No.

IN THE

SUPREME COURT OF THE UNITED STATES

TYSON MARTIN,
Petitioner,
v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR THE PETITIONER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-14217-J

TYSON MARTIN,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS STATE OF FLORIDA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(Filed Jul. 26, 2022)

ORDER:

Mr. Tyson Martin, a Florida prisoner convicted of attempted sexual battery when the victim was physically helpless, seeks a certificate of appealability ("COA") to appeal from the district court's denial of his counseled 28 U.S.C. § 2254 habeas corpus petition. While Mr. Martin previously raised seven grounds for relief, he only seeks a COA on Ground 1. In Ground 1A, he argued that the trial court erred by prohibiting the defense from introducing the full recording of Sergeant

Greg Wilder's interview with him, the exclusion of which he asserted deprived him of a fair trial. In Ground 1B, he argued that his trial counsel performed ineffectively by failing to appropriately object to the state's mischaracterization of his statement to Sergeant Wilder.

Here, reasonable jurists would not debate the district court's denial of Ground 1 of Mr. Martin's § 2254 petition. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that to obtain a COA, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further."). As to Ground 1A, the district court properly applied deference under § 2254(d) to the state appellate court's denial of the claim because, as the state appellate court rejected the claim without comment, federal courts presume that the adjudication was on the merits. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011). Mr. Martin's reliance on the content of the parties' arguments, and the panel's questions, on direct appeal about procedural default to overcome this presumption failed because the merits of the claim were also at issue, and the state appellate court's *per curiam* affirmance provided no indication of why it rejected the claim. *See Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1245 (11th Cir. 2017) (providing that the presumption "stands unless rebutted by evidence from the state court's decision and the record that 'leads very clearly to the conclusion that

the federal claim was inadvertently overlooked in state court.").

Further, in light of the proper deference applied to the state appellate court's decision, reasonable jurists would not debate the district court's rejection of Ground 1A. Mr. Martin based his argument on the trial court's purported error under state evidentiary law, which typically is not a basis for habeas relief. *See Alderman v. Zant*, 22 F.3d 1541, 1555 (11th Cir. 1994) ("As a general rule, a federal court in a habeas corpus case will not review the trial court's actions concerning the admissibility of evidence."). That said, he also argued that the evidentiary error deprived him of his right to a fair trial, which is a cognizable federal claim. *See Felker v. Turpin*, 83 F.3d 1303, 1311 (11th Cir. 1996) (explaining that habeas relief is warranted "when evidentiary errors so infused the trial with unfairness as to deny due process of law."). Nonetheless, reasonable jurists would not debate that the trial court's refusal to admit the entirety of Mr. Martin's statements to Sergeant Wilder, even if a violation of state evidentiary law, did not render his trial fundamentally unfair. The jury was exposed to the portion of Mr. Martin's statement that he contended had been mischaracterized and that he asserted was crucial for his defense of lack of intent. Because the jury was exposed to the portion of Mr. Martin's statement at issue, and he was able to argue in closing arguments that his statement to Sergeant Wilder showed his lack of intent, the trial court's refusal to admit his entire statement did not render his trial fundamentally unfair.

As to Ground 1B, to the extent that Mr. Martin argued that his counsel performed ineffectively by failing to preserve the issue for appeal through a proper objection, the claim failed because, regardless of whether an objection was needed to preserve the issue for appeal, the objection would have lacked merit. *See Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 2015) (explaining that the failure to raise a meritless objection is not deficient performance). The state post-conviction court found that any objection to the purported mischaracterization of Mr. Martin's statement would have lacked merit because "nothing was mischaracterized.'" Mr. Martin offered nothing to establish that this factual finding was incorrect, such that this Court must presume that the finding was accurate. *See Nejad v. Att'y Gen., State of Ga.*, 830 F.3d 1280, 1289 (11th Cir. 2016) (explaining that habeas courts must presume that factual findings made by state courts are correct unless the habeas petitioner rebuts that presumption). Moreover, a review of the record supports the state post-conviction court's finding that the state had not mischaracterized his statement. Accordingly, Mr. Martin's motion for a COA is DENIED.

/s/ [Illegible]
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TYSON MARTIN

VS CASE NO. 4:20-CV-0507-TKW-EMT

SECRETARY DEPARTMENT OF CORRECTIONS

JUDGMENT

(Filed Nov. 1, 2021)

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Petitioner take nothing and that The amended petition for writ of habeas corpus (Doc. 5) is **DENIED**. The certificate of appealability is **DENIED**.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

November 1, 2021 /s/ A'Donna Bridges, Deputy Clerk
DATE Deputy Clerk: A'Donna Bridges

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TYSON MARTIN,
Petitioner,

vs.

Case No.:
4:20cv507/TKW/EMT

SECRETARY DEP'T
OF CORR.,
Respondent.
/

ORDER

(Filed Nov. 1, 2021)

This case is before the Court based on the magistrate judge's Report and Recommendation (Doc. 19) and Petitioner's objections (Doc. 23). The Court reviewed the issues raised in the objections de novo as required by 28 U.S.C. §636(b)(1) and Fed. R. Civ. P. 72(b)(3), and based on that review, the Court agrees with the magistrate judge's disposition of each claim. The Court also agrees with the magistrate judge's determination that Petitioner has not made a substantial showing of the denial of a constitutional right and that reasonable jurists would not find the Court's disposition of Petitioner's claims to be wrong or fairly debatable.

Accordingly, it is **ORDERED** that:

1. The magistrate judge's Report and Recommendation is adopted and incorporated by reference in this order.

2. The amended petition for writ of habeas corpus (Doc. 5) is **DENIED**.

3. The certificate of appealability is **DENIED**.

4. The Clerk of court shall enter judgment in accordance with this Order and close the case.

DONE and ORDERED this 1st day of November, 2021.

/s/ T. Kent Wetherell, II
T. KENT WETHERELL, II
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TYSON MARTIN,
Petitioner,

vs.

Case No.:
4:20cv507/TKW/EMT

SECRETARY DEP'T
OF CORR.,
Respondent.
/

REPORT AND RECOMMENDATION

(Filed Sep. 7, 2021)

Petitioner Tyson Martin (Martin) filed a counseled amended petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 5). Respondent (the State) filed an answer and relevant portions of the state court record (ECF No. 10). Martin filed a reply (ECF No. 18).

The case was referred to the undersigned for the issuance of all preliminary orders and any recommendations to the district court regarding dispositive matters. *See* N.D. Fla. Loc. R. 72.2(B); *see also* 28 U.S.C. § 636(b)(1)(B)–(C) and Fed. R. Civ. P. 72(b). After careful consideration of the issues presented by the parties, it is the opinion of the undersigned that no evidentiary hearing is required for the disposition of this matter, Rule 8(a), Rules Governing Section 2254 Cases. It is further the opinion of the undersigned that the pleadings and attachments before the court show that Martin is not entitled to habeas relief.

I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

The relevant aspects of the procedural background of this case are established by the state court record (*see* ECF No. 10).[1] Martin was charged in the Circuit Court in and for Leon County, Florida, Case No. 2014-CF-2067, with one count of sexual battery when the victim was physically helpless (ECF No. 10-1 at 16 (information)). A jury trial was held on May 10–11, 2016 (*see* ECF No. 10-2 at 245 through 10-4 at 113 (transcript of jury trial)). At the beginning of trial, the State amended the information to add language charging attempt (ECF No. 10-1 at 17 (amended information)). The jury found Martin guilty of attempted sexual battery when the victim was physically helpless (ECF No. 10-1 at 45–46 (verdict)). On August 30, 2016, the court adjudicated Martin guilty and sentenced him as a sexual predator to a "split" sentence of sixty months in prison, with pre-sentence credit of two days, followed by sixty months of probation (ECF No. 10-1 at 136 through 10-2 at 109 (transcript of sentencing); ECF No. 10-1 at 111–19 (judgment and sentence)).

Martin appealed the judgment and sentence to the Florida First District Court of Appeal (First DCA), Case No. 1D16-3953 (ECF No. 10-4 at 168 through ECF No. 10-5 at 43 (parties' briefs)). The First DCA affirmed the judgment per curiam without written opinion on May 30, 2018 (ECF No. 10-5 at 45–46 (opinion)).

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[1] Citations to the state court record refer to the document numbers and page numbers assigned by the court's electronic filing system.

Martin v. State, 247 So. 3d 422 (Fla. 1st DCA 2018) (Table). The mandate issued June 20, 2018 (ECF No. 10-5 at 47 (mandate)).

On May 9, 2019, Martin filed a counseled motion for post-conviction relief in the state circuit court, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (ECF No. 10-5 at 3–19 (Rule 3.850 motion)). The circuit court summarily denied the Rule 3.850 motion in an order rendered on August 28, 2019 (ECF No. 10-5 at 100–02 (order)). Martin appealed the decision to the First DCA, Case No. 1D19-3423 (ECF No. 10-5 at 151–182 (Martin's initial brief)). The First DCA affirmed the circuit court's decision per curiam without written opinion on May 15, 2020 (ECF No. 10-5 at 187–88 (opinion)). *Martin v. State*, 297 So. 3d 525 (Fla. 1st DCA 2020). The mandate issued July 15, 2020 (ECF No. 10-5 at 196 (mandate)).

Martin commenced this federal habeas action on October 23, 2020 (ECF No. 1).

II. STANDARD OF REVIEW

A federal court "shall not" grant a habeas corpus petition on any claim that was adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). The United States Supreme Court explained the framework for § 2254 review in *Williams v. Taylor*, 529 U.S.

362 (2000).[2] Justice O'Connor described the appropriate test:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id., 529 U.S. at 412–13 (O'Connor, J., concurring).

Under the *Williams* framework, the federal court must first determine the "clearly established Federal law," namely, "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003). After identifying the governing legal principle, the federal court determines whether the state court's adjudication is contrary to

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[2] Unless otherwise noted, references to *Williams* are to the majority holding, written by Justice Stevens for the Court (joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer) in parts I, III, and W of the opinion (529 U.S. at 367–75, 390–99); and Justice O'Connor for the Court (joined by Justices Rehnquist, Kennedy, Thomas, and—except as to the footnote—Scalia) in part II (529 U.S. at 403–13). The opinion of Justice Stevens in Part II was joined by Justices Souter, Ginsburg, and Breyer.

the clearly established Supreme Court case law. The adjudication is "contrary" only if either the reasoning or the result contradicts the relevant Supreme Court cases. *See Early v. Packer*, 537 U.S. 3, 8 (2002) ("Avoiding th[e] pitfalls [of § 2254(d)(1)] does not require citation to our cases—indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.").

If the "contrary to" clause is not satisfied, the federal court determines whether the state court "unreasonably applied" the governing legal principle set forth in the Supreme Court's cases. The federal court defers to the state court's reasoning unless the state court's application of the legal principle was "objectively unreasonable" in light of the record before the state court. *See Williams*, 529 U.S. at 409; *Holland v. Jackson*, 542 U.S. 649, 652 (2004). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Section 2254(d) also allows habeas relief for a claim adjudicated on the merits in state court where that adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The "unreasonable determination of the facts" standard is implicated only to the extent the validity of the state court's ultimate conclusion is premised on unreasonable fact finding. *See Gill v. Mecusker*, 633 F.3d 1272, 1292 (11th Cir. 2011).

As with the "unreasonable application" clause, the federal court applies an objective test. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (holding that a state court decision based on a factual determination "will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding."). "The question under AEDPA [the Antiterrorism and Effective Death Penalty Act of 1996] is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410). AEDPA also requires federal courts to "presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.' *Landrigan*, 550 U.S. at 473–74 (quoting 28 U.S.C. § 2254(e)(1)).

The Supreme Court has often emphasized that a state prisoner's burden under § 2254(d) is "difficult to meet, . . . because it was meant to be." *Richter*, 562 U.S. at 102. The Court elaborated:

> As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this

> Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. *Jackson v. Virginia*, 443 U.S. 307, 332, n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (Stevens, J., concurring in judgment). As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Richter, 562 U.S. at 102–03 (emphasis added).

A federal court may conduct an independent review of the merits of a petitioner's claim only if it first finds that the petitioner satisfied § 2254(d). *See Panetti v. Quarterman, 551* U.S. 930, 954 (2007). Even then, the petitioner must show that he is in custody "in violation of the Constitution or laws and treaties of the United States," *see* 28 U.S.C. § 2254(a), and that the constitutional error resulted in "actual prejudice," meaning, the error "had a substantial and injurious effect or influence in determining the jury's verdict," *see Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks and citation omitted).

III. MARTIN'S CLAIMS

A. "Ground 1: The state trial court erred by prohibiting the defense from introducing the recording of Sergeant Greg Wilder's interview of Petitioner Martin. Alternatively, defense counsel rendered ineffective assistance of counsel by failing to appropriately object to the mischaracterization of Petitioner Martin's statement to Investigator Wilder."

"Ground 5: Defense counsel rendered ineffective assistance of counsel by failing to properly preserve the trial court's erroneous denial of the admission of Petitioner Martin's entire statement to Investigator Wilder."[3]

Martin asserts that during trial, the State presented testimony from Sergeant/Investigator Greg Wilder, who stated he interviewed Martin on July 10, 2014 (*see* ECF No. 5 at 3). Martin asserts Investigator Wilder testified as follows, in relevant part:

> Q [by the State]. Did you ask him whether he penetrated her vagina?
>
> A. I did.
>
> Q. And what was his response?
>
> A. He said he did not.

---

[3] For organizational purposes, the court is addressing Martin's federal habeas claims in a different order than he presents them in his amended § 2254 petition.

> Q. So he denied penetrating her vagina?
>
> A. That is correct. Yes, ma'am.
>
> Q. Okay. But said [sic] his hands were moving towards that area?
>
> A. Yes, ma'am.

(ECF No. 5 at 3–4). Martin asserts defense counsel indicated he intended to publish, during cross-examination of Investigator Wilder, the complete audio/video recording of Investigator Wilder's interview with Martin (*id.* at 4). Martin asserts the trial court ruled that defense counsel could not introduce the entire recording into evidence, but counsel could cross-examine Investigator Wilder about specific statements (*id.*).

Martin asserts Investigator Wilder testified as follows during cross-examination and re-direct examination:

> Q [by defense counsel]. Okay. And throughout the interview Mr. Martin denied going towards the—to actually penetrate her vagina; is that correct?
>
> A. Throughout the interview, yes, he—
>
> Q. He admitted touching her butt?
>
> A Right.
>
> Q. He denied doing anything to try to penetrate her vagina?
>
> A. He denied penetrating her vagina, yes.

Q. He denied trying to penetrate it? Did he ever admit to trying to penetrate her vagina?

A No. That—that exact verbiage, no.

Q. Did he ever admit to trying to touch her labia majora or labia minora?

A. That question was never asked, so—

Q. Did he ever try to touch her clitoris?

A. It was never asked.

Q. What about her butthole [sic]?

A. It was never asked specifically.

Q. So you never asked him specifically what he was doing, did you?

A. No, I asked him what he was doing. He indicated to me that his hand was underneath, skin on skin, and that her—he was—he had grabbed her boob, he had grabbed her butt, and his hand was moving down towards her vagina.

Q. Did you ask him if he intended to touch her vagina?

A. No, I did not ask him that.

Q. Did you ask him if he tried to touch her vagina?

A. No, sir.

Q. Did you ask him if he tried to touch her clitoris?

A. No, sir, I did not.

Q. Did you ask him if he tried to touch her labia?

MS. NORRIS [the prosecutor]: Object to asked and answered.

THE COURT: I think you did ask that. Sustained.

MR. ZELMAN [defense counsel]: I did? Just a moment, Your Honor.

(Pause.)

BY MR. ZELMAN:

Q. Investigator Wilder, during your interview with Mr. Martin, did you ask him what he intended to do?

A. I don't recall. I'd have to go back to the—I would have to back to the entire interview, but there were several questions asked there. Your specific questions, I do not recall—I did not ask him those. Overall, I don't know if I asked him that, his overall intention.

Q. Did he make any statements about whether or not he intended to touch—

MS. NORRIS: Are you done with your—

BY MR. ZELMAN:

Q.—her vagina?

MS. NORRIS: I was going to object to hearsay.

THE COURT: Well, overruled on the hearsay. He asked a specific question that relates to what you asked him about, although I think you've already asked him that question. He's already answered no.

BY MR. ZELMAN:

Q. Well, if you refer to page 23, of your—of the transcript, lines 2 and 3.

A Two and 3? Page 23?

Q. Yes. Did he make a statement about whether or not he intended to touch her vagina?

MS. NORRIS: I object to improper—can we go to sidebar?

. . . .

Q. Investigator Wilder, we'll go back to what we were just discussing.

A. Yes, sir.

Q. You testified that you never asked him or he never said what his intentions were. Is that a fair statement?

A. What his intentions were?

Q. Yes.

A. I don't think that was a direct terminology that I asked.

Q. You didn't ask him that?

A. Right, I don't think that was a direct terminology, what I asked. I don't think I specifically asked, "What were your intentions?"

Q. Okay. Did he indicate what his intentions were?

A. He indicated what were not his intentions. Does that make sense?

Q. That being that it was not his intention to touch the vagina?

A. Yes. I'm not trying to go around with words, but his statement was it wasn't his—it was not an intention to touch her vagina.

MR. ZELMAN: Just a moment, Your Honor.

(PAUSE.)

MR. ZELMAN: Nothing further at this time, Your Honor.

THE COURT: Okay. Any redirect from the State?

MS. NORRIS: Sure.

MR. ZELMAN: Do you want him to keep the transcript?

MS. NORRIS: Yes.

REDIRECT EXAMINATION

BY MS. NORRIS:

Q. I would like you to direct me to the line and page number where he told you it was not his intention to touch her vagina.

A. It got cut off. Page 23, I think it's line 2.

Q. No.

A. I'm—

Q. Pay attention to my question.

A. Okay.

Q. Where in this transcript does he say, "It was not my intention to touch her vagina, to penetrate her vagina," to X, Y, Z?

A. It doesn't, ma'am.

Q. So it's actually just the phrase, "It was not my intention," and he didn't finish the sentence?

A. That's correct.

Q. So more accurately he never said about what he did or did not intend to do?

A. Yes, ma'am.

(ECF No. 5 at 4–8).

Martin asserts that during the recorded interview, he actually said the following:

> INVESTIGATOR WILDER: But your hand made it underneath and you were grabbing her butt.
>
> DEFENDANT MARTIN: Yes, that's right.
>
> INVESTIGATOR WILDER: And I'll use non-clinical terms: more of the cheek or more of the crack? Or were you—you said you were moving your hands down toward her vagina, I'm assuming from behind? Your hand wasn't going down the front of her pants—
>
> DEFENDANT MARTIN: **I mean, it went towards but it was not an intention to—**
>
> INVESTIGATOR WILDER: Well, let me ask: Did you go in the waistband or the short? Did you go up the leg?
>
> DEFENDANT MARTIN: In the waistband. And these are high waisted shorts.

(ECF No. 5 at 8) (emphasis added by Martin).

Martin asserts the State "made the mischaracterization worse" during closing arguments by stating:

> Maybe he didn't intend to hurt her feelings. Maybe he didn't intend for her to go this far. Maybe he didn't intend—I don't know. But he didn't say that.

(ECF No. 5 at 13).

Martin contends the trial court deprived him of his constitutional right to a fair trial, guaranteed by the Fifth and Fourteenth Amendments, by preventing him

from publishing the entire recording of Investigator Wilder's interview to the jury (ECF No. 5 at 8, 12; ECF No. 18 at 1–5). He contends Florida's "rule of completeness" codified at Florida Statutes § 90.108(1), which is based upon "fairness" principles, and Florida state cases interpreting that rule, dictated that the defense be permitted to play the entire recording of the interview (ECF No. 5 at 8–12; ECF No. 18 at 15). Martin contends it was crucial for the defense to present evidence of Martin's lack of intent to penetrate the victim's vagina, because his intent differentiated the lesser included offenses of attempted sexual battery (of which Martin was convicted) and simple battery (*id.*). Martin contends the jury heard the victim's testimony that he (Martin) digitally penetrated her vagina, but the jury obviously believed his (Martin's) statements to Investigator Wilder, that he did not penetrate her vagina, because the jury did not convict him of sexual battery (*id.*). Martin contends if the jury had heard his entire conversation with Wilder, the jury would have found that he did not intend to penetrate the victim's vagina and thus would have convicted him of simple battery instead of attempted sexual battery (ECF No. 5 at 10, 13–14; ECF No. 18 at 1–2).

Martin asserts when he attempted to present this claim on direct appeal, the State argued in its answer brief that it was not preserved and that defense counsel should have asked to recross-examine Investigator Wilder (ECF No. 5 at 12). Martin asserts that a review of the direct appeal oral argument (available on the First DCA's website) demonstrates that the appellate

court agreed with the State's lack-of-preservation argument, specifically, that defense counsel failed to renew the request to publish the recording following the State's redirect (*id.*). Martin asserts that on this basis, he presented a claim of ineffective assistance of trial counsel (IATC) in his Rule 3.850 motion, claiming that defense counsel rendered ineffective assistance, in violation of the Sixth Amendment, by (1) failing to object to Investigator Wilder's testimony on redirect on the ground that it was misleading and mischaracterized Martin's statement, (2) failing to request to recross-examine Wilder with the recording, (3) failing to object to the State's closing argument as misleading, and (4) failing to preserve, for appellate review, the claim that the recording should be admitted due to Wilder's mischaracterizing Martin's statement during re-direct examination, and that exclusion of the entire recording violated Martin's right to a fair trial (*id.* at 12–13, 28–30).

Martin contends due to the trial court's exclusion of the recording and defense counsel's alleged ineffectiveness, the jury never heard his actual statement to Investigator Wilder, that his hand "went towards" the victim's vagina "but it was not an intention to—" (ECF No. 5 at 12–14). Martin contends the state courts' adjudications of his "fair trial" and IATC claims were contrary to and unreasonable applications of clearly established federal law (*id.* at 12, 15, 30). He additionally contends the state courts' adjudications were based on an unreasonable determination of the facts in light of the evidence in the state court record (*id.*).

Martin requests an evidentiary hearing on his IATC claims, on the ground that the state court denied him the opportunity present evidence at an evidentiary hearing (*id.* at 16–17, 30).

The State concedes that Martin exhausted his federal "fair trial" claim and his IATC claims in the state courts (*see* ECF No. 10 at 17, 45). The State contends the state courts' adjudications of Martin's claims were not contrary to or an unreasonable application of clearly established federal law (*id.* at 17–25, 45–49).

1. Federal Fair Trial Claim

Martin claims that the trial court deprived him of his constitutional right to a fair trial, guaranteed by the Fifth and Fourteenth Amendments, by preventing him from admitting into evidence the entire recording of his conversation with Investigator Wilder.

The transcript of Martin's trial is part of the state court record. M.W., the victim, testified she was 22 years old at the time of her testimony in May of 2016 (she was 20 years old at the time of the offense) (ECF No. 10-2 at 283 through 10-3 at 52 (M.W.'s trial testimony)). M.W. testified that on July 2, 2014, she, Taylor Foster (M.W.'s roommate), Ms. Foster's boyfriend (Andrew Sebesta), and Mr. Sebesta's roommates (Martin and Lacey Marx) went to the "Strip" on Tennessee Street. M.W. testified she consumed three to four strong vodka drinks. M.W. testified that at approximately 12:30 a.m. (the morning of July 3), she and the group left the "Strip" and went to Mr. Sebasta's house. M.W.

testified that when she arrived, she got sick in the bathroom and then laid down on the couch in the living room. M.W. testified she fell asleep on the couch and awoke between 2:30 and 3:00 a.m., when she felt Martin touching her:

> A. I was woken by—by Tyson Martin's hands down the back of my pants, in my vaginal area, inside my vagina, while I was sleeping.
>
> Q [by the prosecutor]. Now, you said inside of your vagina?
>
> A. Yes.
>
> Q. Okay. Can you—do you know—can you describe what you felt inside of your vagina? I know that's an awkward question, but what was inside of your vagina?
>
> A. Tyson Martin's fingers.
>
> Q. Okay. Were they touching the outside of vagina, or inside of your vagina?
>
> A. Inside.
>
> Q. Okay. Were they being still or moving?
>
> A. Moving very vigorously.
>
> Q. Okay. Would you describe it as—and I'm going to use a lay term—would you describe it as being fingered?
>
> A. Yes.

Q. Okay. Do you know how many fingers he had inside of you?

A. More than one.

Q. Can you—and I'm sorry I'm being detailed, but—

A. That's okay.

Q. —can you describe how much of the finger he had inside of your vagina?

A. The full finger, I mean, as far as it would go. The entire finger. Fingers.

Q. So up until the base—

A. Yes—

Q. —the palm of the hand?

A. —up until—up until they wouldn't go any further.

(ECF No. 10-3 at 1–3). M.W. testified she was wearing a red tank top and high-waisted shorts with no underwear. She testified Martin's arm was "down the back of me, all the way through my pants, around my buttocks and inside my vagina" (*id.* at 8–9).

M.W. testified she was lying on her left side and woke up and turned around. She testified that Martin was behind her. M.W. testified she said, "Are you fucking kidding me? Don't touch me. Leave me alone. Go away." (ECF No. 10-3 at 3). M.W. testified she said this "very sternly," and although she would not characterize it as screaming, she "did get my point across" (*id.*).

M.W. testified that Martin said, "You weren't supposed to wake up" and then backed up (*id.*). She testified she laid there "kind of frozen" and eventually went back to sleep (*id.* at 9).

M.W. testified she awoke again at 7:00–7:15 that morning "in a panic" (ECF No. 10-3 at 9). She testified, "I thought—I hoped it was a nightmare, and then I realized that that really happened to me, and I got real scared." (*id.* at 9–10). M.W. testified she found Taylor (her roommate) in a back bedroom and pulled her into the hallway. M.W. testified that she told Taylor what happened, that she did not feel safe or comfortable, and that she wanted to go home. M.W. testified she and Taylor left and went home, and she laid in bed and cried in the fetal position until she went to work at Jimmy John's later that day. M.W. testified her boss sent her home after an hour because he could tell she was clearly upset. M.W. testified she reported the event to law enforcement four days later, on Monday, July 7,2014. M.W. testified she reported it because "Something had to be done. If he would do it to me, he would do it to someone else." (*id.* at 11). With respect to her interaction with Martin earlier that evening, M.W. testified they introduced themselves, but she did not talk to him, flirt with him, or dance with him.

On cross-examination, M.W. testified she did not recall sending Lacey Marx (one of Martin's roommates) a Facebook friend request on July 3 (after she and Taylor left the house) or "tagging" Marx in a photograph taken the night before (ECF No. 10-3 at 22–23). M.W. testified she spent July 4,2014 (the day after the

incident) celebrating with friends (*id.* at 36). She testified she, her boyfriend Jason, and Taylor Foster went to a fraternity house in Heritage Grove during the day and then went to the "Strip" (*id.* at 36–37). M.W. testified she was drinking but not excessively (*id.*).

Kenneth Pinkard, an officer with the Tallahassee Police Department (TPD) testified that M.W. reported a sexual battery on July 7, 2014 (*see* ECF No. 10-3 at 58–63 (Pinkard's trial testimony)). Officer Pinkard testified he took a written statement from M.W. He testified he also collected a bra, shirt, and pair of shorts from M.W.

Taylor Foster's description of the events on the night of July 2 and early morning of July 3 were largely consistent with M.W.'s testimony (*see* ECF No. 103 at 65–90 (Foster's trial testimony)). Foster testified M.W. began drinking at the "Strip" and got sick in the bathroom of Andrew's house afterwards. Foster testified Andrew carried M.W. from the bathroom to the living room and laid her on the couch. Foster testified she and Andrew went to one of the bedrooms shortly thereafter, and M.W. was asleep at that time. Foster testified she heard other people talking in the common/living room area but did not know who it was. Foster testified she woke up the next morning at 6:30 or 7:00 to M.W. knocking on the bedroom door. Foster testified M.W. was crying hysterically. Foster testified Andrew drove them to where M.W. had left her car, then she and M.W. drove home and went to work at Jimmy John's later that day.

On cross-examination, Ms. Foster testified that on July 4,2014, she, M.W., and M.W.'s boyfriend went to "a bunch" of parties at Heritage Grove apartments during the day and then went to the "Strip" that night (ECF No. 10-3 at 83–87). Ms. Foster testified she and M.W. were drinking all day and were drunk that night (*id.* at 86–87).

Andrew Sebesta testified, in relevant part, that he moved M.W. from the bathroom to the couch (*see* ECF No. 10-3 at 91–112 (Sebesta's trial testimony)). Sebesta testified that everyone else, including Martin, was in the living room when he put M.W. on the couch. Sebesta testified that M.W. was "pretty much asleep, but every once in a while she would, like, butt into the conversation and then go back to not being with us" (*id.* at 98). Sebesta testified that Martin was one of the people who was still in the living room when he (Sebesta) and Taylor Foster went to bed. Sebesta testified that the next morning, he drove Taylor and M.W. to M.W.'s car, and M.W. was crying. Contrary to M.W.'s and Foster's testimony, Sebesta testified that M.W. was drinking prior to when they went to the "Strip."

Brittany Auclair a Crime Laboratory Analyst in the Biology Section of the Florida Department of Law Enforcement, testified she performed DNA testing on certain areas of the bra, shirt, and shorts collected by the TPD (*see* ECF No. 10-3 at 113–47 (Auclair's trial testimony)). Auclair testified she did not locate any semen or blood on those clothing items. Auclair testified she also tested for "touch DNA" by turning the shorts inside out and swabbing from the top, sides, and down

toward the crotch area (*id.* at 126–27). Auclair testified she "quantitated" the sample twice (*id.* at 129). Auclair testified the first time, there was no male DNA present, and the second time there was "a very, very low amount" such that she was unable to compare it to Martin's DNA (*id.* at 129–30). Auclair testified that if someone put a hand down the back of the shorts, and then the wearer of the shorts continued to wear them, the wearer's DNA could dislodge any DNA cells that may have been present from the person who put a hand down the shorts.

Investigator Greg Wilder testified next. Investigator Wilder testified he interviewed Martin at the Tallahassee Police Department on July 10, 2014 (ECF No. 10-3 at 152–53). Investigator Wilder testified that Martin initially stated he could not remember many of the events on the night in question because he was intoxicated, but after Wilder "confronted him with the concept of DNA evidence," Martin's story changed (*id.* at 157–59). Wilder testified that Martin admitted he touched the victim "in an inappropriate way" (*id.* at 159). Wilder testified he asked Martin where he touched the victim, and Martin responded that he touched "her boob or boobs and her butt" (*id.*).

At some points during the prosecutor's direct examination, Investigator Wilder testified that Martin said certain things, but Wilder could not recall Martin's exact words. During those occasions, the prosecutor used the written transcript of the interview to refresh Wilder's recollection. For example:

Q. Did he [Martin] tell you whether he had any beliefs that night as to whether or not she was intoxicated?

A. Yes, ma'am.

Q. What did he say he believed about that?

A. I don't have the exact quotes memorized, but there was indications. There were quotes specifically in our interview that he stated that.

Q. Would it refresh your memory if I showed you a transcript from that interview?

A. Yes, ma'am.

MS. NORRIS: May I approach, Your Honor?

THE COURT: Yes.

MS. NORRIS: For defense counsel, I'm on page 20, lines 6 through 8.

BY MS. NORRIS:

Q. And if you could just read this silently to yourself.

A. Okay.

Q. And does that refresh your memory?

A. Yes, ma'am.

Q. Did he indicate to you in the interview that he knew her frame of mind at that time that he was touching her?

A. Yes, ma'am.

Q. And what was that?

A. She was out. She was out. She was out of it. She wasn't there. She was completely passed out.

(ECF No. 10-3 at 160–61).

Direct examination continued:

Q. Did he describe how he touched her butt?

A. Yes, ma'am.

Q. Under the clothes? How?

A. He reached in from—he described reaching in at the waistline of the rear of her clothes and taking his hand and putting it down the back of her shorts, downward from the waistline along her butt.

Q. Did he say what direction he was heading when he put his arm down the top of her waistband, down towards her butt?

A He indicated he was headed down there.

Q. Down where?

A. Towards her vagina.

Q. Did you ask him whether he penetrated her vagina?

A. I did.

Q. And what was his response?

A. He said he did not.

Q. So he denied penetrating her vagina?

A. That is correct. Yes, ma'am.

Q. Okay. But said his hands were moving towards that area?

A. Yes, ma'am.

Q. Did he tell you what happened at that point?

A. Yes, ma'am, he did.

Q. What was that?

A. He stated that as his hand was down her pants, she woke up, and the victim confronted him verbally.

(ECF No. 10-3 at 162–63).

The prosecutor asked Investigator Wilder if Martin said anything about knowing what he was doing was wrong or about any feelings about what he was doing at the time (ECF No. 10-3 at 163). Wilder responded that he did not want to misquote Martin, so the State again refreshed Wilder's recollection with the transcript of the interview (*id.* at 163–64). Wilder then testified that Martin indicated he was inebriated and made a bad decision, and that he was "flicked up" (*id.* at 164).

The prosecutor wrapped up direct examination with a few more questions, and then the court took a

short recess before defense counsel's cross-examination of Investigator Wilder (ECF No. 10-3 at 164–65). Outside the presence of the jury, defense counsel announced his intent to introduce the entire audio/video recording of Wilder's interview with Martin (ECF No. 10-3 at 165–66). The court and counsel discussed the issue as follows:

> MR. ZELMAN: I believe that the case law is pretty clear that contemporaneously with the admission of any testimony concerning a portion of the Defendant's statement, the rest of it should be contemporaneously disclosed to the jury.
>
> THE COURT: Not necessarily. If there's something that's misleading in the testimony that's given, you certainly have a right in fairness to show the rest of the document that would clarify it. But you don't get to just play everything that he said, because that's hearsay when—from your side not—there's an exception on the other side because it's a party opponent. So is there something that's—that you have specifically that's going to be misleading the jury from what's been asked about what was said?
>
> MR. ZELMAN: Well, I think that the misleading portion specifically is the fact that the implication of the direct statement of Investigator Wilder was that Mr. Tyson—or Mr. Martin stated that he was moving toward her vagina, the implication being that he was going to try and touch it. I think that the entire

video reveals otherwise. And the rule of completeness—

THE COURT: If you have where—well, like I said, rule of completeness is, this is going to be misleading unless you consider something else that goes with it in context. So if you've got something specific that was asked and something that was said that puts that in context, that's certainly fair. But you don't just get to say I'm going to play the whole video because, you know, there's—I disagree with your characterization of what he said. You can cross examine. That's what cross examination is all about. Didn't he say this? And where did he say that? And you've got the transcripts, apparently.

MR. ZELMAN: Yes, Your Honor. In *Swearingen versus State*, 91 So. 3d 885, the court states pursuant to the rule of completeness all portions of the defendant's statements should be provided contemporaneously to the jury and not just those that benefit the State. I think that clearly—

THE COURT: I would like to see the context of *Swearingen* because I'm pretty sure things that are just good for the defense that have nothing to do with what was offered by the State would not be proper. So have you got a copy of that for me?

MS. NORRIS: And, Your Honor, if I could put something into the record.

. . . .

. . . I have no intent of mischaracterizing the Defendant's statement, I do not want to do that, or mislead the jury. But the question during the interview by the investigator was on page 21, lines 21 through 24.

"Question: Did your fingers ever make it to her vagina?"

"Answer: No, they didn't. They moved towards that area, but no."

I think, of course, the defense can cross examine the investigator that he doesn't know what the Defendant's intent was, he doesn't know what his plan was, if he moved close towards her vagina.

But I don't believe I've taken anything out of context. I've put into evidence the fact that he denied ever touching her vagina, which is the inculpatory—I'm sorry, exculpatory statement of the Defendant.

And it is my position that I agree with the court, they don't get to wholesale put in the entire interview. If there is a portion I misled, that would be admissible.

MR. ZELMAN: Your Honor, I would also refer to *Metz versus State*, 59 So. 3d 1225. The Defendant's exculpatory out-of-court statement is admissible into evidence when a State witness has testified to incriminating statements contemporaneously made by the Defendant, and the jury should hear the remaining portions at the same time so as to avoid the

potential for creating misleading impressions by taking statements out of context.

THE COURT: All right. And I don't have that case, but I have the one you gave me that's just as I cited. The purpose of the rule is to avoid the potential for creating misleading impressions by taking statements out of context. The proper standard for determining the admissibility of testimony under the rule is whether in the interest of fairness the remaining portions of the statement should have been contemporaneously provided to the jury.

