

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER THORPE,
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**

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345
FL Bar No. 114227
Email: fferman@ffermanlaw.com

COUNSEL FOR THE PETITIONER

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In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-10842

CHRISTOPHER J. THORPE,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:20-cv-00408-WS-HTC

ORDER:

2

Order of the Court

23-10842

Christopher Thorpe moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2254 habeas corpus petition. To merit a certificate of appealability, Thorpe must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because he has failed to make the requisite showing, the motion for a certificate of appealability is DENIED.



UNITED STATES CIRCUIT JUDGE

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-10842

CHRISTOPHER J. THORPE,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:20-cv-00408-WS-HTC

Before BRANCH and LAGOA, Circuit Judges.

2

Order of the Court

23-10842

BY THE COURT:

Christopher Thorpe has moved for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order denying a certificate of appealability on appeal from the denial of his 28 U.S.C. § 2254 petition. His motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE CITY DIVISION**

CHRISTOPHER J. THORPE,

Petitioner,

Case No. 4:20cv408-WS/HTC

v.

SECRETARY, DEPARTMENT OF
CORRECTIONS, STATE OF
FLORIDA,

Respondent.

JUDGMENT

Petitioner's petition for writ of habeas corpus is DENIED.

JESSICA J LYUBLANOVITS,
CLERK OF COURT

February 14, 2023

DATE

s/ *Ronnie Barker*
DEPUTY CLERK

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

CHRISTOPHER J. THORPE,

Petitioner,

v.

4:20cv408-WS/HTC

SECRETARY, DEPARTMENT OF
CORRECTIONS, STATE OF
FLORIDA,

Respondent.

ORDER ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Before the court is the magistrate judge's report and recommendation (ECF No. 14) docketed December 1, 2022. The magistrate judge recommends that Petitioner's petition for writ of habeas corpus be DENIED. Petitioner has filed objections (ECF No. 19) to the magistrate judge's report and recommendation, and those objections have been carefully reviewed by the undersigned.

Upon review of the record in light of Petitioner's objections, the court has determined that the magistrate judge's report and recommendation is due to be

adopted. Like the magistrate judge, the undersigned finds that Petitioner has failed to demonstrate that he is entitled to relief under 28 U.S.C. § 2254.

Accordingly, it is ORDERED:

1. The magistrate judge's report and recommendation (ECF No. 14) is hereby ADOPTED and incorporated by reference into this order.
2. Petitioner's petition for writ of habeas corpus (ECF No. 1), challenging the conviction in *State v. Thorpe*, 2011-CF-1190, in Leon County, Florida, is DENIED.
3. The clerk shall enter judgment stating: "Petitioner's petition for writ of habeas corpus is DENIED."
4. A certificate of appealability is DENIED.

DONE AND ORDERED this 14th day of February, 2023.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CHRISTOPHER J. THORPE,

Petitioner,

v.

Case No. 4:20cv408-WS-HTC

SECRETARY DEPARTMENT
OF CORRECTIONS,

Respondent.

REPORT AND RECOMMENDATION

Petitioner Christopher J. Thorpe, through counsel, filed a petition under 28 U.S.C. § 2254 challenging his conviction in the circuit court of Leon County, Florida, for sexual battery, in case 2012-CF-1190. ECF Doc. 1. After considering the petition, the record, the State's response, ECF Doc. 7, and Petitioner's reply, ECF Doc. 13, the undersigned recommends the petition be DENIED without an evidentiary hearing.

I. BACKGROUND

Petitioner, a masseuse, was charged with three counts of sexual battery which took place during a massage session on April 2, 2012. At trial, the victim, J.W., testified that during her only massage session with Petitioner, Petitioner—without her consent—inserted his finger “into her,” performed oral sex on her, and had

intercourse with her. She testified she “just froze” during the incident, other than “shouting out” to Petitioner at one point about whether he had a condom. ECF Doc. 7-2 at 204-15. Shortly afterwards, after her friends, mother and supervisor were able to calm her down, she reported the incident to authorities. *Id.* at 222-23.

On July 3, 2013, a jury found Petitioner guilty of sexual battery. ECF Doc. 7-1 at 54. On September 27, 2013, the state court sentenced him to 20 years’ imprisonment followed by 10 years’ probation. *Id.* at 200. Petitioner appealed his judgment to the First District Court of Appeals (“First DCA”), which affirmed *per curiam* without a written opinion on January 20, 2016, and denied rehearing on February 29, 2016. *Thorpe v. State* (1D13-4711), 185 So. 3d 1239 (Fla. 1st DCA 2016); ECF Doc. 7-7 at 4. Petitioner sought discretionary review in the United States Supreme Court which was denied on October 3, 2016. The conviction became final on that date.¹ *See Bond v. Moore*, 309 F.3d 770, 773–74 (11th Cir. 2002) (holding a state prisoner’s conviction becomes final when the U.S. Supreme Court denies certiorari). The AEDPA clock began running for sixty (60) days until December 2, 2016, when Petitioner filed a Rule 3.800 motion, ECF Doc. 7-9 at 65. The state

¹ Under the Antiterrorism and Effective Death Penalty Act Of 1996 (“AEDPA”), 28 U.S.C. § 2244, et seq., as amended, a federal habeas petition must be filed within one year of certain trigger dates. For the purposes of this petition, the pertinent trigger date is “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). Additionally, the one-year time period is tolled for “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

court denied that motion on December 7, 2016.² *Id.* at 103. The AEDPA one-year limit began running again, and ran for 292 more days until Petitioner, through counsel, filed a Rule 3.850 motion on September 26, 2017. ECF Doc. 7-9. That motion was continuously pending until August 11, 2020, when the First DCA issued its mandate affirming the circuit court's decision. ECF Doc. 7-13 at 2. Petitioner filed the instant federal petition six (6) days later, on August 18, 2020. ECF Doc. 1. Because 365 days had not yet expired on the AEDPA clock, the petition is timely.

II. LEGAL STANDARDS

The AEDPA governs a state prisoner's petition for habeas corpus relief. 28 U.S.C. § 2254. Under the AEDPA, relief may only be granted on a claim adjudicated on the merits in state court if the adjudication resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) 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).

