

Appellate Case:

1 also identified the defendant, as well. Ms. Rochelle Cornfield
2 talked about the incident taking place at Melvin Russell's home
3 on about May 19th/May 20th of 2014.

4 There's been other stipulations regarding the other
5 elements of the crime here that was charged by the Government,
6 and the Government would submit to the Court that it has
7 satisfied its burden regarding what is required here with all
8 inferences in favor of the Government.

9 THE COURT: All right. Do you have some rebuttal?

10 MR. LINNENBURGER: Nothing further, Your Honor.

11 THE COURT: Very good. Thank you very much. At this
12 time, I'll deny the motion.

13 You may call your first witness. Oh, no, you can't.
14 The jury is not here.

15 MR. LINNENBURGER: I think for purposes of the
16 record, Your Honor, I need to renew my motion as to the
17 Rule 412 evidence. I believe Mr. Michael provided further
18 potential support for my motion, in that he discussed his
19 belief that the science, meaning the SANE exam and DNA, could
20 not necessarily tell if intercourse was consensual or not. In
21 light of that, I believe that provides more support for our
22 position that the reason that was included on the SANE exam
23 initially was in order to discuss those particular issues, and
24 so that it made individuals analyzing any evidence aware that
25 there is a possible alternative explanation.

1 So as I said, just for purposes of the record, I

2 would renew my Rule 412 motion at this time.

3 THE COURT: Very good. Thank you.

4 What do we hear from our Marshal? Do you have a full
5 tank of gas?

6 U.S. MARSHAL SHAWN COZART: Sorry, Your Honor.

7 I kind of caught a little bit of what the question was. So, is
8 the witness not needed?

9 THE COURT: The witness is in custody right now, and
10 she is on her way here --

11 U.S. MARSHAL COZART: Correct.

12 THE COURT: -- pursuant to a subpoena, which she did
13 not come down voluntarily.

14 U.S. MARSHAL COZART: Correct.

15 THE COURT: We're going to put her on as soon as she
16 gets here. I don't think she will be a long witness. And then
17 we've got to get her back up to where she came from.

18 U.S. MARSHAL COZART: Okay. So let me check, because
19 I know the deputies that found her spoke to her husband, also.
20 I'm under the assumption, if he's smart, he's driving to
21 Albuquerque, also.

22 THE COURT: Well, that would solve the problem, if he
23 is, but I don't want her to have to hang out at the bus stop or
24 something all night long.

25 U.S. MARSHAL COZART: Right. I mean, I don't --

Appellate Case

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1 in the event that on cross-examination they attempt to seek to
2 bring in opinions that would otherwise be inappropriate.

3 And then Dr. Greenburg will not be called. So it
4 will be Dr. Gibbs, and then we will have a determination to
5 make as to whether or not Mr. Russell wishes to testify.

6 THE COURT: okay, very good. Anything else to take
7 up before we bring in the jury?

8 MR. SPINDLE: No, Your Honor.

9 MR. LINNENBURGER: I do have two quick matters, Your
10 Honor. One, and I'm sure the Court is getting tired of me on
11 this issue, but one last addition to my 412 proffer, and a
12 request that the Court reconsider its earlier ruling and allow
13 us to present those two questions that would have been
14 presented to the SANE nurse -- or that one question; I'm
15 sorry -- that would have been presented to the SANE nurse.

16 In addition to what I've stated previously, Your
17 Honor, there was testimony from the alleged victim yesterday
18 that she had resided with a gentleman for a period of
19 approximately five years, and this was towards the end of that.
20 The Government then elicited testimony from her that that
21 particular gentleman preferred men. The obvious implication of
22 the Government's question is to imply that she did not have a
23 significant other, and I think that that also provides further
24 support as to why it is important that I be allowed to present
25 this evidence to the jury, because it would provide an

1 explanation and a motive for her to come up with a story as to
2 why she had spent the night at another man's home.

3 And if the Government is arguing -- well, they've
4 already implied to the jury that the male that she had been
5 living with for a long time, she had no sort of romantic
6 relationship with. Then I think I am entitled to this evidence
7 that shows that she had some sort of romantic/physical
8 relationship with somebody that potentially could have been
9 upset to learn that she had spent the night in another man's
10 home.

11 So for that reason, I would ask the Court, again, to
12 reconsider its 412 ruling and to allow me to present that
13 limited evidence to the jury before I rest.