And they quote another case which has a similar quote. So if there's a potential for creating, as I said, a misleading impression, you can certainly ask him any questions you want to clarify that. But you don't get to just get to say we're just going to play the statement. I don't know what's in the statement. I haven't heard it. There may be some stuff that is relevant, may not be relevant, but it's going to be an objection to hearsay.

But you certainly, if—if it's unfair, if the jury has been misled by any questions and answers, you can correct that with any reference to the transcript of his statement that you have.

MR. ZELMAN: Judge, I respectfully disagree. I think—and as I was citing to *Metz*, it refers to *Ramirez versus State*, which is a Florida Supreme Court case, 739 So. 2d 568. Fairness is clearly the focus of the rule. Thus when

a party introduces part of a statement, confession, or admission, the opposing party is ordinarily entitled to bring out the remainder of the statement.

THE COURT: Well, that's the language—you say that, but only if that's going to clear up and clarify in context. If you've got something in that statement that you want him to tell the jury about, I'm perfectly okay with that.

But I don't think that rule, the ruling of the case law in this area says if you ask a person about what somebody said, and that statement happens to be recorded by the way, she didn't play any of the statement. All she did was ask this person who happened to be there at the time what did he say, and he answered questions to it. So we don't even have a situation in which the State has played a portion of a statement. They've asked—

MR. ZELMAN: No, but they have quoted from the transcript, and the best evidence of the statement is going to be the recording.

THE COURT: If you wanted to object to it, you could.

MS. NORRIS: I think that a personal witness can also be the best evidence. I don't think the best evidence rules applies to that.

THE COURT: The best evidence only is—only applies if he says, "I've listened to that tape recorded statement and here is what

it says on it." That's not a best evidence thing. There's nothing—just because it's recorded doesn't mean the State can't call a witness, as they are doing, when there may or may not be a lot of stuff in there that the State doesn't want to get into.

MR. ZELMAN: Judge, I would like to proffer the entire recording into—into evidence then.

THE COURT: You can. Certainly, you can put it into evidence, but I'm giving you the opportunity to tell me what parts of the statement that you want to use or you want to play that is going to clarify something or take away what you feel to be a misimpression of the jury.

MR. ZELMAN: And, Judge, **I don't want to concede that we are not entitled to introduce the entire statement. I believe that the case law is clear that we are entitled contemporaneously to introduce the entire statement as a matter of fairness because only a portion of it was referenced in the direct—in the direct testimony of this witness**. So I—

THE COURT: Well, like I said, is there something specifically, though, that—in other words, if you told me that everything else that's on that statement is necessary so as to be fair—that's the whole idea of the rule, so the jury is not misled and given a false impression—I'm open to it. But you're just telling me I want to read the whole thing, and I'm

entitled do it because it was a statement given contemporaneously with questions that have been asked about it.

MS. NORRIS: And I would note that, I mean, the Defendant's reading of the case law, I think the rule of completeness is clear, as the Court is saying, it is only to allow the remainder of the Defendant's statements when statements have been made out of context, when the jury is being misled about what was really said because it's been cherrypicked through the statement. And if we were to read the case law in that way, it would obliterate an admission by a party opponent. Then at any time we elicited any statement of a defendant, every single self-serving thing that he said would then be admissible, so long as we don't take it out of context.

Had I introduced those statements and not elicited that he denied penetration, I do think it would be unfair and out of context, and they would be able to say, but didn't he deny penetrating her? Which is why I put it, in fairness, that he did deny that.

But I think he can be crossed examined on, you don't know what his intent was, you don't know if he intended to put his fingers in the vagina. All you know is he said he was headed in that direction. But even if we were to play the whole video, you'll never—I mean, he can ask him, he told you he didn't plan on penetrating her vagina, maybe he did say that. I don't know if he said that or not, but—

THE COURT: Okay. so you haven't pointed out anything specific; but if you want to make that a part of the record, you certainly can do it.

MR. ZELMAN: Well, and, yes, Your Honor. Specifically, I mean, something that was misleading in Investigator Wilder's testimony, when he was referencing, or when the State refreshed his memory about certain things that were in the record concerning how he felt concerning my client, the specific quote was, "Honestly, I made a bad decision. I made a very bad decision."

Then the next page, "I was inebriated and I was fucked up, and I made a very bad decision." Investigator Wilder juxtaposed those two. He said, "I was inebriated. I made a very bad decision, and I fucked up."[4] He switched them. I think that it's important to realize the best evidence and—of the entire statement is what the statement is, not somebody's memory of what the statement was.

THE COURT: Well, that's your choice to ask him if you want to.

MR. ZELMAN: Well, certainly I'm going to, Judge. But I think that, you know—

THE COURT: Do you have a transcript of that? You can ask him to refresh his

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[4] Defense counsel misquoted Investigator Wilder's testimony. Investigator Wilder did not testify that Martin stated he "fucked up"; rather, Wilder testified that Martin stated he "was flicked up" (ECF No. 10-3 at 64).

memory, or you can impeach him if he—if he maintains it's something different than what you say.

What you're saying, though, to me, just—just from analysis is not any significance of any difference in terms of reversing it. That's what he said, that's what he said. You can ask him, well, didn't you first say this and then say that, if you think it's significant. But I just—my personal thing is I don't think it is.

But, anyway, I'm not going to let you just play the tape, not going to happen.

MR. ZELMAN: I would like to proffer it into the record to preserve it for appeal.

THE COURT: Very good.

. . . .

I'm just saying what I understand the law to be, and you don't get to play it just because you want to play it.

MR. ZELMAN: Well, I don't disagree with the court's statement there. Now, in fairness, over a month ago I e-mailed the State with portions of the recording that we intended to redact. They never responded one way or another whether or not they had any objections to that, so, certainly, it's my position that they are objecting now, it's kind of playing a game of "gotcha." So—

THE COURT: Well, whatever you perceive it to be. I can only rule when I get objections, that's the only way I know how to do it.

> I can't go behind either—either of your motives when you object.
>
> MS. NORRIS: Right. I did inquire as to how he was going to put that into evidence because it was hearsay. I didn't mean to play "gotcha."

(ECF No. 10-3 at 166–75) (emphasis added). The audio/video recording was marked as Defense Exhibit 44 and entered into the record (*id.* at 176).

Defense counsel cross-examined Investigator Wilder as follows, in relevant part:

> Q. And throughout the interview Mr. Martin denied going towards the—to actually penetrate her vagina; is that correct?
>
> A. Throughout the interview, yes, he—
>
> Q. He admitted touching her butt?
>
> A. Right.
>
> Q. He denied doing anything to try to penetrate her vagina?
>
> A. He denied penetrating her vagina, yes.
>
> Q. He denied trying to penetrate it? Did he ever admitted [sic] to trying to penetrate her vagina?
>
> A. No. That—that exact verbiage, no.
>
> . . . .

Q. So you never asked him specifically what he was doing, did you?

A. No, I asked him what he was doing. He indicated to me that his hand was underneath, skin on skin, and that her—he was—he had grabbed her boob, he had grabbed her butt, and his hand was moving down towards her vagina.

Q. Did you ask him if he intended to touch her vagina?

A. No, I did not ask him that.

Q. Did you ask him if he tried to touch her vagina?

A. No, sir.

. . . .

Q. Did he make any statements about whether or not he intended to touch—

—her vagina?

MS. NORRIS: I was going to object to hearsay.

THE COURT: Well, overruled on the hearsay. He asked a specific question that relates to what you asked him about, although I think you've already asked him that question. He's already answered no.

BY MR. ZELMAN:

Q. Well, if you refer to page 23, of your—of the transcript, lines 2 and 3.

A. Two and 3? Page 23?

Q. Yes. Did he make a statement about whether or not he intended to touch her vagina?

MS. NORRIS: I object to improper—can we go sidebar?

THE COURT: Is it—is it something separate than no? Because he said no when you first asked him the question.

MR. ZELMAN: Well, he said he didn't—

THE COURT: Do you want to clarify it?

MR. ZELMAN: Yes.

THE COURT: Ask him again.

MS. NORRIS: Your Honor, may go sidebar?

THE COURT: Sure.

(Sidebar conference as follows:)

MS. NORRIS: I thought it might be easier if the Court knows what we are referring to. The investigator said, "You were moving your hands down toward her vagina, I am assuming from behind, question mark? Your hand wasn't going down the front of her pants?" And he said, "I mean, it went towards, but it was not an intention to," and then he was cut off. So I don't think it's out of context because I don't know what he did not intend to do. I don't know if he didn't intend to smack

it, if he didn't intend to penetrate it, if he didn't—I don't think it's—

THE COURT: Maybe.

MS. NORRIS: —out of context because—

THE COURT: I think it is legitimate clarified [sic], but my memory, and I may be wrong, I thought you asked him did he—did you ask him about him intending to—

MR. ZELMAN: I think the question was: Did you know what his intent was, or did he tell you? And he said no, but—

THE COURT: I think you also asked him did you ask him if that was his intent, and he said that it never came up or something like that.

MR. ZELMAN: That's different from what he said here, so—

MS. NORRIS: Actually, if I could—the question that he just asked that I objected to was, "Did you ask him if he intended to penetrate her vagina?" He never asked him if he intended to penetrate her vagina. All he said was—

THE COURT: That's what I thought he said before. That's what he said, "I didn't ask him." He went through several body parts, and he said, "I didn't ask him."

MS. NORRIS: I think maybe the proper objection would be improper impeachment because it's the Defendant's statement of it went

towards it, but it was not an intention to—we don't know what the rest of that is. I don't know what he was trying to say it was not his intention to do. He didn't—it's not specifically in reference to penetrating her vagina. I think it's unfair to make the assumption or the leap when I can't cross examine the Defendant about what his intention—

THE COURT: The only question right now is: Did you ask him if it was his intent to touch her vagina? I think he's already answered that question.

MR. ZELMAN: Okay.

THE COURT: But in the interest of clarifying it, if you want to ask him, he can say it. He may waffle a bit because he either maybe—remembers or he doesn't remember, if you want to refresh his memory about that. But that's a little different than did he admit doing it.

MR. ZELMAN: You're right.

MS. NORRIS: I just want to be clear about what, you know, was said because he doesn't say, "I did not intend to penetrate her vagina," he never said that from the transcript.

THE COURT: Well, the question is: Did you ask him: If he didn't ask him—

MS. NORRIS: Right. Okay. Okay.

THE COURT: If he did ask him, what was his answer?

MS. NORRIS: Right. Okay.

(The sidebar conference concluded, and the following took place in open court:)

BY MR. ZELMAN:

Q. Investigator Wilder, we'll go back to what we were just discussing.

A. Yes, sir.

Q. You testified that you never asked him or he never said what his intentions were. Is that a fair statement?

A. What his intentions were?

Q. Yes.

A. I don't think that was a direct terminology that I asked.

Q. You didn't ask him that?

A. Right. I don't think that was a direct terminology, what I asked. I don't think I specifically asked, "what were your intentions?"

Q. Okay. Did he indicate what his intentions were?

A. He indicated what were not his intentions. Does that make sense?

Q. That being it was not in his intention to touch the vagina?

A. Yes. I'm not trying to go around with words, but his statement was it wasn't his—it was not an intention to touch her vagina.

(ECF No. 10-3 at 187–94). That concluded the cross-examination.

The State conducted re-direct examination as follows, in relevant part:

> Q. I would like you to direct me to the line and page number where he told you it was not his intention to touch her vagina.
>
> A. It got cut off. Page 23, I think it's line 2.
>
> Q. No.
>
> A. I'm—
>
> Q. Pay attention to my question.
>
> A. Okay.
>
> Q. Where in this transcript does he say, "It was not my intention to touch her vagina, to penetrate her vagina," to X, Y, Z?
>
> A. It doesn't, ma'am.
>
> Q. So it's actually just the phrase, "It was not my intention," and he didn't finish the sentence?
>
> A. That's correct.
>
> Q. So more accurately he never said about what he did or did not intend to do?
>
> A. Yes, ma'am.
>
> . . . .

> Q. Okay. With respect to Mr. Martin's intentions—well, when you were asking him about the direction his hand was moving in, did you use the term "vaginal area" or "vagina"? And if you need to refer to page 21, lines 21 through 24. And I'm going to ask the question again now that you're there.
>
> A. Okay.
>
> Q. When you asked him about where his fingers were traveling, did you ask him—did you use the phrase towards her "vaginal area" or her "vagina"?
>
> A. Vagina.
>
> Q. Was your specific question: Did your fingers ever make it to her vagina?
>
> A. Yes, ma'am, that was my question.
>
> Q. And what was his exact response?
>
> A. "No, they didn't. They moved toward the area but no."

(ECF No. 10-3 at 193–96).

The defense presented testimony from three of Martin's roommates. Lacey Marx testified she received a Facebook friend request from M.W. on July 3,2014, and that M.W. "tagged" her in a picture taken the night before (*see* ECF No. 10-3 at 205–36 (Marx's trial testimony)). Marx also testified that sound traveled in the house, and she could frequently hear people in other parts of the house talking in a regular voice. Marx testified she went to bed at approximately 1:15 a.m. on

July 3. She testified she did not recall the TV being on and was not awoken by the TV or anyone speaking loudly in the living room after she went to bed.

John Searcy testified that the TV was on during the entire time that the group was at the house after returning from the "Strip" (*see* ECF No. 10-3 at 236–62 (Searcy's trial testimony)). Searcy testified he and Martin watched TV in the living room while M.W. was sleeping on the couch. He testified he went to bed in one of the bedrooms at approximately 2:30–3:00 a.m. Searcy testified he did not hear anything after he went to bed, but he acknowledged he always slept with earphones.

Martin's sister, Blair, testified she went to bed shortly after Andrew Sebasta put M.W. on the couch (*see* ECF No. 10-3 at 265–96 (Blair Martin's trial testimony)). Ms. Martin testified that the walls in the house were "thin," and she had previously been awoken by voices in the living room (*id.* at 275–76). Ms. Martin testified that during the early morning hours of July 3, she did not hear any loud voices coming from the living room. She testified she saw M.W. the following morning, and M.W. looked "really hungover" but she did not appear hysterical or like she had been crying (*id.* at 278–79, 296).

The prosecutor and defense counsel referenced Investigator Wilder's interview with Martin during their closing arguments. In the first half of her closing argument, the prosecutor argued, "He admits to putting his

hand down the back of her pants and going toward her vagina." (ECF No. 10-4 at 45).

Defense counsel argued:

> He [Investigator Wilder] told you he didn't ask Tyson if Tyson intended to touch M's vagina. He told you that Tyson denied intending to do that.
>
> He didn't ask Tyson if Tyson tried to touch Ms. W's vagina. He didn't ask Tyson if Tyson tried to touch her clitoris or her labia, or if he intended to penetrate her vagina. He didn't ask any of those questions.
>
> He did tell us on cross examination that Tyson stated he didn't intend on touching Ms. W's vagina. He did tell us that Tyson denied penetrating her vagina. He did tell us that Tyson denied touching her vaginal area.
>
> . . . .
>
> If his intent was to touch her vagina or penetrate her vagina, why would he come from the top? These are high-waisted shorts, so the furthest distance from her vagina is the way in which he entered her shorts.
>
> How does that establish his intent to touch her vagina, to penetrate her vagina? It doesn't.
>
> . . . .
>
> Investigator Wilder did not help the State meet their burden. I would submit to you that Investigator Wilder in his testimony

established reasonable doubt concerning the most significant element that the State brought to your attention of the crime charged.

His failure to ask the specific questions, by itself, could establish reasonable doubt that Tyson Martin put his finger—committed an act upon MW in which his finger penetrated M's vagina. He did not ask that question.

More significantly, he didn't ask whether that was what Tyson intended to do or was trying to do. I would submit to you that the two lesser-includeds that are attempts, Investigator Wilder's failure to ask those questions establish beyond a reasonable doubt that Tyson Martin did not attempt to commit a sexual battery, not the reverse, but that his failure to ask those questions mean, and I submit to you that it means that he is not guilty of both versions of the attempted sexual battery. Why? Because there is no evidence to support that finding beyond and to the exclusion of every reasonable doubt.

. . . .

As we said earlier, if Tyson's intent was to touch her vagina, to penetrate her vagina in any way, shape, or form while she was laying [sic] on her side, he would go from the bottom, right where her crotch was.

We'll concede that Ms. W was passed out in the early morning hours of July 3rd. I think all the evidence corroborates that. We'll concede

> that Tyson admitted to touching her breast and grabbing her butt.
>
> I would submit to you, her own testimony tells us where the rest of the story came from. After she woke up, confronted him for touching her butt, she fell back asleep and had a nightmare. The rest of what happened was a nightmare. It did not happen.
>
> As a result, we ask that you return a verdict of not guilty to Sexual Battery Physically Helpless, Sexual Battery, Attempted Sexual Battery Physically Helpless, Attempted Sexual Battery. The only thing that Mr. Martin did was commit a battery.

(ECF No. 10-4 at 68–71, 87–88).

In the second half of her closing argument, the prosecutor argued the following, in relevant part:

> I don't know what he intends. I know what he does. I know what his actions are, and I get to put two and two together.
>
> We have a beautiful girl on a couch, who is sitting there with her, you know, shorts, sitting there. He sees her. He puts his arm down her, and starts going towards her vagina.
>
> According to her, he does goes [sic] in her vagina. You rely on your memory of what the witnesses said, but I have to argue from my memory, that's all I've got, unfortunately.
>
> But Investigator Wilder—he never said he did not intend to touch her vagina. When

> he had his memory refreshed with the transcript of the interview, he said he didn't—he said, "I never intended," dot, dot, dot. Didn't say what it was he didn't intend. Maybe he didn't intend to hurt her feelings. Maybe he didn't intend for her to go this far. Maybe he didn't intend—I don't know. But he didn't say that.
>
> And, in fact, what he did say, when I asked Investigator Wilder, the direct quote was: Did your fingers ever make it to her vagina? No, they didn't. They moved towards that area, but no.
>
> What do you think he was going to do when he got down there, if he didn't? But I'm arguing to you that he did penetrate her vagina.

(ECF No. 10-4 at 99–101).

After trial, defense counsel filed a motion for new trial asserting, as Ground 1, that the trial court violated Florida's rule of completeness by not allowing the defense to introduce the complete recording of Investigator Wilder's interview of Martin (ECF No. 10-1 at 47–49). Defense counsel argued that the recording would have been able to clarify whether Martin finished the sentence, "I mean, it went towards but it was not an intention to—" (*id.* at 49). Defense counsel argued that the trial court's violation of the rule of completeness was a reversible error, and a new trial was the only remedy that would allow Martin to "raise a fair defense" (*id.* at 49). Defense counsel attached a

written transcript of the entire interview (*id.* at 58–78). The trial court denied the motion for new trial without stating reasons (*id.* at 79).

Martin presented his federal fair trial claim to the First DCA on direct appeal, arguing that the trial court's evidentiary ruling denied Martin's right to a fair trial guaranteed by the Fifth and Fourteenth Amendments (ECF No. 10-4 at 185–96). This was the first time that Martin alerted the state court to the federal nature of his claim. The First DCA affirmed Martin's judgment and sentence without written opinion. *See Martin v. State*, 247 So. 3d 422 (Fla. 1st DCA 2018).

Section 2254(d) does not require a state court to give reasons before its decision can be deemed to have been "adjudicated on the merits." *See Richter*, 562 U.S. at 99. When a state court issues an order that summarily rejects without discussion all the claims raised by a defendant, including a federal claim that the defendant subsequently presses in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits. *Id.* "That presumption stands unless rebutted by evidence from the state court's decision and the record in the case that leads very clearly to the conclusion that the federal claim was inadvertently overlooked in state court." *Pittman v. Sec'y, Fla. Dep't. of Corr.*, 871 F.3d 1231, 1245 (11th Cir. 2017) (internal quotation marks and citation omitted)).

Here, Martin has not rebutted the presumption that the First DCA adjudicated the merits of his federal fair

trial claim.[5] Therefore, § 2254(d) applies to the First DCA's decision. *See Richter*, 562 U.S. at 100; *see also Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1353 (11th Cir. 2012) (where state appellate court did not apply a procedural bar, the federal habeas court is compelled to presume that the court's one-word per curiam affirmance was an "adjudication on the merits" entitled to AEDPA deference).

Where, as here, a state court denies relief without providing an explanation or its reasoning, the habeas petitioner must show that there was no reasonable basis for the state court's decision. *See Richter*, 562 U.S. at 98. The federal court must determine what arguments or theories supported or could have supported the state court's decision, and then ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the

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[5] Martin asserts that a review of the direct appeal oral argument, which is available on the First DCA's website, demonstrates that the panel agreed with the State's argument that defense counsel failed to preserve the claim (and specifically, failed to renew the request to play the recording following the prosecutor's redirect-examination of Investigator Wilder) (*see* ECF No. 5 at 12). The court has reviewed the oral argument and concludes that it does not rebut the presumption that the First DCA adjudicated Martin's federal fair trial claim on the merits. Indeed, in a case cited by Martin in Ground 5 of his § 2254 petition, the First DCA noted that a per curiam affirmance without an opinion in a direct appeal, which is what the First DCA did here, does not establish whether the specific issue was or was not preserved for appeal or whether it was denied on the merits. *See Tidwell v. State*, 844 So. 2d 701, 703 (Fla. 1st DCA 2003).

holding in a prior decision of the Supreme Court. *See id.* at 102.

Martin contends the trial court's prohibiting the defense from introducing the complete recording of Investigator Wilder's interview of him was contrary to and an unreasonable application of his rights under the Fifth and Fourteenth Amendments (*see* ECF No. 5 at 12). Martin additionally argues that the state court's rejection of his claim was based on an unreasonable determination of the facts in light of the evidence in the state court record (*id.*).

As an initial matter, Martin has not identified an allegedly unreasonable **factual** reason for the state court's rejection of his federal fair trial claim. Instead, his argument under § 2254(d)(2)—that the state court made an unreasonable determination of the facts by prohibiting the defense from introducing the entire recording of the interview—is entirely derivative of his **legal** challenge. Therefore, the court will analyze Martin's argument under § 2254(d)(1) and determine whether the state court's adjudication of his federal fair trial claim was contrary to or an unreasonable application of clearly established federal law.

Martin has not identified any case, and this court has not found one, in which the Supreme Court held that a defendant was deprived of a constitutionally fair trial in circumstances such as these, i.e., where the trial court did not prevent the defense from introducing **portions** of the defendant's out-of-court statement, in order to clarify or provide context to other

portions of the statement introduced by the prosecution, but the court prohibited the defense from introducing the defendant's **entire** statement.

What Martin's argument comes down to is that the trial court incorrectly applied a state evidentiary rule, i.e., Florida's rule of completeness, and that the evidentiary ruling deprived him of a fair trial. Federal courts will not generally review state trial courts' evidentiary determinations. *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1295 (11th Cir. 2014) (citing *Lisenba v. California*, 314 U.S. 219, 228 (1941) ("We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence."). Indeed, in a habeas corpus action brought by a state prisoner, the federal court's authority is "severely restricted" in the review of state evidentiary rulings. *Taylor*, 760 F.3d at 1295 (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Habeas relief is warranted only when the error "so infused the trial with unfairness as to deny due process of law." *Lisenba*, 314 U.S. at 228; *see Estelle*, 502 U.S. at 75 (holding that habeas relief was not warranted because neither the introduction of the challenged evidence, nor the jury instruction as to its use, "so infused the trial with unfairness as to deny due process of law"); *Bryson v. Alabama*, 634 F.2d 862,

864–65 (5th Cir. Unit B Jan. 1981)[6] ("A violation of state evidentiary rules will not in and of itself invoke Section 2254 habeas corpus relief. The violation must be of such a magnitude as to constitute a denial of 'fundamental fairness.").

Under Florida law, a defendant's out-of-court self-serving exculpatory statements are generally inadmissible hearsay. *See Whitfield v. State*, 933 So. 2d 1245, 1248 (Fla. 1st DCA 2006) (citations omitted). However, the rule of completeness, codified in Florida Statutes § 90.108(1), provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

Fla. Stat. § 90.108(1). Thus, "if a partial statement, writing, or recording is admitted, the rule of completeness permits the opposing party to introduce other portions of that same statement, writing, or recording in the interest of fairness." *Calloway v. State*, 210 So. 3d 1160, 1183 (Fla. 2017) (citing *Kaczmar v. State*, 104 So. 3d 990, 1000 (Fla. 2012)). The rule applies equally to a witness' recollection of a portion of a statement as it

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

does to a portion of a statement admitted verbatim. *See Layman v. State*, 728 So. 2d 814, 816 (Fla. 5th DCA 1999) (citing *Long v. State*, 610 So. 2d 1276, 1282 (Fla. 1992)).

As the First DCA explained in *Eberhardt v. State*, 550 So. 2d 102 (Fla. 1st DCA 1989):

> Because portions of the defendant's conversation with the officer were admitted on direct examination, the rule of completeness generally allows admission of the balance of the conversation as well as other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two. (citation omitted). Once the officer testified in the state's case-in-chief about one portion of Eberhardt's statements to him, the court erred in sustaining the state's hearsay objection for the reason that his statements he was "high" or intoxicated were self-serving.

Id., 550 So. 2d at 105 (citation omitted).

The purpose of the rule of completeness is to "avoid the potential for creating misleading impressions by taking statements out of context." *Larzelere v. State*, 676 So. 2d 394, 401 (Fla. 1996); *see also Metz v. State*, 59 So. 3d 1225, 1226–27 (Fla. 4th DCA 2011). Thus, when a party introduces part of a statement, confession, or admission, the opposing party is ordinarily entitled to bring out the remainder of the statement. *See Ramirez v. State*, 739 So. 2d 568, 580 (Fla. 1999) (citations omitted). "[T]he correct standard is

whether, in the interest of fairness, the remaining portions of the statements should have been contemporaneously provided to the jury." *Id.* (internal quotation marks and citation omitted). "Fairness is clearly the focus of this rule." *Jordan v. State*, 694 So. 2d 708, 712 (Fla. 1997).

However, the rule of completeness is not absolute. *Ramirez*, 739 So. 2d at 580; *Layman*, 728 So. 2d at 816. A trial court may exercise its discretion to exclude portions of a recorded statement. *See Layman*, 728 So. 2d at 816 (citing *Long*, 610 So. 2d at 1280 (noting that portions of an entire videotape may be excluded if they are irrelevant or if their probative value are substantially outweighed by their prejudice)).

Applying the principles embodied in Florida's rule of completeness, and mindful of the deference owed state courts in construing their own evidentiary rules, Martin has not demonstrated that the trial court's application of Florida's rule of completeness deprived him of his constitutional rights to present his defense and to a fundamentally fair trial.

For starters, the undersigned is hard-pressed to find that the trial court's evidentiary ruling was erroneous. Defense counsel did not seek to introduce **portions** of the audio/video recording, instead, he insisted that the rule of completeness required admission of the **entire** recording. The trial court denied counsel's request to admit the entire recording which, as discussed *supra*, was within the trial court's discretion to do absent a showing that all of the recording was relevant

and not unduly prejudicial. Further, the trial court did not restrict defense counsel from introducing portions of the interview that provided context to the statements attributed to Martin by Investigator Wilder on direct examination.

Martin's defense was that he did not penetrate, or intend to penetrate, M.W.'s vagina when he put his hand down the back of her shorts. Martin claims that because the trial court prohibited him from introducing the entire recording, the jury did not hear the following:

> INVESTIGATOR WILDER: But your hand made it underneath and you were grabbing her butt.
>
> DEFENDANT MARTIN: Yes, that's right.
>
> INVESTIGATOR WILDER: And I'll use non-clinical terms: more of the cheek or more of the crack? Or were you—you said you were moving your hands down toward her vagina, I'm assuming from behind? Your hand wasn't going down the front of her pants—
>
> DEFENDANT MARTIN: I mean, it went towards but it was not an intention to—
>
> INVESTIGATOR WILDER: Well, let me ask: Did you go in the waistband or the short? Did you go up the leg?
>
> DEFENDANT MARTIN: In the waistband. And these are high waisted shorts.

> INVESTIGATOR WILDER: But your hand was on her ass underneath her shorts, even if she had underwear on, but it was definitely skin-on-skin?
>
> DEFENDANT MARTIN: True.
>
> INVESTIGATOR WILDER: And your hand is moving down towards her vagina, but—
>
> DEFENDANT MARTIN: But I never touched it.

(*see* ECF No. 5 at 8 (quoting from transcript attached to motion for new trial (ECF No. 10-1 at 63))).

As demonstrated by the trial transcript, defense counsel cross-examined Investigator Wilder about the portion of the interview relating to Martin's moving his hand down the back of the victim's shorts toward her vagina. Counsel asked Wilder whether Martin indicated that it was not his intention to touch the victim's vagina, and Wilder answered, "Yes . . . his statement was it wasn't his—it was not his intention to touch her vagina." During closing arguments, defense counsel reminded the jury of this testimony and argued that additional evidence of Martin's lack of intent was the fact that Martin moved his hand down the top of the victim's high-waisted shorts instead of moving it a shorter distance from the bottom of her shorts.

Martin has not shown that playing the entire recording of his conversation with Investigator Wilder would have explained or clarified the portions presented to the jury through Investigator Wilder's testimony. Nor

has Martin shown that without playing the entire recording, the jury was left with a mistaken or false impression of his statement(s) regarding his intentions when he put his hand down the waistband of M.W.'s shorts. The jury heard Martin's statements that he put his hand down the back of M.W.'s shorts and moved it toward her vagina, "but it was not an intention to—," and that he did not penetrate it. Martin has not demonstrated that the trial court's prohibiting him from introducing the entire recording of the interview prevented him from mounting an effective defense or otherwise deprived him of a fair trial.

In sum, Martin has not demonstrated the state court's adjudication of his fair trial claim was based upon an unreasonable determination of the facts, or that it was contrary to or an unreasonable application of clearly established federal law. Therefore, Martin is not entitled to federal habeas relief on the federal fair trial claim presented in Ground 1.

2. IATC Claims

Martin asserts a related IATC claim, that defense counsel was ineffective for (1) failing to object to Investigator Wilder's testimony on re-direct examination on the ground that it was misleading and mischaracterized Martin's statement, (2) failing to request to re-cross-examine Wilder with the recording, (3) failing to object to the State's closing argument as misleading, and (4) failing to preserve, for appellate review, the claim that the recording should be admitted due to

Wilder's mischaracterizing Martin's statement during re-direct examination, and that exclusion of the entire recording violated Martin's right to a fair trial (ECF No. 5 at 12–13, 28–30).

The State concedes that Martin exhausted the IATC claims asserted in Grounds 1 and 5 (ECF No. 10 at 17, 45). The State contends the claims were adjudicated on the merits by the state court, and Martin had not satisfied the standard for habeas relief under § 2254(d) (*id.* at 23–25, 45–49).

a. Clearly Established Federal Law

The standard for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To obtain relief under *Strickland*, the petitioner must show (1) deficient performance by counsel, and (2) a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 687–88. If the petitioner fails to make a showing as to either performance or prejudice, he is not entitled to relief. *Id.* at 697.

The focus of inquiry under the performance prong of *Strickland* is whether counsel's assistance was "reasonable considering all the circumstances," and reasonableness is measured "under prevailing professional norms." *Strickland*, 466 U.S. at 688. "The petitioner's burden to prove, by a preponderance of the evidence, that counsel's performance was unreasonable is a heavy one." *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir.

2006) (citing *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en Banc)). If the record is not complete regarding counsel's actions, "then the courts should presume that what the particular defense lawyer did at trial—for example, what witnesses he presented or did not present—were acts that some lawyer might do." *Jones*, 436 F.3d at 1293 (citing *Chandler*, 218 F.3d at 1314–15 n.15). "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

The Supreme Court instructed that in reviewing claims of ineffective assistance of counsel the court must be mindful of the following:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong

> presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same *way.*

Strickland, 466 U.S. at 689 (citations omitted).

As to the prejudice prong of the *Strickland* standard, the petitioner's burden of demonstrating prejudice is high. *See Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). To establish prejudice, the petitioner must show "that every fair-minded jurist would conclude 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Jones v. GDCP Warden*, 753 F.3d 1171, 1184 (11th Cir. 2014) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," not that counsel's conduct more likely than not altered the outcome of the proceeding. *Id.* (citation omitted). The petitioner must show that the likelihood of a different result is substantial, not just conceivable. *Williamson v. Fla. Dep't of Corr.*, 805 F.3d 1009, 1016 (11th Cir. 2015) (citing *Richter*, 562 U.S. at 112). "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had

a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

Finally, when a district court considers a habeas petition, the state court's findings of historical facts in the course of evaluating an ineffectiveness claim are subject to the presumption of correctness, while the performance and prejudice components are mixed questions of law and fact. *Strickland*, 466 U.S. at 698; *Collier v. Turpin*, 177 F.3d 1184, 1197 (11th Cir. 1999). "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 131 S. Ct. at 788. As the *Richter* Court explained:

> The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Id. (citations omitted).

b. Federal Review of State Court Decision

Martin presented his IATC claims as Grounds 1 and 2 of his Rule 3.850 motion (ECF No. 10-5 at 53–59). The state circuit court adjudicated the claims as follows:

> The defendant's first claim relates to Investigator Wilder's testimony in redirect. (Att. A, Trial Transcript excerpt, pages 242–245) Defendant contends that counsel should have objected to the questions on redirect. However, nothing objectionable was done in redirect and nothing was "mischaracterized." The prosecutor elicited a quote from the officer. It was up to the jury to decide what that statement meant. If there was any mischaracterization, it was elicited by skillful cross-examination when defense counsel got the investigator to say that it was not the defendant's intention to touch the victim's vagina. (Att. A, Trial Transcript excerpt, page 242) On redirect, the prosecutor simply elicited the statement "It was not my intention . . . " (Att. A, Trial Transcript excerpt, page 243) Since there was no "mischaracterization," any objection would have been futile. Therefore, there was no ineffective assistance of counsel and no unfair prejudice.
>
> The second claim also relates to the redirect testimony of Investigator Wilder. In this claim, defendant claims counsel was ineffective for not again raising the request to play the entire videotape after redirect examination of

> Investigator Wilder. The defense asserts this was necessary because Investigator Wilder "mischaracterized" the defendant's statement in redirect. The Court has already found this to be incorrect in ground one. The State did argue on appeal that this claim was not properly preserved. The defense vigorously argued to the contrary. (Att. B, Reply Brief of Appellant, pages 1–4) The District Court did not address the preservation issue on appeal. Therefore, it cannot be discerned how the District Court viewed the preservation issue. But, it is clear that defense counsel preserved Judge Lewis' initial ruling and nothing occurred in redirect to suggest that ruling was wrong. Nothing has been alleged suggesting Investigator Wilder took anything out of context on redirect. Therefore, there was no ineffective assistance of counsel or unfair prejudice.

(ECF No. 10-5 at 100–01).

Martin appealed the circuit court's decision to the First DCA (*see* ECF No. 10-5 at 161–74 (Martin's initial brief)). The First DCA affirmed the decision without written opinion (ECF No. 10-5 at 187–88 (decision)). *Martin v. State*, 297 So. 3d 525 (Fla. 1st DCA 2020) (Table).

The state court's conclusion, that Martin could not show he was prejudiced by defense counsel's alleged deficiencies, was not contrary to or an unreasonable application of *Strickland*, nor was it based on an unreasonable determination of the facts. Undertaking

the § 2254(d)(2) inquiry first, and applying that deferential standard of review, the undersigned cannot conclude that the Rule 3.850 court's description of the testimony presented at trial was an unreasonable determination of fact in light of the evidence presented in state court. Indeed, the portions of the trial transcript attached to the circuit court's order support its findings.

Additionally, the state court's finding, that Investigator Wilder did not mischaracterize Martin's statement or take it out of context, was reasonable. Martin asserts his actual statement was the following:

> INVESGATOR WILDER: And I'll use non-clinical terms: more of the cheek or more of the crack? Or were you—you said you were moving your hands down towards her vagina, I'm assuming from behind? Your hand wasn't going down the front of her pants—
>
> DEFENDANT MARTIN: I mean, it went towards but it was not an intention to—
>
> INVESTIGATOR MARTIN: Well, let me ask: Did you go in the waistband or the short? Did you go up the leg?
>
> DEFENDANT MARTIN: In the waistband. And these are high waisted shorts.

(*see* ECF No. 5 at 8 (citing transcript of interview, ECF No. 10-1 at 63)).