This standard is both mandatory and difficult to meet. *White v. Woodall*, 572 U.S. 415, 419 (2014). "Clearly established federal law" consists of the governing

² The electronic docket sheet for Petitioner's Leon County Case 2012-CF-1190 shows that Petitioner filed a motion for rehearing of the 3.800 motion which was docketed on December 23, 2016. Dkt. 209 in *State v. Thorpe*, 2012-CF-1190 (Dec. 23, 2016). The docket is not clear as to when the motion was denied, but this makes no difference to the timeliness analysis because the Petition would be timely even if no motion for rehearing were filed.

legal principles set forth in the decisions of the United States Supreme Court when the state court issued its decision. *Id.; Casey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A decision is “contrary to” clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an “unreasonable application” of Supreme Court precedent if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner’s case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000), or “if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Bottoson*, 234 F.3d at 531 (quoting *Williams*, 529 U.S. at 406). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

III. DISCUSSION

For the reasons set forth below, the undersigned finds Petitioner has not shown the state court rulings were contrary to law or resulted from an unreasonable determination or application of facts.

A. Ground One: Trial Court Erred by Allowing the State to Present Investigator's Testimony That Other Clients Had Alleged That Petitioner Engaged in Inappropriate Sexual Conduct During His Massages.

During trial, the State called lead investigator, Sonya Bush, as a witness. Investigator Bush testified that on April 5, 2012, the Defendant voluntarily appeared at police headquarters with his attorney and gave a video recorded interview. ECF Doc. 7-1 at 70-165. The State did not initially offer the recorded interview in evidence or play it for the jury. Instead, the State asked Investigator Bush, “he told you that they basically had sex, right?” and Bush responded in the affirmative. ECF Doc. 7-1 at 77.

On cross-examination, defense counsel asked Investigator Bush if Petitioner had also told her during the interview how the massage turned into consensual sex. *Id.* at 320-21. The State objected on the ground that those statements to the investigator were self-serving hearsay. *Id.* Defense counsel responded that even so, it was necessary to admit them because the investigator’s testimony that Petitioner just said in the interview that they “had sex” was not complete and could mislead the jury. *Id.* at 80-83 & 91. After listening to the parties’ argument, the trial court

determined, for completeness, the jury should be allowed to hear that part of the interview where Petitioner explained the incident. *Id.* at 113. However, at that point, the State argued the jury should be allowed to hear the entire interview. *Id.* at 118-19. The defense did not object, other than to seek redaction of parts of the recording containing attorney-client privilege or references by Investigator Bush to witness tampering.

Thus, with those agreed-upon redactions, the entire recorded interview was played for the jury. On the video, after Petitioner explained the massage routine and insisted that the sex was consensual, the investigator asked him, “Have you ever had sex with any of your clients?” The Petitioner answered, “No.” *Id.* at 135. Then, when the investigator asked, “Why this one?”, Petitioner claimed, “I’ve never had this issue with a client” and stated, “This is really out of character for me to even go there with this client.” *Id.* at 135-36.

When the State resumed its examination of Investigator Bush, the prosecutor asked, “[I]sn’t it true the defendant’s been charged with sexual battery on another client in the course of a massage?” *Id.* at 140. Counsel for the Defendant objected, arguing the State invited a mistrial, that the trial court had already ruled the evidence regarding the charge of sexual battery in a different Leon County Circuit Court case

was not admissible as similar fact evidence,³ that the State's questioning was not a proper form of impeachment, and that it was being offered merely to show propensity and did not go to the Defendant's veracity. *Id.* The State argued Defendant's statements in the video "opened the door" to the State's questions. *Id.* The trial court agreed and allowed the State to inquire about other incidents of inappropriate sexual conduct. *Id.* at 148-50.

When the State again resumed its examination of Investigator Bush, the prosecutor asked if the investigator had received any other complaints of inappropriate sexual conduct during a massage with the Defendant. The investigator informed the jury that one person had filed a police report which referenced 8 women complaining about inappropriate sexual conduct committed by Petitioner during massages, none of which, other than as to the person who filed the report, rose to the level of criminal conduct. Petitioner argues this testimony violated his rights under the Confrontation Clause of the Sixth Amendment and Due Process Clause of the Fourteenth.

³ The State had filed a notice of intent to introduce similar fact evidence, namely a similar charge against Petitioner for sexual battery on another victim, which case was still pending at the time of trial. The defense filed an opposing motion *in limine*. ECF Doc. 7-1 at 36. The circuit court denied the State's motion and granted the defense motion *in limine* under *Williams v. State*, 110 So. 2d 654 (Fla. 1959), finding the other incident was neither material nor similar given the question of consent in the instant case.

1. Petitioner Exhausted This Claim

Respondent argues Petitioner failed to exhaust this issue in his direct appeal because Petitioner couched his claim in his initial brief in terms of state court error. ECF Doc. 7 at 23-24. The undersigned disagrees. “[T]o exhaust state remedies fully, the petitioner must make the state court aware that the claims asserted present federal constitutional issues.” *Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 457 (11th Cir. 2015). A petitioner “need not use magic words or talismanic phrases to present his federal claim to the state courts.” *Id.* A petitioner can exhaust a claim by, for example, “including … ‘the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim [as a federal one].’” *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1351 (11th Cir. 2012) (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)). A petitioner “is not required to cite ‘book and verse on the federal constitution.’” *Id.* at 1352 (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971)). Nor is a court so “draconian or formalistic as to require petitioners to give a separate federal law heading to each of the claims they raise in state court to ensure exhaustion for federal review.” *Kelley v. Sec'y for Dep't. of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004).

The undersigned finds Petitioner met this standard for exhaustion. In his initial brief on appeal, Petitioner specifically referenced the United States Constitution as a basis for his claim in several places. First, he argued, “The [investigator’s] testimony violated Appellant Thorpe’s constitutional right to

confront these alleged accusers. The Sixth Amendment provides: ‘In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’ U.S. Const. amend. VI. See also art. I, § 16, Fla. Const.” ECF Doc. 7-4 at 26-27. He also argued, “Constitutional due process principles prohibit the prosecution from relying on a criminal defendant’s past conduct to prove that the defendant committed the crime in question. See U.S. Const. amends. V & XIV; art. I, § 9, Fla. Const.” Moreover, in the final footnote in the section on this issue in the initial brief, Petitioner argued, “The trial court’s erroneous ruling resulted in Appellant Thorpe being denied his constitutional right to a fair trial. *See* U.S. Const. amends. V & XIV; art. I, § 9, Fla. Const.” *Id.* at 34 n.17. Therefore, the undersigned finds Petitioner made clear the federal nature of his claim and exhausted this claim.

2. Ground One Fails on the Merits

Petitioner argues the trial court erred in allowing Investigator Bush to testify about complaints of misconduct by other women because (a) the State cannot open its own door; (b) the testimony was based on hearsay; (c) the allegations were improper impeachment; (d) the probative value did not outweigh the prejudice; and (e) the error was not harmless. Accordingly, he argues Investigator Bush’s testimony violated his Fifth and Fourteenth Amendment rights.