14 THE COURT: Okay.

15 MR. LINNENBURGER: And the other is, Your Honor, I've
16 had a little bit of further time to reflect on the incident
17 with Mr. Michael yesterday, and his vouching for the
18 credibility of the victim, and I would note that after the
19 Court had stated multiple times, we will not be doing that,
20 that as Mr. Spindle was preparing to ask his next question,
21 Mr. Michael, who is a long-time FBI agent, he's a professional
22 witness, he knows better than this, he's associated with the
23 Government, he leaned forward and stated again: "I believe
24 her." And I think because of that, I need to ask for a
25 mistrial at this time.

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Resubmit

1 And those are the only two issues I have, Your Honor.

2 THE COURT: Thank you. Your motion for mistrial will

3 be denied. And I think my ruling stands on the 412.

4 Does the Government have anything?

5 MR. SPINDLE: No, Your Honor.

6 THE COURT: You may bring in the jury.

7 (In the presence of the Jury at 9:08 A.M.)

8 THE COURT: Good morning. You may call your next

9 witness.

10 MR. LINNENBURGER: Thank you, Your Honor. The

11 defense would call Dr. Dwayne Gibbs.

12 MR. MOORE: Please come forward and be sworn. Please

13 raise your right hand.

14 (DR. DWAYNE LEONARD GIBBS, DEFENSE WITNESS, SWORN)

15 MR. MOORE: Please be seated.

16 DIRECT EXAMINATION

17 BY MR. LINNENBURGER:

18 Q. Good morning, sir.

19 A. Good morning.

20 Q. Could you state and spell your full name for the record,

21 please.

22 A. Dwayne Leonard Gibbs. D-w-a-y-n-e L-e-o-n-a-r-d

23 G-i-b-b-s.

24 Q. Mr. Gibbs, what is your profession?

25 A. I'm a medical doctor, general surgeon.

1 says.

2 Having said that, in spite of Instruction 3-A, I
3 believe that it is inappropriate to refer to Ms. E as Jane
4 Doe throughout these instructions. I believe that it would
5 violate Mr. Russell's constitutional rights to due process and
6 a fair trial, in that it unnecessarily implies that he is
7 guilty. It unnecessarily suggests to the jury that she is, in
8 fact, a victim, and that she is in need of additional
9 protection that would not be available in any other case.

10 And so I think to the extent that any of these
11 instructions refer to her as Jane Doe, outside of the simple
12 recitation of the Grand Jury, what the Grand Jury returned, I
13 think it's inappropriate and unconstitutional, and we would
14 object to those on those grounds.

15 THE COURT: All right.

16 MR. LINNENBURGER: And, Your Honor, I noted that the
17 Court is not proposing to tender an instruction on our proposed
18 lesser included of assault. And I'd apologize, I forget the
19 exact statutory reference. I believe it was 113(a)(4).

20 THE COURT: Yes.

21 MR. LINNENBURGER: I believe that there is absolutely
22 evidence to suggest that anything that occurred in that room
23 was not necessarily sexual, and a big part of that evidence is
24 that there was, indeed, no DNA located in the vaginal, oral, or
25 cervical swabs for any individual outside of Ms. E .

1 I would also note that this is another reason that it
2 was extremely important that I be allowed to present the
3 Rule 412 evidence, because that would provide additional
4 evidence that any supposed injuries that the Government will
5 rely on to suggest that whatever happened in that room was
6 sexual had a potential alternative explanation, which then
7 would have provided me more support for my theory and more
8 support for my requested lesser included.

9 If the Court is -- while I maintain that that is an
10 absolutely appropriate request, and we will stand by that
11 request, if the Court is not going to provide that -- and I say
12 this in the alternative, although for the record I don't mean
13 in the alternative. My initial request, I believe, was
14 entirely appropriate. But if I can't get that, I don't think
15 there is any way that the Government can complain if a lesser
16 included instruction for sexual abusive contact under 18 U.S.C.
17 2244 is provided. If the reason that the Court is not inclined
18 to provide a lesser included for just assault is that it deems
19 that there has been insufficient evidence to suggest that
20 whatever happened may not have been sexual, I believe that
21 would cure that.