Investigator Wilder's testimony on re-direct examination, that Martin did not actually state, "It was not

my intention to touch her vagina" but actually stated, "It was not my intention to—" but did not finish the sentence, was not a mischaracterization. With regard to context, defense counsel had already elicited the context of Martin's statement during cross-examination immediately prior to Wilder's testimony on re-direct examination.

Based on the record, a reasonable jurist could agree with the state court's determination that Investigator Wilder did not mischaracterize Martin's statement or take it out of context. Martin thus has not satisfied § 2254(d)(2).[7]

Second, the court undertakes the § 2254(d)(1) inquiry—whether the conclusion of the Rule 3.850 court that Martin could not show deficient performance or prejudice under *Strickland*, was unreasonable. Martin claims that defense counsel was ineffective for (1) failing to object to Investigator Wilder's testimony on redirect examination on the ground that it was

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[7] The court follows the Eleventh Circuit in *Tarleton v. Sec'y, Fla. Dep't of Corr.*, No. 18-10621, 2021 WL 3117460, at *8 n.5 (1 tth Cir. July 23, 2021) and the Supreme Court in *Wood v. Allen*, 558 U.S. 290, 301 (2010), and assumes arguendo but declines to decide, that "the factual determination at issue should be reviewed . . . only under § 2254(d)(2) and not under § 2254(e)(1)." *Wood*, 558 U.S. at 301; *Tarleton*, 2021 WL 3117460, at *8 n.5. Because the Rule 3.850 judge's determination of the facts "was not an unreasonable determination of the facts in light of the evidence presented in the state court proceedings," the court does not need to decide whether the state court's factual determinations should be reviewed under the arguably more deferential standard set out in § 2254(e)(1). *Wood*, 558 U.S. at 301; *Tarleton*, 2021 WL 3117460, at *8 n.5.

misleading and mischaracterized Martin's statement, (2) failing to request to recross-examine Wilder with the recording, (3) failing to object to the State's closing argument as misleading, and (4) failing to preserve, for appellate review, the claim that the recording should be admitted due to Wilder's mischaracterizing Martin's statement during re-direct examination, and that exclusion of the entire recording violated Martin's right to a fair trial (ECF No. 5 at 12–13, 28–30).

A fairminded jurist could agree with the state court that there is no reasonable probability the jury would have returned a different verdict if defense counsel had done what Martin faults him for not doing. The jury was presented with undisputed evidence that Martin put his hand down the back of M.W.'s shorts, touched her buttock(s) with his fingers, and was moving in the direction of her vagina. The undisputed evidence also showed that M.W. woke up when Martin's hand was down her pants. The jury obviously did not believe that Martin's fingers actually penetrated M.W.'s vagina, but the jury clearly believed that Martin intended to do so. Upon review of the evidence presented to the jury and the transcript of the unpresented recording, a fairminded jurist could conclude there is no reasonable probability the jury would have reached a different conclusion regarding Martin's intent if defense counsel had played the recording. Put another way, there is no reasonable probability the jury would have concluded that Martin had no intention of penetrating M.W.'s vagina in light of the undisputed evidence showing he put his hand down the back of her

shorts, touched her buttock(s), and moved his finger(s) toward her vagina just prior to her waking up.

With respect to the prosecutor's closing argument, Martin contends defense counsel should have objected to the following statements as misleading: "Maybe he didn't intend to hurt her feelings. Maybe he didn't intend for her to go this far. Maybe he didn't intend—I don't know. But he didn't say that." (*see* ECF No. 5 at 13).

"To find prosecutorial misconduct, a two-element test must be met: (1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *United States v. Gonzalez*, 834 F.3d 1206, 1226 (11th Cir. 2016) (internal quotation marks and citations omitted).

"It has long been held that a prosecutor may argue both facts in evidence and reasonable inferences from those facts." *Tucker v. Kemp*, 762 F.2d 1496, 1506 (11th Cir. 1985); *United States v. Johns*, 734 F.2d 657, 663 (11th Cir. 1984) (holding that the prosecutor is not limited to a bare recitation of the facts; she may comment on the evidence and express the conclusions she contends the jury should draw from the evidence). But prosecutors must observe the distinction between the permissible practice of arguing evidence and suggesting inferences which the jury may reasonably draw from it and the impermissible practice of arguing suggestions beyond the evidence. *See United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992) (citation omitted). Further, a prosecutor may comment on the

uncontradicted or uncontroverted nature of the evidence and may point out that there is an absence of evidence on a certain issue. *See White v. State*, 377 So. 2d 1149 (Fla. 1980).

Here, the prosecutor's comment was made in her second closing argument, after defense counsel had argued, "He [Investigator Wilder] did tell us on cross-examination that Tyson stated he didn't intend on touching Ms. W's vagina." (ECF No. 10-4 at 69). The prosecutor argued the following in response:

> But Investigator Wilder—he never said he did not intend to touch her vagina. When he had his memory refreshed with the transcript of the interview, he said he didn't—he said, "I never intended," dot, dot, dot. Didn't say what it was he didn't intend. Maybe he didn't intend to hurt her feelings. Maybe he didn't intend for her to go this far. Maybe he didn't intend—I don't know. But he didn't say that.

(ECF No. 10-4 at 100). The prosecutor did not misstate or mischaracterize the evidence, she simply pointed out that Martin did not actually finish his sentence, and she suggested hypotheticals to highlight that fact.

Considering the evidence adduced at trial and the fact that the jury was instructed that the attorneys' statements during closing argument were not evidence (*see* ECF No. 10-4 at 29), a fairminded jurist could agree with the state court's conclusion that Martin failed to demonstrate deficient performance or

prejudice with respect to defense counsel's failure to object to the prosecutor's statements referenced *supra.*

Finally, to the extent Martin contends defense counsel's alleged failures at trial prejudiced the outcome of his direct appeal (i.e., that defense counsel failed to preserve the claim that the recording was admissible due to Investigator Wilder's alleged mischaracterization of Martin's statement during re-direct examination, and that exclusion of the entire recording violated Martin's right to a fair trial), this is not the proper method of measuring prejudice under *Strickland.* When the claimed error of counsel occurred at the guilt stage of trial, *Strickland* prejudice is gauged against the outcome of trial, not the outcome on appeal. *See Purvis v. Crosby*, 451 F.3d 734, 739 (11th Cir. 2006) (citing *Strickland*, 466 U.S. at 694–95).

Martin has not demonstrated that the state court's adjudication of the IATC claims presented in Grounds 1 and 5 was based upon an unreasonable determination of the facts, or was contrary to or an unreasonable application of *Strickland.* Therefore, Martin is not entitled to federal habeas relief on the IATC claims asserted in Grounds 1 and 5.

B. "Ground 2: The state trial court erred by allowing the State to amend the information on the morning of the trial."

Martin asserts that on the first day of trial, the State filed an amended information that added an allegation that he "did unlawfully commit **or attempt**

to commit a sexual battery upon M.W." (ECF No. 5 at 17–21) (added language emphasized). Martin asserts defense counsel objected to the amendment on the ground that he "anticipated that this was going to be an all-or-nothing type of situation" and was thus prejudiced in the preparation of the defense. The trial court overruled defense counsel's objection. Martin asserts if the trial court had not permitted the State to amend the information, the State would not have been entitled to a jury instruction on attempted sexual battery, which was the offense of which Martin was convicted (*see* ECF No. 5 at 20–21; ECF No. 18 at 6). Martin contends the trial court's ruling deprived him of his constitutional right to notice and a fair trial under the Fifth and Fourteenth Amendments. He contends the trial court's ruling and the First DCA's rejection of this claim on direct appeal were based upon an unreasonable determination of the facts and "contrary to and an unreasonable application of Petitioner Martin's constitutional rights" (ECF No. 5 at 21).

The State concedes Martin exhausted this claim by presenting it on direct appeal (*see* ECF No. 10 at 26). The State contends the state court's adjudication of the claim was not based upon an unreasonable determination of the facts, nor was it contrary to or an unreasonable application of clearly established federal law (*id.* at 26–31).

The original information charged Martin with Sexual Battery When Victim Physically Helpless, as follows:

> COUNT I: On or about July 3, 2014, [Tyson J. Martin] did unlawfully commit a sexual battery upon M.W., a person twelve years of age or older, by digitally penetrating her vagina, without the victim's consent, while the victim was physically helpless to resist, contrary to Section 794.01 I (4), Florida Statutes.

(ECF No. 10-1 at 16).

On the morning of trial, the State filed an Amended Information which again charged Martin with Sexual Battery When Victim Physically Helpless, but added the following:

> COUNT I: On or about July 3, 2014, Tyson J. Martin did unlawfully commit **or attempt to commit** a sexual battery upon M.W., a person twelve years of age or older, by digitally penetrating her vagina, without the victim's consent, while the victim was physically helpless to resist, contrary to Section 794.01 I (4) **and 777.04**, Florida Statutes.

(ECF No. 10-1 at 17) (emphasizing added language). Florida Statutes § 777.04 is Florida's attempt statute.

Defense counsel objected to the amendment as follows:

> [T]he State this morning handed me an Amended Information which we are going to object to. It doesn't add anything other than the statutory citation for attempt, which, attempt has never been an issue in this case. It's always been an allegation of a completed act.

> I don't think it's appropriate. And, certainly, we're procedurally prejudiced by them adding on the eve of trial, especially when we were set for trial previously, and this was not brought in whatsoever, and it literally was not brought up to me until about 15 or 20 minutes ago. We've anticipated that this was going to be an all-or-nothing type of situation.

(ECF No. 10-2 at 254–55 (trial transcript)). The trial court inquired as to how the defense was prejudiced:

> THE COURT: What factually would be different in terms of prejudice? I mean, if you're investigating the case, taking depositions, either—it either happened or it didn't happen. It sounds like this would be, well, he tried to penetrate, but he didn't, that would be the—I guess the fallback from the State is if you don't think there was penetration and you think he tried to but he failed, then that would be—obviously, that's a legal argument. It's not a factual thing that you would have to go prepare for, is it?
>
> MR. ZELMAN: Well, I think it certainly would—from a procedural standpoint would have changed our preparation. Certainly, we would have spent more time possibly preparing in Mr. Martin's testimony if that's what was going to happen. I think the attempt issue—
>
> THE COURT: Why—why would—why would his testimony be any different?

MR. ZELMAN: Well, it's not that it would be different, Your Honor. It's during these statements that my client made to law enforcement—which I don't know whether or not the State is going to use—I believe that the implication can be made and certainly was made by law enforcement, whether rightfully or wrongfully, that he was attempting to touch her vaginal area.

Again, that gets into the confusion that we talked about in the jury instruction. However, had we known that attempt was going to be an issue in this case, we certainly would have prepared differently, and I would have deposed Investigator Wilder, which we chose not to do because, you know, whether or not he testifies, it's mostly hearsay, if at all.

THE COURT: Well, anything the Defendant said can come in as an exception to hearsay if it's relevant, so I just don't see the prejudice. All they're doing is sticking a—as you just said, it's not factually different. The only thing that's different is we've got this other statute that also may apply here. So—but I will—if we get to the end of the trial, similar to this instruction here, and I see something that I haven't seen and you can renew that and object, and I will reconsider it, but—

MR. ZELMAN: Thank you, Your Honor.

THE COURT: —right off the face of it, I don't see any prejudice to the defense to that minor amendment.

(ECF No. 10-2 at 255–57). The prosecutor responded that she thought it would be "cleaner" to amend the information but that the State was not required to amend it in order to request a jury instruction on attempt as long as there was some evidence to support the attempt theory, which she believed there was (*id.* at 257–58).

Rule 3.510 of the Florida Rules of Criminal Procedure provides, in relevant part:

> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> (a) an attempt to commit such offense if such attempt is an offense and is supported by the evidence. The judge shall not instruct the jury if there is no evidence to support such attempt and the only evidence proves a completed offense.

Fla. R. Crim. P. 3.510(a).

Contrary to defense counsel's assertion that attempt had "never been an issue in this case," Rule 3.510 put defense counsel on notice that Martin could be convicted on an attempt theory if there was any evidence to support it. Defense counsel knew about Investigator Wilder's interview with Martin and thus knew that the State had evidence to support an attempt theory.

Martin has not identified any case in which the Supreme Court held that notice of a charge was constitutionally inadequate where, although the defendant was initially adequately apprised of the offense against him (as Martin was here by virtue of the allegations in the original information), the prosecutor proceeded on more than one potential theory of liability, and the state's procedural rules authorized the prosecutor to do so. Because Martin has not identified a Supreme Court decision that clearly establishes the legal proposition needed to grant federal habeas relief, the AEDPA precludes this court from granting relief on Ground 2. *See Lopez v. Smith*, 574 U.S. 1, 5–7 (2014) (reversing grant of federal habeas relief because Supreme Court case law did not clearly establish that a prosecutor's focus on one theory of liability at trial (i.e., an aiding and abetting theory) can render an earlier notice of another theory of liability (i.e., an actual perpetration theory) inadequate).[8]

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[8] In *Lopez*, the Supreme Court noted that the Court of Appeals cited *Russell v. United States*, 369 U.S. 749, 763–764 (1962); *In re Oliver*, 333 U.S. 257, 273–274 (1948); and *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)) as clearly established federal law, but the Court held that these cases "stand for nothing more than the general proposition that a defendant mush have adequate notice of the charges against him," which was "far too abstract to establish clearly the specific rule [petitioner] needs." 574 U.S. at 5–6.

C. "Ground 3: The state trial court erred by preventing the defense from introducing the photographs depicting the alleged victim's activities on the day following the purported offense."

Martin asserts defense counsel attempted to admit six photographs (Defendant's Exhibits 8, 9, 13, 14, 15, and 16) that depicted M.W.'s activities on July 4, 2014, the day after the attempted sexual battery (ECF No. 5 at 21–24). Martin asserts the photographs were relevant to M.W.'s credibility, because they impeached her testimony that she was upset about the incident by showing that she went out drinking and partying the next day (ECF No. 5 at 21–24; ECF No. 18 at 6–7). Martin asserts the trial court permitted defense counsel to admit only one photograph, Defendant's Exhibit 14, which showed only M.W.'s smiling face, but the trial court ruled the other photographs were inadmissible because they had minimal probative value, and that value was outweighed by the danger of undue prejudice, specifically, the jury would use the evidence to judge M.W.'s character instead of her credibility. Martin concedes that the jury heard testimony from more than one witness, including M.W. herself, regarding M.W.'s activities on July 4.

The State concedes Martin exhausted this claim by presenting it on direct appeal (*see* ECF No. 10 at 32). The State contends the state court's adjudication of the claim was not based upon an unreasonable determination of the facts, nor was it contrary to or an

unreasonable application of clearly established federal law (*id.* at 33–38).

The five photographs at issue are part of the state court record (*see* ECF No. 10-4 at 145–54 (Defendant's proffered Exhibits 8,9,13,15, and 16)). Defendant's Exhibit 8 depicts M.W., Taylor Foster, and Lacey Marx standing together looking into the camera, with Foster and Marx holding drinks (ECF No. 10-4 at 146 (Defendant's Exhibit 8)). During defense counsel's cross-examination of M.W., M.W. described the photo as depicting herself, Taylor Foster, and Lacey Marx hours prior to the attempted sexual battery (ECF No. 10-3 at 22–23 (M.W.'s testimony)). Defense counsel sought to introduce Defendant's Exhibit 8 into evidence during Lacey Marx's testimony (*see* ECF No. 10-3 at 210). Marx identified Defendant's Exhibit 8 as a photograph of her, M.W., and Taylor Foster taken while they were at the "Strip" on the night of the incident (*id.* at 210–11).

The State objected to admission of Exhibit 8, and the issue was discussed at sidebar as follows:

> MS. NORRIS: Your Honor, my objection is going to be to relevance. Under the Rape Shield Statute, the clothing or dress or manner of dress of the victim at the time of the offense is not admissible. I don't see any relevance of showing this. It's well established—
>
> THE COURT: Let me see, because I haven't seen any of the photos y'all are talking about. This is the night of the—

MR. ZELMAN [defense counsel]: Yes.

THE COURT: —of the event.

MR. ZELMAN: Yes.

THE COURT: What's the relevance?

MR. ZELMAN: Your Honor, it shows they were having a good time. It shows that they are partying, drinking—

THE COURT: On the night of the incident?

MR. ZELMAN: Yes.

THE COURT: So what? What does that tend to prove that's relevant to the case?

MS. NORRIS: I think it's already in evidence. That would just be superfluous, and the only relevance would be to show her manner of dress.

MR. ZELMAN: The clothing is in evidence. I don't see how that's—how that's—

THE COURT: I don't see any particular prejudice to this shot, but I'm still wondering what the relevance is. It shows she was there having a good time. So what? It doesn't show her with him.

MR. ZELMAN: If I could ask a few more questions, I think I can establish the relevance. For example, how Ms. Marx came into possession of this photo, I think that would establish—

> THE COURT: Tell me how. What's she going to say?
>
> MR. ZELMAN: She's going to say that M tagged her in this friend requested her on Facebook and tagged her on this on July 3rd.
>
> THE COURT: So what?
>
> MR. ZELMAN: I think it's relevant. I mean, if she's been—arguably, if she's been raped by Lacey's roommate, why would she friend request Lacey the day after this supposedly happened and tag her in a photo? It goes to [M.W.]'s credibility.
>
> THE COURT: Well, you can certainly ask her did she tag you in a photo and did she ask to be your friend if she wasn't before. I don't know what—that's very, very tangentially relevant. I don't see why you need a photo of what the actual photo was. I agree with the State, it's—I don't think it's terribly prejudicial, but I don't think it's relevant.
>
> MS. NORRIS: I just don't think it's relevant is my objection. I have no objection to the questioning about, you know, there was a photograph taken of the two of you, she tagged you, friended you on Facebook. I don't have an objection to that.

(ECF No. 10-3 at 211–13).

Defense counsel continued his examination of Lacey Marx. Ms. Marx testified that M.W. sent her a Facebook friend request on July 3, 2014 and "tagged" her (Marx) in the photograph (ECF No. 10-3 at 214–15).

Defense counsel renewed his request to admit Exhibit 8 into evidence (*id.* at 216). The prosecutor objected on grounds of relevance (*id.*). The trial court sustained the prosecutor's objection (*id.*).

The other photographs at issue are Defendants' Exhibits 9, 13, 15, and 16. Defendant's Exhibit 9 depicts M.W. asleep with Taylor Foster looking into the camera and pouting over M.W.'s shoulder (ECF No. 10-4 at 148 (Defendant's Exhibit 9)). M.W. testified that the photo depicted her asleep (ECF No. 10-3 at 27–28 (M.W.'s trial testimony)). Defendant's Exhibit 13 depicts, from left to right, M.W., a woman named Christi McCoy, and Taylor Foster standing together and looking into the camera (ECF No. 10-4 at 150 (Defendant's Exhibit 13)). M.W. testified that the photo depicted the three of them on July 4 (ECF No. 10-3 at 36–38 (M.W.'s testimony)). Defendant's Exhibit 15 depicts Taylor Foster's cleavage, with M.W. looking into the camera over Foster's shoulder (ECF No. 10-4 at 152). M.W. testified that the photo depicted her and Foster on July 4 (ECF No. 10-3 at 40 (M.W.'s testimony)). Defendant's Exhibit 16 depicts a close-up of M.W. sticking out her tongue, with Taylor Foster (and her cleavage) looking into the camera in the background (ECF No. 10-4 at 154). M.W. testified that the photo depicted her and Ms. Foster on July 4 (ECF No. 10-3 at 40 (M.W's testimony)).

Defense counsel sought to admit the photographs during its case-in-chief, but the prosecutor objected:

> MS. NORRIS: I do object to this photograph [Defendant's Exhibit 9]. My understanding is I don't believe the testimony—

well, first of all, with all of these exhibits, I would note at the bottom are photos of all the other exhibits, so it's very hard to kind of—they all contain photographs that I object to.

But having said that, this shows it was posted on July 6th. This was posted on Taylor Foster's Facebook page. Taylor Foster said she doesn't know when it was taken. She [M.W.] wore that shirt throughout the weekend.

I guess the insinuation is maybe that she was wearing it that night or that she was wearing it the following days.

My argument, again, is that this is improper character evidence under the Rape Shield about how a victim is dressed or behaving, is not admissible.

I don't think that if—and under Ehrhardt, if it's not admissible on the day of the offense, I think this is an end run around the statute to try to show what she's—and this applies to all these pictures—to show what she looks like and how she behaves the days after the incident.

I don't think they are being offered for any relevant purpose, to prove anything but slut shaming, improper character evidence, to show that she's out partying and dressed like a whore, and I don't think they are probative of anything. They are definitely much more prejudicial than they are probative.

There is testimony in the record now that she did go to the 4th of July party; that there

were photographs taken of her where she appeared to be happy and that she was smiling. I think that is sufficient to argue, well, she's not behaving like the victim of a sexual battery behaves, whatever that is. But I think that the photographs are meant to be inflammatory and have no other relevant purpose.

THE COURT: Okay. What do you say about No. 9?

MR. ZELMAN: Specifically with respect to No. 9, the testimony was that this was taken on July 4th, that was testified to by Taylor Foster. She was very clear about her testimony. This is the same top that was—that is in evidence. So it contradicts the statement that was made to Officer Pinkard that it hadn't been washed, it hadn't been worn.

THE COURT: There was no testimony it hadn't been worn. There was testimony she hadn't washed it. I don't even think she said that. You said it or somebody said it in opening statement, but I didn't hear any testimony about it.

MR. ZELMAN: I don't remember specifically, Judge. However, the photo was authenticated by Ms. Foster.

THE COURT: What's the relevance?

MR. ZELMAN: What's the relevance?

THE COURT: Right. Yeah, I agree Ms. Foster said this was taken on July 4th.

MR. ZELMAN: The relevance is that it shows what she's doing subsequent to the event. We are not slut shaming as the State stated, and this certainly is not something that is covered by the Rape Shield Statute.

THE COURT: Well, how does this show what she's doing? It's a picture of her—I guess this will go on the record one way or the other, but it's—it's a photograph of who has been identified—I couldn't tell you who it is—but it's been identified as MW, and I suppose that's Ms. Foster who is making kind of a pouty face there. It shows her [M.W.] presumably intoxicated to the extent that she's either passed out or can't walk on her own or whatever. So what exactly is it that you think this proves or disproves?

MR. ZELMAN: I think it's relevant to show her behavior in the days subsequent to the allegation that she has made that Mr. Tyson—Mr. Martin sexually battered her.

THE COURT: What does that add to—the testimony already is that they were out drinking the day after, maybe the following day. Well, the day after would be the 4th, that's the day you're talking about, right?

MR. ZELMAN: Right, this was the 4th.

THE COURT: Right.

MR. ZELMAN: I don't believe that we have any pictures from the 3rd. However, this—you know, yes, there's been testimony, there's obviously been testimony. However, I

think it's significant to show that contrary to the—to Ms. W's testimony that she was upset and kept to herself, during the days subsequent to this incident, she was out partying, she was drinking, drinking so much that she appears to be passed out. I think that is entirely relevant and material to our—

THE COURT: Yeah, I agree with the State, that the probative value of this is very slight considering the context of all the other testimony and evidence; and the prejudicial effect of it, the danger that the jury will not use it to affect [sic] the credibility of the witness but, rather, judge her by her character afterwards is great, and so I agree that this picture should not come in. Okay. Let's go to No. 13.

MR. ZELMAN: We'd certainly like to proffer that in the record, Your Honor.

THE COURT: I assume you're going to proffer all those I said. It'll be in the record one way or the other.

Does the State have an objection to 13?

MS. NORRIS: I'm sorry. On 13, it's the same objection for—I mean, again, I think—I don't think she looks bad or anything in this photograph, but, again—

THE COURT: Which one is—which one is the—Ms. W?

MS. NORRIS: Ms. W is the one on the far left, and on the far right is Ms. Foster.

Again, my issue is if the way and the manner in which a victim is dressed on the date of the offense is inadmissible, why is her manner of dress later on admissible?

I know that the argument is it's being offered to prove she was out having a good time. But, again, I think the danger of unfair prejudice, showing, look, she's wearing spaghetti straps and really high, short shorts and she's being provocative and sexy and showing her legs and arms, I just—I don't know what probative value it adds. I object on relevance grounds there because I'm not sure what it adds.

THE COURT: Okay, and I assume you have the argument to all the photos that you have. This one, I would say it is a little different because it's been identified as a—this shows us having a party on the 4th or being at party on the 4th. There's nothing, to me, inappropriate about the dress in terms of July 4th holiday, and they all seem to be dressed the same. There's been no suggestion, as counsel says, that we're showing she's a slut or something like that.

MS. NORRIS: Can I—

THE COURT: And it doesn't have all the extra stuff that some of the other photos have as well. So it shows that she appears to be having a good time on July 4th. A picture is sometimes is worth a thousand words. And even though there's testimony, yeah, we went

out partying, this is her smiling with her friends. So I would say this would come in.

Do you want to put on something else for the record?

MS. NORRIS: My—looking at No. 14, then—I believe, 13 and 14, I think 14 can establish that she's out having fun on the 4th with her friends just as well as 13 can without showing the manner of dress, just showing her smiling. So I would say that they would be—what's the word? Cumulative. And I would ask that the court enter 14 rather than 13 because they are showing essentially the same—

THE COURT: Oh, I see what you're saying.

MS. NORRIS: —relevance, I guess.

THE COURT: How about the other photos and the other miscellaneous stuff on there other than the photo?

MS. NORRIS: We could redact it.

THE COURT: What do you say?

MR. ZELMAN: I certainly don't have a problem redacting the stuff underneath. With respect to the cumulative nature, part of the argument that we are making is that she had contact with all these other people in the days after the incident and didn't say anything to anybody. I think that's entirely material. I think it's relevant, and it's significant to our argument in this case, the defense—

THE COURT: I agree with the State. I'll give you one photo that shows her out smiling with her friends, to show that she was—

MR. ZELMAN: Judge, this is a different friend.

THE COURT: Pardon me?

MR. ZELMAN: This is a different friend.

THE COURT: I don't care. The reason I consider this tangentially relevant is to support your argument that she had several days, several opportunities to go to the police or report. She didn't. She was out doing something that you can argue is inconsistent with somebody who says they were very upset. You don't need several photographs to show her apparently having a good time.

MR. ZELMAN: Judge, I mean, you said it yourself a few moments ago, a picture is worth a thousand words.

THE COURT: That's why I'm willing to give you a picture that shows that but not several. And looking at those photographs, I think you can get the same thing and overcome to [sic] the State's objection to No. 13, which is the dress. This is not showing the dress, just shows everybody smiling, as a matter of fact, just as well or better; and you take out all the other stuff, I think that would be fine.

So given the argument on that, I would say 14, cropping that photograph will be fine.

You got 15, and I know what the State's objection is. So tell me—tell me about 15, and 16 looks very similar.

MR. ZELMAN: Again, Judge, these all go to her actions, her behavior on the days subsequent to—

THE COURT: Well, let's go with 15. Who is in 15?

MR. ZELMAN: That is—15 is Ms. Foster and Ms. W.

THE COURT: And which one is Ms. W?

MR. ZELMAN: The one in the back.

THE COURT: Which one?

MR. ZELLMAN: The one in the back.

THE COURT: She is smiling with her friend. What's—what's—what's the significance of that versus 14?

MR. ZELMAN: Your Honor, I think these both took place on July 4th during different times. It's consistent with and it corroborates the testimony that we have that she's out the entire day, having a good time, partying, celebrating, everything that's inconsistent with somebody who has been a victim of a sexual assault. It's inconsistent with her testimony that she was upset and—

THE COURT: Well, I've already given you that in terms of the other photo. But I'm saying I'll give you a photo that shows her out

in her—like I said, you can admit there's a little difference between her saying, yeah, I was out partying all day. She's already admitted that. You got the testimony of other people that say that was what was happening, and you can corroborate that with a photo that shows her smiling with her friends, which you have. So what does this add other than that?

I don't see it. Other than showing Ms. Foster and her cleavage, it doesn't add anything. The other one is having her—it looks like maybe Ms. W sticking her tongue out.

MR. ZELMAN: Having a good time.

THE COURT: Yeah, okay.

MR. ZELMAN: I mean, a single photo, when they were talking a single photo or five photos, which I think is what this is, five or six photos, I don't see how that's cumulative. They are not the same issue. It's not like we're talking about a gruesome crime scene where the defense is objecting that, you know, we're trying to inflame the jury.

We're not trying to inflame the jury here. All we are doing is trying to show it's inconsistent with her claim of being upset and sad and in shock and whatnot, all of these photos are inconsistent with that. And—

THE COURT: Well, like I say, I don't mind having a photo that corroborates that there's—there's absolutely no dispute in the evidence right now that Ms. W was out at a

party July 4th, and that's what this corroborates.

And you have a—like I say, if they want to see her and see how she was having a good time, that's fine; but I don't see why you have to have several photos to do that, other than to show her and I guess to judge her by what she's doing then. And, plus, this also has other extraneous stuff on it, all the several photos. To the extent that her facial expressions might suggest something, that's different.

. . . .

MR. ZELMAN: Judge, they all—they all go to the same issue. They all go to the inconsistency with her claim of being sad, upset.

THE COURT: Well, if that's all they prove, you already have that. You already have her admission that she was out doing it. I've given you a photo which shows her smiling, which corroborates that she's apparently having a good time, is not upset.

. . . .

So I'll give you No. 14, cropped off with the extraneous things that shows, apparently, her—with friends? I'm not sure which one is Ms. W. Is Ms. W in No. 14?

MR. ZELLMAN: She's the one in the middle.

THE COURT: The one in the middle? Even better, because she's there with a big smile on her face.

> MR. ZELMAN: Judge—
>
> THE COURT: Okay.
>
> MR. ZELMAN: —and with respect, all the other photos, my client has a constitutional right to put on a defense for the jury to see the full picture of what was going on.
>
> THE COURT: I understand it's a constitutional right to present a defense, and I have my right, though, to make rulings, and I have made it, so those are—those are my rulings on the photos. No. 14 can be cropped, and you can introduce that.
>
> . . . .
>
> MS. NORRIS: And I just wanted to note for the record that, similarly, when the Court does the 403 weighing test on the undue prejudice to the defense pursuant to Ehrhardt under the Rape Shield Statute, the court is to make that weighing, but with the victim being the one about the undue prejudice, so I do believe you have support of that in the statute.

(*see* ECF No. 10-3 at 300–12).

The State re-called M.W. in rebuttal (*see* ECF No. 10-3 at 314–18). The prosecutor asked her why she was "going out having fun" on July 4 after what happened to her on July 3 (*id.* at 317). M.W. responded:

> If I stayed at home, that's all I thought about. And my boyfriend was in town, and I wanted to try and forget about it, and I wanted to just try and be normal and forget

> that it happened and enjoy the weekend that I had with my boyfriend while he was in town, and I wanted to try and forget about it. That's all I wanted to do, was just forget that it happened.

(ECF No. 10-3 at 317).

Martin appealed the trial court's evidentiary ruling to the First DCA (*see* ECF No. 10-4 at 203–07 (Martin's initial brief)). Martin argued that the trial court's exclusion of the photographs violated his federal constitutional right to present a defense and to confront witnesses against him (*id.*). Martin cited *Taylor v. Illinois*, 484 U.S. 400,408 (1988), *Washington v. Texas*, 388 U.S. 14, 23 (1976), *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), and *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (*id.* at 205). The First DCA affirmed without written opinion (ECF No. 105 at 45–46). *Martin v. State*, 247 So. 3d 422 (Fla. 1st DCA 2018) (Table).

As discussed *supra*, the defense sought to admit the photographs to impeach the victim's credibility. The defense argued Exhibit 8 was relevant to M.W.'s credibility because if she had been sexually battered by Martin, she would not have sent a friend request to Martin's roommate (Lacey Marx) and tagged her in a photograph hours after the incident. The defense argued Exhibits 9, 13, 15, and 16 were relevant to impeach M.W.'s testimony that she was upset after the incident, because it showed that she was drinking and partying with friends the day after, instead of immediately reporting the alleged sexual battery to police.

The trial court ruled that the photographs were "tangentially" relevant and of minimal probative value, especially since the jury heard testimony on the same subjects depicted in the photographs, and one of the photographs (Defendant's Exhibit 14) was admitted into evidence. The court further held that the minimal probative value of the excluded photographs was substantially outweighed by the danger of unfair prejudice.

The trial court's analysis hinged on three of Florida's evidentiary rules, set forth in Florida Statutes §§ 90.401–.403. Florida Statutes § 90.401 defines relevant evidence as evidence "tending to prove or disprove a material fact." Section 90.402 provides that "[a]ll relevant evidence is admissible, except as provided by law." Section 90.403 sets forth the following exclusion:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Fla. Stat. § 90.403. The standard for applying this exclusion is as follows:

> This statute compels the trial court to weigh the danger of unfair prejudice against the probative value. In applying the balancing test, the trial court necessarily exercises its discretion. Indeed, the same item of evidence may be admissible in one case and not in another, depending upon the relation of that item to the other evidence.

Twilegar v. State, 42 So. 3d 177, 194–95 (Fla. 2010) (citing *State v. McClain*, 525 So. 2d 420, 422 (Fla. 1988)).

Additionally, and specifically with respect to Defendant's Exhibit 8 (the photo of M.W. standing with Taylor Foster and Lacey Marx hours prior to the sexual assault), Florida's "Rape Shield" statute provides that evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery is inadmissible in a sexual battery prosecution. *See* Fla. Stat. § 794.022(3).

Martin relies upon the same Supreme Court cases he relied upon in his direct appeal, *Chambers, Taylor, Washington*, and *Davis*. Martin cites the first three, *Chambers, Taylor*, and *Washington*, for the general proposition that the Fifth, Sixth, and Fourteenth Amendments guarantee a defendant the right to present a defense (*see* ECF No. 5 at 23). And Martin cites the fourth case, *Davis*, for the general proposition that the Sixth Amendment guarantees a defendant the right to confront witnesses against him (*id.*).

The Supreme Court has "cautioned the lower courts . . . against 'framing our precedents at such a high level of generality' " on federal habeas review. *See Lopez*, 574 U.S. at 5–6 (quoting *Nevada v. Jackson*, 569 U.S. 505, 512) (2013)). In order to qualify as "clearly established federal law," for purposes of § 2254(d)(1), Martin must identify a Supreme Court case that addresses the specific question presented in his case. *See Lopez*, 574 U.S. at 6.

In *Chambers*, the Supreme Court held that the exclusion of trustworthy third-party inculpatory confessions based on the mechanistic application of outdated evidentiary rules violates a defendant's right to due process. 410 U.S. at 293–94. The defendant in *Chambers* was unable to introduce the inculpatory confessions because the state where the crime occurred, unlike most other states, had not recognized an exception to the hearsay rule for declarations against penal interest, which would have rendered the confessions admissible. *Chambers*, 410 U.S. at 298–301 .

In contrast, Martin's case did not involve exclusion of an inculpatory confession of a third party; rather, it involved the exclusion of extrinsic evidence of instances of the victim's conduct to impeach her credibility (i.e., M.W.'s "tagging" Lacey Marx in the photo even though Marx's roommate had allegedly sexually battered her (Defendant's Exhibit 8)), and M.W.'s celebrating with friends in the photos from July 4 (Defendant's Exhibits 9, 13, 15, and 16). The admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury and unfairly embarrass the victim. *See Jackson*, 569 U.S. at 511. No decision of the Supreme Court clearly establishes that the exclusion of such evidence for the reasons identified by the trial court in Martin's case violates the Constitution. *See id.*

Moreover, the trial court's exclusion of the photos did not deprive Martin of his right to present a defense. As previously discussed, the jury heard testimony that M.W. sent Lacey Marx a Facebook friend request and

tagged her in the photo later on the same day that Martin attempted the sexual battery. And the jury heard testimony, from Taylor Foster and M.W. herself, that M.W. was drinking and "having fun" between the time of the attempted sexual battery (on July 3) and the time M.W. reported it to police (on July 6). Additionally, the trial court permitted the defense to admit one of the July 4 photos (Defendant's Exhibit 14) which showed M.W. at a party with friends on July 4.

Martin's citation to *Taylor v. Illinois* is also unavailing. In *Taylor*, the Supreme Court was presented with the issue of whether a trial court's refusal to allow a defense witness to testify, as a sanction for failing to identify the witness during pre-trial discovery, violated the defendant's constitutional right to obtain the testimony of favorable witnesses. 484 U.S. at 402. The Supreme Court held that such a sanction was not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment and found no constitutional error on the specific facts of the case. *Id.*

Here, Martin was not prohibited from presenting evidence or witnesses to impeach M.W.'s credibility. Indeed, defense counsel presented such evidence in the form of testimony from defense witness Lacey Marx, in addition to the testimony elicited from Taylor Foster and M.W. *Taylor* does not "clearly establish" that the trial court's exclusion of the photographs in Martin's case violated Martin's right to present a defense.