Because the First DCA affirmed the judgment without issuing a written order, the Court will “look through” the unexplained decision of the First DCA to the last

related state-court decision that did provide a relevant rationale of each claim.⁴ *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The trial judge’s comments and rulings during trial constitute the last decision to provide a relevant rationale, and the Court will presume the First DCA applied the same rationale and apply the deference due under 28 U.S.C. § 2254(d). Although Petitioner has exhausted Ground One, for the reasons discussed below he is not entitled to relief on it.

As an initial matter, a trial court’s evidentiary ruling does not provide a basis for federal habeas relief absent a showing that the ruling affected the fundamental fairness of the trial. *See Sims v. Singletary*, 155 F.3d 1297, 1312 (11th Cir. 1998). A petitioner must show the ruling was more than merely erroneous; it must have had “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (applying the harmless error standard for federal habeas review of constitutional error set forth in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). On federal habeas corpus review regarding a state court’s decision to admit or exclude evidence, the court will “determine only ‘whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial.’” *Hill v. Sec’y, Florida Dep’t of Corr.*, 578 F. App’x 805, 810 (11th Cir. 2014) (unpublished) (quoting *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989)).

⁴ The Court will also “look through” the First DCA’s decision as to Ground Three.

Here, the trial court determined the probative value of allowing Investigator Bush to answer a question about similar charges against him outweighed any prejudicial effect and was necessary to cure what the court determined to be a misleading statement made by Petitioner in the recorded interview. Specifically, the state court concluded Petitioner’s statement that he had not had a similar issue with another client “led [the] jury to believe he’s never had inappropriate contact with anybody else,” ECF Doc. 7-1 at 148, and it “[was] not fair to let the jury think that that statement is necessarily true.” *Id.* at 149-50.

Under the “opening-the-door” doctrine, when a party offers inadmissible evidence before a jury, the court may in its discretion allow the opposing party to offer otherwise inadmissible evidence on the same matter to rebut any unfair prejudice created. *Crawford v. United States*, 198 F.2d 976, 978–79 (D.C. Cir. 1952) (the doctrine rests “upon the necessity of removing prejudice in the interest of fairness”); *see also Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000) (“As an evidentiary principle, the concept of ‘opening the door’ allows the admission of otherwise inadmissible testimony to ‘qualify, explain, or limit’ testimony or evidence previously admitted.”) (quoting *Tompkins v. State*, 502 So.2d 415, 419 (Fla. 1986) and citing *Huff v. State*, 495 So.2d 145, 150 (Fla. 1986)). Although Petitioner argues it was the State, rather than Petitioner who opened the door, the state court’s determination to the contrary did not result in a fundamental error. Petitioner’s case came down to consent, and, regardless of whether the jury heard

about other complaints against Petitioner, the victim testified she did not consent to any of the sexual conduct that occurred, and the jury heard her testimony about her being upset and crying immediately after the event, and of her immediately reporting the incident to the authorities.

Petitioner is therefore not entitled to relief on this Ground.

B. Ground Two: Ineffective Assistance of Trial Counsel (“IATC”) by “Opening the Door” to the Admission of Otherwise Inadmissible Evidence.

Petitioner argues counsel’s insistence on playing for the jury the recording of the investigator’s interview with Petitioner was deficient because the door was thereby opened for the State to introduce evidence that “at least eight women” had accused Petitioner of misconduct. Petitioner raised this ground in his 3.850 motion and appeal of its denial to the First DCA; thus, it is exhausted.

An IATC claim requires a showing that (1) counsel’s performance during representation fell below an objective standard of reasonableness, and (2) prejudice resulted, *i.e.*, that a reasonable probability exists that but for counsel’s unprofessional conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *Id.* at 689. A petitioner bears the burden of proving that counsel’s

performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.* at 688-89.

Strickland's prejudice prong requires a petitioner to allege more than simply that counsel's conduct might have had "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. A petitioner must show a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Bare allegations the Petitioner was prejudiced by counsel's performance are not enough. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th Cir. 1987).

Applying *Strickland*, the circuit court denied relief on this ground because a "review of the entire record clearly demonstrates that defense counsel made a tactical decision to play the recorded statement of Defendant." ECF Doc. 7-9 at 36. Namely, "[t]he playing of Defendant's tape-recorded statement to Investigator Bush gave the defense an opportunity to attempt to establish consent on the part of the victim without subjecting Defendant to cross examination by the State." *Id.* The First DCA affirmed on the same basis. *Thorpe v. State*, 298 So. 3d 1289, 1290 (Fla. Dist. Ct. App. 2020) (citing *Schoenwetter v. State*, 46 So. 3d 535, 554 (Fla. 2010) ("Reasonable decisions regarding trial strategy, made after deliberation by a claimant's trial attorneys in which available alternatives have been considered and rejected, do not constitute deficient performance under *Strickland*."); *see also Bruno v. State*, 807 So. 2d 55, 68 (Fla. 2001) ("Counsel's performance in this case

may not have been perfect, but it did not fall below the required standard.”)). The state courts’ decisions were neither contrary to law nor a misapplication of the facts.

Petitioner’s defense was that he and the victim had consensual sex. To establish this defense, counsel had to either put Petitioner on the stand or have his recorded statement played for the jury. If Petitioner had taken the stand, he would have been subject to rigorous examination by the State. By playing the recording, the jury could hear Defendant’s side of the story without Defendant having to testify.

Relying on counsel’s testimony at the 3.850 evidentiary hearing, Petitioner argues counsel did not make a strategic decision to have the entire recording played; instead, Petitioner argues counsel allowed the entire recording to be played because he did not remember the full extent of Petitioner’s comments regarding not having this issue with anyone other than J.W. Petitioner’s argument, however, overlooks counsel’s testimony that he cannot control what the court does on evidentiary rulings; that is, that he could not control whether the court would allow the follow-up questions to Detective Bush after Petitioner’s words were played to the jury.

In other words, once the State moved to have the entire recording played, counsel was put in a position of having to choose between the risks if all of it were played or if none of it were be played. If counsel chose the latter, he would have no evidence to present to the jury to rebut the victim’s testimony that she did not consent. Thus, counsel chose to have the recording played, knowing he could not predict the state court’s subsequent evidentiary rulings and, also, knowing the state

court had already denied the State's motion to allow evidence of the other criminal charge into evidence (making it more likely the state court would also not allow the follow-up questions to Investigator Bush). Viewed in this context, counsel's decision was not unreasonable simply because it did not turn out the way he had wished.

Favoring one defense strategy over another is almost never a basis for finding ineffective assistance of counsel. "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. Thus, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "Strickland mandated one layer of deference to the decisions of trial counsel. . . . When § 2254(d) was amended by AEDPA in 1996, that added another layer." *Nance v. Warden, Georgia Diagnostic Prison*, 922 F.3d 1298, 1303 (11th Cir. 2019). Given the deference due, it is a "rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 911 (11th Cir. 2011). This is not one of those rare cases. Petitioner is not entitled to habeas relief on this Ground.