22 And so while I disagree with the court's ruling to
23 the extent that the Court's ruling may stand, we would request
24 the lesser included, then, to be provided for sexual abusive
25 contact, which clearly would be encompassed within the elements

**Argument of Defense Counsel and Oral Ruling of the District Court on
Mr. Russell's Request for Lesser-Included Jury Instruction on
"Assault by Striking, Beating or Wounding," Contained on Appeal, Vol. V**

1 Your Honor, based on the evidence to date, I believe
2 that it is clear that a jury could rationally acquit
3 Mr. Russell of the ultimate charged offense, which requires
4 penetration to any extent, and still find that he may have
5 committed a lesser offense. We would thus request that the
6 Court include a version of -- it's Tenth Circuit Pattern
7 Instruction 133, the lesser included offense instruction. And
8 we would request that an instruction be provided for --

9 THE COURT: Would that be the attempt?

10 MR. LINNENBURGER: No. That is lesser included.
11 That's the lesser included offense, Your Honor.

12 THE COURT: What is the lesser included offense?

13 MR. LINNENBURGER: Your Honor, we would request an
14 instruction as to 18 U.S.C. 113(4), which is assault by
15 striking, beating, or wounding.

16 THE COURT: Let me get this right. 18 U.S.C. 113?

17 MR. LINNENBURGER: 113(4). I apologize; I missed the
18 "A." 113(a)(4). I apologize, Your Honor.

19 I believe that based on the charges in the
20 indictment, they have alleged physical force, which would
21 include striking, beating, or wounding. Those are the
22 allegations that have been made. That is part of what the
23 Government is relying on to meet the elements of the ultimate
24 charged offense.

25 I think it's clear that assault is encompassed in the

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1 sexual assault that is charged, and because there was no DNA
2 located inside, I think it is entirely rational that a jury may
3 potentially find that there was no penetration and acquit
4 Mr. Russell of the charged offense, but could potentially still
5 agree that he had committed the lesser offense of assault
6 without the penetration. And so for that reason, we would
7 request that the Court provide --

8 THE COURT: Why wouldn't that be an attempt?

9 MR. LINNENBURGER: Your Honor, I'm entitled to have
10 the jury instructed as to my theory, and I think the jury could
11 also determine that he was not attempting to commit any sexual
12 crime. Because if he had been attempting, then it would stand
13 to reason that either his semen or his DNA would have been
14 located at least on the vaginal swabs or on the oral swabs.

15 THE COURT: Not necessarily.

16 MR. LINNENBURGER: well, it's true, Your Honor, not
17 necessarily, but it's still entirely reasonable that a jury
18 could determine that, in which case I believe that under United
19 States vs. Bruce, 458 F.3d 1157, that I would be entitled to an
20 instruction as to the lesser assault charge. I'm not saying
21 the jury is going to buy it, Your Honor, but I think I'm
22 entitled to the instruction.

23 THE COURT: Anything else? Any other special
24 instructions that you feel you need?

25 MR. LINNENBURGER: No, Your Honor. And just for the

1 record, Mr. Spindle is right, a lot of my proposed instructions
2 included that language. And as the Court knows, I'm just
3 making sure that the record is preserved.

4 THE COURT: Okay, very good.

5 So I guess we're now just waiting on this additional
6 witness, and we will just be in recess. Somebody can let us
7 know when she gets here.

8 (Recess was held at 3:48 P.M.)

9 (In Open Court at 4:38 P.M.)

10 MR. LINNENBURGER: One brief issue, Your Honor, with
11 regard to this witness.

12 Your Honor, pursuant to Rule 611(c)(2), I would
13 request both parties be allowed to ask this particular witness
14 leading questions. I believe it is appropriate to call this
15 witness a hostile witness. She is clearly unwilling, as she
16 ignored two subpoenas; and after being subpoenaed, ignored
17 phone calls and messages.

18 THE COURT: She didn't get two subpoenas. She just
19 got one Subpoena.

20 MR. LINNENBURGER: No, she was subpoenaed by both
21 sides.

22 THE COURT: No. Your subpoena was never served.

23 MR. LINNENBURGER: It was, Your Honor.

24 THE COURT: They told me it was not.

25 MR. LINNENBURGER: You may have misheard, Your Honor.

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1 says.

2 Having said that, in spite of Instruction 3-A, I
3 believe that it is inappropriate to refer to Ms. E as Jane
4 Doe throughout these instructions. I believe that it would
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23 the extent that the Court's ruling may stand, we would request
24 the lesser included, then, to be provided for sexual abusive
25 contact, which clearly would be encompassed within the elements

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1 of what is charged, with the only change being that rather than
2 the sexual act being penetration, it would simply stop at
3 contact without penetration.

4 And other than that, Your Honor, we will stand by all
5 of the objections that would have been set forth in our
6 tendered instructions, I believe it was on February 28th.