The same is true of *Washington v. Texas*. In *Washington*, the Supreme Court was presented with the

issue of whether a defendant's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor was applicable to the States through the Fourteenth Amendment, and whether that right was violated by a state procedural statute providing that persons charged as principals, accomplices, or accessories in the same crime cannot be introduced as witnesses for each other. 388 U.S. at 14–15. The Court held that the Sixth Amendment's right to compulsory process was applicable in state criminal proceedings. *Id.* at 19. The Court further held that Washington was denied his right to compulsory process because the State "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id.* at 23.

As previously discussed, the trial court's exclusion of the photographs at issue did not prevent Martin from presenting impeachment evidence on the subjects depicted in the excluded photos. Therefore, *Washington* provides no basis for habeas relief.

Martin's final citation is to *Davis v. Alaska.* In *Davis*, the Court confronted the issue of whether the Confrontation Clause required that a defendant be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as juvenile delinquent, when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

415 U.S. at 309. The Court held that defense counsel should have been permitted to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness," and that the trial court violated the Confrontation Clause by limiting defense counsel's cross-examination regarding how the witness's fear or concern for his probation status may have affected his testimony. *Id.* at 318.

Again, Martin was not precluded from presenting impeachment evidence, by way of cross-examination or otherwise, on the subjects depicted in the excluded photographs. *Davis* thus affords him no relief.

Comparing each of the cases relied upon by Martin to the specific question presented in this case, the undersigned concludes that Martin has failed to demonstrate that the First DCA's rejection of his federal constitutional claim was contrary to or unreasonable application of clearly established federal law. Therefore, Martin is not entitled to federal habeas relief on Ground 3.

D. "Ground 4: "The state trial court erred by failing to give the special jury instruction requested by the defense."

Martin asserts the trial court erred by failing to give a special jury instruction which would have clarified the definition of "vagina" (ECF No. 5 at 25–28; ECF No. 18 at 7–8). Martin asserts it was important for the jury to be instructed that he could only be guilty of

attempted sexual battery if he had the intent to penetrate M.W.'s vagina. Martin asserts Investigator Wilder testified he used the terms "vagina" and "vaginal area" interchangeably during his interview with Martin, and that Martin admitted his fingers "moved toward the area" but did not make it to M.W.'s vagina. Martin asserts the standard jury instruction did not adequately distinguish between "vagina" and "vaginal area," but the special jury instruction defined vagina, vulva, labia majora, labia minora, clitoris, and vaginal orifice. Martin contends the trial court's refusal to give the special jury instruction deprived him of his right to a fair trial under the Fifth and Fourteenth Amendments.

The State concedes Martin exhaust Ground 4 by presenting it on direct appeal (ECF No. 10 at 38–39). The State contends the state court's adjudication of the claim was not contrary to or an unreasonable application of clearly established federal law (*id.* at 39–44).

The special jury instruction requested by the defense was the following:

> An issue in this case is whether Tyson Martin penetrated M[.] W[ ]'s vagina with his finger(s).
>
> The word vagina is defined as the canal which forms the passageway between the cervix uteri and vulvae.
>
> The vulva is defined as the external genitals of the female, including the mons; the labia

> majora, the labia minora. the clitoris, and the vaginal orifice.
>
> The labia majora is defined as the two folds of cellular adipose tissue lying on either side of the vaginal opening and forming the lateral borders of the vulva. The labia minora is defined as the two thin folds of integument which lie within the labia majora and enclose the vestibule. The clitoris is defined as the fold of skin at the top of the labia minora. The vaginal orifice is defined as the area between the labia minora into which the urethra and vagina open.
>
> The vulva, including the mons, the labia majora, the labia minora. the clitoris, and the vaginal orifice, is NOT part of the vagina.
>
> To prove the crime of sexual battery by digital penetration, the State must prove beyond all reasonable doubt that Tyson Martin inserted his finger(s) into the vagina of M[.]W[.].
>
> If you have a reasonable doubt as to whether Tyson Martin digitally penetrated M[.]W[.]'s vagina, you should find the Martin [sic] not guilty.
>
> However, if you are convinced beyond a reasonable doubt that Tyson Martin digitally penetrated M[.]W[.]'s vagina, you should find Tyson Martin guilty if all the elements of the charge have been proved.

(ECF No. 10-4 at 132–33 (Defendant's Request for Special Jury Instruction)).

Defense counsel raised the issue of the special jury instruction prior to the taking of testimony at trial:

> MR. ZELMAN: I've also filed a request for a special jury instruction. I'm bringing it up now because I would like to address it during opening. This is a case involving digital penetration. Your Honor may recall a number of years ago that Laurel Mobley had a case before Your Honor in which she requested a special instruction very similar to the one that we have prepared. It was filed with the Court on April 7th. May I approach?
>
> The significance of the instruction, Your Honor, in a digital penetration case can't be overstated. In common parlance, the term "vagina" refers to the vaginal area and that, in fact, happened here both in Ms. W's statement to the police as well as Investigator Wilder's interview with my client.
>
> There was significant confusion over whether or not there was penetration of the vagina versus touching of the vagina, and I think that it's going to be very significant that the court instruct the jury what is not considered to be the vagina for purposes of the sex battery statute, which is why I have included in this request specific definitions of the vagina, which excludes the labia majora, the labia minora, and the clitoris, as well as the vaginal orifice, and specifically the vulva, which includes the mons, the labia majora, the labia minora, the clitoris, and the vaginal orifice, not part of the vagina.

We think it's appropriate in this case for the court to give that instruction. Obviously, you haven't heard the evidence. I bring it up now because I would like to address it during opening statement so that the jury is aware they need to pay attention to those issues during trial.

THE COURT: How would it come up in opening statement?

MR. ZELMAN: Well I've outlined what I believe the testimony is going to be, and I'm going to ask the jury that merely my client being accused of touching her vagina isn't enough, touching the clitoris, the labia majora, the labia minora would not be—

THE COURT: But that's—that's argument. That's not—opening statement is here is what the evidence will be.

MR. ZELMAN: I agree, Your Honor. I think summarizing what they are expected to hear is going to be important.

THE COURT: But that wouldn't include a legal definition of vagina, I don't think, would it?

MR. ZELMAN: Well, I think that they need to be aware that it's an issue in—

THE COURT: Well, you can certainly say, I mean, say, you know, there are some facts that are not in dispute, some facts that are in dispute; and one of the facts that are in dispute is that there was digital penetration

of the vagina, so listen closely to whether there was or not. Then the question of—I mean, I'm not saying I will or I won't give the instruction. But I—when you said you'd like to address it in opening statement, I would think there would be an objection from the State if you started arguing here is what happened, here is what didn't happen, in terms of—

MR. ZELMAN: Well, I'm certainly not going to be arguing, Your Honor. But I want them—I don't want them to be uncomfortable with that concept when it comes to listening to it during trial and certainly later on during closing argument.

THE COURT: Have you run this by the State?

MR. ZELMAN: Yes. That's why—one of the reasons we're bringing it up now. I don't believe that Ms. Norris agrees with the whole definition that we're requesting.

THE COURT: Well, I'll hear argument. Okay. You said and I do remember another case with this—

(Discussion off the record.)

THE COURT: Did I give the instruction in that case?

MR. ZELMAN: Yes, Your Honor.

THE COURT: So that might be good precedent, but—

MS. NORRIS: May I just be heard briefly?

THE COURT: Yeah.

MS. NORRIS: I think, you know, this is a digital penetration case. The case law is clear that there has to be some entry into the vagina, it could not be simply touching on the out—you know, the external genitalia. But I think that even the cases cited by the defense, the first one being—and I know we are not going all into it, but *Richards v, State*, which is at 738 So. 2d 415, says at the end, we emphasize that we are not holding that an instruction defining vagina is required in every digital penetration case. It was necessary in this case because of the confusion created by the State. And—

THE COURT: What was the confusion?

MS. NORRIS: I think there was a lot of back and forth with the child's private parts about—hold on, I don't want to—about her female area, her vaginal area, things like that, that were a little misleading because one could be external versus the penetration of the internal required for digital penetration. I would prefer that the court wait and listen to the evidence in this case.

THE COURT: Well, that's what I do. I'm not saying I will or I won't give it, but—

MS. NORRIS: Right. So at that point, I mean, I do think it's improper, and I've not

seen any medical expert that has been disclosed.

I don't know what other case this was given in, whether there was a doctor who examined the child's genitalia and discussed external versus internal. I mean, there's so much science written in here, I don't know if it's accurate. I don't know where it came from. I have no objection to, after the definition of sexual battery, putting in a definition of the vagina is the tube leading from the external genitalia to the cervix and the uterus, something simple like that.

I just—at this point I'm not sure that all of the definition of vulva and labia majora and labia minora and the vaginal orifice, I think that is extremely confusing.

I also anticipate that this victim will testify as she had in her interview and in her deposition that this Defendant's fingers were as deep inside of her vagina as they could possibly go. So I really don't think this is going to be a borderline case. I would like to confuse the jury as little as possible.

I do think it's inappropriate to argue about entry, penetration, but just say, hey, his finger has to actually enter her vagina, it has got to enter and penetrate it, so listen for that, and I think that would be appropriate.

So I would ask the court to reserve ruling with respect to that jury instruction just yet and wait and not allow this detailed scientific

> terminology to be used during opening statement.
>
> THE COURT: Oh, yeah, I didn't say I was going to give it, I was just trying to figure out—he wants—he wanted to argue—or not argue, he wanted to bring it up in his opening statement, and that's why I was questioning why—why would this come up in opening statement?
>
> If we're—if we're just talking, I do think—I mean, if I'm sitting on the jury, unless I'm a gynecologist, I'm going, "Huh?" with all this stuff.
>
> But I will—yeah, I'll leave it open. When we get to that point, if I think the jury needs some clarification, I will. I think it's certainly permissible for you to raise that as a defense and point the jury to the fact that we are not saying—you know, if that's your defense, I don't know—we're not saying something didn't happen, but there was no penetration. If that's your defense, you can certainly say that.

(ECF No. 10-2 at 248–54).

The parties again addressed the special jury instruction during the charge conference after the close of the evidence:

> MR. ZELMAN: Judge, as—in sitting in the last couple of days, we all know this is a digital penetration case. Digital penetration

requires—or digital—sexual battery by digital penetration requires actual penetration.

During testimony of both Ms. W. and Investigator Sergeant Wilder, they both conceded at various times that there was a comment about either hands down her pants or vaginal area.

I think it's significant for the jury to know that in order for them to convict Mr. Martin, that there actually has to be penetration, not of the vulva, not of the clitoris, not of the labia, but of the vagina. And I think it's supported by the cases that are cited in our request for special instruction.

THE COURT: Right, I read those cases.

MR. ZELMAN: Okay.

THE COURT: Obviously, it's required that they prove that. But—but I guess the question I have—and I suggested this when we talked about it—is I don't know that this really helps the jury on that issue.

Certainly, you have to prove it. I note that I've got four ladies on the jury. I can't imagine that a jury doesn't know what a vagina is. And if I were sitting there, and you gave me a description and started describing or defining vulva and all that, I would just get lost, and it would not help me at all in determining whether there was actually penetration of the vagina.

And I looked at those cases, and I also looked in the statute, there is no legal definition of vagina.

MR. ZELMAN: That's correct.

THE COURT: So I think the Supreme Court presumes that the jury will use their common sense and know. And, yeah, there's some conflict in the testimony about whether there was penetration, and they are going to have to prove there was.

There's testimony from the victim without any doubt in her mind there was penetration. There's testimony from the officer, from the Defendant's statement that, "I touched her, but never even got near her vagina." So, you know, the jury can resolve that.

You know, I don't know even—I started thinking, well, maybe I can define vagina, it wouldn't hurt anything. But I'm at that definition, it's: The canal which forms the passageway between the cervix and the uteri and vulvae. And then I've got to describe what in the world is that. So I don't know what the State—maybe the State has reconsidered, but you did object to it originally, I think. What's your position?

MS. NORRIS: Your Honor, my position is the same. I mean, I think the Court has—Your Honor has a duty and a responsibility tomake things about the law clear to the jury, not to obfuscate the issues even more than there already are.

I think that *Richards v. State*, which I cited previously, 738 So.2d 415, is on point because in that case they said, "We emphasize we are not holding that the instruction defining vagina is required in every digital penetration case. It was necessary in this case because of the confusion created by the State."

And in this case, I think the Court characterized it correctly, you've got one person saying fingers were as deep in the vagina as they could possibly go; and one person saying I never even touched her vagina, not even the outside, not the—not her labia minora, majora, vulva, nothing, didn't even touch anything. So it's a matter of—there is no in between. If this had—if maybe we had had a factual scenario of him touching the outside or in between her vaginal lips but not penetrating, it might be appropriate. But I simply think that the court has to look at the evidence in the record and determine if that's a factual issue that's going to be at stake.

I do think it's confusing, and I don't even know—I mean, what is the vaginal orifice? Is that not the vagina? Is that—

I'm also a little worried because we don't have any medical testimony to support any of this. Nobody is available to cross examine about exactly where these things are and what they are. I don't know your scientific, anatomical background. But it just—I don't know what all this stuff means.

I'm going to have a difficult time arguing it when I don't even understand it, much less arguing it to the jury. And above and beyond that, I think there's a lot of superfluous things about an issue in this case is whether—et cetera, I think that's clearly an element.

To prove the crime of sexual battery, the State must prove—that's already an element, it would be repeating something that's redundant.

If you have a reasonable doubt, that's already—the jury has already been instructed that the State has to prove each element beyond a reasonable doubt, so I don't think that this is helpful. I object to the court reading it. It clearly says penetration of her vagina is required, and I think that the jury will know what that is.

MR. ZELMAN: Respectfully, Judge, I think that there is some confusion in the statute, and one of the reasons why these courts have held that an instruction is necessary is because it's not defined in the statute. We have a situation where, yes, there are four women on the jury.

THE COURT: Maybe I missed it. Do you have a case that that says I need to give this instruction? Because of a confusion in the law?

MR. ZELMAN: That's what I'm looking for, Judge.

THE COURT: I could see, for example, if you had a child, a child victim who said, well, he touched my tee-tee, or he—you know, then it's not going to be really clear. You may in certain circumstances have to try to do that. I don't know if I would go into all that, but still—

MR. ZELMAN: Well, certainly, instead of denying the request, certainly ferret it out. I think it's significant to make the distinction between the labia, the clitoris, and the vagina itself. I think it's commonly held and commonly believed that the vagina is a woman's entire private parts.

Now, yes, there has not been any medical testimony, and I think medical testimony, when we are getting into this—into the discussion of the definition of a vagina, I don't think it's appropriate in most criminal cases because this is a legal definition, not a medical definition. We have two demonstrative exhibits—

THE COURT: But do you have a case in which this legal—legal jury instruction is given?

MR. ZELMAN: I'm sorry?

THE COURT: But do you have a case there that—where this instruction—

MR. ZELMAN: This specific instruction, no.

THE COURT: What instruction was given?

MR. ZELMAN: I think that they—

THE COURT: The cases I saw were all having to do with the sufficiency of the evidence. And certainly saying, you know, contact alone is not enough, you have to show penetration.

MR. ZELMAN: Right. And, you know, our position is—

THE COURT: Okay. Is there—is there a case that—that says you must give a specific instruction?

MR. ZELMAN: I don't think that there's a case that says that you have to give a specific instruction, no. And that's not what I was saying.

I think in order to avoid the potential for a jury to convict based on anything other than penetration, when we are dealing with an object, it's appropriate for the Court to give—

THE COURT: I'm sorry to cut you off. Go ahead, finish.

MR. ZELMAN: It's appropriate for the court to give an instruction so that the jury doesn't convict based on touching or touching of the labia, the clitoris, and it's solely penetration of the vagina, which is separate from the other—the clitoris, the labia that we've discussed. I think that that's a significant issue.

THE COURT: It certainly is an issue which I think that they have to show penetration. But the evidence in this case and like I say, I don't have a child, I've got an adult who says my vagina was penetrated, not just touched, whatever. I've got no testimony, no evidence that says I touched her in that area around her vagina or her clitoris or vulva, whatever else, I touched. I don't have any evidence of that at all.

MR. ZELMAN: I disagree. I think that Investigator Wilder, Sergeant Wilder's characterization of Mr. Martin's statement concerned the vaginal area and not the vagina, and I think that that's where the confusion comes in, and that's what we are concerned—

THE COURT: Vaginal area is not the—do you want me to say the vaginal area is not a vagina?

MR. ZELMAN: I think we need to define—

THE COURT: I could do that, I guess. I don't remember—I thought his testimony was that the Defendant said his hands were moving towards that area but never got there, that's what I thought I heard. But if there's some testimony of that, and you think the jury wouldn't be clear about it, I can say—and I think the State would agree that—maybe not—that the vaginal area is not the vagina. If you include the vaginal area, that, to me, means your pubic area—

> MR. ZELMAN: Right.
>
> THE COURT: —for lack of a better term.
>
> MS. NORRIS: And, I mean, I guess the testimony they're referring to was Officer Wilder, and I think we quoted from the question and answer, was: were your hands moving towards her vagina? And the Defendant responded, towards that area, but something, something. So I mean, I—
>
> THE COURT: So I'm thinking in terms of an argument that you can make, I don't think you can argue to the jury based on the evidence that, well, he may have touched her vagina, but he never penetrated it. Or he may have touched her vagina area and never touched it, because there's no evidence that he did, other than the victim. The victim says he penetrated. So it's not like well, you know, he was giving me a massage, and he got kind of close, and I think he penetrated. Or he says I was giving her a massage, and it got a little close, but I never penetrated. Then you would have, well, okay, well, maybe. I'm even skeptical about that. But—
>
> MR. ZELLMAN: Well, I certainly respect the Court's, you know, position.

(ECF No. 10-3 at 321 through 10-4 at 4).

The trial court gave Florida's standard jury instruction on sexual battery and attempt as follows, in relevant part:

To prove the crime of Sexual Battery when Victim Physically Helpless, the State must prove the following four elements beyond a reasonable doubt:

1. MW was 12 years of age or older.

2. Tyson Martin committed an act upon MW in which the finger of the Defendant penetrated her vagina.

3. MW was physically helpless to resist.

And 4. The act was committed without the consent of MW.

. . . .

The lesser crimes indicated in the definition of Sexual Battery when victim Physically Helpless are: Sexual Battery, Attempted Sexual Battery when victim Physically Helpless, Attempted Sexual Battery, and Battery.

. . . .

To prove the crime of Attempted Sexual Battery When Victim Physically Helpless, the State must prove the following elements beyond a reasonable doubt:

1. MW was 12 years of age or older.

2. Tyson Martin attempted to penetrate the victim—or the vagina of MW with his finger; however, he failed or was prevented from doing so.

And 3. MW was physically helpless to resist.

> 4. The act was committed without the consent of MW.

(ECF No. 10-4 at 24–26 (trial transcript)). *See* Fla. Standard Jury Instructions in Crim. Cases, Part Two: Instructions on Crimes, Chp. 11, § 11.3.

Martin presented Ground 4 to the First DCA on direct appeal (*see* ECF No. 10-4 at 208–12 (Martin's initial brief)). He cited the Fifth and Fourteenth Amendments in support of his claim that the trial court's failure to give the special instruction denied his constitutional right to a fair trial, but he did not cite any Supreme Court case in support of his claim (*see id.*). The First DCA affirmed the judgment without written opinion. *Martin v. State*, 247 So. 3d 422 (Fla. 1st DCA 2018) (Table).

As in state court, Martin did not cite any Supreme Court decision in support of Ground 4 in his amended § 2254 petition (*see* ECF No. 5 at 25–28). Martin's failure to identify a Supreme Court decision that addresses the specific question presented, let alone demonstrate that the First DCA's rejection of his federal claim was contrary to or an unreasonable application of that decision, provides grounds on which to deny federal habeas relief.

Further, although the Supreme Court has found certain jury instructions unconstitutional, the jury instruction at issue in Martin's case is not one of those.[9]

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[9] For example, the Supreme Court has repeatedly held that jury instructions imposing mandatory presumptions violate the

Moreover, Martin does not dispute that the instructions given to the jury were a correct statement of the law. And although he appears to argue that the failure to define vagina and other parts of the female genitalia deprived the jury of the opportunity to adequately consider his theory of defense, that argument is not supported by the state court record.

Martin's theory of defense was that even though he put his hand down the back of M.W.'s shorts, touched her buttocks, and moved toward her vagina, he did not penetrate her vagina or intend to penetrate her vagina. The standard jury instructions informed the jury that in order to be convicted of sexual battery, or attempted sexual battery, by the use of fingers, the State was required to prove that Martin penetrated M.W.'s vagina with his finger(s), or he attempted to penetrate her vagina with his finger(s), respectively.

At trial, there was no evidence that Martin touched or intended to touch any part of M.W.'s genitalia except

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defendant's due process rights, because they relieve the State of its burden to prove every element of the offense beyond a reasonable doubt. *Carella v. California* 491 U.S. 263, 265–66 (1989); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Other cases involve the penalty phase in capital cases. *See Mills v. Maryland*, 486 U.S. 367, 384 (1988) (holding that penalty phase jury instructions in a capital case are unconstitutional where they may lead the jury to believe they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular circumstance); *Beck v. Alabama*, 447 U.S. 625, 627 (1980) (holding that the death penalty may not be imposed when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict).

her vagina. M.W. testified that she awoke with Martin's fingers "moving vigorously" inside her vagina (ECF No. 10-3 at 1–2 (M.W.'s trial testimony)). Martin told Investigator Wilder that his hand was headed toward M.W.'s vagina, but he did not penetrate her vagina or intend to touch her vagina (ECF No. 10-3 at 162, 187–88, 193 (Investigator Wilder's trial testimony)). Defense counsel asked Investigator Wilder if Martin admitted to trying to touch other parts of M.W.'s genitalia, i.e., her labia majora, labia minora, or clitoris, and Wilder responded that he did not ask Martin those questions (*id.* at 187–89). Investigator Wilder admitted that toward the end of his interview, he interchanged the terms "vagina" and "vaginal area" (*id.* at 178–79). However, on re-direct examination, Wilder testified as follows:

> Q. When you asked him [Martin] about where his fingers were traveling, did you ask him—did you use the phrase towards her "vaginal area" or her "vagina"?
>
> A. Vagina.
>
> Q. Was your specific question: Did your fingers ever make it to her vagina?
>
> A. Yes, ma'am, that was my question.
>
> Q. And what was his exact response?
>
> A. "No, they didn't. They moved toward the area but no."

(ECF No. 10-3 at 196 (Investigator Wilder's trial testimony)).

If Martin's theory of defense had been that he touched or penetrated another part of M.W.'s genitalia besides her vagina, and if there was evidence adduced at trial that supported that theory, Martin may have had an argument that the failure to provide the jury with definitions of the relevant genitalia prevented the jury from adequately considering his defense. But those were not the circumstances.

Martin has not demonstrated that the state court's adjudication of the fair trial claim presented in Ground 4 was based upon an unreasonable determination of the facts, or contrary to or an unreasonable application of clearly established federal law. Therefore, he is not entitled to federal habeas relief on Ground 4.

E. "Ground 6: Defense counsel rendered ineffective assistance of counsel by failing to investigate, research and prepare for trial."

Martin contends defense counsel was ineffective for failing to depose Investigator Wilder regarding his belief, based upon his conversation with Martin, as to whether Martin denied any intention to touch M.W.'s vagina (ECF No. 5 at 31–34). Martin asserts that in addition to his interview with Investigator Wilder, he had a conversation with Wilder in the hallway immediately following his arrest. Martin asserts during this conversation, Investigator Wilder explained the charge, and Martin told Wilder that he did not touch or intend to touch M.W.'s vagina. Martin asserts a

female transport officer was also in the hallway and overheard the conversation. Martin acknowledges that Investigator Wilder testified that he did not recall any such conversation in the hallway.

Martin asserts if defense counsel had deposed Investigator Wilder, counsel could have identified and deposed the transport officer and then called her to testify. Martin also asserts that Wilder's deposition would have prepared defense counsel to recross-examine Wilder regarding Martin's statement regarding his intent.

The State concedes that Martin exhausted this IATC claim by presenting it in his Rule 3.850 motion and on appeal of the circuit court's denial of the motion (*see* ECF No. 10 at 49). The State contends the state court's adjudication of the claim was not based upon an unreasonable determination of the facts, nor was it contrary to or an unreasonable application of clearly established federal law (*id.* at 50–52).

1. Clearly Established Federal Law

The *Strickland* standard governs this claim.

2. Federal Review of State Court Decision

Martin presented this IATC claim as Ground 3 of his Rule 3.850 motion (ECF No. 10-5 at 60–62). The state circuit court adjudicated the claim as follows:

> The third claim is that counsel was ineffective for failing to depose Investigator

> Wilder and an unnamed transport officer. This claim is based on the defense contention that Investigator Wilder had an unrecorded conversation with defendant in the presence of an unnamed transport officer. However, Investigator Wilder clearly stated that his only conversation with the defendant was recorded. (Att. A, Trial Transcript excerpt, page 233, lines 13–14) No deposition would have changed this fact. So the sole defense contention is that a deposition of the unnamed transport officer might have resulted in a contradiction of the investigator's statement. This is pure speculation. It is particularly absurd since there exists an extensive recorded conversation of what the defendant actually said. The record refutes any alleged ineffective assistance of counsel and unfair prejudice to the defendant.

(ECF No. 10-5 at 101–02). The First DCA affirmed this decision without written opinion. *Martin v. State*, 297 So. 3d 525 (Fla. 1st DCA 2020) (Table).

The state court's factual finding regarding Investigator Wilder's testimony was reasonable. The trial transcript shows that Investigator Wilder testified as follows, in relevant part:

> Q [by defense counsel]. Now, after Mr. Martin's interview was over and he was—you were leaving the room with him, did the two of you have a conversation?
>
> A. I don't recall. The transport officer came and got him after the determination was

made to arrest him, and I don't recall that I—I don't recall a conversation. I don't recall if he was escorted—if I escorted him down with the patrol unit or not.

Q. Did you have a conversation with him after the decision was made to arrest about what he said that caused you to arrest him?

A. I did have a conversation with him after I notified him he was being arrested and we handcuffed him and sat him in the room that he was being interviewed in. I do not recall the extent of that conversation. Any conversation I had with him was recorded.

Q. If it was in the room?

A. If it was in the room, yes, sir.

Q. So any conversation outside of that room would not have been recorded?

A. Yeah. But then again, I don't recall having a conversation with him in regards to this outside of the room.

Q. The conversation you did have with him concerning why he was being arrested—I think I left the transcript up there. Did you discuss with him why he was being arrested in the interview room?

A. Yes, sir.

(ECF No. 10-3 at 183–84 (Investigator Wilder's trial testimony)).

Martin has not demonstrated that the adjudication of his claim was based upon an unreasonable determination of the facts. As the state court found, Wilder specifically testified that any conversation with Martin was recorded. Wilder also testified that he recalled no other (i.e., unrecorded) conversation. Therefore, Martin has not satisfied § 2254(d)(2).

Additionally, Martin has not demonstrated that the state court's application of *Strickland's* prejudice prong was unreasonable. Martin proffered no factual basis to support his suggestion that Investigator Wilder's deposition would have produced different or additional testimony regarding the alleged hallway conversation or Wilder's belief as to Martin's intention when he put his hand down M.W.'s shorts. Likewise, Martin proffered no factual basis for his suggestion that deposing Investigator Wilder would have led to the discovery of a transport officer who would have testified she heard Martin say he did not touch or intend to touch M.W.'s vagina. The state court reasonably characterized Martin's assertions as purely speculative and reasonably concluded that Martin failed to show prejudice under *Strickland.* Martin thus is not entitled to federal habeas relief on Ground 6.

F. "Ground 7: The cumulative effect of the errors in this case deprived Petitioner Martin of a fair trial."

Martin asserts that all of the alleged errors committed in his case, considered either individually or

together, resulted in his being denied a fair trial (ECF No. 5 at 34).

The State contends Martin's "cumulative effect" argument is not cognizable on federal habeas review (ECF No. 10 at 53). The State further argues that Martin did not demonstrate any individual errors in Grounds 1 through 6; therefore, there is no error to accumulate (*id.* at 53–54).

The "cumulative effect" or "cumulative error" doctrine provides that the aggregation of non-reversible errors "can yield a denial of the constitutional right to a fair trial, which calls for reversal." *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1284 (11th Cir. 2014) (citing *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012)). The federal court must first address the validity of each of the petitioner's claims individually and then examine any errors in the aggregate and in light of the trial as a whole. *Id.* Where there is no actual error, the cumulative-error claim has no merit. *Insignares*, 755 F.3d at 1284 (citing *Morris*, 677 F.3d at 1132).

For the reasons discussed *supra* in Grounds 1 through 6, this court has found no actual error with respect to any of Martin's claims. In the absence of any actual error, Martin's "cumulative effect" claim asserted in Ground 7 has no merit and should thus be denied.

IV. CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. § 2254 Rule 11(a). A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. 28 U.S.C. § 2254 Rule 11(b).

"Section 2253(c) permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting § 2253(c)(2)). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citing *Miller-El*, 537 U.S. at 327). The petitioner here cannot make that showing. Therefore, the undersigned recommends that the district court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Thus, if there is an objection to this

recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Accordingly, it is respectfully **RECOMMENDED**:

1. That the amended petition for writ of habeas corpus (ECF No. 5) be **DENIED**.

2. That a certificate of appealability be **DENIED**.

At Pensacola, Florida, this 7th day of September 2021.

/s/ Elizabeth M. Timothy
ELIZABETH M. TIMOTHY
CHIEF UNITED STATES
MAGISTRATE JUDGE

[Notice To The Parties Omitted]

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2014-CF-2067

STATE OF FLORIDA

vs.

TYSON MARTIN,

Defendant. /

VOLUME II

(Pages 104 - 248)

PROCEEDINGS:	JURY TRIAL
BEFORE:	THE HONORABLE TERRY P. LEWIS
DATE:	May 10, 2016
TIME:	Commencing at: 1:30 P.M. Concluding at: 5:00 P.M.
LOCATION:	Leon County Courthouse Tallahassee, Florida

* * *

INVESTIGATOR GREG WILDER

* * *

[196] the touch DNA from the male toucher?

A Yes, and it can dislodge any cells that may be present.

MS. NORRIS: I have no further questions. Thank you.

THE COURT: Let me see if the jurors have any for you. I don't see any. Release the witness?

MS. NORRIS: Yes, she can be released.

MR. ZELMAN: I would like to retain her, but she can go about her business. We can get in touch with her if we need to recall her.

THE COURT: All right. Thank you, ma'am.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MS. NORRIS: The State calls Investigator Greg Wilder.

THE COURT: Okay. As soon as she's ready, I'm going to have her swear you in.

THE WITNESS: Yes, sir.

Whereupon,

INVESTIGATOR GREG WILDER

was called as a witness, having been first duly sworn, was examined and testified as follows

THE COURT: Have a seat.

MS. NORRIS: Your Honor, may I retrieve the [197] documents and exhibits?

THE COURT: Sure.

DIRECT EXAMINATION

BY MS. NORRIS:

Q Good afternoon.

A Good afternoon.

Q Can you introduce yourself to the jury, please, and spell your first and last name?

A Yes, ma'am. I am Sergeant Greg Wilder, W-i-l-d-e-r.

Q And where are you a sergeant?

A I am employed by the City of Tallahassee, Tallahassee Police Department.

Q How long have you been employed by the Tallahassee Police Department?

A Almost 18 years.

Q Now, I know you're a sergeant. Are you assigned to a certain division or unit?

A I was. I was assigned to the Special Victims Unit at the time of this situation.

Q How long have you been – or how long, total, did you spend in the Special Victims Unit?

A About four years.

Q What exactly does the Special Victims Unit specialize in?

A Special Victims Unit investigates and follows up on [198] all sexual-related crimes that are reported to Tallahassee Police Department, as well as juvenile, child abuse situations, missing persons, and so forth.

Q What was your position title when you were in the Special Victims Unit?

A Investigator.

Q How did you come about being involved in this particular case?

A I was assigned this – this case for followup after it had been reported to a patrol officer.

Q Would that be Officer Pinkard?

A Yes, ma'am.

Q And did you interview the complainant, MW, who had reported that a sexual battery had occurred?

A I did interview her. I did not interview her that day that it was reported. I interviewed her a couple of days later.

Q Okay. Did you collect a sexual assault examination kit from MW in this case?

A No, ma'am, we did not.

Q Let me strike that. Let me backtrack real quick.

You, at the time of this incident back in July 2014, were assigned to the Special Victims Unit as an investigator?

A Yes, ma'am.

Q When did you leave the Special Victims Unit?

[199] A I moved from Special Victims to the Violent Crimes Unit, which was just a lateral move, later that fall, October maybe.

Q Okay. So you had been there almost a full four years at the time of your investigation in this case?

A No, at that particular time I had been there about a year. I had moved – I've had several positions at the department. I had – about three years prior to that particular time, I had moved back in there from a different position.

Q Okay. I guess at the time of this you had had almost four full years of experience in Special Victims?

A Yes, ma'am.

Q Over the years?

A Yes, ma'am.

Q I'm sorry, I misunderstood. So you are familiar with sexual assault examination kits?

A Yes, ma'am.

Q And you've had occasion over those four years to collect them from complainant victims in sexual battery cases?

A Absolutely.

Q Why did you not select a sexual assault examination kit from MW in this case?

A This was a delayed, a significantly delayed report from the actual incident date to the time she reported to [200] the – to us in law enforcement.

Q Do you recall the time delay?

A I think the incident was on the night of the 3rd, early morning hours of the 3rd, and the report didn't come in until the late afternoon hours of the 7th, so you're talking over four days.

Q Does your – if you have a delayed report, does that impact your ability to collect physical or forensic evidence from that victim in any way?

A Yes, ma'am.

Q How so?

A DNA – forensic evidence, I should say, is – can be – I don't want to say destroyed but destroyed or lost over time, especially in sexual assaults, if the victim showers, if the victim cleanses themselves, just by

everyday skin cells being – falling off and removed. There are various measures or various ways that forensic evidence can be destroyed. And significantly as the – as time increases, the likelihood of recovering any touch DNA or DNA evidence goes down significantly.

Q Okay. So you didn't have her go to the hospital to get vaginal swabs or any kind of swabs like that taken?

A No, ma'am.

Q What about any other types of evidence, did you try to test any other evidence?

[201] A The officer collected the clothing that she was wearing that particular day. She came in with the clothing. There was indication that she had not washed it or tampered with it since the – so he seized that – the patrol officer seized those items as evidence and collected them, and they were submitted.

Q Okay. Submitted to FDLE for testing?

A Yes, ma'am. I'm sorry.

Q As part of your investigation in this case, did you also interview the Defendant, Tyson Martin?

A I did.

Q And tell me about how that came about.

A He – the morning – I was assigned the incident for followup on the morning of the 10th. After three

days, there was – it was reported on the 7th. I spoke with the victim that morning via the telephone. She indicated she wanted to pursue –

Q Let me – I'm going to cut you off just real quick.

A It's all right.

Q It's okay. I should ask a better question.

Did you ultimately request the Defendant to come in for an interview?

A Yes, ma'am, I did.

Q And did he do that?

A Yes, ma'am, he did.

[202] Q And on what day did you interview him?

A The 10th of July.

Q July?

A Yes, ma'am. July 10th, 2014.

Q And he – did he come voluntarily?

A Yes, ma'am.

Q Did anyone come along with him?

A He had two individuals that came with him, two females.

Q Where did this interview take place?

A The interview took place at the Tallahassee Police Department in the Criminal Investigations Division in one of the two interview rooms.

Q And are you aware of who the two females that were with him were?

A I believe one of them was his sister, Blair, he said. And I think he said the other one was a female roommate, but I do not recall her name.

Q Possibly Lacey Marx?

A Yes, Lacey. Yes, ma'am.

Q So he came to the police station with his sister, Blair Martin, and Lacey Marx?

A Yes, ma'am. He drove and they were in the car with him.

Q Before beginning this interview, did you confirm his [203] name, identity, date of birth in any way?

A I did.

Q How did you –

A I'm sorry, go ahead.

Q How did you do that?