C. Ground Three: Trial Court Erred by Denying Petitioner Thorpe's Motion for a Judgment of Acquittal

Petitioner argues the state court's denial of his motion for judgment of acquittal violated the Sixth and Fourteenth Amendments to the U.S. Constitution. He contends that under *In Re Winship*, 397 U.S. 358 (1970), the evidence in his case was insufficient to sustain the jury's verdict of guilty beyond a reasonable doubt because the State failed to present any evidence of a lack of consent to the sexual battery.

As an initial matter, claims challenging a state court's denial of a judgment of acquittal based on sufficiency of the evidence "do not raise a federal constitutional claim and therefore do not state a basis for federal habeas corpus relief." *Luis Agosto v. Sec'y, Dep't of Corr.*, 2019 WL 2904727, at *8 (M.D. Fla. July 5, 2019) (claims the state trial court erred in denying his motion for judgment of acquittal because there was insufficient evidence that the victim sustained "great bodily harm" do not raise a federal constitutional claim). "A state's interpretation of its own laws provides no basis for federal habeas corpus relief since no question of a constitutional nature is involved." *Id.* (citing *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992)). Since the instant claims address whether the evidence was sufficient to prove lack of consent under Florida law, they do not raise federal constitutional issues.

Second, Petitioner procedurally defaulted any federal due process claim by failing to raise it to the trial court. Instead, at the end of the State's case, defense counsel simply argued "the State has not met its burden beyond a reasonable doubt that the victim -- that Mr. Thorpe committed sexual battery, certainly on three counts against [the victim]." ECF Doc. 7-2 at 414. The trial court denied the motion, finding the victim's testimony created a jury question as to whether the State had met its burden of proof on the elements of the crime. *Id.* Because Petitioner did not present a federal due process argument to the trial court when he moved for judgment of acquittal, this ground for relief is not exhausted and Petitioner is not entitled to habeas relief on this Ground.

IV. CONCLUSION

A. Evidentiary Hearing

The undersigned finds that an evidentiary hearing is not warranted. In deciding whether to grant an evidentiary hearing, this Court must consider "whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schrivo v. Landigan*, 550 U.S. 465, 474 (2007). Additionally, this Court must take into account the deferential standards prescribed by § 2254. *See id.* Upon consideration, the undersigned finds that the claims in this case can be resolved without an evidentiary hearing. *See Schrivo*, 550 U.S. at 474.

B. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides: “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” 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).

After review of the record, the Court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also recommended 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.” Rule 11(a), Rules Governing Section 2254 Cases. If there is an objection to this recommendation by either party, that party may bring such 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 petition under 28 U.S.C. § 2254, challenging the conviction in *State v. Thorpe*, 2011-CF-1190, in Leon County, Florida, ECF Doc. 1, be DENIED without an evidentiary hearing.
2. That a certificate of appealability be DENIED.
3. That the clerk be directed to close the file.

At Pensacola, Florida, this 1st day of December, 2022.

s/ Hope Thai Cannon
HOPE THAI CANNON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed **within fourteen (14) days** of the date of the Report and Recommendation. Any different deadline that may appear on the electronic docket is for the court's internal use only and does not control. An objecting party must serve a copy of its objections upon all other parties. A party who fails to object to the magistrate judge's findings or recommendations contained in a report and recommendation waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1.

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FEB 06 2014

IN THE CIRCUIT COURT OF THE **PUBLIC DEFENDER**
SECOND JUDICIAL CIRCUIT, **2ND JUDICIAL CIRCUIT**
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2012-CF-1190

COPY

STATE OF FLORIDA

vs.

VOLUME I
Pages 1 - 211

CHRISTOPHER THORPE,

Defendant.

PROCEEDINGS: JURY TRIAL

BEFORE: THE HONORABLE DAWN CALOCA JOHNSON

DATE: July 2, 2013

TIME: Commencing at 8:37 a.m.
Concluding at 3:51 p.m.

LOCATION: Leon County Courthouse
Tallahassee, Florida

REPORTED BY: VERONICA M. GUTIERREZ, Court Reporter
Notary Public in and for the
State of Florida at Large

VERONICA M. GUTIERREZ
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

1 APPEARANCES

2 REPRESENTING THE STATE:

3 JOHN HUTCHINS, ASSISTANT STATE ATTORNEY
4 OFFICE OF THE STATE ATTORNEY
4 LEON COUNTY COURTHOUSE
5 TALLAHASSEE, FLORIDA 32301

6

7 REPRESENTING THE DEFENDANT:

8 CHRISTOPHER B. NORRIS, ESQUIRE
9 ANTHONY L. BAJOCZKY, ESQUIRE
9 BAJOCZKY, FOURNIER & NORRIS
10 125 NORTH FRANKLIN BOULEVARD
10 TALLAHASSEE, FLORIDA 32302

11

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1 PROCEEDINGS

18 MR. HUTCHINS: There is only one lesser, Judge, and
19 that's simple battery.

20 MR. NORRIS: Did you do that during the charge?

21 THE COURT: We do it --

22 MR. NORRIS: I have never done it.

23 THE COURT: I don't know if you're going to talk
24 about it, though.

25 MR. NORRIS: No. I'm not going to mention it in my
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1 think this is a bad business. So one morning I decided to
2 text the number, and I got an immediate response from the,
3 from the number, and then got in contact with the person.

4 Q Okay. And were you able to schedule a massage?

5 A I couldn't do it -- the defendant told me to do it
6 through the web site, because he has a coupon code, but it was
7 for a Groupon and not the Living Social code that I had. So I
8 had to go back through, trying to contact the per -- the
9 defendant. And when I did, he said that he'll call me back
10 when he's in front of a computer, and then he'll put the code
11 in himself.

12 Q Now, do you remember April the 2nd of 2012?

13 A Yes.

14 Q What day of the week was that?

15 A That was on a Monday.

16 Q Okay. Now, at that time, were you still a student
17 at FSU?

18 A Yes, I was.

19 Q And were you doing any internships?

20 A Yes. I was interning at the Office of the Attorney
21 General.

22 Q Specifically, in what section of the Attorney
23 General's Office were you interning?

24 A The Florida Commission on the Status of Women.

25 Q Okay. And what type of things did you do during

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1 your internship?

2 A I did a lot of research on women issues and I
3 created fact sheets and a comprehensive report on veteran
4 women in the State of Florida. Then we traveled around
5 Florida just to let people know about the issues that we
6 researched about Veterans Affairs and anything dealing with
7 women. And then I helped the commissioners whenever they had
8 anything to do. They asked us for research, so I always
9 researched and sent them the documents.