7 And then I have nothing further on that, Your Honor.

8 THE COURT: Very good. Thank you.

9 MS. DIMAS: Your Honor, regarding my argument for the
10 lesser included offenses, I have brought some case law, as well
11 as copies for the Court, if you would like to review them.

12 THE COURT: What case law do you have with you?

13 MS. DIMAS: I have brought United States v.
14 Rafaelito, 946 F.2d 107.

15 THE COURT: That's Rafaelito?

16 MS. DIMAS: Rafaelito, R-a-f-a-e-l-i-t-o.

17 THE COURT: Okay.

18 MS. DIMAS: Also, U.S. v. Joe.

19 THE COURT: I've got that.

20 MS. DIMAS: Okay. As well as United States v. John.

21 THE COURT: I've got that.

22 MS. DIMAS: Would you like copies of Rafaelito?

23 THE COURT: Yes, of Rafaelito, if you've got that
24 handy.

25 MS. DIMAS: May I approach?

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1 THE COURT: Yes.

2 MS. DIMAS: Your Honor, the United States would
3 object to any lesser include offense for both the assault
4 charge that has been proposed by the defendant, as well as the
5 sexual contact charge that has been proposed by the defendant.
6 I'm sure the Court is well aware of the test that must be used
7 in determining whether there should be a lesser included
8 offense. The four-part test is proposed by U.S. v. Joe.

9 The United States would essentially contend that
10 regarding the sexual contact charge, the third prong isn't
11 necessarily -- I'm sorry -- the fourth prong isn't met here,
12 provided by the evidence that has been presented by not only
13 the United States, but also in the defendant's case in chief.
14 The fourth prong is that the jury must be able to rationally
15 convict the defendant of the lesser offense and acquit on the
16 greater offense.

17 The United States asserts that the evidence that's
18 been presented shows that the victim was penetrated. Not only
19 did she provide in her testimony that the defendant penetrated
20 her vagina with his penis, but there was also testimony from
21 the SANE nurse that she had injuries in her external genitalia.
22 There was an exhibit that provided documentation of that
23 injury, to show that it was within her vagina, as well.
24 Dr. Gibbs also testified as to external bruising -- or I'm
25 sorry -- external swelling to the victim's genitalia.

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1 We would submit to the Court that this shows that no
2 rational jury could acquit the defendant of this charge and
3 convict of the lesser charge based on this evidence. It
4 essentially shows that there is enough evidence to provide for
5 the penetration. So we would ask the Court not to allow that
6 particular charge.

7 THE COURT: Thank you. Do you have a rebuttal?

8 MR. LINNENBURGER: Well, I believe the Government
9 just made my case on Rule 412, Your Honor. But other than
10 that, again, Your Honor, solely because there are injuries to
11 the vaginal area does not necessarily mean that even without
12 412 evidence, the jury is free to believe that an adult woman
13 may otherwise have had vaginal intercourse in a timeframe
14 around there.

15 There is plenty of evidence to highlight
16 inconsistencies not only in her testimony internally, in her
17 stories internally, but her testimony in regards to other
18 individuals, and that absolutely it would be entirely
19 appropriate for the jury to believe that potentially an assault
20 occurred and that she was beaten, but that it was not sexual in
21 nature.

22 There is also testimony that Mr. Russell was
23 depressed from the recent loss of a loved one and that he had
24 anger management issues, and those are all things that would
25 support the jury potentially finding that this was an assault

1 outside of the context of anything sexual. So I would stand by
2 that, Your Honor.

3 And, again, in addition, if the Court -- if that is
4 the court's reasoning for excluding that lesser included, then
5 we would request that a lesser included for abusive contact
6 under 2242, I believe it is -- 2244, be included, and that
7 would allay those concerns. And I don't hear any complaint
8 from the Government on that, in particular.

9 THE COURT: Thank you.

10 Well, it's my view of the evidence that the
11 alternative scenario is totally lacking. There is no basis on
12 which a rational jury could convict of a lesser offense and
13 acquit of the greater offense. Consequently, I decline to give
14 a lesser included offense instruction.

15 I've made the one change that has been requested by
16 the Government, and I forget the page that I made it on. On
17 Page 20. I put, in lieu of "any person," "Jane Doe." And I
18 think the reason for using "Jane Doe" is not any reflection on
19 the defense or defendant. These instructions are filed. They
20 are open to the public. And I think we have to protect the
21 person, Jane Doe, from any notoriety as a result of this trial.

22 So with that in mind, and with that one change, we
23 are ready to instruct the jury.

24 MR. SPINDLE: Your Honor, may I address one issue
25 before the jury comes back?