A His driver's license, he presented his driver's license after he came to the station. I copied his information from that driver's license.

Q And were you able to look at the photograph, look at him, make sure it was the same person?

A Yes, ma'am, they were one and the same.

Q And what was his date of birth?

A I would have to go back to the –

Q If you need to see a copy of your report, I can get you a copy of that.

A Yes, ma'am, I'll take your copy. Sorry, I have a working copy as well.

Q That's okay. And this report, you would have written this at or near the time that you interviewed Mr. Martin in this case?

A Yes, ma'am. My entire report was completed by the 14th of July.

Q And you wrote these – this information in here when it was fresh in your memory?

A Yes, ma'am.

[204] MS. NORRIS: May I approach, Your Honor?

THE COURT: Sure.

BY MS. NORRIS:

Q I'm showing you a copy of the report.

MS. NORRIS: For the defense, I'm on page 2 of 7.

BY MS. NORRIS:

Q Referring to the top.

A Yes, ma'am. 9/2 of 1991.

Q So he was 22 years old at the time you interviewed him?

A Yes, ma'am.

Q During the duration of that interview, did you advise Mr. Martin that he was free to leave?

A I did.

Q Was he under arrest at that time?

A No, ma'am.

Q Did you go over his rights with him before you started asking him questions?

A I did.

MS. NORRIS: May I approach?

THE COURT: Yes, ma'am.

BY MS. NORRIS:

Q I'm showing you what I've marked for identification as State's Exhibit 6. Do you recognize this document?

A Yes, ma'am.

[205] Q What is that?

A It appears to be a copy of the Statement of Rights and Miranda form that we have at the City of Tallahassee Police Department that I explained to Mr. Martin and he signed.

Q And is this an exact copy of the signed – the form that you read with him and that he signed?

A Yes, ma'am.

MS. NORRIS: At this time the State would enter this as State's Exhibit 6.

MR. ZELMAN: No objection.

THE COURT: All right, so admitted.

(State's Exhibit No. 6 received in evidence.)

BY MS. NORRIS:

Q Okay. So you informed him that he had a right to remain silent?

A Yes, ma'am.

Q You informed him that anything he could – anything he said could and would be used against him in a court of law?

A Yes, ma'am.

Q Did you inform him that he had a right to talk to a lawyer and have them present while he was being questioned?

A I did.

Q Did you inform him that if he could not afford a lawyer, one would be appointed to represent him before any [206] questioning if he wanted?

A Yes, ma'am.

Q Finally, did you inform him that he could decide at any time to exercise his rights and not answer any questions or make any statements?

A I did.

Q Did he indicate that he understood those rights and that he was willing to speak to you?

A Yes, ma'am, both verbally and written.

Q Once he had agreed to talk to you, did you ask him about this night – I think it was Wednesday, July 2nd, to the early morning of July 23rd – sorry, July 3rd?

A Yes, ma'am, I did.

Q And how did he first respond to your inquiring about the night of this incident?

A He didn't know anything about what I was talking about, I think that was almost an exact quote. And he indicated that he did not remember the night at all.

Q Did he explain to you why he claimed he didn't remember the night at all?

A In layman's terms, that he was severely drunk and intoxicated.

Q Did you ask him if he remembered how he got home that night?

A I did.

[207] Q And what was his response?

A His initial response was he didn't know; and, in fact, he had to ask his roommates the next morning how he got home.

Q Okay. Did you ask him whether or not his – he remembered if his roommate Andrew's girlfriend was there that evening, meaning Taylor Foster?

A I did ask that.

Q And what was his response?

A He couldn't remember at first.

Q He couldn't remember if Taylor Foster was there?

A Correct, he could not recall if she was there or not.

Q Did you ask him whether he remembered if Taylor Foster's friend M had been out with him that night?

A Yes, ma'am.

Q And what was his response initially?

A Initially the same response, he couldn't recall if she was there or not.

Q Did he eventually change his story as to whether he remembered her being – M being there or not?

A He did.

Q What did he say then?

A It progressed, after multiple questions, to that she was out with him and I believe Andrew and Andrew's girlfriend.

[208] Q About how many times – I believe you said initially he was saying he couldn't remember anything that night. But how many times did he deny knowing what happened that night?

A Three to four.

Q Okay. Did he eventually admit that he did remember stuff from that night?

A Yes, ma'am.

Q And after what – did you – did you present him with anything before he finally changed his story?

A I confronted him with the concept of DNA evidence, forensic evidence, and his story almost immediately changed.

Q Okay. And did he admit to touching MW?

A He did.

Q And did he describe the way in which he touched her?

A His quote, was quote, unquote, in an inappropriate way.

Q Did you ask him where he touched MW in appropriately?

A I did.

Q What was his response?

A He described, in his terms, her boob or boobs and her butt.

Q Did he say anything about what MW was doing at the time that he touched her boobs and her butt?

A He indicated she was – throughout the interview, [209] different terminology, but she was asleep, passed out, and not aware of this – of what he was doing.

Q Did he say whether or not he knew that she was asleep?

A Yes.

Q Okay. And how did that come about?

A Because she – his quote was that she woke up when he was touching her.

Q I believe you testified a minute ago at some point he described her as being passed out?

A Yes, ma'am.

Q Did he tell you whether he had any beliefs that night as to whether or not she was intoxicated?

A Yes, ma'am.

Q What did he say he believed about that?

A I don't have the exact quotes memorized, but there was indications. There were quotes specifically in our interview that he stated that.

Q Would it refresh your memory if I showed you a transcript from that interview?

A Yes, ma'am.

MS. NORRIS: May I approach, Your Honor?

THE COURT: Yes.

MS. NORRIS: For defense counsel, I'm on page 20, lines 6 through 8.

[210] BY MS. NORRIS:

Q And if you could just read this silently to yourself.

A Okay.

Q And does that refresh your memory?

A Yes, ma'am.

Q Did he indicate to you in the interview that he knew her frame of mind at that time that he was touching her?

A Yes, ma'am.

Q And what was that?

A She was out. She was out. She was out of it. She wasn't there. She was completely passed out.

Q Did Mr. Martin describe how MW was positioned on the couch?

A He did.

Q And what position did he describe her as being in?

A She was laying on her side. Her face was to the pillows towards the back of the couch, and her – her backside, her buttocks and her back were out towards where your feet would be, like if you were sitting. So face towards the pillows, to the rear – towards the back of the couch, and her butt and back towards the open section.

Q Towards the living room?

A Yes, ma'am.

Q Did he describe how he reached her butt?

[211] A Yes, ma'am.

Q Over the clothes or under the clothes?

A Under the clothes.

Q Okay. Did he describe how he touched her butt?

A Yes, ma'am.

Q Under the clothes? How?

A He reached in from – he described reaching in at the waistline of the rear of her clothes and taking his hand and putting it down the back of her shorts, downward from the waistline along her butt.

Q Did he say what direction he was heading when he put his arm down the top of her waistband, down towards her butt?

A He indicated he was headed down there.

Q Down where?

A Towards her vagina.

Q Did you ask him whether he penetrated her vagina?

A I did.

Q And what was his response?

A He said he did not.

Q So he denied penetrating her vagina?

A That is correct. Yes, ma'am.

Q Okay. But said his hands were moving towards that area?

A Yes, ma'am.

Q Did he tell you what happened at that point?

[212] A Yes, ma'am, he did.

Q What was that?

A He stated that as his hand was down her pants, she woke up, and the victim confronted him verbally.

Q Did he say what he did in response to her confronting him verbally?

A He said he immediately removed his hand and began apologizing, saying he was sorry, he was sorry, and that he was embarrassed.

Q Did he say anything about knowing what he was doing was wrong or any feelings about what he was doing at that time?

A Multiple times, yes, ma'am.

Q What types of things would he say?

A His indication was – one of the instances was he knew what he did was wrong. I don't want to –

Q And I have the transcript if you need to see it. It's okay.

A I don't want to misquote any quotes from him because there were three or four instances.

Q I don't want you to either.

MS. NORRIS: May I approach?

THE COURT: Yes, ma'am.

MS. NORRIS: For defense counsel, first would be page 24, lines 20 to 21; page 25, lines 1 and 2.

[213] BY MS. NORRIS:

Q Those would be the two. Does that refresh your memory?

A Yes, ma'am. Yes, ma'am.

Q And what were those statements?

A He indicated he had made a very bad decision. When – when the conversation continued, shortly thereafter, it was almost one after the other, he described being inebriated and that he made a decision, and that he was, quote, unquote, fucked up. Excuse my language.

Q Did you ask him if M had done anything that evening to suggest that she was sexually, romantically, or in any way interested in him?

A I did.

Q And what was his response?

A His response was no, she had not. It was almost like a three-part question. I asked if she had done anything to flirt with him? He said no. Had she made any advances towards him? No. And I asked the reciprocating questions, if he had done that towards her, and he said no.

The indication was that they had – they didn't know each other. They said hello at the beginning of the evening, and they didn't know each other at all and had no further conversations throughout that day.

Q Thank you. I have no further questions at this [214] time.

A Yes, ma'am.

THE COURT: Why don't we take a short recess before you start your cross? Unless it's going to be real short.

MR. ZELMAN: It's not.

THE COURT: Okay. Let's take ten minutes then.

(Brief recess.)

(The following took place outside the presence of the jury:)

THE COURT: You're you ready to go forward, though, aren't you, Mr. Zelman?

MR. ZELMAN: Yes, sir. As long as Ms. Norris can tell me how to operate this thing.

THE COURT: You better wait for her then. I sure don't know how.

MR. ZELMAN: You and me both.

MS. NORRIS: I'm sorry, Your Honor.

THE COURT: That's all right. I think we're ready. Okay.

MS. NORRIS: I think we have one issue to address before the jury comes back in.

THE COURT: Yes, ma'am.

MR. ZELMAN: That's correct, Your Honor. I let Ms. Norris know that it was my intent during my

cross to [215] introduce the video of Mr. Tyson's entire interview.

I believe that the case law is pretty clear that contemporaneously with the admission of any testimony concerning a portion of the Defendant's statement, the rest of it should be contemporaneously disclosed to the jury.

THE COURT: Not necessarily. If there's something that's misleading in the testimony that's given, you certainly have a right in fairness to show the rest of the document that would clarify it. But you don't get to just play everything that he said, because that's hearsay when – from your side not – there's an exception on the other side because it's a party opponent. So is there something that's – that you have specifically that's going to be misleading the jury from what's been asked about what was said?

MR. ZELMAN: Well, I think that the misleading portion specifically is the fact that the implication of the direct statement of Investigator Wilder was that Mr. Tyson – or Mr. Martin stated that he was moving toward her vagina, the implication being that he was going to try and touch it. I think that the entire video reveals otherwise. And the rule of completeness –

THE COURT: If you have where – well, like I said, rule of completeness is, this is going to be misleading [216] unless you consider something else that goes with it in context. So if you've got something specific that was asked and something that was said that

puts that in context, that's certainly fair. But you don't just get to say I'm going to play the whole video because, you know, there's – I disagree with your characterization of what he said. You can cross examine. That's what cross examination is all about. Didn't he say this? And where did he say that? And you've got the transcripts, apparently.

MR. ZELMAN: Yes, Your Honor. In *Swearingen versus State*, 91 So.3d 885, the court states pursuant to the rule of completeness all portions of the defendant's statements should be provided contemporaneously to the jury and not just those that benefit the State. I think that clearly –

THE COURT: I would like to see the context of *Swearingen* because I'm pretty sure things that are just good for the defense that have nothing to do with what was offered by the State would not be proper. So have you got a copy of that for me?

MS. NORRIS: And, Your Honor, if I could put something into the record.

MR. ZELMAN: Yes, Your Honor.

MS. NORRIS: Can you give me that case cite, please?

[217] MR. ZELMAN: Sure. It's 91 So.3d 885.

MS. NORRIS: And, Your Honor, I will hop on Westlaw in a second, but the State – I tried very carefully – I have no intent of mischaracterizing the

Defendant's statement, I do not want to do that, or mislead the jury. But the question during the interview by the investigator was on page 21, lines 21 through 24.

"Question: Did your fingers ever make it to her vagina?

"Answer: No, they didn't. They moved towards that area, but no."

I think, of course, the defense can cross examine the investigator that he doesn't know what the Defendant's intent was, he doesn't know what his plan was, if he moved close towards her vagina.

But I don't believe I've taken anything out of context. I've put into evidence the fact that he denied ever touching her vagina, which is the inculpatory – I'm sorry, exculpatory statement of the Defendant.

And it is my position that I agree with the Court, they don't get to wholesale put in the entire interview. If there is a portion I misled, that would be admissible.

MR. ZELMAN: Your Honor, I would also refer to *Metz versus State*, 59 So.3d 1225. The Defendant's exculpatory out-of-court statement is admissible into evidence when a [218] State witness has testified to incriminating statements contemporaneously made by the Defendant, and the jury should hear the remaining portions at the same time so as to avoid the potential for creating misleading impressions by taking statements out of context.

THE COURT: All right. And I don't have that case, but I have the one you gave me that's just as I cited. The purpose of the rule is to avoid the potential for creating misleading impressions by taking statements out of context. The proper standard for determining the admissibility of testimony under the rule is whether in the interest of fairness the remaining portions of the statement should have been contemporaneously provided to the jury.

And they quote another case which has a similar quote. So if there's a potential for creating, as I said, a misleading impression, you can certainly ask him any questions you want to clarify that. But you don't get to just get to say we're just going to play the statement. I don't know what's in the statement. I haven't heard it. There may be some stuff that is relevant, may not be relevant, but it's going to be an objection to hearsay.

But you certainly, if – if it's unfair, if the jury has been misled by any questions and answers, you can [219] correct that with any reference to the transcript of his statement that you have.

MR. ZELMAN: Judge, I respectfully disagree. I think – and as I was citing to *Metz*, it refers to *Ramirez versus State*, which is a Florida Supreme Court case, 739 So.2d 568. Fairness is clearly the focus of the rule. Thus when a party introduces part of a statement, confession, or admission, the opposing party is ordinarily entitled to bring out the remainder of the statement.

THE COURT: Well, that's the language – you say that, but only if that's going to clear up and

clarify in context. If you've got something in that statement that you want him to tell the jury about, I'm perfectly okay with that.

But I don't think that rule, the ruling of the case law in this area says if you ask a person about what somebody said, and that statement happens to be recorded – by the way, she didn't play any of the statement. All she did was ask this person who happened to be there at the time what did he say, and he answered questions to it. So we don't even have a situation in which the State has played a portion of a statement. They've asked –

MR. ZELMAN: No, but they have quoted from the [220] transcript, and the best evidence of the statement is going to be the recording.

THE COURT: If you wanted to object to it, you could.

MS. NORRIS: I think that a personal witness can also be the best evidence. I don't think the best evidence rules applies to that.

THE COURT: The best evidence only is – only applies if he says, "I've listened to that tape recorded statement and here is what it says on it." That's not a best evidence thing. There's nothing – just because it's recorded doesn't mean the State can't call a witness, as they are doing, when there may or may not be a lot of stuff in there that the State doesn't want to get into.

MR. ZELMAN: Judge, I would like to proffer the entire recording into – into evidence then.

THE COURT: You can. Certainly, you can put it into evidence, but I'm giving you the opportunity to tell me what parts of the statement that you want to use or you want to play that is going to clarify something or take away what you feel to be a misimpression of the jury.

MR. ZELMAN: And, Judge, I don't want to concede that we are not entitled to introduce the entire statement. I believe that the case law is clear that we [221] are entitled contemporaneously to introduce the entire statement as a matter of fairness because only a portion of it was referenced in the direct – in the direct testimony of this witness. So I –

THE COURT: Well, like I said, is there something specifically, though, that – in other words, if you told me that everything else that's on that statement is necessary so as to be fair – that's the whole idea of the rule, so the jury is not misled and given a false impression – I'm open to it. But you're just telling me I want to read the whole thing, and I'm entitled do it because it was a statement given contemporaneously with questions that have been asked about it.

MS. NORRIS: And I would note that, I mean, the Defendant's reading of the case law, I think the rule of completeness is clear, as the Court is saying, it is only to allow the remainder of the Defendant's statements when statements have been made out of context, when the jury is being misled about what was

really said because it's been cherrypicked through the statement. And if we were to read the case law in that way, it would obliterate an admission by a party opponent. Then at any time we elicited any statement of a defendant, every single self-serving thing that he said would then be admissible, so long as we don't take it out of context.

[222] Had I introduced those statements and not elicited that he denied penetration, I do think it would be unfair and out of context, and they would be able to say, but didn't he deny penetrating her? Which is why I put it, in fairness, that he did deny that.

But I think he can be crossed examined on, you don't know what his intent was, you don't know if he intended to put his fingers in the vagina. All you know is he said he was headed in that direction. But even if we were to play the whole video, you'll never – I mean, he can ask him, he told you he didn't plan on penetrating her vagina, maybe he did say that. I don't know if he said that or not, but –

THE COURT: Okay. So you haven't pointed out anything specific; but if you want to make that a part of the record, you certainly can do it.

MR. ZELMAN: Well, and, yes, Your Honor. Specifically, I mean, something that was misleading in Investigator Wilder's testimony, when he was referencing, or when the State refreshed his memory about certain things that were in the record concerning how he felt concerning my client, the specific quote was,

"Honestly, I made a bad decision. I made a very bad decision."

Then the next page, "I was inebriated and I was fucked up, and I made a very bad decision." Investigator [223] Wilder juxtaposed those two. He said, "I was inebriated. I made a very bad decision, and I fucked up." He switched them. I think that it's important to realize the best evidence and – of the entire statement is what the statement is, not somebody's memory of what the statement was.

THE COURT: Well, that's your choice to ask him if you want to.

MR. ZELMAN: Well, certainly I'm going to, Judge. But I think that, you know –

THE COURT: Do you have a transcript of that? You can ask him to refresh his memory, or you can impeach him if he – if he maintains it's something different than what you say.

What you're saying, though, to me, just – just from analysis is not any significance of any difference in terms of reversing it. That's what he said, that's what he said. You can ask him, well, didn't you first say this and then say that, if you think it's significant. But I just – my personal thing is I don't think it is.

But, anyway, I'm not going to let you just play the tape, not going to happen.

MR. ZELMAN: I would like to proffer it into the record to preserve it for appeal.

THE COURT: Very good.

[224] MS. NORRIS: I just might, for the record, if it's going to be in the – God, I can't talk, sorry – in the record, I would also note there is a lot of gratuitous crying and sobbing and apologizing of the Defendant that I also think is unfairly – I don't think it's probative of anything, and that would be another basis, I would object for that.

THE COURT: Well, like I say, I don't know. I haven't listened to it, don't know what's on it. I'm just saying what I understand the law to be, and you don't get to play it just because you want to play it.

MR. ZELMAN: Well, I don't disagree with the Court's statement there. Now, in fairness, over a month ago I e-mailed the State with portions of the recording that we intended to redact. They never responded one way or another whether or not they had any objections to that. So, certainly, it's my position that they are objecting now, it's kind of playing a game of "gotcha." So –

THE COURT: Well, whatever you perceive it to be. I can only rule when I get objections, that's the only way I know how to do it. I can't go behind either – either of your motives when you object.

MS. NORRIS: Right. I did inquire as to how he was going to put that into evidence because it was hearsay. I didn't mean to play "gotcha."

[225] MR. ZELMAN: Now, the video that we would like to proffer is roughly 53 minutes long. I don't know how the Court wants to do that.

THE COURT: Well, I don't – I don't want to watch it. But it's – you have – it's all – all recorded, right?

MR. ZELMAN: Yes.

THE COURT: The appellate court can see it or listen to it or view it or whatever they want to do with it.

MR. ZELMAN: So we have marked this as Defense Exhibit 44 for identification purposes.

THE COURT: Okay. Anything else before the jury comes back?

MS. NORRIS: Nothing from the State, Your Honor.

MR. ZELMAN: No, Your Honor.

THE COURT: Okay, let's bring them in then.

THE BAILIFF: Jury in the courtroom.

(The jury returned to the courtroom, and the following took place in open court:)

THE COURT: The record will reflect all the jurors are back, the Defendant is present, the witness is back on the stand. We are ready for cross examination.

CROSS EXAMINATION

BY MR. ZELMAN:

Q Good afternoon.

[226] A Good afternoon.

Q You testified that you interviewed Mr. Martin on July 10th, 2014, correct?

A Yes, sir.

Q Okay. And he came to your – to meet with you voluntarily?

A Yes, sir.

Q And although he initially denied any knowledge of what was going on with Ms. W, he ultimately was truthful with you, correct?

MS. NORRIS: Objection.

THE COURT: Sustained.

BY MR. ZELMAN:

Q He ultimately told you what happened?

A He told me his account of what happened.

Q Okay. And his account of what happened was that he touched her breasts and touched her butt?

A Partially, yes.

Q Okay. Was there – what else did he tell you?

A Those specific words, yes. The inclination – or the indication and during the course of the interview indicated there was other – other conduct or other actions that he was doing. That doesn't make sense, does it? Yes.

MS. NORRIS: Your Honor, I'm going to object to ask to rephrase the question as to what else did he tell you [227] during the interview –

THE COURT: Yeah, it's kind of broad.

MR. ZELMAN: Okay. I'll try to narrow it, Your Honor.

BY MR. ZELMAN:

Q When I asked you whether he admitted to touching her boob and her butt, you said yes. And then there was something else that he told you concerning him touching her?

A I apologize for the –

Q It was a bad question.

A Right. He – in his statement to me he admitted to touching his – her butt and her boob, yes, for clarification.

Q And he specifically and repeatedly denied touching or penetrating her vagina?

A Yes.

Q Okay. Throughout the interview did you use, kind of interchangeably, the term "vagina" with "vaginal area"?

A I can't recall, I'm sorry.

Q I guess – let me rephrase that.

Was there some point towards the end of the interview when you referred to what he was – what he admitted to doing as having his hands on the inside of her butt/vaginal area?

A Again, off the top of my head, I don't recall. If it's – if it's in the record or in the transcript, then I [228] would say yes. I would be happy to review it if that's the case.

Q I'm going to approach and show you a transcript of the July 10th interview, July 10th, 2014, interview with Mr. Tyson. Turn it to page 33. When I get back to my notes, I will tell you what line.

A Yes, sir.

Q Lines 10 through 12. Does that refresh your memory?

A Yes.

Q Okay. Why don't you just go ahead and close that, and we'll leave that up there just in case we need to use it again.

A Okay.

Q And so you were interchanging the terms "vagina" with "vaginal area"?

A Yes, sir.

Q And according to your testimony on direct, you have been a sex crimes investigator in total through your career for about four years?

A Yes, sir.

Q And as a sex crimes investigator, you receive training as to what violates a criminal statute and what doesn't violate a criminal statute; is that correct?

A Yes, sir.

Q And you're aware of what – what acts are required [229] in order to violate the sex battery statute in order for you to make a determination whether or not there is going to be an arrest, or to recommend an arrest to the State Attorney's Office?

A That would be more accurate, yes, sir.

Q Okay. And so when you're dealing with sex battery and the use of an object or a finger, what is required in order – are you familiar with what's required in order –

A I would –

Q Are you familiar with what's required in order for a recommendation for an arrest to be?

A I would have to look – again, it's been a couple of years, and I haven't been in that unit – exactly what the statutory requirements are.

I can say first and foremost, after obtaining information from either party in the case, specifically the Defendant in his – in his statement, it's – I hate to use the term "willy-nilly." It's just not willy-nilly I go and place a charge and then we go back, we review, we review the statute, we specifically read the statute, and I confer with the State Attorney, and then we determine what is the best course of action, what is the best charge.

So based on the information totality in this case, the charge that was presented or placed on the Defendant was the best applicable charge.

[230] Q And in his interview, in order for – based on your work as a sex crimes investigator, he did not admit penetrating the vagina, correct?

A He did not admit penetrating the vagina, yes.

Q Now, the interview, the room where this takes place at the Police Department, there are hidden cameras, correct?

A There are.

Q And it's video and audio recorded?

A Yes, sir.

Q Is the subject aware that it's video and audio recorded? Do you tell him that?

A No, sir.

Q And why don't you tell him this?

A Because it's not applicable. He's not a victim and/or a witness. We are required to let witnesses and victims know that they are being recorded.

We are not required to notify defendants and/or potential suspects of crimes that they are being recorded. Quite honestly, I want a natural response.

Q So you don't tell them because you don't want them to kind of get like stagefright like they would on camera?

A No, I wouldn't say that. I just – we do things – I do things by the book. We read them Miranda if we feel that there's going to be any incriminating questions. But as far as notifying them they are being recorded, we are not required [231] to, so we don't. I don't.

Q Well, you said you want a natural response.

A Right. They are the subject, or they are the focus of a potential criminal act; whereas, victims and/or witnesses are not. I'm not trying to hide anything from a victim or a witness. And it's not that I'm trying to hide anything from a Defendant, but just as he is going to play his cards, I'm going to play my – my cards.

Q And in your – the course of your career, you've had suspects or defendants try to get just as much information out of you as you are trying to get out of them; is that accurate?

A That's a valid statement, yes, sir.

Q Was Mr. Martin doing that?

A No, sir.

Q In your experience, the type of suspect or defendant that typically will try to get information out of you just as you're getting information out of them, do they have more experience with the criminal justice system?

MS. NORRIS: Objection, Your Honor, relevance and improper –

THE COURT: Sustained.

BY MR. ZELMAN:

Q And according to your direct testimony, you confronted Mr. Martin with the possibility of forensic evidence, and that's when he started telling you what [232] happened; is that correct?

A That's correct.

Q You didn't actually have forensic evidence in this case?

A No, sir.

Q He didn't know that?

A No, sir.

Q Would you characterize that tactic as being deceptive?

A I would characterize it as an investigative technique that is taught not only nationally but internationally for law enforcement.

Q To be deceptive with a suspect to get them to make a statement?

A I wouldn't characterize it that way, your verbiage. I think it's just a technique, and are we – in every single case are we completely honest with defendants and/or suspects? Absolutely not. But that's also to – an attempt to elicit a response that is –

Q To elicit a statement?

A Yes.

Q And it was effective in this case?

A I would say so, yes.

Q Now, after Mr. Martin's interview was over and he was – you were leaving the room with him, did the two of you [233] have a conversation?

A I don't recall. The transport officer came and got him after the determination was made to arrest him, and I don't recall that I – I don't recall a conversation. I don't recall if he was escorted – if I escorted him down with the patrol unit or not.

Q Did you have a conversation with him after the decision was made to arrest about what he said that caused you to arrest him?

A I did have a conversation with him after I notified him he was being arrested and we handcuffed him and sat him in the room that he was being interviewed in. I do not recall the extent of that conversation. Any conversation I had with him was recorded.

Q If it was in the room?

A If it was in the room, yes, sir.

Q So any conversation outside of that room would not have been recorded?

A Yeah. But then again, I don't recall having a conversation with him in regards to this outside of the room.

Q The conversation that you did have with him concerning why he was being arrested – I think I left the transcript up there. Did you discuss with him why he was being arrested in the interview room?

A Yes, sir.

[234] Q Okay. Do you remember what you said?

A I would have to – to direct quote, I would have to refer back to the transcript.

Q Take a look at page 34.

A I'm on 34.

Q Line 17 through 18.

A Sorry, I have to count down.

Q I think the line numbers are hidden on that one.

A Okay.

Q Does that refresh your memory as to exactly what you said?

A Yes, sir.

Q Does it constitute sexual battery –

MS. NORRIS: I object. I'm sorry, I'll wait until the question.

BY MR. ZELMAN:

Q So he was arrested because –

MS. NORRIS: I object to hearsay.

THE COURT: He was arrested because?

MS. NORRIS: Well, I believe what he's trying to do is refer to the transcript, and then I think he can ask him why did you arrest him that day; that wouldn't be hearsay unless he is asking him to quote what he said out of court previously, which would be hearsay.

[235] BY MR. ZELMAN:

Q Why did you arrest him?

A I arrested him because the totality of the circumstances indicated that he had sexually battered the victim while she was physically incapacitated.

Q It wasn't because his rubbing his hand up on her? Is that not what you said?

A That's – that's what is in here. And, yes, I think that the words are correct. It's misconstrued as to what was being described, if that makes sense.

Q Prior to today, have you seen this transcript?

A I'm sorry?

Q Prior to today, have you seen this transcript?

A Yes, sir.

Q And you've watched the video?

A It's been quite a while since I watched it but, yes, sir.

Q But more recently you've read the transcript?

A No, I haven't watched the video more – I read the transcript more recently than the video.

Q That was my question.

A I'm sorry.

Q More recently, you –

A Oh, yes, sir. I thought you said more recently than I read the transcript. No, sir. The transcript is more [236] recent than the video.

Q Okay. And throughout the interview Mr. Martin denied going towards the – to actually penetrate her vagina; is that correct?

A Throughout the interview, yes, he –

Q He admitted touching her butt?

A Right.

Q He denied doing anything to try to penetrate her vagina?

A He denied penetrating her vagina, yes.

Q He denied trying to penetrate it? Did he ever admitted to trying to penetrate her vagina?

A No. That – that exact verbiage, no.

Q Did he ever admit to trying to touch her labia majora or labia minora?

A That question was never asked, so –

Q Did he ever try to touch her clitoris?

A It was never asked.

Q What about her butthole?

A It was never asked specifically.

Q So you never asked him specifically what he was doing, did you?

A No, I asked him what he was doing. He indicated to me that his hand was underneath, skin on skin, and that her – he was – he had grabbed her boob, he had grabbed her butt, [237] and his hand was moving down towards her vagina.

Q Did you ask him if he intended to touch her vagina?

A No, I did not ask him that.

Q Did you ask him if he tried to touch her vagina?

A No, sir.

Q Did you ask him if he tried to touch her clitoris?

A No, sir, I did not.

Q Did you ask him if he tried to touch her labia?

MS. NORRIS: Object to asked and answered.

THE COURT: I think you did ask that. Sustained.

MR. ZELMAN: I did? Just a moment, Your Honor.

(Pause.)

BY MR. ZELMAN:

Q Investigator Wilder, during your interview with Mr. Martin, did you ask him what he intended to do?

A I don't recall. I'd have to go back to the – I would have to go back to the entire interview, but there were several questions asked in there. Your specific questions, I do not recall – I did not ask him those.

Overall, I don't know if I asked him that, his overall intention.

Q Did he make any statements about whether or not he intended to touch –

MS. NORRIS: Are you done with your –

BY MR. ZELMAN:

Q – her vagina?

[238] MS. NORRIS: I was going to object to hearsay.

THE COURT: Well, overruled on the hearsay. He asked a specific question that relates to what you asked him about, although I think you've already asked him that question. He's already answered no.

BY MR. ZELMAN:

Q Well, if you refer to page 23, of your – of the transcript, lines 2 and 3.

A Two and 3? Page 23?

Q Yes. Did he make a statement about whether or not he intended to touch her vagina?

MS. NORRIS: I object to improper – can we go sidebar?

THE COURT: Is it – is it something separate than no? Because he said no when you first asked him the question.

MR. ZELMAN: Well, he said he didn't –

THE COURT: Do you want to clarify it?

MR. ZELMAN: Yes.

THE COURT: Ask him again.

MS. NORRIS: Your Honor, may go sidebar?

THE COURT: Sure.

(Sidebar conference as follows:)

MS. NORRIS: I thought it might be easier if the Court knows what we are referring to. The investigator [239] said, "You were moving your hands down toward her vagina, I am assuming from behind, question mark? Your hand wasn't going down the front of her pants?" And he said, "I mean, it went towards, but it was not an intention to," and then he was cut off. So I don't think it's out of context because I don't know what he did not intend to do. I don't know if he didn't intend to smack it, if he didn't intend to penetrate it, if he didn't – I don't think it's –

THE COURT: Maybe.

MS. NORRIS: – out of context because –

THE COURT: I think it is legitimate clarified, but my memory, and I may be wrong, I thought you asked him did he – did you ask him about him intending to –

MR. ZELMAN: I think the question was: Did you know what his intent was, or did he tell you? And he said no, but –

THE COURT: I think you also asked him did you ask him if that was his intent, and he said that it never came up or something like that.

MR. ZELMAN: That's different from what he said here, so –

MS. NORRIS: Actually, if I could – the question that he just asked that I objected to was, "Did you ask him if he intended to penetrate her vagina?" He never [240] asked him if he intended to penetrate her vagina. All he said was –

THE COURT: That's what I thought he said before. That's what he said, "I didn't ask him." He went through several body parts, and he said, "I didn't ask him."

MS. NORRIS: I think maybe the proper objection would be improper impeachment because it's the Defendant's statement of it went towards it, but it was not an intention to – we don't know what the rest of that is. I don't know what he was trying to say it was not his intention to do. He didn't – it's not specifically in reference to penetrating her vagina. I think it's unfair to make the assumption or the leap when I can't cross examine the Defendant about what his intention –

THE COURT: The only question right now is: Did you ask him if it was his intent to touch her vagina? I think he's already answered that question.

MR. ZELMAN: Okay.

THE COURT: But in the interest of clarifying it, if you want to ask him, he can say it. He may waffle a bit because he either maybe – remembers or he doesn't remember, if you want to refresh his memory about that. But that's a little different than did he admit doing it.

MR. ZELMAN: You're right.

[241] MS. NORRIS: I just want to be clear about what, you know, was said because he doesn't say, "I did not intend to penetrate her vagina," he never said that from the transcript.

THE COURT: Well, the question is: Did you ask him: If he didn't ask him –

MS. NORRIS: Right. Okay. Okay.

THE COURT: If he did ask him, what was his answer?

MS. NORRIS: Right. Okay.

(The sidebar conference concluded, and the following took place in open court:)

BY MR. ZELMAN:

Q Investigator Wilder, we'll go back to what we were just discussing.

A Yes, sir.

Q You testified that you never asked him or he never said what his intentions were. Is that a fair statement?

A What his intentions were?

Q Yes.

A I don't think that was a direct terminology that I asked.

Q You didn't ask him that?

A Right, I don't think that was a direct terminology, what I asked. I don't think I specifically asked, "What were your intentions?"

[242] Q Okay. Did he indicate what his intentions were?

A He indicated what were not his intentions. Does that make sense?

Q That being it was not in his intention to touch the vagina?

A Yes. I'm not trying to go around with words, but his statement was it wasn't his – it was not an intention to touch her vagina.

MR. ZELMAN: Just a moment, Your Honor.

(Pause.)

MR. ZELMAN: Nothing further at this time, Your Honor.

THE COURT: Okay. Any redirect from the State?

MS. NORRIS: Sure.

MR. ZELMAN: Do you want him to keep the transcript?

MS. NORRIS: Yes.

REDIRECT EXAMINATION

BY MS. NORRIS:

Q I would like you to direct me to the line and page number where he told you it was not his intention to touch her vagina.

A It got cut off. Page 23, I think it's line 2.

Q No.

A I'm –

Q Pay attention to my question.

[243] A Okay.

Q Where in this transcript does he say, "It was not my intention to touch her vagina, to penetrate her vagina," to X, Y, Z?

A It doesn't, ma'am.

Q So it's actually just the phrase, "It was not my intention," and he didn't finish the sentence?

A That's correct.

Q So more accurately he never said about what he did or did not intend to do?

A Yes, ma'am.

Q The interview that you conducted with this Defendant, you were asked questions about it being audio/video recorded?

A Yes, ma'am.

Q Does the Police Department routinely – you record those and then impound them into evidence as a piece of evidence that's available to the State and the defense, correct?

A Yes, ma'am.

Q And did you do that in this case?

A It's saved on the server, on the hard-drive server, and that's all saved indefinitely. So, yes, both the State and the defense can request it.

Q And this interview took place, if my math – the [244] incident occurred in the early morning hours of July 3rd, so we had July 3rd, July 4th, 5th, 6th, 7th, 8th, 9th, 10th. This would be the eighth day after the sexual battery?

A Yes, ma'am.

Q When you confronted him with the DNA, did you tell him, hey, buddy we found your DNA on her clothes or on her?

A No, ma'am.

Q Okay. What do you mean when you confronted him with – were you confronting him with just DNA generally, that we can get DNA in criminal cases?

A It was a generalization, yes, ma'am.

Q In this case, did you lie to him and say that you had had DNA somewhere on the victim that you did not actually have?

A No, ma'am, I never said we had his DNA.

Q Just you possibly could get it?

A Yes.

Q And have you submitted the items for testing yet?

A The clothing, I believe – well, it was impounded. I don't believe it had been submitted yet, no, ma'am.

Q And did you have a sample of the Defendant's DNA at that point yet to submit for comparison even?