10 Q Now, directing your attention back to April the 2nd,
11 do you get the address of the business, and do you go there
12 that morning?

13 A Yes. I GPS'd the address and went to the complex
14 where it was.

15 Q And what happened when you arrived at that complex?

16 A When I arrived there, I was driving around, looking
17 for the name of the actual business, but I couldn't find it.
18 So I tried -- I contacted the number that was on the Living
19 Social brochure and no response. But then I text the number,
20 and that's when the defendant called me back and said, did
21 someone call me from this number? But it was a different
22 number that he called me from.

23 And I said, I'm here but I don't see the name of the
24 place. And then he was just like, oh, it's not -- the name of
25 the place isn't on there. It's just -- it's a rehabilitation

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1 center.

2 Q Okay. Did, eventually, he show up that morning?

3 A Yes. He eventually showed up.

4 Q Okay. What happened when the defendant arrived at
5 the location?

6 A He arrived like a -- like, just a couple minutes
7 before the appointment was supposed to start. And he got out
8 of the car, waived at me. And I said, hello and I waived back
9 and then went to proceed to open the, the door. So I stayed
10 in my car because -- since he wasn't there. I figure, you
11 know, I'll just stay and wait until he set up.

12 Q Eventually, did you go into the business?

13 A Yes, I did.

14 Q Okay. Now, this business, it's located inside of
15 Leon County, is that correct?

16 A Yes, it is.

17 Q It's just down here on South Monroe?

18 A Yes.

19 Q Okay. What happened when you entered the business?

20 A When I walked in, I stood at the door until he came
21 back around to greet me at the door. He had a paper that he
22 told me to fill out. And I sat down at the -- like, right by
23 the door there were three little chairs. I sat down and
24 proceeded to fill out the paperwork.

25 Q Now, let me back up for a second. Before you went

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1 into this building, did you call anybody or did you text
2 anyone to tell them that you had arrived at the location?

3 A Yes. I text Veronica.

4 Q And why did you text Veronica?

5 A I have -- me and her is very close and we always --
6 either her or somebody else, I always let someone know where I
7 am or where I'm going and if I reached that place.

8 Q Okay. So he gives you paperwork to fill out and you
9 fill it out; is that correct?

10 A Yes.

11 Q Is there any discussion between you and him, or do
12 you just fill out the paperwork?

13 A There was a discussion. He came and he was just --
14 he kept complimenting me saying, you know, you're very pretty.
15 You know, I like beautiful black women and stuff like -- just
16 kept, like, overly, like, continuously complimenting me. Then
17 he asked me why I was here. And I told him, like, why, that I
18 came for a massage.

19 Q Why did you go for the massage?

20 A Me and Veronica had been doing kickboxing classes
21 and running and stuff. And then all the stress that I'd been
22 going through. So I decided to get a professional massage.

23 Q Now, had you ever had a massage prior to this date?

24 A No. Not a professional massage.

25 Q Now, after filling out the paperwork, did he lead

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1 you back to a massage room?

2 A Yes, he did.

3 Q Now, was this a very small room?

4 A Yes.

5 Q What was in the room?

6 A When I walked in, there were candles. There was,
7 like, one flat bed, like a massage bed in the middle of the
8 room, and then there was a chair in the corner.

9 Q So the room is -- would you say it's about ten feet
10 by ten feet maybe?

11 A I honestly don't know the measurements.

12 Q That's fine. Now, does he ask you to get undressed?

13 A Yes. He -- as he told me to get undressed to the
14 most comfortablest as I can. And I know I've, like -- you
15 know, you watch movies and stuff so you understand, like, when
16 you get a massage what you take off and how you lay on the
17 table.

18 Q So what did you take off?

19 A I took off my bra, my business shirt that I had on,
20 because I was going to my internship, my jeans pants, and my
21 shoes.

22 Q And did you lie down on the table?

23 A Yes. He -- I -- he told me I could either lay on
24 top of the sheet or I could go under the sheet and cover
25 myself appropriately. So I decided to go under the sheet and

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1 just cover myself as I've seen on, like, movies or watching
2 anything.

3 Q Now, what did the defendant say when he came into
4 the room?

5 A When he came back -- like, he knocked and then said,
6 are you ready? And I said, yes, I'm ready. And he came back
7 in the room. And then he said, well, Ms. [REDACTED] you draped
8 the sheet wrong, or whatnot. And I was, like, oh, I'm sorry.
9 You know, I just always thought it goes like that. And so he
10 picked up the sheet, and it was up for a while. Then he put
11 it back down and then tucked it under me.

12 Q And at some point did he start the massage?

13 A Yes, he did.

14 Q Where did he start?

15 A He started on my, my shoulders and, like, my neck
16 area, the top part.

17 Q Okay. Did he work his way down to, eventually, your
18 legs or feet?

19 A Yes. Yes, he did.

20 Q Okay. Let me ask you, Ms. [REDACTED] while you're
21 being massaged, do you ever moan or groan or make any sounds?

22 A No.

23 Q Okay. At some point does the defendant touch you
24 inappropriately?

25 A Yes, he did.

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1 Q Could you please tell the members of the jury about
2 that?

3 A He -- when coming up my right side, he started from
4 the foot and came up. And the first time he got, like,
5 into -- because he separated my legs so that he could get
6 into, like, the part -- into my thigh. He got up there and
7 then he, he touched -- like, his hand grazed my vagina area,
8 and I kind of got like, completely tense. Then he said, calm
9 down, relax. You know, he apologized and said, sorry, that
10 was a mistake.

11 Q Did you say anything to him at that point or did you
12 just --

13 A No. I just --

14 Q -- get tense?

15 A -- my whole body just got tense.

16 Q Okay. So what happened after that?

17 A After that, he massaged back going down. And I was
18 still a little bit tense, but then he, like, you know, stayed
19 away from, like, my thigh area for a while. So I started to
20 relax a little bit. Then he came back up, and he did again,
21 but this time he put his finger in me.

22 Q Now, let me ask you this: You say you're laying on
23 the table; is that correct?

24 A Yes. On my stomach.

25 Q Okay. Did he move your legs apart?

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1 A Yes, he did.

2 Q What did you say when he touched your vagina a
3 second time?

4 A I didn't say anything. I completely just froze.

5 Q Okay. Did you ask him to stick his finger in your
6 vagina?

7 A No.

8 Q Did you consent to that?

9 A No, I didn't.

10 Q Did he say anything when he stuck his finger in your
11 vagina while you're laying on your stomach?

12 A No.

13 Q Did you say anything?

14 A No.

15 Q What were you thinking, Ms. [REDACTED]?

16 A Honestly, I wasn't thinking anything. I just kind
17 of, like, froze and completely, like, shut down. Like, my
18 body just was tense. I was, like, not breathing really hard
19 or anything. I just kind of just shut down.