A No, ma'am.

Q Okay. With respect to Mr. Martin's intentions – well, when you were asking him about the direction his hand [245] was moving in, did you use the term "vaginal area" or "vagina"? And if you need to refer to page 21, lines 21 through 24. And I'm going to ask the question again now that you're there.

A Okay.

Q When traveling, did you ask him – did you use the phrase towards her "vaginal area" or her "vagina"?

A Vagina.

Q Was your specific question: Did your fingers ever make it to her vagina?

A Yes, ma'am, that was my question.

Q And what was his exact response?

A "No, they didn't. They moved toward the area but no."

Q Did Mr. Martin appear nervous during the course of this interview?

A Yes, ma'am.

MS. NORRIS: I have no further questions.

THE COURT: Let me see if the jurors have any questions for you. I'm not seeing any.

Keep him under the rule? Let him go about his business?

MS. NORRIS: Yes, sir, please.

THE COURT: All right. Thank you, sir.

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2014-CF-2067

STATE OF FLORIDA

vs.

TYSON MARTIN,

Defendant. /

VOLUME IV

(Pages 387 - 485)

PROCEEDINGS: JURY TRIAL

BEFORE: THE HONORABLE TERRY P. LEWIS

DATE: May 11, 2016

TIME: Commencing at: 1:50 p.m.
Concluding at: 7:05 p.m.

LOCATION: Leon County Courthouse
Tallahassee, Florida

* * *

[388] CLOSING ARGUMENTS

* * *

[402] MS. NORRIS: Thank you, Judge. May it please the Court and defense counsel.

Good afternoon, ladies and gentlemen. I want to start by telling you thank you from all of us. You have been with us through jury selection on Monday, trial all day yesterday, trial all day today. Jury service is not everyone's favorite time of year when they get that, but we really – we do this every other week, and we cannot do our jobs without fellow citizens agreeing to come here and give up your time to be here and listen attentively to these – these important cases. So we do all thank you for that, and I know the defense shares in my thanks to you all.

The Judge just went through the jury instructions with you, and I just want to point out, because there's a lot of – it can get confusing with page after page of the law, but it really boils down to the elements of the crime. When you ask yourself what does the State have the burden of proving in a criminal case, it's two things: A crime was committed, and this Defendant is the one that did it. Okay?

In order to determine whether this crime was committed, you look at the elements, and they are the ones that are numbered in there for you, okay? They are kind of like ingredients to a recipe. I have to prove [403] each one of those elements beyond a reasonable doubt. Not every fact in the case, not every single little detail beyond a reasonable doubt, but those four things.

So when you look in the instructions and you go back to deliberate, the first thing – I'm not telling you how to do – I guess I'm suggesting an easy way to do it

is go straight to the highest offense, Sexual Battery, Victim Physically Helpless. What did the State have to prove? One, two, three, four. Let's go through each one and see if we think that they prover it.

If you believe I have proven each one of those elements beyond a reasonable doubt, you must find that defendant guilty of that charge. If not, if you say, no, State dropped the ball, they didn't prove Element 2, they didn't prove Element 3, they didn't prove – whatever, then you would move on to the next – on your verdict form, the next highest included offense and go look at that one, and go through with the same attention on that one.

So that's just a suggestion. But, again, those are what the State has to prove. Because sometimes you might get back in the jury room and say, well, there was some dispute amongst the witnesses about A, B, C. Well, if that doesn't go to the heart of the matter, you know, if you don't believe that's a material – I think we talked [404] about that at jury selection, if you don't think that's a material fact or something that really changes your opinion of the case, you can – you can move on.

In this case, I only think certain things are in dispute, so I want to go through the things I don't believe are in dispute. If it turns out they are, I'll readdress them on rebuttal, but things that I don't think y'all need to even waste your time talking about, because I don't think that the parties are in disagreement on them. One would be MW's age, Element No. 1. I think

everyone agrees she was over the age of 12. She was in college. She was over the age of 18.

Element No. 2, that's where I think our main dispute is going to be today, okay? So I'll keep on going.

Element No. 3, MW was physically helpless to resist. I don't think there's going to be a lot of argument on this. Your definitions explain that physically helpless means that a person is unconscious, asleep, or for any other reason physically unable to communicate your unwillingness to do something.

Pretty much everyone who came in this courtroom described MW's condition consistently with one another. She did, Taylor did, Andrew did, Lacey did, they all did. She was drunk. She went to the bathroom. Either she walked or was carried or something to the couch, where [405] she fell asleep and was asleep for the remainder of the evening. She was sleeping. She told you she was sleeping.

Even the Defendant, even Mr. Martin told you he knew she was sleeping and that she was, in fact, sleeping. You heard through the testimony of the investigator who interviewed him that he says that he knew that she was drunk, he knew that she was asleep, and that, in fact, while he was doing whatever it is y'all decide he was doing, she woke up, which implies you don't wake up unless you're asleep.

So that would meet the very definition of physically helpless, because you can't prevent someone from doing something when you're asleep in your

underwear. That's what makes her physically helpless to resist. So I don't think there is a lot of dispute on Element 3.

Going on to Element 4, the act was committed without MW's consent. You have the definition of consent. You can use your common sense. You cannot consent to a sexual act while you're asleep, okay? When your eyes are shut, and you are in dreamland, you cannot give consent to have someone put their fingers inside of your vagina.

She even told you when she took the stand, "No, never gave him permission to do this. I did not want him to do this." And you can infer that from the [406] circumstances as well.

Even – and I don't think it's going to be argued, but just to cover all the bases, you could even say there's not even circumstantial evidence that she impliedly – I can't talk, it's been a long day – that she gave implied consent because everyone – and maybe that's why I asked those questions. Did you ever see them talking to each other extensively? No, just hi, I'm M. How are you? Nice to meet you. That's it. No long conversations, no dancing or grinding up on each other at the strip to make him think that she's interested. No flirting. No sexual advances by either of them.

And even he tells you that, no, she didn't flirt with me all night. No, I didn't flirt with her. We didn't even talk. So there's no implied, she was behaving in a way to make him think it was okay. She simply just did not consent. So I'm going to go back to the Element 2,

which is the one I think is going to be in dispute in this case. And that is: Did Tyson Martin commit an act upon MW in which his finger penetrate her vagina?

We talked in jury selection about, you know, he-said/she-said cases or sexual crime cases. And we talked about: who here believes that they happen? How many of you have seen one with your own two eyes?

[407] Sex crimes occur in private. People do things like this in private. They do not happen on the 50-yard line at Doak Campbell Stadium. They do not happen with the running camcorder taking a video of what someone is doing. They happen late at night, two, three o'clock in the morning on a couch when everyone else is passed out drunk, and the only people in that room are you and MW.

It is by its very nature a crime that occurs in private. That does present challenges to proving it, but it does not make this not a crime. It does not make this something that I cannot prove beyond a reasonable doubt.

In this case you heard – I want to start with – well, I kind of want to go through what evidence we have that supports that he penetrated her vagina with his finger, okay?

I would note that, I think in opening statement, the defense told you the only person who is going to testify that Tyson Martin's finger penetrated MW's vagina is MW, that's what he told you.

The only person who can testify that his fingers were in her vagina is her. Who else can do that? Nobody can do that. It's her vagina. I mean, I'm not trying to be crude, but she is the only one that knows what's inside of her. She is a woman. She told you she knows what that feels like. He was fingering her.

[408] This is not a mistake. This is not a playing around, rub it. He was – she said he had his fingers as deep as they would go, and they were maneuvering as a man would do if he were sexually trying to – you know, he was fingering her, that's the only way I know how to describe it. She told you that she is certain. That is your evidence. That is your testimony.

And you get to weigh her credibility about whether she is telling you the truth in regard to that, and we'll – we'll get to that in a little bit.

But I want to go over some of the other evidence, too, because I presented it, and I want to explain why. We do not have DNA evidence in this case.

Yes, we sent Ms. W's top and her bra and her shorts to FDLE for testing along with DNA standards from both herself and the Defendant. We did test for that. I wanted you to hear from that expert. She told you – this was Brittany Auclair – that the first thing she does is test for semen, blood, and saliva. They first test for bodily fluids because those have high concentrations of DNA in them. Much more likely to get a good DNA result from that, but there was none.

Well, I asked her if the allegation is that someone put their fingers in a vagina and pulled them out, would you expect semen? No. would you expect blood? No. [409] Would you expect saliva? No.

You're not going to get a bodily fluid. So last, they look for touch DNA because it's so hard to get. I think her words were it's difficult to obtain. It's very difficult when you touch something to leave good quantities of DNA behind.

Now, you have heard there was not a vaginal swab in this case because of the fact that it was a delayed report. Investigator Wilder told you he had spent four years in the Special Victims Unit doing sex crimes; that if you have a delayed report, you're very unlikely to get anything, even in a semen-type case, much less in a touch DNA case.

So he didn't believe there was any point, in his training and experience, to collect the vaginal swab or get a sexual assault examination kit.

The expert told you that you can shower, and DNA can be removed from your vagina; that you can go to the restroom and when you wipe, you can wipe away touch DNA from the vagina. Even semen, which is designed to be durable and get to the eggs to fertilize them to create life are designed to be super durable, and even they only last for three days.

So you can imagine a much, much smaller quantity of touch DNA easily going away over that course of – from [410] the 3rd to the 7th. And Brittany Auclair

explained to you that if even if there was a vaginal swab, out of the hundreds of swabs that she has tested in her employment in the Crime Lab as a DNA analyst, very rarely would you get touch DNA from a vaginal swab. She told you very rarely. It's extremely difficult to get that.

And please keep in mind, too, when you're looking at that, you know, because I fear that y'all might go back there and be like, well, his DNA is not in her vagina. Therefore, if DNA is everything, he didn't touch it. Please remember her testimony, that a woman – first of all, remember how the buccal swabs, she told you, are the – with a Q-Tip taken from the inside the cheek, because that kind of area is wet, it's moist, there's a rich DNA there. Not to be gross, but analogize that to a vagina. It's a wet, moist area where – with skin with very, very high concentrations of the womans's own DNA down there. If you're taking a swab of that, and you have a little bit of touch DNA from coming in and out, and hours are passing in time, her vaginal area is going to overwhelm or drown out any touch DNA that would be in there.

So I would argue to you it is very rare to get that. It doesn't mean anything that we don't have this – don't have that in this case. It would be great, sure, but I [411] would argue it's neither here nor there because of how rare it is and difficult it is to get.

And MW, she told you she's in her second – or she was in her second year, finishing TCC. I don't think she is a forensic expert that knows, I better run quickly to

the FDLE lab and get a swab of my vagina in case those cells expire, you know, unless they go away. She doesn't know. She's not making a decision about what she's going to do about whether or not there might be touch DNA in her vagina.

She did have the forethought to collect her clothes, and that was sent in for testing. You heard Ms. Auclair tell you that the quantitation on the swab that was ran from the back of the shorts was run twice.

The first quantitation didn't have any male DNA that they could see. On the second quantitation there did appear to be a Y chromosomes or male DNA present, but it was in such insufficient quantities, she couldn't test it. There was so little there, she was unable to run an analysis and compare it to the defendant's DNA. But she was able to see XY chromosomes or male DNA present.

Again, I would argue to you: What does it matter? Mr. Martin told you all, through the testimony of Investigator Wilder, when he was being interviewed, he told you he put his hands down the back of her shorts. [412] Underneath her clothes, put his hands down and touched her butt. So we know his hand was there. Isn't that even stronger for the fact that – I mean, here is something he's admitted to doing, and we still don't have his touch DNA on it? It kind of shows that even if there was touch DNA in her vagina, probably wouldn't have gotten it. We can't even get it off the whole shorts where his whole hand is rubbing on, not just a finger.

why else should you believe Ms. W when she tells you that the Defendant's finger penetrated her vagina?

Well, I would ask you to think about that. She did delay report. That's not uncommon. You can use your common sense. Why did she not call 911 at three o'clock in the morning? Why did she not immediately do that? Why didn't she go wake everybody else in the house up, get up, get up, oh, my God, this just happened. Maybe she feels ashamed, embarrassed. I don't know.

But something happens to her, she freaks out and is in shock and just waits until the crack of dawn and goes in and tells her best friend, "I want to get out of here. I don't feel good here. I'm uncomfortable being here. This horrible thing just happened to me, just take me home. We've got to go get ready to get to work."

Because she didn't call 911 at that time because – well, she didn't have a car to leave. She didn't have – so [413] she laid on the couch for the rest of the night. Because she waited until after her boyfriend came to visit, I mean, I think she told you today that either he went to live with his family or went to work somewhere in Orlando, I'm not sure, that summer, but he wasn't here. Her boyfriend arrives. She waits until after he leaves on Sunday to go to the Police Department Monday. I would argue to you that that is no indication of whether or not this really happened to her because she took the time to think about, is that what I want to do? Do I really want to follow through this process to the end? Because here we are two years later, you saw the deposition transcripts, because she thought about it,

you shouldn't believe her? She waited before she made the decision and the deliberate choice, you know what? I want him – if he did this to me, I want to make sure – I should tell somebody about it to protect – you know, just, I should tell somebody. It's not right.

So she finally makes that deliberate choice, and she should not be believed for that? Is she not to be believed because she went out on July 4th to celebrate with her boyfriend who was in town?

Is she lying to you about his fingers penetrating her vagina because she went to her boyfriend's fraternity's party over at Heritage Grove? I mean, does [414] she – should she just shrivel up and sit in her apartment for day and day on end and cry into her gallon of ice cream for you to believe her, that this happened? I mean, that's – she's 20 – how old? Twenty years old. She's in college. I would argue to you she doesn't know what she's doing.

She went out and said, yeah, I'm going to go have a good time and try to forget about what that guy to me on the couch. My boyfriend is here, and I'm going to put a happy face on and maybe go have a couple drinks.

Again, does that tell you this didn't happen to her? Or I would argue, does it show it did? I'm going to go forget about it. I'm going to drink to forget and go have fun and just try to be with my best friend, my boyfriend, and forget what he did to me.

There are a lot of questions about it. And are you smiling in this? And are you – you went out here? She's twenty years old. Somebody just sexually battered her, and she went out to go try to forget about it. You're absolutely right she did.

And then because she goes to this party and does not walk up to every single person, she says, "Hi, I just got sexually battered last night. I feel really horrible about it, and it makes me feel sick to my stomach. Nice to meet you. I'm M."

[415] She's not to be believed because she didn't tell everybody she ran into at that 4th-of-July party? Really? She told the people, she told you, "that mattered to me. I told my boyfriend. I told my best friend." This was private. You don't walk around parties where everyone is having a good time and say, "Hey, let me tell you about this horrible thing that happened to me."

And, finally, I would argue, is she not to be believed because nobody woke up to her bloodcurdling screams at the top of her lungs?

First of all, let's backtrack to this house. This is a house in which you have five or six or more college kids, all but two of whom are completely obliterated, who have come home and stayed up late and are passed out, who are –

MR. ZELMAN: Objection, Your Honor, facts not in evidence.

THE COURT: Well, I've already told the jury what the attorneys say is not evidence. They'll remember it the way they remember it.

MS. NORRIS: So you have a houseful of people who have all been out – almost all of them have been out drinking all night. They are pretty heavily intoxicated. They go to their – they disperse after getting the [416] munchies or whatever, go to bed. And they don't hear a scream.

Now remember, these are college kids all living together, all different work schedules, school schedules, class schedules, studying for tests, going out to bars. They were able – and I think I even asked Mr. Sebesta about this. "Didn't you just learn to deal with that? Didn't you just learn to sleep through it?" And he said, "Well, yeah, you just get used to it."

That's what happened that night. And even so, please remember Ms. W's testimony. Never did she say, "I screamed." Never did she say, "I hollered. I yelled."

She said, "I said sternly," and I – let me see, I can't find the exact quote, but she was confronted with it when she was on the stand. She said, "I said sternly and very loudly, back the – back off. What the hell are you doing?"

Nowhere did she say she screamed at the top of her lungs. And I would argue to you, even if she is mistaken about the loudness, I guess, of her – the – sorry, volume, even if she's mistaken about the volume of voice that she used, maybe she wants to remember she

said it more loudly than she did. Maybe she wants to feel more assertive or confident in how she said it.

Either way, Tyson Martin admits to putting his hand [417] down her pants. What does whether she said, "Back off," in a quiet voice or a medium voice or high voice have anything to do with whether or not it happened, right? Because, remember, he admits to doing that.

He admits to putting his hand down the back of her pants and going toward her vagina. So what volume of voice she uses is neither here nor there. It's a minor point that I would argue is not what's at issue here today.

The issue is what happened in her vagina, not the volume with which she said for him to, "Back the fuck off."

Now, we talked in jury selection about conflicts in the testimony. And I think I used the example of, you know, two jurors going home and telling their spouses about jury selection and how their stories might differ, how the memories might be a little bit different.

We saw that at play today and yesterday. That's why I do it in jury selection. You always see this at play. You have the sister, Blair Martin, who says, absolutely, she saw – she remembers MW and Taylor Foster coming over to their house on Edwards Street, the house where this took place, before they went out to the fraternity house and the Strip.

Out of all of the witnesses you heard from, Blair [418] Martin, MW, Taylor Foster, John Searcy, am Andrew Sebesta, she is the only one who says they came to their house ahead of time. Everyone else said, no, they met up with us at Heritage Grove. They drove their own car, remember? That's why her car was parked at Heritage Grove.

I'd argue to you she's mistaken because people can be mistaken about little details. They can be mistaken about facts. Oh, yeah, she was definitely drinking. Well, one person said, no, they weren't drinking. One person said, yeah, they were. One said they were drinking wine. One said they were drinking vodka. How do you know it was vodka? Did you taste it? No. Assuming, she assumed it's vodka.

So you're going to have conflicts in the testimony, okay? There's no way every single witness, like a robot, is going to get up there and say verbatim what the other witness says.

Your job as a juror is to distinguish, are those conflicts significant? Are they material to this case? Or are these just people mistaken about details?

Also, Blair Martin says, "No, I was sitting at the head chair, the one closest to the living room, with my back to it."

John Searcy says, "No, no, no, she was at the other [419] seat. Tyson Martin was at that seat."

You're going to have conflicts in the evidence. So instead of going through all of the conflicts and how

everybody's testimony differs from each other, I'm just going to focus on the testimony of the people that were in that room when this happened. MW and Tyson Martin.

When you look at their testimony, and even when you look at MW's testimony, her memory of that night is pretty good. And the instructions will tell you on page 4 and 5, starting under weighing the Evidence, it says: It is up to you to decide what evidence is reliable. You may find some of the evidence not reliable or less reliable than others.

In other words, you can believe every word that comes out of one witness's mouth. The next witness, you can say, "I believe half of what she says and not the other half."

And then the third one you can say, "I don't believe anything that he said." It's your choice. You get to believe all or nothing or any part of a witness's testimony. And these things, 1 through 6 here, are just some guidelines to give you things to consider when you're determining who you believe and how much of what they say you believe.

And No 27 Did the witness seem to have an accurate [420] memory? I'm not going to blow smoke up – I mean, I can assure you, you're all thinking, everyone is drinking, how can we be sure they remember? Some people might black out. some people don't remember.

Well, when you look at MW's testimony, what she toll, you happened that night is consistent with pretty

much what every other witness said up and to the point where she went to be and said, "I don't remember anything until I woke up to Mr. Martin's fingers in my vagina."

But her testimony, Andrew Sebesta's testimony, Taylor Foster, all of them have the same version. They went to Heritage Grove. They took a bus, party bus over to the Strip. They were at the Strip.

She didn't talk to Tyson Martin all night. They then came home. She, within minutes of getting there, feel good and went to the bathroom. She felt sick. The alcohol wasn't sitting right with her. She wanted to go to bed, didn't feel good, went out to the couch, M – her best friend, Taylor, brought her a bucket, and then she went to sleep.

That seems to be a pretty accurate memory in comparison to what everybody else said happened, right? They pretty much line up. So what would make you think her memory would all of sudden not be accurate when she says he put his fingers in her vagina hours later, after [421] she's had some time to sleep, she wakes up, and she knows that?

Even the Defendant's testimony lines up, like, almost identically to what she says. Think about it. Even he says she was laying on the couch with her head facing that direction. Her face was facing the wall, and her back was to the living room. These are all details that MW remembers. Remember that. She remembers that much detail, the direction her head was, which

way her face was faced, who did what before she fell asleep. They are identical.

Even how he entered her shorts, she remembers that. She remembers that he was right behind her, that he seemed to be kneeling, sitting on the coffee table, kneeling down; that he put his hands down the top of her high-waisted shorts.

He says the exact same thing, so it's consistent. Her memory is pretty good about what happened because even he agrees with it. And remember how she told you that when she confronted him and said, "what the F are you doing?" And he says, "you weren't supposed to wake up."

Remember what he's just watched all evening. He's watched her come be put on that couch, home from the bar, sees that she's gotten sick, is put on the couch. He [422] then sees her sleep through an entire – like, hours of events going on in that house, drunk, boisterous people talking about where they are going to eat, how they are going to get there, Wendy's or chic-fil-A. She's sleeping through it.

She sleeps through them leaving and starting up the car and driving away. She sleeps through John Searcy getting in his car and driving away and leaving out the front door, which is right next to that couch that she's asleep on.

She sleeps through them coming back and sitting at the table and breaking out the chic-fil-A to start eating it. She sleeps through John Searcy coming back

through the front door and shutting it. Then she sleeps through the *Cops* episode, which, if you've ever watched one of those, you know how those sound.

Then the taxi driver comes back to bring the scarf. She sleeps through that. They open the door and have a conversation with the cab driver, she sleeps through that. She's dead to the world.

He told you she didn't move a muscle. She didn't flinch. She didn't make a peep. She was out. And he knew it. That's why he said to her, when she confronted him, "you weren't supposed to wake up." He had witnesses her sleeping through all of that.

[423] Now, of course, yes, you do have his statement where he denies penetrating her vagina. I would ask that you keep in mind that that is over a week after the fact, from July 3rd until July 10th, when he agrees to go in for questioning.

You know, maybe he has the wherewithal to realize he would be in bigger trouble if he put his fingers inside of her vagina versus if he was just headed that way. Argue, oh, the drunk girl was mistaken. No, no. I'll admit a little bit to look, you know – but I'm not going to go all the way. I'm not going to tell the whole truth. I'm going to tell part of the truth to see if that will, you know, satisfy them. I'm not going to tell the whole truth.

But why would she lie about it? And you get to look, when you're weighing credibility, No. 4: Did the

witness have some interest in how the case should be decided?

No one has more interest in how this case is decided than the Defendant. MW does not, regardless of the outcome this case. This case isn't about her. This is the State of Florida versus Tyson Martin, not MW versus Tyson Martin.

So I would argue to you she doesn't have a – there is no – she never met this kid before. She had never [424] met him. That was the first time she'll ever met him. She has no beef with him. She has no motivation to accuse him of putting his fingers in her vagina if he didn't, in fact, put his fingers in her vagina.

She is the only one that knows that. She remembers every detail of that evening, and she told you almost every – one or two things, just like every other witness, yes, are not going to be perfectly accurate.

So when you go back and judge her testimony, please, judge the other witnesses' testimony, too. Did they remember everything perfectly? And I bet you'll find that they didn't. But she has no reason to say that he did this if he didn't do it.

I would ask you, too, why else is he putting his hand in the back of her pants and telling you he was going towards her vagina? It's a half truth. And then you can look at his behavior.

He told – you know – he knew what he was doing was wrong. He told Investigator Wilder. Wilder told you he was nervous in the interview. Even his sister

said when he found out they wanted him to come in for questioning, he was acting fidgety, or I forget the exact words she used, but worrier and – oh, that's it, worried and antsy. And she said, "well, anybody would be."

No, not if you just someone touch someone's butt. [425] You would be nervous if you realized you'd put your fingers in someone else's vagina, that would make you antsy and worried.

The last thing I want to mention, and I'll sit down, is the lesser-included offenses. And earlier when I started telling you that the best – I think the best way, on the verdict form that the Judge is going to read to you in a little bit, it starts out with: We, the jury, find the Defendant guilty as charged of: Sexual Battery when victim Physically Helpless. And then the charges go from the highest offense charged, all the way down to not guilty. It's like a little funnel, okay?

And what the instructions say is that you must find the Defendant guilty of the highest offense you believe has been proven beyond a reasonable doubt. So only if that one is not, do you go to the next one.

I would argue to you please – your verdict is not a compromise. Verdict means speak the truth. It shouldn't be, well, three of us think he is guilty as charged; three of us think he is not guilty, so let's meet in the middle. That would not be fair to Mr. Martin. That would not be fair to – I mean, that just wouldn't be fair, just kind of split the baby.

Only if I have met my burden should you find him guilty of a criminal charge, only if I have proven each [426] of those elements beyond a reasonable doubt. I'm not afraid of that burden.

In this case MW told you she woke up to his fingers deep inside of her vagina, as far as they would go, more than one, moving around. He was fingering her while she was passed out, asleep. And the only one who can tell us that is her. That's it.

I don't have a camcorder down in her shorts. There's nobody else in there who can tell you that but her. And I would submit to you that she is credible, and she is telling you that that's what happened to her because that is what happened to her. And I would ask that you find him guilty as charged.

THE COURT: Thank you. Mr. Zelman.

MR. ZELMAN: Thank you, Your Honor. Good afternoon. The State has presented the first half of their closing arguments. They are going to be allowed to speak after do, but I do want to comment before I go into my closing on a few things that they've said.

Mr. Martin did not get on the stand and testify. He was not here. You didn't hear him speak. You didn't see a transcript. You didn't see a recording. You heard the rendition of what happened from Investigator Wilder, the individual who admitted to you that he used deceptive tactics in order to get Mr. Martin to make a statement.

[427] Investigator Wilder also said that that tactic was successful. Well, he didn't testify, I'm going to leave it at that. I don't have to rehash that issue.

As I said during my opening, in order for you to convict Mr. Martin of sexual battery, whether it's as charged or lesser-includeds, you are going to have to believe not only that Ms. W's statement is, you know, was made and is true, but that it is credible.

And how do you determine what is credible? We are going to go through that as well as the jury instructions that you heard shortly. But just because somebody says the sky is green doesn't mean that it's green.

What other ways do we have to determine what that individual is saying is actually true? The State also mentioned during their closing that nobody heard a bloodcurdling scream.

Well, you were paying attention to the witness testimony. Nobody testified about a bloodcurdling scream, whether it was Ms. W or anyone else who testified that was in that house.

Ms. W reluctantly admitted that she, in a very loud – in a very loud volume made the statement to Mr. Martin, you know, "what are you doing? Stop." In a very loud tone.

The State questioned, well, what does the volume [428] prove? Volume doesn't prove whether this happened or didn't happen. What it goes to is her credibility, believe. The State also commented that Ms. W's

memory is pretty good, and it was only faulty on some minor details.

Well, I would submit to you that minor details might be one thing. However, it's not minor that she believes, strongly believes that she walked from the bathroom to the couch, that's not minor, because it goes to her ability to observe – I'm sorry, let me look at the jury instructions, and I can tell you exactly. In weighing the Evidence, No. 1: Did the witness seem have to an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

Everybody else in that house who testified about how she got from the bathroom to the couch told you she was carried. The only one who is inconsistent, the only one who lacks credibility in that is Ms. W.

I would submit to you that establishes that she didn't have an opportunity to see and know the things about which she testified, and she didn't seem to have an accurate memory.

So with those few things concerning the State's closing, I want to go through the jury instructions with [429] you. The most important instruction that you've received from the Court – I discussed it during my opening, we discussed it during jury selection on Monday – is that it is the State's burden to prove all of the elements beyond and to the exclusion of every reasonable doubt. I know this is a little hard to see. We are

going to go through that a little bit. Let me move this forward.

Beyond a reasonable doubt is the highest burden in our system of justice. When it comes to a criminal case, when it comes to a civil case, beyond a reasonable doubt is it.

So what does beyond a reasonable doubt mean? The Court's instructions on the very first page explain to you whenever the words "reasonable doubt" are used, you must consider the following: A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing, and weighing all the evidence, there is not and abiding conviction of guilt; or, if having a conviction, it is one which is not stable, but one which wavers and vacillates, then the charge is not prover beyond a reasonable doubt, and you must find the defendant not guilty because the doubt is reasonable.

[430] The instruction continues. It is to the evidence introduced in this trial and to it alone that you are to look for that proof. A reasonable doubt as to the guilt of the defendant may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt, you should find the defendant not guilty.

I want you to keep in mind the last two clauses of that last sentence, a reasonable doubt as to the guilt of

the defendant may arise from a conflict in the evidence or the lack of evidence.

Now, during jury selection the State went through a rendition of a he-said/she-said case and the types of things that you can and can't believe. I think it is significant in a sexual battery case such as this for there to be a delay of five days; five days, four nights in the report of a sexual battery.

Now, does that mean that the sexual battery is more likely than not? That it probably, you know, probably happened? It likely happened? Or it happened beyond a reasonable doubt? I don't think that it's fair to look at that in a vacuum.

The question is: Has the State proven each of these elements beyond a reasonable doubt? Or was an element partially proven, but you don't believe that the evidence [431] fully supports it being found beyond a reasonable doubt? We'll come back to that later.

The State commented towards the end of their closing that Ms. W has no motivation to lie, and she remembers every detail. We've already discussed at least one reason why she doesn't remember every detail. And at this point, her motivation to lie – why would she lie? as the state asked you. What would her motivation be to do that?

She's accused somebody of a very serious crime. And at this point, almost two years after the fact, what's her motivation? To save face. To perpetuate the lie saves face. She doesn't have to admit that she made

a mistake. So when someone says to you that she doesn't have a motivation to lie, I submit to you they are being shortsighted.

The State also commented that Mr. Tyson – or Mr. Martin had no reason to be nervous or antsy if all he did was touch her butt.

I believe that you heard from Investigator Wilder that he'd never been there before, he'd never been in that type of situation. He's nervous and antsy. He's called by the cops. It's not like he's interrogating Investigator Wilder as well or better than Investigator Wilder is interrogating him. He's sitting there, subject [432] to the deceptive tactics that were used, telling the truth. He doesn't have the wherewithal to be deceptive. He's nervous. He is so nervous that he is shaking.

I submit to you it's unreasonable to believe that he is such a conniving individual that he has the wherewithal to tell Investigator Wilder, "Well, I touched her boob. I put my hand down her pants, and I touched her butt." And then to withhold that next thing that – what the State is saying he was untruthful about, that he stuck his finger or fingers in Ms. W's vagina.

I would submit to you that's an incredible allegation that Mr. Martin would have the wherewithal to be deceptive under the circumstances that he was subjected to on July 10th, 2014, in that interview room.

Now, before we talk about Ms. W and her testimony yesterday and today, I want to touch on the other witnesses.

Taylor Foster, Ms. W's best friend, on cross examination yesterday when confronted with her own text messages with her boyfriend, and specifically the text message that said that M had to work at 11:30 and so that's why she wanted to drive, she said, "Oh, no, meant 11:30 the next day."

Well, the testimony that we had from Ms. W herself was that she was at work July 3rd about 10 a.m. So if [433] she tells us that she is at work at 10 a.m., why is Ms. Foster telling us, "Oh, no, that text message was about the next morning"?

Well, Ms. Foster's testimony is contradicted by her own boyfriend, Andrew Sebesta, who told us that at some point while they were at Heritage Grove, Ms. W was excited because she didn't have to work and that's when she really started joining the party. She testified that she didn't drink before – before they got to the Strip. And I would submit to you that that may very well be true, because she didn't drink if she had to work.

And she testified, Taylor testified that M wasn't drinking at Heritage Grove. Over again, Taylor is contradicted by her own boyfriend who testified that M was drinking wine at Heritage Grove. And how do we know she was drinking wine?

Ms. Norris, what am I doing wrong? I got it.

MS. NORRIS: You got it?

MR. ZELMAN: How do we know she was drinking wine? She Tweeted it. July 2nd, "Taylor and I bought a gallon of wine. This could get dangerous."

Now, does that establish whether or not Mr. Martin's finger penetrated her vagina? No. However, it goes to her deception. She doesn't want to admit that she was drinking before she was supposed to go to work that [434] night. However, the evidence, I would submit to you, the credible evidence establishes that she was. Just like the credible evidence establishes, as Taylor testified, as Andrew testified, as Blair testified, that Andrew carried M from the bathroom to the couch.

Taylor also told you that M was more drunk than normal. Again, her being more drunk than normal, does that establish whether or not her vagina was penetrated? No. And if I didn't say that, I didn't know that the State would. However, it goes to her ability to perceive events accurately.

She testified, Ms. W testified she was working four jobs. I think we had Jimmy John's, Karma, Promotions, and Mad Anthony's in Panacea.

Now, we know she was hungover the morning of July 3rd. How do we know that? We have the testimony of Blair Martin, who was sober, woke up to drive she and her brother back to Jacksonville on the 3rd. M was in the bathroom, dry-heaving and throwing up, the same sounds that she heard the night before.

I would submit to you that when M went to work on the morning of July 3rd at Jimmy John's, she was hungover. Was she upset because she was hungover? Who knows? But suffice it to say, her boss didn't want her there. She was sent home.

[435] Now, we know from Taylor's testimony that Ms. W went out the night of July 3rd. So she is sexually battered in the early morning hours of July 3rd; but because her boyfriend came in town for the first time that summer, she is going to delay reporting it she's going to go out and party with her boyfriend his fraternity brothers, and her best friend. They went to Potbelly's, a club called standard, and then went to a friend's or a fraternity house with her boyfriend and their friends because everything was too busy. That's her best friend.

Now, conveniently Ms. W doesn't remember going out on the night of July 3rd. July 4th, again, Taylor Foster testifies, "we went to Heritage Grove. We got there between 11:30 a.m. and 12:00 p.m. We met up with friends. We partied. We drank." They left at two. Came back, partied some more, drank some more, left at six. Then they went to the Strip that night between 10 and 11.

Ms. Foster testified that both mid and she were drunk at the Tennessee Strip. They were drinking at the Tennessee Strip.

Now, let's go back to Ms. W's testimony concerning what happened the night of July 2nd. She testified that when she got in line, she gave her ID to the bouncer.

And her birthday was a couple of weeks away, and so the [436] bouncer said to her, "Happy birthday," banded her for 21 so she could drink. Remember, she's 20.

Now, on cross examination I confronted her with the fact that her birthday was really like three months away, not a couple of weeks, which was what her testimony was on direct. So are we to presume that she went to the same bouncer on the 4th? He gave her the same birthday present?

Now, Andrew Sebesta, Taylor's boyfriend they had just started dating when all this happened. What did he tell us?

Well, he confirmed that M was drinking. He is the one who told us that M was excited when she found out she didn't have to go to work. How do we know that that's accurate? Why would he say otherwise? What motivation does he have to be dishonest with you?

He's probably in one of the toughest positions. His girlfriend is best friends with Ms. W. He's Mr. Martin's roommate. I submit to you that he did the best he could telling you the absolute truth. And yet he tells you, in contradiction of what Ms. W said, she is drinking prior to her now saying she didn't have to work. Again, she does not want to admit that she's doing something she is not supposed to. Not supposed to drink when she goes to work, not supposed to drink at work. Well, she's [437] scheduled to work that night. Why would she – why would she admit here that she was drinking?

Now, what else did we hear from Mr. Sebesta? It's a small house. It's an old house. The walls are thin. You can hear people talking from any bedroom in a normal tone anywhere else in the house. You don't have to yell. You don't have to scream bloody murder. It doesn't have to be a bloodcurdling scream. Normal voices.

He told us in his testimony that he was not awoken – awakened after he went to be by anyone speaking very loudly in the early morning hours of July 3rd.

Let's back it up a little bit. He testified he got home. He ordered Jimmy John's. Taylor and M went to the bathroom. She gets sick. He carries her back. She's out of it. She's pretty much asleep.

He also testifies that he went out of town. He went to Tampa, and he observed both Facebook posts and Snapchats from Taylor, July 3rd, July 4th, that contained Ms. W.

Now, he told you that he was not Snapchat friends with Ms. W at the time. He also told us that Snapchats disappear after a period – after a few seconds. You view them and then they disappear. So we don't have those pictures. We don't know what they are.

[438] However, he tells us on the 3rd and the 4th that Ms. W is partying. She's drinking. She did not appear upset. She appeared to be having a good time.

Now, the state asked him on redirect if he was there the entire time. Obviously, not. So he doesn't

know what she was doing in between those Snapchat pictures.