20 Q At some point does he take his finger out of your
21 vagina?

22 A Yes, he did.

23 Q Can you please tell the members of the jury what
24 happened next?

25 A He -- after he took my fing -- his fingers out, he,

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1 he then -- he started -- he massaged my legs a little while
2 longer, but then he told me to turn over. And when he said,
3 turn over, the first time, I didn't move. I still kind of
4 was, like, frozen. And then he kind of, like, he nudged me
5 and was, like, turn over. And that's when I kind of, like,
6 just started moving. But he -- because it was so small and
7 I'm, I'm not small at all, like, he kind of, like, was nudging
8 me while I turned over.

9 Q Let me go back for a second, Ms. [REDACTED] When you
10 were speaking with the defendant, initially filling out the
11 paperwork, did he tell you that he had done martial arts?

12 A Yes. He was telling me, you know, that he's in
13 martial arts, because I, I told -- I said I was doing the
14 kickboxing. He said he's done martial arts, that he was
15 thinking of doing, like, the kickboxing and stuff inside the
16 build -- like branching out and doing other things.

17 Q Now, let's go back. You say he rolled you over.

18 A Uh-huh.

19 Q Okay. Did he continue to massage you after you were
20 on your back?

21 A While I was on my back, he went -- he stayed on that
22 side and just --

23 Q Well, I'm sorry. Let me interrupt you.

24 A Oh.

25 Q When you roll over, do you still have the sheet?

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1 A Yes.

2 Q Okay.

3 A I have the sheet but when I was turning over, like,
4 I clung to it to, like, cover my breast area, and I just kept
5 clinging to it with just that one hand.

6 Q And you said he continued with the massage; is that
7 correct?

8 A Yes.

9 Q Could you please tell the members of the jury about
10 that?

11 A He stayed on that side, the same side he was on. He
12 massaged -- he moved the sheet so that my thigh will be out.
13 He massaged my thigh and he was, like, moving down. He walked
14 around to the right side, again, but on the opposite side.
15 And then he, he proceeded to -- like, he put his -- he put my
16 toe in his mouth, and then he proceeded to, like, you know, he
17 would separate my legs so that he could massage going up on
18 that side.

19 Q And did he massage up your leg?

20 A Yes.

21 Q And what happened when he got to the top of your
22 thigh?

23 A When he got to the top of my thigh, he separated my
24 thigh a little -- my legs a little bit more so that he could
25 get to the inner part, and he put his finger in me. And he

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1 put his finger in me and then he started to, like, you know,
2 just jabbing his finger inside me.

3 Q Did this hurt?

4 A It hurted, but at this point I wasn't thinking about
5 anything. Like, I was looking on the right-hand side at the
6 wall, just staring at the wall.

7 Q Now, when you say he jabbed his finger in you, do
8 you know how far he jabbed his finger into you?

9 A I know I felt his knuckles. I felt his knuckle on
10 my vagina lips while it was apart.

11 Q Now, you say he jabbed his finger in you. And then
12 did he move it in and out?

13 A Yes. He moved it in and out with the jabbing, kind
14 of in and out.

15 Q Did you say anything to him at this point?

16 A No.

17 Q Did you ask him to do that?

18 A No, I didn't.

19 Q Did you consent to him doing that?

20 A No.

21 Q Ms. [REDACTED], what were you thinking as this was
22 going on?

23 A As this was going on, I was just -- like, at this
24 point, I was staring at the wall. And I was hoping that he
25 was -- he'll realize that I'm completely, like, responsive and

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1 I'm uncomfortable and he'll just stop. But I didn't say
2 anything, and I just kept, like, staring at the wall, like,
3 hoping that it will just be all over.

4 Q Were you afraid of the defendant?

5 A Yes. He's a big guy.

6 Q At some point did he stop jabbing his finger in and
7 out of your vagina?

8 A Yes.

9 Q Can you please tell the members of the jury what
10 happened next?

11 A After he stopped jabbing his finger in and out, he
12 was in between my legs, but my legs wasn't separated, like,
13 as, like, far, so he opened my legs a little bit more. My
14 legs kind of, like, bounced back to, like, in a -- like, when
15 you open it, it kind of bounced back. So he opened it again
16 and, like, held it down for a while until, like, my nerves
17 kind of just like -- I shut down all over again. And he
18 proceeded to, like, move my underwear and gave me oral.

19 Q Now, did you ask him to do that?

20 A No, I did not.

21 Q Did you consent to him doing that to you?

22 A No.

23 Q And when you say he gave you oral, did he lick your
24 vagina?

25 A Yes. He was, like, licking, like, around the clit

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1 area and just -- that's usually, like, just where he was, just
2 around the clit area, just, like, licking.

3 Q And what were you thinking as this was going on,
4 Ms. [REDACTED]

5 A I wasn't thinking. Like, I just kept staring at the
6 wall. And I just, like -- that's it. I just kept staring at
7 the wall.

8 Q You never looked at him; you just stared at the
9 wall?

10 A I couldn't, I couldn't see him, because my breasts
11 were so large. And when I was laying on my back, the only
12 thing I could see is his shadow off the wall because of the
13 candle that was there. That was the only thing I could see,
14 because I couldn't, I couldn't look down and see him.

15 Q At some point did the defendant stop performing oral
16 sex on you?

17 A I'm sorry. What was that?

18 Q At some point did he stop performing oral sex on
19 you?

20 A Yes.

21 Q What happened next, Ms. [REDACTED]?

22 A After he stopped performing oral sex, he got up and
23 then he kept coming closer. And I can see it from the -- his
24 shadow on the wall. And he kept, like, coming closer and
25 coming closer. When I was able to see his face, I reached out

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1 and pushed against his sweatpants. And I felt a bulge on the
2 side of his sweatpants. But when I pushed against it, like,
3 he didn't move, he didn't flinch, anything. Like, I was
4 looking at him this time. And he kept coming closer and I
5 reached out, again, to push again -- against the sweatpants.

6 Q So you were trying to push him off of you?

7 A Yes. Push him away.

8 Q Were you trying to resist him?

9 A Yes.

10 Q Now, you said, the second time you pushed, you felt
11 skin.

12 A Yes. The second time I put -- like, I reached out
13 and I cupped my hand to where I knew that bulge was to try to
14 push, again, and all I felt was complete skin.

15 Q Now, did you ask him to take his pants off?

16 A No.

17 Q What were you thinking at this point when you
18 realized the defendant had his pants off and you were alone
19 with him in this room?

20 A Well, when I looked at him and I realized that his
21 pants was off, I was, like -- in my head, that's when, like,
22 it really hit me. I was, like, he's going to do this, like,
23 he -- he's going to completely do this. And that's when I
24 shouted out.

25 Q Would you please tell the members of the jury what

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1 you shouted?

2 A I shouted out, do you have a condom?

3 Q And what did the defendant do when you said that,
4 ma'am?

5 A He smirked and reached over on the bed and picked up
6 a condom off the bed. That wasn't there when I first laid
7 down.

8 Q So there was a condom actually lying on the massage
9 table next to you?

10 A On the massage table that wasn't there before.

11 Q And you didn't put that condom there; is that
12 correct?

13 A I didn't put that condom there.

14 Q The only -- the two of you were in that room; is
15 that correct?

16 A Yes.

17 Q Now, you say he smirked at you.

18 A It, it was this -- like, he just smirked and kind
19 of, like, just reached over and just picked up a condom as
20 if -- as in, like, there was no words, no nothing, just this,
21 this smirk.

22 Q At any point during any of this, ma'am, are you
23 moaning or groaning?

24 A No.

25 Q Are you gyrating your hips?

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1 A No.

2 Q Or meeting his force with your force?

3 A No. I was completely, like, frozen, for the most
4 part.

5 Q What did the defendant do after he reached for the
6 condom?

7 A He reached for my -- the condom and then he went
8 ahead and -- in my head, I thought he was, he was going to
9 have to leave to go get a condom. And that's when I was,
10 like, you know, I would, I would probably just grab my stuff
11 and leave.

12 But because it was already there, he reached over
13 and used his other hand, because there was one hand that was
14 already on my leg. But when he reached over for the condom,
15 he was standing in between my leg. One of my legs was already
16 off, like kind of off of the table, because he separated it.
17 And he proceeded to put on the condom, but he used the other
18 hand that was holding my leg to play with my clit area.

19 Q Did you ask him to do that?

20 A No.

21 Q Did you consent to his doing that?

22 A No.

23 Q After the defendant placed the condom on his penis,
24 what happened next, Ms. [REDACTED]?

25 A He got closer enough to penetrate me, not cli --

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1 like, he stood up the whole time, because I was already half
2 off the table.

3 Q One of your legs was off the table; one of them was
4 off.

5 A Yes.

6 Q And he was in between; is that correct?

7 A And he was in between. So he got close and he
8 proceeded to have sex with me.

9 Q Okay. Now, did you consent to that?

10 A No.

11 Q Did you ask him to do that?

12 A No.

13 Q Was this sex against your will?

14 A Yes.

15 Q Did you say anything to him at this point,

16 Ms. [REDACTED] ?

17 A No. Not after I asked about the -- do you have a
18 condom? I just completely shut down. Like, I just turned
19 back and I stared into the wall and just shut down.

20 Q You asked him, do you have a condom? Is that the
21 only thing you said once the massage began?

22 A No. Before -- even before he put his finger in me
23 or he touched me, he was massaging my leg, and the oil got hot
24 because he was rubbing. I didn't even really say anything
25 about that until he started blowing on my leg, where he was

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1 rubbing with the oil. And he said, is that okay? And I said,
2 yes, that's okay.

3 Q So when the oil on your leg heated up, you
4 basically -- he blew on it and said, that's okay?

5 A Uh-huh.

6 Q Were those the only two statements you made to him
7 while you were in that room?

8 A On the massage table?

9 Q On the massage table.

10 A To my recollection right now, yes.

11 Q Now, did the defendant penetrate your vagina with
12 his penis?

13 A Yes.

14 Q And did he ejaculate?

15 A I did not see anything. Like, I know he said he was
16 done and he pulled out and started to clean himself up and to
17 leave the room.

18 Q Does he say anything to you at that point?

19 A He turned, he asked me do I need a, a rag? He takes
20 a rag out the cabinet, wipes his mouth. And then I didn't say
21 anything or I didn't respond. And he just drops the rag on
22 the table and proceeds to walk to the door. He turns around
23 and says, you know, you truly are a beautiful black woman and
24 closes the door behind him.

25 Q And what do you do once you're finally alone in this

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1 room?

2 A I, I literally -- I got off the table and it wasn't
3 as if I jumped off the table. I just kind of, like, moved off
4 the table. I took off my underwear, and I had a Girl Scout
5 cookie box in my bag. I threw it in and I dragged on my jeans
6 and put on my bra and my shirt. And I put on one shoe and
7 grabbed my bag. The other shoe was in my hand, so I was
8 walking to the door while I was putting that on.

9 Q Now, when you got to the door, was the door locked?

10 A The door that I was in, it was closed but not
11 locked. Like, I opened the door.

12 Q The door to the massage room, you opened that?

13 A Yes. I opened that and I proceeded to look out. I
14 didn't know which way he went, because he kind of closed it
15 while he was standing in the frame. So I looked to the left
16 and I noticed that there was a light in the back part, or
17 whatnot, where I thought -- I think it was the bathroom. And
18 I just went to the, I went to the left to go to the door that
19 I was coming out of.

20 Q To the front door?

21 A To the front door.

22 Q The door you came in?

23 A Uh-huh.

24 Q Now, when you get to that door, do you push it to go
25 out?

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1 A Yes. I push it and it was locked.

2 Q Now, had you locked that door when you came in?

3 A No. We walked in and it was already open.

4 Q Okay. Now, the type of lock that's on this door, is
5 it just one of those where you turn the knob and it unlocks
6 and then you're able to push it?

7 A Yeah. It had a bar and a little knob thing right
8 under it.

9 Q Okay. So you could just turn that --

10 A Uh-huh.

11 Q -- and push it?

12 A Yes.

13 Q Now, were you reaching to unlock that door?

14 A Yes. I was certain -- because it was so early in
15 the morning -- like, you could see outside, but inside it was
16 pretty dark. So I was, like, feeling to reach for the knob to
17 open the door.

18 Q At some point did the defendant approach you --

19 A Yes.

20 Q -- while you were at the door?

21 A He walked up. I didn't even hear him behind me. He
22 walked up and he stood on that side where the door -- the knob
23 is, and held his hand on the bar.

24 Q Now, again, were you afraid of the defendant or
25 intimidated by his size?

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1 A Yes.

2 Q What, if anything, did he say to you while you were
3 standing there?

4 A While he was standing there, he, he started engaging
5 in conversation, just asking me, you know, just things like,
6 oh, what school do you go to? And then I have a lanyard of
7 the organization that I'm in. And he saw it and he was, like,
8 oh, you're in SISTUHS. And, you know, he was saying that he
9 knew, he knew other people that are in SISTUHS. He did say
10 that he met people that had my same name and they were so
11 nice -- they were nice women and just, like, engaging in small
12 talk while he was standing there in front of the door.