However, he testified consistently, the Snapchat pictures were consistent. They were continuous. There were multiple pictures on the 3rd and 4th of Ms. W partying, having a good time, drinking, not appearing upset.

We'll come back to Investigator Wilder and Ms. Auclair.

Who else testified today? What did we hear from them?

Lacey Marx testified. She's known Mr. Martin since they were very young, about 20 years. She confirmed that this was an old house; there was not good insulation. She testified that yellow wall, directly on the other side of it, is Blair's room. That's the couch, if you recall, that Ms. W said, testified to that she was laying on when she was allegedly assaulted by Mr. Martin.

If you can hear somebody speaking in a normal voice from any room in the house, from any other location in the house, would it not be reasonable for anybody in that [439] house, especially Blair, to hear somebody speak very loudly when the rest of the house is quiet?

What else did Lacey tell us? She told us that the night of July 2nd, early morning of July 3rd, sometime when they were at the Strip, that a picture was taken with her, Taylor, and M.

She told us that that picture was posted to M's Facebook page; and in oiler for her to see that picture, M had to friend request her. M friend-requested Lacey on July 3rd, the day that she was raped by Mr. Martin. She had to be friends with her to see that picture. So Ms. W is raped –

MS. NORRIS: I object to the characterization, Your Honor.

MR. ZELMAN: Sexually assaulted –

MS. NORRIS: Thank you.

MR. ZELMAN: – the early morning hours of July 3rd. She's so upset that she's sent home early from work. And after she's sent home early and she's laying in her room, by herself, she has the wherewithal to post a picture on Facebook and friend request her attacker's roommate and friend and tag her in a picture. Is that believable? Does that make Ms. W's accusation credible? I would submit to you it makes it incredible.

What else did Ms. Marx tell us that is significant? [440] She did go to the Tallahassee Police Department on the day that Tyson was interviewed. However, contrary to Investigator Wilder's assumption, she didn't ride there with him. She drove separately, and Blair rode with her.

Now, why is that significant? Why is it significant that Investigator Wilder made and assumption? Let's go through his testimony.

Investigator Wilder had been in the Special Victims Unit investigating sex crimes for about four years at that point in time. Now, it wasn't four years straight. There was a little bit of confusion, I think, but throughout his career, at that point in time, it was a total of about four years.

I think it's fair to say as long as he's been a law enforcement officer and as long as he's been a sex crimes investigator, he knew what needed to be done. He knew what information he needed to obtain to make an arrest, to support a prosecution.

He told you he didn't ask Tyson if Tyson intended to touch M's vagina. He told you that Tyson denied intending to do that.

He didn't ask Tyson if Tyson tried to touch Ms. W's vagina. He didn't ask Tyson if Tyson tried to touch her clitoris or her labia, or if he intended to penetrate her vagina. He didn't ask any of those questions.

[441] He did tell us on cross examination that Tyson stated he didn't intend on touching Ms. W's vagina. He did tell us that Tyson denied penetrating her vagina. He did tell us that Tyson denied touching her vaginal area.

Now, State's Exhibit 4-D – and we'll go to 4-E shortly – the front view of the shorts that Ms. W was wearing the night of July 2nd and the morning of July 3rd. This is what she was wearing while she slept. Extremely short shorts. I think that the term is high-waisted shorts. She testified that they came to just

below her belly button and to the middle of her back, and they were size zero. They were tight.

If Tyson's intent was to touch M's vagina, to touch her clitoris, to touch her labia, to touch her vaginal area, would it not make more sense for him to come from here? Or from here?

If his intent was to touch her vagina or penetrate her vagina, why would he come from the top? These are high-waisted shorts, so the furthest distance from her vagina is the way in which he entered her shorts.

How does that establish his intent to touch her vagina, to penetrate her vagina? It doesn't. Also, and incredible claim. It lacks credibility, should not be believed.

Investigator Wilder, Sergeant Wilder told us what [442] his job was. He was aware of the requirements. He was aware of what the law required and provided, yet he did not ask Tyson Martin the specific questions necessary for the State to meet its burden.

Mr. Martin and I don't have the burden. The burden is right here. Who is supposed to help the State meet its burden? Law enforcement officers.

Investigator Wilder did not help the State meet their burden. I would submit to you that Investigator Wilder in his testimony established reasonable doubt concerning the most significant element that the State brought to your attention of the crime charged.

His failure to ask the specific questions, by itself, could establish reasonable doubt that Tyson Martin put his finger – committed an act upon MW in which his finger penetrated M's vagina. He did not ask that question.

More significantly, he didn't ask whether that was what Tyson intended to do or was trying to do. I would submit to you that the two lesser-includeds that are attempts, Investigator Wilder's failure to ask those questions establish beyond a reasonable doubt that Tyson Martin did not attempt to commit a sexual battery, not the reverse, but that his failure to ask those questions mean, and I submit to you that it means that he is not [443] guilty of both versions of the attempted sexual battery. Why? Because there is no evidence to support that finding beyond and to the exclusion of every reasonable doubt.

Who else did the State call that is supposed to help them meet their burden? The forensic analyst, Brittany Auclair.

Now, I want you to remember what Investigator Wilder told us Tyson admitted to doing. Sticking his hard, down the back of her shorts and touching or grabbing her butt. According to Brittany Auclair, there were 15 areas on the inside of Ms. W's shorts that fluoresced; that showed that there was something there that she needed to look at.

However, she believer, some way, shape, or Tom, that the majority of those 15 stains were the acid-wash

or the dye that were used in making those, you know, pair of shorts.

However, ask yourself: How do we know that? Her job is to establish facts. There was no testimony for Ms. Auclair that she did any testing on those to establish whether or not they were acid or dye. None. Lack of evidence.

Now, Ms. Auclair testified that she was given a case scenario. The only case scenario she was given was what [444] the State believed happened. She wasn't told what Tyson Martin told Investigator Wilder. She wasn't given a copy of the report. She certainly didn't tell us that. All she was told was that the suspect was accused of inserting – going down the back of her shorts and inserting his fingers into her vagina. And so she focused her analysis on a very small portion of the inside of those shorts.

Where was that? She sat right there in that witness stand and user that laser pointer that I'm still trying to figure out. She said – she indicated here where the seam is, what would be the butt crack, and I guess where this design is right here on both shorts. This area right here. She testified she used one swab to test all of the stains in that area.

The State wants you to believe that the fact that there is no forensic evidence to corroborate Ms. W's testimony doesn't mean anything. I would submit to you that the methodology that was used by Ms. Auclair was flawed, and she relied on a case scenario and limited

her examination and denied you, the finders of fact, of evidence that could help the State or help the defense.

I would submit to you that her failed methodology is evidence of a lack of evidence on the part of the State, and they cannot meet their barren beyond a reasonable [445] doubt as a result.

One swab was used for all four stains that she tested. Of the 15 stains on the inside of those shorts, the State only gave you evidence of 26.6 percent of those stains.

What about the other 73.4 percent? We had the assumption from Ms. Auclair that they were acid-wash or dyed. She didn't tell us one way or another what they were. They have deprived you of evidence as a result of the failed methodology in that testing.

Ms. Auclair also testified that if she had been given additional information, so I would submit to you, if she had been told what Mr. Martin admitted to doing, grabbing – putting his hand down the shorts and grabbing the butt cheek and where he did it, why didn't she test here or here? Why didn't she test the stains that were there? Because it would have corroborated what Mr. Martin told Investigator Wilder?

Now, she testified that after the deposition when she was provided this information, she didn't go back and either test them herself or have it retested by somebody else. The State didn't ask her to do it. Law enforcement didn't ask her to do it.

There were multiple – now, one of the explanations that the State trier to get out of Ms. Auclair in her [446] testimony as to why there would have been a higher concentration of female DNA in the crotch of the shorts was because Ms. W wasn't wearing any underwear. I want you to look back and think about the location of those other stains. How many of those other stains were not in the crotch area that were not tested?

The failure to provide a complete an accurate case scenario to Ms. Auclair deprived you, the jury, of information, and there's a lack of evidence.

Who are the other witnesses? Remember, we're still going to go back to Ms. W. John Searcy testified this morning, and he was one of the two individuals who was sober. I think it's important to distinguish between those who were sober, those who were not.

John testified that he dropped Lacey, Andrew, and Tyson off at Heritage Grove at about 10 p.m. He testified that they returned in a taxi at about 1 a.m.

He remembered Lacey running into the house looking for money, going back outside, and then they all kind of came in together.

Now, at the time – at the time, he told us that he was sitting on the couch underneath the window, and Blair was sitting on the couch with the yellow wall, that shares – the shared wall with her room.

He told us who came back. We know it's Lacey and [447] Andrew, Tyson, Taylor, M, and Laurel. He told us they all walked in on their own. It was pretty chaotic,

and they were all very intoxicated. He said of the group, Taylor, Foster, and Laurel seemed the least intoxicated.

When they first got in there, they were pretty much all standing in the middle of the room. Shortly after they arrived, Blair excused herself and left, went to her room, presumably went to bed, and we'll talk about what Blair said shortly.

It was about 30 minutes after they arrived. Now, they got back about 1, so about 1:30, Lacey and Laurel left to go get chic-fil-A. They were gone, he believed about ten minutes, and he had gone after them because he didn't want them to walk; he didn't think it was safe. So gone about 10 minutes, that puts us at about 1:40.

When he got back, Andrew and Taylor were on the couch under the window. So here (indicating). And M was laid out on this couch. Lacey was sitting at the table with Laurel, at the table. So here we have Andrew. And Taylor. M laying down. Lacey and Laurel were at this table. Tyson was sitting in the chair. After about five or ten minutes, Lacey left the table. So she left the table about 1:45 to 1:50. Laurel finished what she was eating; and about five to ten minutes later, she went and joined Lacey in Lacey's room, and they talked. So she [448] left the table about 1:55 to 2.

Now, between the time that Lacey left the table and Laurel joined her in the room, John told us that Andrew and Taylor went to his room, and that he and Tyson remained in the living room, M on the couch asleep. And he and Tyson watched whether it was one

and a half, two, two and a half episodes of *Cops*, he told us that it was about 3 in the morning when he went to ben. Yeah, he admitted that M didn't wake up during *Cops*.

He told us about how sometimes after the first episode or during the first episode, the taxi driver came back and knocked on the door. M didn't wake up. He went to bed after the second episode. About 2 or 3 in the morning, rather, Tyson, sitting in this chair, was turned around facing the TV, I would submit to you that the timeline that we have just gone over that was given to us by John is probably one of the most accurate timelines that we are going to get. He was sober. He was very clear about what he said.

When the State tried to trip him up about difference between his testimony and his deposition, he said "Well, I think that my written statement, which was done about two weeks after this incident, is going to be more accurate." Sure enough, his written statement corroborated what he told us here in his testimony.

[449] Now, he told us, part of the timeline I skipped over, was that not even five minutes after everyone got back that M went to the bathroom, and about five to ten minutes later, she was carried to the couch by Andrew. So we know that by no later than 1:30 in the morning M is asleep on the couch. So that timeline probably will be the best timeline we have. Now, what did Blair have to say?

THE COURT: Before you – before you go anymore, unless you're real close to going – we've been here almost two hours, we need to take a break.

MR. ZELMAN: That's fine.

THE COURT: How much –

MR. ZELMAN: I'm not close.

THE COURT: You're not close? Let's take a 10-minute break.

(Brief recess.)

THE BAILIFF: Jury in the courtroom.

(The jury returned to the courtroom, and the following took place in open court:)

THE COURT: Okay. The record will reflect all the jurors are back, and the defendant is present. And we were in your closing argument, Mr. Zelman.

MR. ZELMAN: Thank you, Your Honor.

Aside from Ms. W, the final witness who we have not [450] discussed is Blair Martin; admittedy, my client's sister. And when the State tried to attack her credibility and her truthfulness, she told you on redirect she is not going to sit here and lie for him. She was sober that night. She is giving you the best rendition of what happened that she can.

Now, as the State indicated in their closing, she may be mistaken about M and Taylor being present before the group went out. I would agree she was

mistaken, she is not being dishonest. You saw her testimony. You can judge her credibility for yourself. But during her testimony, what did we learn?

We learned that she and John stayed at home while the others went to wherever they went to on the Strip. We learned that between 12:45 and 1, they got back. I would compare what she described to kind of like a bull in a China shop, everyone coming in at once, a bunch noise. So much so that although she was up watching Netflix, she kind of packed her stuff up and was getting ready to let them do whatever they were going to do. She said that she hung out with them for about 15 minutes.

Now, she went into her room. She was getting ready for bed. She had a long drive the next day. She was in her room for about five minutes, so now we're talking about roughly 1:20-ish. She went to the bathroom to [451] brush her teeth and wash her face, get ready for bed. Knocks on the door, because it's closed.

She told us it's unusual, unless somebody is in there, for the door to be closed. And she hears somebody dry-heaving, retching, throwing up, getting sick. She goes back out into the living room, pokes her head out and realizes who is there, and she sees Andrew and Taylor on the couch. And she says – looks around, she concludes it must be M. She says to Andrew and Taylor, "I think she's in the bathroom getting sick."

They get up, they go in there. Although M doesn't ask for a glass of water, and when it's offered she says no, Blair tells us that she gets it anyway. She tells us

that she puts that glass of water – she used that fancy pointer and indicated right about right there (indicating), on that coffee table.

She corroborates what the other witnesses aside from Ms. W told us, that Ms. W was carried from the bathroom to the bar – I mean, to the couch. Her head over here, other leg – other arm under her legs. Andrew places her on the couch. She's out.

She brushes her teeth. She goes to bed. Now, she doesn't have a distinct memory of where her brother was at that exact moment in time. She doesn't see Lacey out there.

[452] Now, remember, this is at about 1:30, 1:20, 1:30, around about that time, around the time when John told us that Lacey and Laurel had gone to get food and John went after them.

So who is left? Taylor, Andrew, Tyson, and M. That would be consistent with Lacey not being there, Laurel not being there.

Now, she also told us that the house – sound carries in that house. Her room shares a wall with the living room. It's an old house. There are thin walls. She can hear people talking.

Prior to this night, there had been several times where she had been awoken by someone in the living room speaking in a very loud voice.

She also told us how their house had been broken into. And so when she heard noises at a time when the

rest of the house was quiet, not only would it wake her up because she was a light sleeper, but she would go and check it out. She told us that in the morning hours of July 3rd, 2014, she was not awakened by anyone speaking in a loud voice.

Now, the state would have you believe that because she didn't specifically hear somebody talking or somebody watching TV or somebody doing – you know, opening and, closing the door, the taxi driver knocking on the door [453] and dropping off the scarf, that, yeah, she wouldn't have heard anything because she was probably already asleep, and she didn't hear anything.

At the moment in time when Ms. W claims that she spoke to Tyson in a very loud voice, the rest of the house, everyone else in the house was asleep. It would have been quiet. There would not have been any other noise to hear, to drown out.

Now, what else significant – what else significant did she tell us in her testimony? The following morning she had set her alarm for 7 a.m. M – Taylor would have you believe that when M woke up and woke up Taylor, that M was hysterical. She was crying. She was upset.

Blair has told us she set her alarm for 7. She gets up, she goes to the bathroom, the door is closed again. Knocks on the door. What does she hear? The exact same thing she heard the night before, dry-heaving, retching.

She goes to Taylor – into Andrew's room, knocks on the door, wakes them up. They then go into the bathroom, help M, and the three of them walk out.

She sees M. M is not hysterical. M is not crying. She looks hungover. Now, does that mean that in and of itself that Tyson Martin's finger was not penetrating her vagina earlier that morning? No.

It is significant because M made a point in her [454] testimony to tell us that when she woke up that morning, she was hysterical; she was crying; she was upset. That's why that detail is significant.

So as I said in my opening statement, in order to convict my client, you need to believe M. You need to believe her when she tells you that his finger was penetrating her vagina.

We already discussed M's deception about her not being scheduled for work when all the other evidence contradicts that. We already discussed that she denied drinking at Heritage Grove. And I gave you and explanation for why she would be receptive about that.

I gave you – we discussed her claim that she was banded 21-up for a birthday present and how that's not – that doesn't make sense. It's an incredible claim.

We discussed how she tagged Lacey in a photo the morning she was sexually assaulted and how that also makes her claim incredible.

We discussed M's lack of – or, sorry, her claim that she walked that night from the bathroom to the couch

and how all the other evidence shows that her memory is not accurate. All the other evidence establishes she was carried and that at the time she was extremely intoxicated.

She was adamant that she chose to go to sleep; that [455] she didn't pass out, and all the other evidence contradicts that.

She also testified that after Tyson sexually assaulted her, and she confronted him, she said in a very loud voice whatever it is she said to get him away, and that she eventually went back to sleep.

However, her deposition testimony contradicts that. She admitted yesterday that in her deposition she said she went back to sleep when Tyson went to ben. Tyson went to bed as soon as he was confronted, and so she went back to sleep immediately after she claims to have been sexually assaulted.

Now, we talked about her going out and partying on the 3rd; her being at Heritage Grove on the 4th. On the 3rd, in addition to Taylor and her boyfriend, Jason; she saw Mike Kuhl, Reuben, Michael, all of those at Jimmy John's. She didn't say anything to them about having been raped.

Now, she claims she was scared; she was in shock; she was laying in her room in the fetal position. That's not supported by the testimony.

The testimony is that she wasn't home very much during those next few days. And when she was recalled today, she told us that she spent the next few days with

her boyfriend. The implication there is that she didn't [456] want to interrupt her time with Jason to go to the cops, and so that's why she waited until the following Monday.

Well, she told us she got off of work about noon on July 3rd, and that Jason arrived, a little after six. She had six hours to go to the cops and not interrupt her weekend with Jason, the first time that they were going to see each other that summer.

And the state wants you to believe that she didn't go to the cops because she was in shock and she was scared. Why was she scared? She didn't see Tyson from the moment she left that house, from the moment that he went to bed, until she finally went to the police five days, four nights later, in the late afternoon of July 7th.

Why was she scared? She never told us that he tried to contact her that he followed her that he said anything to her; that he threatened her. She was around her co-workers on the 3rd. She was around her friends, her boyfriend. She went to – they attempted to go to two different bars that night, the night of the 3rd. She didn't tell anybody other than her boyfriend and Taylor.

Now, the 4th, she told us all about – she and Taylor told us all about how they were at Heritage Grove. She identified some people that she saw. She didn't tell us that she saw Tyson. In fact, the evidence is that [457] Tyson at that point was in Jacksonville with his family for the weekend.

But on the 4th, she saw Hector Marin (phonetic), Daniel Avila, Alexis, Christi McCoy. Not Tyson, not the person she was scared of. She didn't tell them what happened.

Instead, she didn't want to interrupt her weekend with her boyfriend. So they went to parties at Heritage Grove. They let and then came back. They let and then went to the Strip. They drank all day. And if you remember, the pictures that were seen by the witnesses were that she was having a good time. She was smiling. July 4th, Defense Exhibit 14, there is M in the middle. She is supposed to be scared. She is supposed to be upset. She is supposed to be lying in her room in the fetal position, according to her testimony.

She is out at Heritage Grove, with a huge smile on her face. Partying. Celebrating. Having a good time. This is about a day, day and a half after she was supposedly raped or sexually assaulted.

I want to go back a little bit to what she said her feeling was after she was sexually assaulted. She was in shock. She was scared. She was frozen. But she went back to sleep as soon as he went to bed.

Saturday, July 5th, after her second night of [458] partying with her friends, after she was sexually assaulted, she goes to work at Karma. Her co-worker, Anna Claire, was going through something, she didn't go into detail, and we didn't ask, that she felt she could relate to Anna; Anna could come to her if she needed anything. And she told Anna that she had been sexually assaulted.

But if you remember, she, in her deposition, said the only people she told before she went to the police were Taylor and Jason. She didn't list her parents. She didn't list Anna.

In fact, I think on redirect, she testified that just within the last few minutes that she remembered she had told Anna. But she didn't tell any of her other coworkers or her boss.

The only thing that she remembered doing the following day, on July 6th, was driving Jason to the bus station at 8 a.m. She didn't know what she had done the rest of the day. So she truly wanted to wait until her weekend was over, the first time that she has seen Jason that summer, she was waiting until after he left to go to the police.

Why didn't she go then? Instead, she didn't go any time on July 6th. The testimony was she went late afternoon, so 8 a.m., what, 30 hours after she dropped [459] Jason off at the bus station? With everything that we've gone through up to now, you don't believe that there is a reasonable doubt whether or not Tyson Martin sexually committed an act on MW in which the finger of the Defendant penetrated her vagina, or he attempted to do one of those things – State's Exhibit 3, the shorts. These are the shorts Ms. W testified she was wearing the morning that she was sexually assaulted. Size zero, as she testified.

In order to believe that Tyson's fingers or finger penetrated her vagina, you will have to believe that he was able to get his arm – remember, they were just

below her bully button, in the middle of her back, so these are in the middle of her back. He is supposed to get, not just his hand, down her shorts, which is what he admitted to doing, but he is to get his entire arm, forearm and fingers in a position where he can penetrate her vagina.

I submit to you it's not physically possible for her to be digitally penetrated wearing these shorts when a hand, arm, forearm, is in the back of her shorts.

As we said earlier, if Tyson's intent was to touch her vagina, to penetrate her vagina in any way, shape, or form while she was laying on her side, he would go from the bottom, right where her crotch was.

We'll concede that Ms. W was passed out in the early [460] morning hours of July 3rd. I think all the evidence corroborates that. We'll concede that Tyson admitted to touching her breast and grabbing her butt.

I would submit to you, her own testimony tells us where the rest of the story came from. After she woke up, confronter him for touching her butt, she fell back asleep and had a nightmare. The rest of what happened was a nightmare. It did not happen.

As a result, we ask that you return a verdict of not guilty to Sexual Battery Physically Helpless, Sexual Battery, Attempted Sexual Battery Physically Helpless, Attempted Sexual Battery. The only thing that Mr. Martin did was commit a battery. Thank you.

THE COURT: Rebuttal from the State?

MS. NORRIS: You would think that MW was on trial today. But she didn't ask to be the victim in this case. She did not ask to have Mr. Martin's hands down her pants while she was asleep, and yet she is the one who is being berated and judged and questioned about everything that she can't remember or remembers a little bit differently.

This is not a trial against her. She told you, you were just – defense counsel just said there's no way that he could have put his hand, down the back of her pants that way. He said that there was no way that he could have put his fingers in her vagina; that she made [461] it all up; that it was a nightmare.

Why does she remember every single detail of what happened to her then? Remember how she told you she was a very heavy sleeper, probably more so that evening because she had been drinking.

Now, remember when I asked her: Did something wake you up? Was it him touching her breast? No. Was it him touching her buttocks? No. What did she say woke her up? His fingers furiously moving inside of her vagina. The maneuvering of his fingers in her body, that's what she told you woke her up. Something penetrating her vagina.

She didn't even – did you hear her testify anything about him touching her boob? Because she slept through it. They didn't know that until the Defendant told Investigator Wilder, "I touched her boob, too." But

she slept through that. And then she slept through that, the hand, all the way back behind those tight shorts, she slept all the way through that. It was the insertion of his multiple fingers in her vagina and his maneuvering them that woke her up. That's how she knows exactly what it was.

This is not a nightmare. And yet, oh, yeah, she used that phrase so that was, you know, captured on to. But she just said, "I was hoping it had been a [462] nightmare," but it wasn't. This was not a nightmare. She's not mistaken about what happened to her.

I'd also implore you, when you go back there to look at Elements 1 through 4 – and I promise you nowhere do I have to prove what he intended. That is absolutely irrelevant.

No. 1. She was 12 years or older, no intent there.

No. 2. Tyson Martin committed an act on her in which his finger penetrated her vagina, not that he intended to, not that he thought about it, not that he made a smart decision on which direction to go, but that he did it. Don't have to prove that he intended to.

3. She was physically helpless to resist.

And 4. The act was done without her consent. Nowhere must I prove his intent. And you're right, Investigator Wilder is familiar with the statutes; and, no, he didn't ask what he intended because it doesn't matter.

And speaking about Investigator Wilder, you heard his testimony. This was audio/video recorded. A copy of that audio/video recording is stored, any is available to anyone who wants to view it.

You also saw the Defendant's attorney using a transcript of that interview in oiler to question Investigator Wilder, so everything is clearly delineated [463] out there. There's no secrets what happened in that interview.

You saw him questioning – using it to refresh his memory and point out question and line number. Okay? So if there were receptive tactics that forced Mr. Martin to say the things that he said, you can be sure that they would have been explored.

So the insinuation that he used this real tricky, sneaky, something trick to get him to say what he said, the only thing he did was say, "You do realize that we have the ability to check for DNA. Do you know what DNA is? I mean, we can get skin cells, it doesn't have to be – "

"Okay, I touched her. Okay, you're right." Confronted with the fact that, hey, we're going to look at the evidence, he never said we found your DNA in her shorts. We didn't lie to him. He just said, "You do know we have DNA, right?" No deception going on there.

And if there was, I mean, if they are conceding, yeah, committed a battery, he did all the things that he said he did, what deception then? If that's the truth, what is he being deceived to say?

The defense could go through every single witness, every little difference between all of their testimonies, because there are some. We would not be human beings if [464] we didn't have differences between people's testimony. And I'm not going to go through go every single witness's testimony, how they said something different than what someone else said.

All of them said something, one or two things that didn't match up with what the other one said. That was not unique to Ms. W. That was all the defense witnesses, too. That was all of the witnesses, because of human nature. That's why we talk about it so much in jury selection.

Blair Martin, it's interesting that when the defense witness remembers something wrong or incorrectly, oh, it's not a big deal, just mistaken. But she is to be believed in everything that she says. But when MW misremembers something, oh, take all her testimony and throw it in the garage because she made a mistake about whether she was carried to the couch or walked.

Blair Martin didn't even – she thought that they were all drinking at the house before they went to the frat house, and she's wrong. Every other witness has said that she's wrong. But, yet, disregard that inconsistency and buy wholesale and believe absolutely everything else she says is gospel?

So M made some mistakes about some things. Everybody testified she didn't have to work that night, [465] which would make sense. why else would you get

ready to go out and go party if you have to go in to work? Taylor testified that was the next day she was supposed to go into work at 11 or 11:30, something like that. That's why she didn't want to drink too much, because she didn't want to be hungover.

Andrew, he remembered wrong about the Snapchat party bus. He doesn't remember how they got to the Strip.

I said, "Is it possible those Snapchats came from July 4th and not the 3rd?" He goes, like, "Oh, you're right. I guess maybe I didn't see these Snapchats on the 3rd, because MW was not partying on the 3rd.

You can rely on your own memory, but my understanding is on the 3rd, she sulked a little bit, and she had a little pity party, and then she picked herself back up. Her boyfriend got in town that night, and she said, "You know what? I've sulked today. I've laid in bed and been upset about this. I've been disturbed. I've been violated. I've cried about it enough. I'm going to move on and go about my weekend."

Again, I ask you: Is she not to be believed because she is not still crying today about this, because she moved on, because she tried to have a fun weekend? I think that's – I think it is – doesn't make sense to argue that that behavior shows that this didn't happen.

[466] Lacey, she says inconsistent things. She denies drinking before they went out, yet another witness we've got is saying she is doing Jager Bombs. So you know what? So everybody has a little bit different

memory. Is she suppose', to remember with the four jobs that she's juggling, trying to put herself through college, which job she had to work that night when it was different every week?

Is she purposely trying to deceive you or lie to you about that? Or are these minor details? Don't miss the forest for the trees. I mean, we're looking at trees here, looking at all these little details.

And about M being upset the next ray, whether or not she was upset, the defense says, well, Blair Martin, the Defendant's sister, who, they are not just siblings, they are best friends, roommates, she volunteered it herself, Blair's sister said she wasn't upset that morning; therefore, we must believe her that she was not upset that morning, she was just hungover.

Well, three other people contradict that. Why is Blair Martin's testimony so much better than everybody else's, especially when she is his sister? She wants to help him. She doesn't want to see him charged with this.

Andrew said, "She was upset. She was obviously upset. She was crying, but she was trying to hide it [467] from me because I didn't know her very well." She was trying to, you know, maintain and, you know, not look like she was that upset.

Her best friend of 20 – or 10, however many years it was, said she was hysterical, she was very upset, she was crying. She, herself, said she was upset. Why are we to discount all three of their testimonies just

because his sister says she wasn't? So I mean, I do think it's much ado about nothing because it's not relevant to what happened the evening of July 2nd and July 3rd.

The defense claims that MW's claim that she got banded for 21 is incredible, unbelievable. Well, you get to use your common sense about a hot girl walking into a bar on the Tennessee Strip and whether the guys there want her to get drunk. Okay? Sorry, but that's how it is. That's life. So that's not incredible at all. And, in fact, it actually is supported by all the evidence that she was drinking that night.

How else did she get her vodka drinks? Why would she lie to you about that? Why is that so incredible? It's just to pick her apart and put her on trial.

Going to sleep eventually, rather than going to sleep, I mean, the girl eventually went to sleep that night. I don't think she ever said she immediately did. [468] And the delayed reporting, again, I know I addressed this originally, but you can use your common sense that sexual batteries sometimes go unreported. Not everyone who has a crime committed against them marches themselves immediately to the police station and reports it. Maybe sometimes they think, you know what? I'll just get over it. I'll get over it. I'll go out, I'll forget, I'll put it behind me, I'll just – it's not a big deal, not a big deal.

And then it nags. And then it's, you know, this is really bothering me, I keep thinking about this. What did she tell you? If he'll do it to me, maybe he'll do it to

someone else, that's why I went. That's why she eventually went.

Maybe she tried to push it down, party it away, you know, have fun and get – just not think about it and eventually say, you know what? I just can't do it.

Maybe she actually wanted to think about what she would have to go through and make a well-thought-out, reasoned decision about the depositions and the statements and the interviews and the court appearances and the coming in here in front of a bunch of strangers. Maybe she wanted to think about that before she made the decision to press the charges. So – so we should fault her for that? We should tell her she's a liar, because [469] she didn't rush to the police station before she got to really think about it like a mature adult?

You would hope that she would be deliberate and make sure she is doing the right thing before she does it. Before she goes in there and says, yes, I swear that he put his fingers in my vagina, you would hope that she'd make that deliberate decision and think about it.

Who has been not telling the truth? Not Ms. W. She – she told her boyfriend. She told Taylor then. She went and told Investigator Wilder then. She told Mr. Pinkard Officer Pinkard at the duty desk. She took the recorded statement you saw her questioned about. She took the deposition.

Who was lying? Tyson Martin. He goes to be interviewed and tells his sister, "I don't have a clue what

this is about. I don't know. I'm not sure. I don't know why they're calling me." But he's nervous. If you didn't do anything, why are you nervous?

Then he gets in there and is asked questions about it, denies knowing anything, what he's talking about. "I don't know anything that you're talking about. I don't even know if Taylor was there." Denies her even being there, conveniently. Denies M even being there. Denies remembering anything. "I was too drunk to remember anything, too drunk to remember anything," over and over [470] and over again. Why? To get out of trouble. He has done it before. Well, you know –

MR. ZELMAN: I'm going to object to that statement, Your Honor. It's a mischaracterization of the evidence. It's not even a valid argument on the evidence.

THE COURT: I sustain that.

MS. NORRIS: I didn't mean – I think I said it out of context, I'm sorry.

But he's lying before in the interview about what he knows and what he did, so why would he not later in the interview continue to lie about what he did? Right? To protect himself.

We already saw in his statements to Investigator Wilder, he is willing to lie to protect – to get out of trouble. Why would he not lie about the penetration? He would.

Now, he gradually admitted a little more, a little more, and he wanted to give the officer something, wanted to – you know, "Okay, I don't remember anything. Okay, I remember a little bit. Okay. Oh, DNA, okay. Fine, I touched her, but I didn't do that," minimizing what he did. Minimizing it, wanting to tell a little of the truth, give them a little bit. Is that so hard to believe, and eight days later? Florida statutes are available on Google.

[471] The defense suggests that alcohol affects someone's ability to perceive events accurately. You're right, it does. Well, he was heavily intoxicated', too. Why is that such a one-sided standard that it applies to her but not to him? And, yes, I do think he'd have the wherewithal to deny penetration. He's a 22-year-old adult.

Again, so she is not to be believed because she tagged a girl that she had fun with the night before on Facebook, and it automatically sent a friend request because she tagged her?

She has no beef with that girl. MW and Lacey Marx have nothing – no beef between them. They had a picture. She tagged her in it. Therefore, the sexual battery didn't happen?

Again, he told you it happened. We're fighting over the penetration. And please do not be inflamed by the continued use of the worn "rape" in this case. This is not that. This is a sexual battery. This is a digital penetration of a vagina, and it is called a sexual battery.

When you were – I'm sorry, I'm trying to skip some stuff, I know we've been in here forever.

When Investigator Wilder was asked about the Defendant's intent – and, again, there's nowhere in the [472] jury instructions, no element that I'm supposed to prove what he intends. I don't know what he intends. I know what he does. I know what his actions are, and I get to put two any two together.

We have a beautiful girl on a couch, who is sitting there with her, you know, shorts, sitting there. He sees her. He puts his arm down her, and starts going towards her vagina.

According to her, he does goes in her vagina. You rely on your memory of what the witnesses said, but I have to argue from my memory, that's all I've got, unfortunately.

But Investigator Wilder – he never said he did not intend to touch her vagina. When he had his memory refreshed with the transcript of the interview, he said he didn't – he said, "I never intended," dot, dot, dot. Didn't say what it was he didn't intend. Maybe he didn't intend to hurt her feelings. Maybe he didn't intend for her to go this far. Maybe he didn't intend – I don't know. But he didn't say that.

And, in fact, what he did say, when I asked Investigator Wilder, the direct quote was: Did your fingers ever make it to her vagina? No, they didn't. They moved towards that area, but no.

What you think he was going to when he got [473] down there, if he didn't? But I'm arguing to you that he did penetrate her vagina.

The evidence about what MW did in the days following this incident, we have heard about a day and a half of the testimony about what happened on July 4th – no, sorry, July 3rd, July 4th, July 5th, July 6th, and, July 7th.

I would argue to you the only thing that is relevant is what happened on the night of July 2nd into the morning of July 3rd. While the argument is that what happened on those five days goes to show that she didn't behave the way a victim should behave, I don't know what that is, but apparently she didn't – she didn't do the right thing after she was sexually battered by this man. But the argument, if that's what it's designed to show, I would argue to you is to make her look bad in your eyes, to make her look like, oh, she's such a party – how many times did we use the word party and drinking and club and Heritage Grove and bars to make her look like – a what? A bad girl who deserved this?

It's not relevant. It shows nothing. If anything, I would argue to you it supports that this happened because she was out trying to forget about it. Trying to shame her.

Before I close I want to talk about the DNA. I [474] would ask you: What are we trying to hide, or what are we trying to not test by not sharing additional information with Brittany Auclair?

If the state Attorney's Office had shared with her the fact that the Defendant admitted exactly what the victim claimed he had done and put his hand down the back of her shorts, how would that change what she tested?

He said he did the exact same thing that she said he did, put her hands – you know, put his hand down the back of her shorts. So how would she have tested the shorts differently? Again, it's neither here nor there. It's an argument to distract you from what the issue is.

She explained why she used one swab, because if she did separate swabs, she wouldn't get enough DNA to be able to find a foreign contributor.

She's the – I don't – she's the one who studied biology and criminology and has her master's, not me; so you can rely on what she says. But in her expert opinion, that was the best way to get his DNA. And she explained why she didn't test all those stains.

It sounds good to get up here and say we only tested 23 percent of the stains. She told you, you only get – you only get DNA from human biological material. She believed, based on all the things she tested, that that was acid-wash from the jeans, bleach from the jeans. It [475] was not semen. It was not saliva. It was not blood. It could have been vaginal secretions, but those would have belonged to MW. So she didn't test them, because in her training and experience, it wouldn't have been fruitful. So I would ask that we not Monday-morning quarterback her judgment about

what to test, especially when the Defendant's version wouldn't have changed the factual scenario at all, because he said he put his hand, in the same area.

The defense argument boils down to three things. MW is either mistaken or lying about the volume of her voice. Therefore, she is either mistaken or lying about the Defendant putting his fingers inside of her vagina.

I would argue to you her exact quote about the volume of her voice that she read to you guys from the witness stand was, "I wasn't screaming bloody murder, but I was in his face sternly, clearly, and very loudly and told him to get off me. I got my point across, but I wasn't very loud. I was loud enough to get my point across." Much to do about nothing.

And Blair Martin, the one who claims – who is the sister, who claims, "I didn't hear anything," she also didn't hear any of the other things that happened just adjacent to her bedroom; didn't hear anyone knocking on the door. She's the one who says that if people talk in [476] a normal voice in that room, she's up, she can hear it, she's jumping to the door because of this burglary.

Well, where was she when they got a knock on the door at 3:00, 2:30, 3:00 in the morning? She didn't hear that. She was desperate to get sleep. She was probably sleeping hard because she only had five hours. She didn't hear them eating dinner in there. The volume is much to do about nothing.

The second argument of the defense boils down to she is not to be believed because she went out and tried to enjoy the weekend; therefore, she is lying about him penetrating her vagina. Again, defies common sense. I've already addressed that that could be the way she dealt with this emotionally in this case.

Finally, because she didn't report it immediately; therefore, he didn't penetrate her vagina. He admits to putting it down the back of her pants. Why would she delay and then make it up? What reason does she have to falsify that he put his fingers in her vagina?

Is there any reason to believe that she can't remember that significant detail? She might forget what – you know, how many drinks she had or which place they went to first or whether she walked or got carried to the couch. She might forget, you know, in the morning whether it was 6:30 or 7:00, but you don't forget waking [477] up to fingers inside of you, moving around vigorously. That is a significant detail. That is something you know that you do not for get. Please don't be distracted by the other noise. Please don't not see the forest for the trees and find him not guilty because she's a bad – she went out and had some drinks and had a good weekend with her boyfriend.

Why would she lie? Why would she do that, say that he put his fingers in her if he didn't? We know why he would say that; to not get in trouble. So why did he lie at the first – at the beginning?

I would ask you find him guilty because he did violate her while she was physically helpless to resist him. He is guilty of this offense.

THE COURT: Thank you to both counsel. And, members of the jury, if you're reading, reading along with me on the jury instructions, I'm on page 7, under the Rules for Deliberation.

And there are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict.

First of all, you must following the law as set out in these instructions. If you fail to follow the law, your verdict would be a miscarriage of justice. There is no reason for failing to follow the law in this case. [478] All of us are depending upon you to make a wise and legal decision in this matter.

This case must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of exhibits an evidence and these instructions.

This case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone, nor should your verdict be influenced by feelings of prejudice, bias, or sympathy.

Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in the case.

Your duty is to determine if the Defendant has been proven guilty or not in accord with the law. It is the Judge's duty to determine a proper sentence if the Defendant is found guilty. And whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict.

In just a few moments you'll go back again to the jury room, and the first thing you'll want to do is select a foreperson who will preside over your deliberations, like the chairperson of a meeting, and will sign and date the verdict form when all of you have agreed on a verdict in this case.

[479] You may find the Defendant guilty as charged in the information or guilty of such lesser-included crime as the evidence may justify or not guilty. If you return a verdict of guilty it should be for the highest offense which has been proven beyond a reasonable doubt. If you find that no offense has been proven beyond a reasonable doubt, then, of course, your verdict must be not guilty.

Only one verdict may be returned as to each crime charged, and we only have one crime charged, so we only have one verdict, and it must be in writing; and for your convenience, we do have the form prepared. It's fairly straightforward. It's two pages long. There's a separate place for the date and the foreperson, depending on what you select. And it goes all the way from guilty as charged down through all the lessers and to the final option, which is not guilty as to Count I.

In closing, let me remind you that it is important that you follow the law as spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. And even if you do not like these laws, you must use them. For two centuries we have agreed to a constitution and to live by the law, and no one of us has the right to violate the rules we all share.

And, finally, deciding the verdict is exclusively [480] your job. I cannot participate in that decision in any way. I ask that you please disregard anything I might have said or done during the course of the trial to make you think I preferred one verdict over the other.

And with that, Mr. Bosco, as promised, I seem to have six jurors that are able to deliberate, and that means the good news and bad news – the good news, you get to go. I don't know if you consider it bad news, but the bad news is you don't get to deliberate with your new friends, but I want to thank you very much for serving on the jury. And if you've got anything back in there, the bailiff will help you get that out.

The rest of you are not so lucky. We'll let you retire to the jury room and await your decision.

(The jury was escorted to the jury room at 4:43 p.m.)

(At 7:00 p.m. the following took place:)

THE COURT: Let's bring the jury in.

THE BAILIFF: Jury in the courtroom.

(The jury returned to the courtroom, and the following took place in open court:)

THE COURT: The record will reflect all the jurors are back, and the Defendant is back.

Mr. Guzzo, I do assume that you're the foreperson because I see that paper in your hand.

* * *

IN THE CIRCUIT COURT, IN AND
FOR LEON COUNTY, FLORIDA

CASE NO.: 14-CF-2067

STATE OF FLORIDA,

Plaintiff,

vs.

TYSON MARTIN,

Defendant.

INTERVIEW OF: TYSON MARTIN

DATE: JULY 10, 2014

LOCATION: TALLAHASSEE POLICE DEPARTMENT
TALLAHASSEE, FLORIDA

[3] – – – – –

PROCEEDINGS

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INVESTIGATOR WILDER: All right. Sorry for taking awhile out there.

DEFENDANT MARTIN: That's no problem.

INVESTIGATOR WILDER: Do you have your ID so – just so you are Taylor. Jacksonville, that's why.

DEFENDANT MARTIN: That's fine.

INVESTIGATOR WILDER: This is my partner, Paul.

UNIDENTIFIED INVESTIGATOR: How are you doing?

DEFENDANT MARTIN: Good.

INVESTIGATOR WILDER: He and I work together in the same shop, so.

This is a permanent address? The Wolf Street (phonetic) – that's the one in –

DEFENDANT MARTIN: Yes.

INVESTIGATOR WILDER: – Jacksonville?

DEFENDANT MARTIN: Yeah, that's it.

INVESTIGATOR WILDER: Where are you living now?

DEFENDANT MARTIN: I'm living at 100 Edward Street; that's about to change.

INVESTIGATOR WILDER: Okay. Where are you fixing to go?

DEFENDANT MARTIN: It's Villa Lago, but I'm not [4] sure of the apartment.

INVESTIGATOR WILDER: Okay, and that's for the fall semester?

DEFENDANT MARTIN: Yeah, just fall, so, it's just a five month lease.

INVESTIGATOR WILDER: Is this a house?

DEFENDANT MARTIN: This is a house, yes.

INVESTIGATOR WILDER: Do you got roommates?

DEFENDANT MARTIN: Uh-huh. Two of them are sitting with me.

INVESTIGATOR WILDER: Oh, the girls out there? Are they going with you?

DEFENDANT MARTIN: Just one of them, my sister.

INVESTIGATOR WILDER: What about – so do you live with anybody else? How big of a house is it?

DEFENDANT MARTIN: It's four bedrooms total. There's one other person that lives there, so. He's in our class though.

INVESTIGATOR WILDER: Okay. I got to looking at the file. Thank you for being patience.

DEFENDANT MARTIN: Sure.

INVESTIGATOR WILDER: And let me give it back to you.

That phone number I called you on, that was your cell phone, right?

[5] DEFENDANT MARTIN: That's right.

INVESTIGATOR WILDER: Just wanted to make sure I got that right. Looking at the case file – and sorry, I have like four of them on my desk – your name came up in an investigation and you may or may not have information in regards to that.

DEFENDANT MARTIN: Sure.

INVESTIGATOR WILDER: Just to protect you and to protect us, and everything like that, I'm going to read you your Miranda rights.

DEFENDANT MARTIN: Sure.

INVESTIGATOR WILDER: You're not under arrest.

DEFENDANT MARTIN: Okay.

INVESTIGATOR WILDER: You're free to go at any time. I have some questions that could be incriminating, so I want to make sure I cover it for you; I don't want to get you jammed up. Does that make sense?

DEFENDANT MARTIN: That makes sense. Thank you.

INVESTIGATOR WILDER: I just need to fill this out. I wasn't planning on it initially. Today is the 10th?

DEFENDANT MARTIN: I think so.

INVESTIGATOR WILDER: I can't believe it's already July. It is eleven a.m.

[6] Okay. I'm just – all I did was fill your name and the address and date, and I'm going to read this had verbatim, off this sheet, and I'm going to let you look at it once we're done. At the end of me reading you your rights – have you ever had your rights read to you?

(Defendant shakes head in negative.)

INVESTIGATOR WILDER: Okay. At the end of me reading this to you, there's an acknowledgement of rights at the bottom. There's three questions I'll ask you. I need a verbal response, not a head nod, head shake, a moan, or anything like that: A "yes" or "no" or "I don't understand;" that type of response, okay?

So statement of rights. Before you answer any questions or make any statements, you must fully understand your rights:

Number 1. You have the right to remain silent;

Number 2. Anything you say can and will be used i against you in a court of law;

Number 3. You have a right to talk to a lawyer and have them present with you while you're being questioned;

Number 4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any [7] questioning if you so wish;

Number 5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

I printed my name with my badge number that I read this to you.

These are the questions.

DEFENDANT MARTIN: All right.

INVESTIGATOR WILDER: Acknowledgement of rights: Number 1. Do you understand each of these rights as I've explained to you?

DEFENDANT MARTIN: Yes.

INVESTIGATOR WILDER: I'm just writing in your responses.

DEFENDANT MARTIN: All right.

INVESTIGATOR WILDER: Number 2. Have you previously ever asked any other law enforcement officer to allow you to speak to a lawyer about this incident? Have you asked any other cops to let you talk to a lawyer?

DEFENDANT MARTIN: I don't even know what the incident is, so.

INVESTIGATOR WILDER: So would that be a "no"?

DEFENDANT MARTIN: That would be a "no."

INVESTIGATOR WILDER: Okay. I don't want to put [8] words in your mouth.

Having these rights in mind, do you wish to talk to us now?

DEFENDANT MARTIN: Sure. Yes.

INVESTIGATOR WILDER: Sure is fine. I'll put both of them. All I need from you, Tyson, is just on the double Xs, if you want to read over it, that's just biographical information what I read you, and signing it is just saying that's what was read to you and you understand your rights and those were your answers.

DEFENDANT MARTIN: Okay.

INVESTIGATOR WILDER: You're not signing anything of any guilt of any kind, or you know, signing away your life or –

DEFENDANT MARTIN: Right.

INVESTIGATOR WILDER: – or kidneys or anything like that.

DEFENDANT MARTIN: And date and time?

INVESTIGATOR WILDER: No, you don't have to do all of that. I'll fill that in. He'll actually fill that in because he's sitting here.

All right. What – where were you this weekend?

DEFENDANT MARTIN: I went –

INVESTIGATOR WILDER: July 4th weekend.

[9] DEFENDANT MARTIN: Yeah, I was in Jacksonville.

INVESTIGATOR WILDER: So do you remember when you went?

DEFENDANT MARTIN: Thursday, I believe.

INVESTIGATOR WILDER: What was Thursday, was that the 3rd or the 4th? Third.

DEFENDANT MARTIN: Third.

INVESTIGATOR WILDER: Okay. What were you – do you have any idea why you're here?

DEFENDANT MARTIN: I have no idea. That's why I asked on the phone.

INVESTIGATOR WILDER: Your name came up in an investigation. I'm not going to hold any punches. I'm not going to sugarcoat things. This isn't like TV where you got people trying to bamboozle you.

Something happened the night before you left.

DEFENDANT MARTIN: Okay.

INVESTIGATOR WILDER: At your house. Okay. Does that recollect – does that bring you iany recollection?

DEFENDANT MARTIN: Honestly, we went to the strip. Do you know where the strip is?

INVESTIGATOR WILDER: Yeah.

DEFENDANT MARTIN: We went out and then –

INVESTIGATOR WILDER: This is really making me [10] feel old, but, yes.

DEFENDANT MARTIN: All right. I didn't know.

We went to the strip that night, and I got pretty wasted, honestly, and I don't remember how we got home. I asked my roommates how we got home.

INVESTIGATOR WILDER: Who is "we?" Tell me, who is "we?" Give me names.

DEFENDANT MARTIN: It was me, my roommate, so Lacey and Andrew I think were with us. I can't remember if his girlfriend was with us.

INVESTIGATOR WILDER: Who? Andrew's girlfriend? Is Andrew a roommate?

DEFENDANT MARTIN: Yeah.

INVESTIGATOR WILDER: Lacey a roommate?

DEFENDANT MARTIN: Yes.

INVESTIGATOR WILDER: Andrew is a roommate.

DEFENDANT MARTIN: Yes, that's right.

INVESTIGATOR WILDER: And maybe his girlfriend?

DEFENDANT MARTIN: Maybe his girlfriend, yeah.

INVESTIGATOR WILDER: Anyone else?

DEFENDANT MARTIN: And I think that his – I think that his girlfriend's friend was there. I don't know though.

INVESTIGATOR WILDER: Do you know his girlfriend's name or the friend's name?

[11] DEFENDANT MARTIN: No. I just met her that night.

INVESTIGATOR WILDER: Andrew's girlfriend?

DEFENDANT MARTIN: Yeah. She was there at the fraternity house.

INVESTIGATOR WILDER: What frat are you in?

DEFENDANT MARTIN: I'm not in a fraternity. He is.

INVESTIGATOR WILDER: Okay.

DEFENDANT MARTIN: So we just went there that night.

INVESTIGATOR WILDER: What about the girlfriend's friend? Do you know her name?

DEFENDANT MARTIN: I don't. We were just standing there while we were talking.

INVESTIGATOR WILDER: So you went to the strip. You got back. Was everybody with you when you got back?

DEFENDANT MARTIN: I honestly don't – I honestly i don't remember how we got back. I asked my roommates the next morning how we got back.

INVESTIGATOR WILDER: Okay. So you're saying you don't remember anything that happened after you got back until you woke up?

DEFENDANT MARTIN: That's right.

[12] INVESTIGATOR WILDER: Okay. Here's where there's some concern.

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: Okay? Like I said, I don't want to get you – I'll put it out there because I'm a realist. I've been a cop for 17 years, and I'm too old to do the magic bullshit-type stuff.

DEFENDANT MARTIN: Sure.

INVESTIGATOR WILDER: It is what it is.

Umm, what you're saying doesn't match with some stuff that's been told to me from other people involved, from other people in the house, after you got back from being on the strip.

DEFENDANT MARTIN: Okay.

INVESTIGATOR WILDER: When I say that, meaning, we just need to be out in the open with

everybody. I'm not going to lie to you. I would just ask for the same respect of you not lying to me.

Your name has been brought up in an incident with the roommate or the friend of Andrew's girlfriend, when she was out back at the house with you, after you went to the strip.

DEFENDANT MARTIN: Sure.

INVESTIGATOR WILDER: Okay. So having said that, does that refresh your memory at all about what [13] happened?

DEFENDANT MARTIN: Not really. I mean, I do know that I was sitting on the couch in that room and I was pretty – I was like on the other couch just sitting there.

INVESTIGATOR WILDER: On the other couch?

DEFENDANT MARTIN: Yeah. And my buddy – my roommate, John, was there as well.

INVESTIGATOR WILDER: Okay. How many roommates do you have?

DEFENDANT MARTIN: He's not really my roommate. He's there because he doesn't have a place to live until the summer is over.

INVESTIGATOR WILDER: Did you have any interaction with the friend of Andrew's girlfriend?

DEFENDANT MARTIN: (Defendant shakes head.)

INVESTIGATOR WILDER: You weren't on the same couch as her?

DEFENDANT MARTIN: No.

INVESTIGATOR WILDER: Because you said you were sitting there on the couch and you quickly switched it to "I was sitting on the other couch."

DEFENDANT MARTIN: No, I didn't say that.

INVESTIGATOR WILDER: How many couches do you have?

[14] DEFENDANT MARTIN: I was sitting on the opposite couch. There's one that's sitting right here and one that's sitting right here.

INVESTIGATOR WILDER: Oh, so they're like in an "L"?

DEFENDANT MARTIN: Right.

INVESTIGATOR WILDER: Okay. And where was she at?

DEFENDANT MARTIN: I think she was – I was on the small couch so I think she was on this one, I think.

INVESTIGATOR WILDER: So it's like a couch and a loveseat?

DEFENDANT MARTIN: I mean, just longer couch, I guess. I don't know what a loveseat is.

INVESTIGATOR WILDER: I don't know, because I'm just trying to get – like a two-seater couch and a three-seater couch?

DEFENDANT MARTIN: Yeah, right. Three-seater couch.

INVESTIGATOR WILDER: The issue here is what took place between you and her on the couch.

DEFENDANT MARTIN: Right, okay.

INVESTIGATOR WILDER: And if it was something that she asked for, that was consensual, I need to [15] know. But this whole I don't know what's going on and I don't know what happened, it's not going to fly, because I've got a pretty specific account of what occurred.

DEFENDANT MARTIN: Okay.

INVESTIGATOR WILDER: So do you want to tell me what happened?

DEFENDANT MARTIN: No, I'm honestly being truthful with you.

INVESTIGATOR WILDER: Okay.

DEFENDANT MARTIN: I literally do not remember anything that happened after that and my roommates can attest to that. I told them I don't

remember anything that happened after we got home that night so.

INVESTIGATOR WILDER: So you don't remember talking with her at all?

DEFENDANT MARTIN: I never even spoke a word to her except for maybe "hey" when we were at the fraternity house.

INVESTIGATOR WILDER: There is no reason for any of your DNA to be anywhere on her –

DEFENDANT MARTIN: Absolutely not.

INVESTIGATOR WILDER: – or inside of her?

DEFENDANT MARTIN: Absolutely not.

INVESTIGATOR WILDER: Okay, you understand what I [16] mean by DNA, right?

DEFENDANT MARTIN: You can go ahead and explain it to me in case I have the wrong definition.

INVESTIGATOR WILDER: DNA is not necessarily –

DEFENDANT MARTIN: But no.

INVESTIGATOR WILDER: I'll specify what I do. I'm an investigator with the Special Victims Unit.

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: I deal with sexual crimes, ideal with juvenile crimes, child abuse.

Obviously, this person is not a child, so one would infer that this is a sex-in-nature issue.

DEFENDANT MARTIN: Um-hmm.

INVESTIGATOR WILDER: An allegation has been made against you that you performed a sex act on this female.

DEFENDANT MARTIN: Okay.

INVESTIGATOR WILDER: And she was not a willing participant.

DEFENDANT MARTIN: (Nods head.)

INVESTIGATOR WILDER: And the issue is, I want you to be truthful with me about what occurred. I can see you're nervous obviously. I can see when you put your hand up, you're shaking.

Have you ever been in trouble before?

[17] DEFENDANT MARTIN: No.

INVESTIGATOR WILDER: I'm not trying to get you jammed up. I just need to know the truth. So if something took place between the two of you, it is what it is. You're in college, she's in college, whatever.

If it was something that – you know, I need to know in your own words what occurred between the two of you. You know what I mean?

DEFENDANT MARTIN: Uh-huh.

INVESTIGATOR WILDER: Because I can't – if I'm put in the position of only presenting one side of the certain situation, that side of the situation doesn't look good for you right now, because I'm giving you an opportunity – and my partner will tell you that I do this with everybody.

You don't know me from Adam, man, but I'm not going to sit here and baby you. I mean, you're a grown adult and adults make choices, but I'm telling you the God's honest truth. I give everybody their fair share and their fair lick. I give everybody their opportunity to tell me the truth and their side of the story. A lot of people don't take me up on that and they regret it eventually – not from me but from the outcome of the investigation.

[18] So having said that, what happened between the two of you guys?

DEFENDANT MARTIN: I honestly don't remember, sir.

INVESTIGATOR WILDER: Okay. So let's go back to the DNA thing. I'm not talking about semen or anything like that. DNA is dead skin cells or any kind of, you know, rubbing of skin cells, hair follicles, anything biological that could come from you. And none of that would be on her, in her, or anything like that; is what you're saying?

DEFENDANT MARTIN: I mean, honestly, I touched her.

INVESTIGATOR WILDER: Okay.

DEFENDANT MARTIN: In an inappropriate way perhaps, yes, I did.

INVESTIGATOR WILDER: Okay. Tell me where you touched her in an inappropriate way. I didn't want to say that; that was a tongue twister, sorry.

DEFENDANT MARTIN: Right.

INVESTIGATOR WILDER: Where did you touch her? And you can use slang. We're all adults here. I'm not looking for clinical definitions.

DEFENDANT MARTIN: I touched her on her butt and her boobs.

[19] INVESTIGATOR WILDER: On top of the clothes? Underneath the clothes?

DEFENDANT MARTIN: I attempted to go underneath the clothes. Obviously, was not . . .

INVESTIGATOR WILDER: What was her reaction? Was she asleep? Awake? What? Drunk?

DEFENDANT MARTIN: I believe she was drunk. But she just – she was like – I think she woke up and was like – I forget her exact words honestly. She was just like, "What are you doing? Blah, blah, blah."

I'm like, "I'm so sorry. I'm really fucked up. I'm really embarrassed right now. I'm sorry," and I just went straight to my room.

INVESTIGATOR WILDER: Did you say anything else to her? Like you – did you say anything else?

DEFENDANT MARTIN: No, that's it. I knew what I was doing was wrong and – yeah.

INVESTIGATOR WILDER: Okay. So let's clarify. You tried to touch her breasts underneath her clothes?

DEFENDANT MARTIN: I tried to, yes.

INVESTIGATOR WILDER: What about – and you said her butt underneath her clothes. Walk me through –

DEFENDANT MARTIN: She was laying on her side.

INVESTIGATOR WILDER: Okay. On the couch?

[20] DEFENDANT MARTIN: Yeah.

INVESTIGATOR WILDER: And she was asleep, or drunk, or that's what you think, she was passed out?

DEFENDANT MARTIN: I couldn't – I knew she was drunk. Honestly, we had all been drinking.

INVESTIGATOR WILDER: So she's out of it, essentially, on the couch, right?

DEFENDANT MARTIN: Yeah.

INVESTIGATOR WILDER: Laying there on her side. And where were you at?

DEFENDANT MARTIN: I was on the other side of the couch.

INVESTIGATOR WILDER: Did you move over?

DEFENDANT MARTIN: No, I never got on the couch with her. I was on the other side of the couch.

INVESTIGATOR WILDER: Okay. Did you move over?

DEFENDANT MARTIN: No. I never got on the couch with her.

INVESTIGATOR WILDER: I'm not a scientist, but that's difficult for me to –

DEFENDANT MARTIN: No. She –

INVESTIGATOR WILDER: – but did you have extra long arms to reach across the couch?

DEFENDANT MARTIN: No, I'm like, I moved over to touch her but I was never on the couch.

[21] INVESTIGATOR WILDER: Okay. And when you touched her, how did you touch her? From behind? On top? I mean . . .

DEFENDANT MARTIN: Well, she was lying on her side like this with her back towards me.

INVESTIGATOR WILDER: Okay. Was her back towards the cushions of the couch or –

DEFENDANT MARTIN: It was away from the cushions.

INVESTIGATOR WILDER: So her face was facing the cushions?

DEFENDANT MARTIN: That's right.

INVESTIGATOR WILDER: And her back and her butt were facing kind of out towards where you would –

DEFENDANT MARTIN: That's right.

INVESTIGATOR WILDER: And you moved in and try to put your hands – what did you try to do first?

DEFENDANT MARTIN: I tried to touch her.

INVESTIGATOR WILDER: I know but did you go to her boobs first? Did you try her butt first?

DEFENDANT MARTIN: I honestly couldn't tell you.

INVESTIGATOR WILDER: Did your fingers ever make it to her vagina?

DEFENDANT MARTIN: No, they didn't. They moved towards that area but no.

INVESTIGATOR WILDER: So your fingers didn't go [22] inside of her vagina.

DEFENDANT MARTIN: No, sir. Absolutely not.

INVESTIGATOR WILDER: What if I told you that's what woke her up, your fingers being inserted into her vagina?

DEFENDANT MARTIN: That's not true. That's 100 percent not true. I will – I know that is not true.

INVESTIGATOR WILDER: Okay. How do you know that's not true?

DEFENDANT MARTIN: Because I know I did not do that. I promise you.

INVESTIGATOR WILDER: Okay, well, that's what I'm saying. She's passed out. You've got your hand – what was she wearing?

DEFENDANT MARTIN: She was wearing jean shorts and some sort of shirt.

INVESTIGATOR WILDER: Any panties on?

DEFENDANT MARTIN: I don't really –

INVESTIGATOR WILDER: But your hand made it underneath and you were grabbing her butt.

DEFENDANT MARTIN: Yes, that's right.

INVESTIGATOR WILDER: And I'll use non-clinical terms: more of the cheek or more of the crack? Or were you – you said you were moving your hands down towards her vagina, I'm assuming from behind? Your [23] hand wasn't going down the front of her pants –

DEFENDANT MARTIN: I mean, it went towards but it was not an intention to –

INVESTIGATOR WILDER: Well, let me ask: Did you go in the waistband or the short? Did you go up the leg?

DEFENDANT MARTIN: In the waistband. And these are high waisted shorts.

INVESTIGATOR WILDER: But your hand was on her ass underneath her shorts, even if she had underwear on, but it was definitely skin-on-skin?

DEFENDANT MARTIN: True.

INVESTIGATOR WILDER: And your hand is moving down towards her vagina, but –

DEFENDANT MARTIN: But I never touched it.

INVESTIGATOR WILDER: That's what I'm saying. You never put your fingers inside of it; did you ever rub it at all?

DEFENDANT MARTIN: No, sir.

INVESTIGATOR WILDER: Okay. And that's what caused her to stir?

DEFENDANT MARTIN: I have no idea.

INVESTIGATOR WILDER: You said she was passed out.

DEFENDANT MARTIN: Yes.

[24] INVESTIGATOR WILDER: I'm assuming your hand is on her ass.

That's what – and she was like, "What are you doing?"

DEFENDANT MARTIN: That's right.

INVESTIGATOR WILDER: And you said?

DEFENDANT MARTIN: I said, "I'm so sorry. I'm very embarrassed and I'm very sorry.

INVESTIGATOR WILDER: What about – what about – what about the verbiage of something along the lines of, "You weren't supposed to wake up."

DEFENDANT MARTIN: I did not say that.

INVESTIGATOR WILDER: Okay?

DEFENDANT MARTIN: I did not say that.

INVESTIGATOR WILDER: All right.

DEFENDANT MARTIN: I did not say that.

INVESTIGATOR WILDER: Okay. What do you think should be the outcome of all of this? What do you think, honestly?

DEFENDANT MARTIN: Honestly, I made a bad decision. I made a very bad decision.

INVESTIGATOR WILDER: Okay.

DEFENDANT MARTIN: And I'm the first person to, like, call people out for doing any sort of thing like this. I am 100 percent against people who do stuff [25] like this. I was inebriated, and I was fucked up, and I made a very bad decision.

INVESTIGATOR WILDER: But you know – how old are you?

DEFENDANT MARTIN: Twenty-two.

INVESTIGATOR WILDER: Twenty-two, right?

DEFENDANT MARTIN: Made a very bad decision.

INVESTIGATOR WILDER: You're absolutely right, you made a very bad decision. You don't even know this girl, right?

DEFENDANT MARTIN: I don't.

INVESTIGATOR WILDER: Is this the first time you met her?

DEFENDANT MARTIN: Yes.

INVESTIGATOR WILDER: Okay. Is she attractive? I don't know, I've never seen her. Is she a good looking girl?

DEFENDANT MARTIN: Yes.

INVESTIGATOR WILDER: Did she make – I'm asking this stuff, because you're right, you made a bad decision. But you can't blame alcohol, man, you know what I mean?

DEFENDANT MARTIN: I'm not blaming alcohol. I'm telling you I would never do this –

INVESTIGATOR WILDER: If you were sober?

[26] DEFENDANT MARTIN: Absolutely. And that was my bad decision.

INVESTIGATOR WILDER: Okay. Did she make any advances to you at all?

DEFENDANT MARTIN: No, sir.

INVESTIGATOR WILDER: Did she flirt with you at all?

DEFENDANT MARTIN: No, sir.

INVESTIGATOR WILDER: Did you flirt with her at all?

DEFENDANT MARTIN: No, sir.

INVESTIGATOR WILDER: All night?

DEFENDANT MARTIN: No, sir.

INVESTIGATOR WILDER: Okay. I'm just – you know, it's a bad decision and it's an unfortunate circumstance. And I appreciate your honesty, okay. I want to make sure you and I are on the same page, though, that you're being completely honest.

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: Because you started off with "I don't remember nothing." I could tell you were nervous because you were sitting there talking with me and my partner.

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: And you became more [27] truthful.

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: Is that it?

DEFENDANT MARTIN: Yes, sir. 100 percent.

INVESTIGATOR WILDER: Okay. You felt you made a bad choice and you wouldn't have done it if you were sober?

DEFENDANT MARTIN: No, sir. And that's not to excuse it, and she's still a victim, and alcohol is never an excuse.

INVESTIGATOR WILDER: What do you think – let's go back to what I said – what do you think should be the outcome of this? What do you think I

should do? It's ultimately not up to me, but what is your recommendation? Honestly, tell me.

DEFENDANT MARTIN: Sir, I really think that – I mean, words can't fix anything, but she is due an apology and she is due an honest, "I'm very sorry. I would never do that again. I'm sorry what I did to you and I'm sorry if it caused you any pain."

You know, I know no apology is not everything, but it's the least I could do, and it's about as much as I could do, and at least in my personal life advocate for nobody should ever do this.

INVESTIGATOR WILDER: Okay. Let me step out [28] and talk to my boss real quick and let her know how our conversation went, and I'll be right back, okay?

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: Just, you got to give me a couple of minutes because obviously I've got to find my sergeant and let her know our conversation, okay?

Again, I appreciate your honesty. It goes a long way. It doesn't excuse your behavior. You understand that, right?

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: Okay. All right. Sit tight. I'll be right back, okay?

DEFENDANT MARTIN: Yes, sir.

(Investigators leave room.)

DEFENDANT MARTIN: Fuck.

(Investigators enter room.)

INVESTIGATOR WILDER: All right, Tyson. Do me a favor. You got anything on you I need to know about? Guns, drugs, bombs, bazookas, anything?

Okay, do me a favor, press the seat back and I need you to stand up for me. Just put your wallet there; I just need to search you real quick.

I'm telling you right now you're being placed under arrest, okay? I'll explain this to you – listen to me. Listen to me. Okay?

[29] I'm going to search you real quick and make sure you don't have anything that's going to hurt me or hurt yourself on there. And what is going to happen is I'm going to have to do some paperwork, so you're going to have to sit here.

I am not going to put the handcuffs behind your back. I am simply just going to put the handcuffs to your chair. These are leg irons. They have to be put on here because everybody that is brought up here that is put into custody is – it's a policy and procedure, okay?

DEFENDANT MARTIN: Yes, Sir.

INVESTIGATOR WILDER: Do you need to use the bathroom or anything real quick?

DEFENDANT MARTIN: No.

INVESTIGATOR WILDER: No? Okay. It shouldn't be too long, but just put your hands right here in the middle of your back. Just relax your hands, relax them, okay?

You ain't got nothing on you, nothing but keys?

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: All of this stuff, I'll probably just put right back in your pocket; just making sure you don't have anything significant else in your pocket. More keys. My partner here is going [30] to go down and without revealing too much information –

DEFENDANT MARTIN: Yes, sir.

INVESTIGATOR WILDER: – tell your roommates that – let's put all of this stuff back in your pocket.

UNIDENTIFIED INVESTIGATOR: Did you drive up here or somebody else?

DEFENDANT MARTIN: I did.

INVESTIGATOR WILDER: Do they have your permission to drive your car?

DEFENDANT MARTIN: Uh-huh.

INVESTIGATOR WILDER: Which one are your car keys?

The one on the left.

INVESTIGATOR WILDER: This one right here?

UNIDENTIFIED INVESTIGATOR: Who do you want to get these?

DEFENDANT MARTIN: My sister.

UNIDENTIFIED INVESTIGATOR: There's –

INVESTIGATOR WILDER: There's two girls. Which one is your sister?

DEFENDANT MARTIN: Blair.

INVESTIGATOR WILDER: Are you right-handed or left-handed?

[31] DEFENDANT MARTIN: Right.

INVESTIGATOR WILDER: Just relax, okay? You understand why you're being arrested, right? Tyson? Do you understand why you're being arrested?

(Defendant nods head.)

INVESTIGATOR WILDER: Yes or no? Okay. Do you want to scoot forward a little bit?

DEFENDANT MARTIN: No, I'm good.

INVESTIGATOR WILDER: All right. If you need anything, just kind of knock on the wall or holler out, and I'll come and see if I can accommodate you or anything. What's up? Shoot. If you got questions, go ahead.

DEFENDANT MARTIN: What am I supposed to do?

INVESTIGATOR WILDER: Heres the deal, okay?

DEFENDANT MARTIN: I made a mistake. I fucking was stupid.

INVESTIGATOR WILDER: You're right. You did make a mistake.

DEFENDANT MARTIN: How does this make me different from anybody else who fucking did shit on purpose?

INVESTIGATOR WILDER: The problem was she was drunk and passed out.

DEFENDANT MARTIN: I understand. I was drunk, [32] too. I made a bad decision. I was inebriated.

INVESTIGATOR WILDER: But alcohol isn't an excuse. I'm not saying it because I'm not going to preach to you, okay? Unfortunately, it happens. You made a bad choice, right?

DEFENDANT MARTIN: (Nods head.)

INVESTIGATOR WILDER: We both admit you made a bad choice.

DEFENDANT MARTIN:

INVESTIGATOR WILDER: Alcohol, just like ignorance, isn't an excuse. Someone who gets behind the wheel of a car – it's a different analogy but it's an

analogy someone who makes a bad choice and gets behind the wheel of a car and crashes into a van full of kids and kills everybody says, "I made a bad choice. I shouldn't have been drunk driving."

It's the same concept. Just because you're intoxicated doesn't give you the right to stick your hands up somebody's pants.

DEFENDANT MARTIN: No, it doesn't.

INVESTIGATOR WILDER: That's what the issue is here, Tyson. I told you from the get-go, I'm going to be honest with you. I mean, I'm not trying to stack charges on you, but I've got to get to the bottom of this. That girl felt violated. She filed a police [33] report.

DEFENDANT MARTIN: She should have felt violated. She had a right to.

INVESTIGATOR WILDER: I mean, you're not in a relationship with her. She doesn't know you. That's the first time you guys met. You said that, she said that I'm not going to get in to all of the stuff that she said, but she felt violated enough, and she had openly admitted she was drunk and passed on the couch. She didn't even know you were there until she felt your hand on the inside of her butt/vaginal area. You know what I mean?

DEFENDANT MARTIN: No.

INVESTIGATOR WILDER: And it woke her up. She told you to stop and you did.

DEFENDANT MARTIN: Yeah.

INVESTIGATOR WlLDER: But that still doesn't give you the right to stick your hand, your skin on skin hand underneath her shorts, underneath her underwear, and start feeling on her buttocks and working your way towards her vagina as you said.

DEFENDANT MARTIN: You're right.

UNIDENTIFIED INVESTIGATOR: How much do you want me to tell your sister? Just that you're being arrested and you'll call her from the jail? Or do you [34] want me to tell her what the charge is?

DEFENDANT MARTIN: I would like to speak with her about it.

INVESTIGATOR WILDER: We can't let her come up.

DEFENDANT MARTIN: Is it possible to give me a phone call?

INVESTIGATOR WILDER: You can do that from the jail. We can't do that from there.

DEFENDANT MARTIN: How long am I supposed to be there?

UNIDENTIFIED INVESTIGATOR: You'll have to see a judge.

INVESTIGATOR WILDER: You'll have to see a judge.

DEFENDANT MARTIN: Am I there all night?

INVESTIGATOR WILDER: Yes, sir.

DEFENDANT MARTIN: Are you serious?

INVESTIGATOR WILDER: Yeah. It's a mandatory – it's a sexual battery count because you digitally was rubbing your hand up on her.

I'll do you this: It is what it is. I didn't take your phone from you.

DEFENDANT MARTIN: I understand.

INVESTIGATOR WILDER: You have a free hand. You can – if you want to call somebody, you can call somebody. I'm just telling you that he's walking down [35] to hand those keys over to her, because we don't have jail facility here, you know what I mean? You have to be transported out to the county jail over off of Appleyard. This is just a police station; it's not a detention facility.

So he needs – he's going to go down there and tell her, and if you want, we'll make it easy. He'll go down and tell her based on the interview you were taken into custody for –

DEFENDANT MARTIN: I'll talk to her.

INVESTIGATOR WILDER: Okay. He's going to turn the keys over to her then, and I anticipate that if your cellphone is on that she'll probably call you. You know? Okay? Just sit tight.