13 Q Now, at this point what were you thinking? I mean,
14 what was your mindset at this point?

15 A I just wanted to leave. I want to get out of there.
16 Like, I just -- I started looking at my car and just, like,
17 looking outside the window. And then he was talking to me and
18 I'm, like, looking down, looking away. But I was just, like,
19 mainly focusing on looking outside.

20 Q Now, at some point did he open the door?

21 A Yes. He eventually opened the door. There was a
22 car driving back and forth, and he said, that might be my next
23 person, or whatnot, that might be in the need -- need of my
24 same services.

25 Q Now, was there somebody standing outside, a male?

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1 you -- did you speak with her there, or did you ask her to
2 meet you somewhere?

3 A I asked her if she would be willing to come back to
4 the police department to do a recorded interview, which she
5 agreed with.

6 Q And did she in fact agree to do that?

7 A Yes, she did.

8 Q And do you recall where this recorded interview was?
9 Was it in a, in a interview room?

10 A Yes. It was in the -- Criminal Investigations
11 Division has two different interview rooms. I believe it was
12 in Interview Room No. 1.

13 Q And you recorded -- the entire conversation was
14 recorded --

15 A Yes.

16 Q -- is that correct?

17 Okay. Now, are you aware of the relative sizes of
18 the victim in the case versus the size of the defendant?

19 A Yes.

20 Q Okay. Is there a great difference there?

21 A Yes.

22 Q All right. Now, at some point did the defendant in
23 the case agree to come in and speak with you?

24 A Yes.

25 Q Okay. And did you make him aware of his Miranda

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1 rights?

2 A Yes, I did.

3 Q And was Mr. Norris actually with him when he came in
4 to speak with you?

5 A Yes.

6 Q Did he provide you a statement?

7 A Yes, he did.

8 Q Did he say that, basically, that they had sex?

9 A Yes.

10 Q Now, in conducting your investigation, did
11 Ms. [REDACTED] contact you the next day?

12 A Yes.

13 Q Okay. Why did she contact you?

14 A She contacted me and said that she had received a
15 voice mail from Mr. Thorpe.

16 Q And did you have an opportunity to hear that voice
17 mail?

18 A Yes, I did.

19 Q Did the defendant ask her not to get law enforcement
20 involved?

21 A Yes.

22 Q Did he want to meet with her and see if he could
23 work it out with her?

24 A Yes.

25 Q Now, do you see the person here in court today that

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1 told you that he basically engaged in sex with the victim in
2 the case?

3 A Yes, I do.

4 Q Can you please point to him and identify one article
5 of clothing?

6 A Yes. It's Mr. Thorpe in the dark suit in the
7 middle.

8 Q Okay.

9 MR. HUTCHINS: No further questions, Your Honor.

10 THE COURT: Mr. Norris, do you have any questions?

11 MR. NORRIS: Yes, ma'am.

12 CROSS-EXAMINATION

13 BY MR. NORRIS:

14 Q Good afternoon, Investigator Bush.

15 A Good afternoon.

16 Q Now, Mr. Thorpe voluntarily came in to give you an
17 interview, didn't he?

18 A Yes, he did.

19 Q And he came on his own free will.

20 A Yes, he did.

21 Q And I was there.

22 A Yes.

23 Q I didn't interrupt you, did I?

24 A No, you did not.

25 Q And he didn't basically tell you they had sex. He

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1 gave you quite an extensive interview, didn't he?

2 A Yes.

3 Q Do you know how long that interview lasted?

4 A I don't recall. But . . .

5 Q Do you have that --

6 A I don't know if I have how long it is.

7 Q Do you have the interview with you today?

8 A A copy of the interview?

9 Q Yeah. Do you have a copy of the interview?

10 MR. HUTCHINS: Objection, Your Honor, relevance.

11 THE COURT: Overruled.

12 BY MR. NORRIS:

13 Q Do you have a copy of the interview, the CD?

14 A I don't know if I do or not. Let me check. Yes, I
15 do.

16 Q What date did you do that interview?

17 A I did that interview, I believe, on the 5th.

18 Q Okay. So he, he came in voluntarily pretty quickly
19 after this happened.

20 MR. HUTCHINS: Objection, Your Honor. Counsel
21 testifying.

22 THE COURT: Overruled.

23 BY MR. NORRIS:

24 Q Correct?

25 A He did not come in the first time he said he was

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1 going to come in, but he came in within a couple days, yes.

2 Q And did he tell you that's because I was --

3 MR. HUTCHINS: Objection, self-serving hearsay, Your
4 Honor.

5 THE COURT: Sustained.

6 BY MR. NORRIS:

7 Q Did he tell you why he didn't come in that day?

8 A Yes.

9 Q Why was that?

10 MR. HUTCHINS: Objection, hearsay.

11 THE COURT: Sustained.

12 BY MR. NORRIS:

13 Q Now, during that interview, Mr. Thorpe explained to
14 you the massage routine, did he not?

15 A Yes, he did.

16 Q And you went over the form that Ms. [REDACTED] filled
17 out?

18 A Yes.

19 Q Can you tell us what Mr. Thorpe -- did Mr. Thorpe
20 tell you that the --

21 MR. HUTCHINS: Objection, hearsay.

22 THE COURT: Let him finish his question,
23 Mr. Hutchins.

24 MR. HUTCHINS: Judge, if he says Mr. Thorpe told
25 you, he's giving a statement out. Anything Mr. Thorpe

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1 said to her is self-serving hearsay and it's improper.

2 THE COURT: Can we take a sidebar, please?

3 (Sidebar discussion held as follows):

4 MR. HUTCHINS: Judge, my objection is if you ask the
5 question, isn't it true my client told you X, Y, Z,
6 you've just gotten the statement out and it's
7 self-serving hearsay. That's my objection.

8 MR. BAJOCZKY: Your Honor, they would be saying
9 that -- if his statement was incriminating, they would be
10 saying, what did he tell you? And in that case, a
11 statement from a defendant is a party, any party in the
12 lawsuit. And usually statements made by parties that can
13 be cross-examination is not considered hearsay. They --
14 how else would they ever get a statement like that in?

15 THE COURT: Well, it's . . .

16 MR. HUTCHINS: Judge, and the defendant can take the
17 stand and tell the officer anything he told her. He can
18 tell his own version of the story, but he can't have his
19 attorney stand up and say, isn't my -- isn't it true my
20 attorney told you this, isn't it true my attorney told
21 you that, isn't it true my attorney?

22 That would be just like us calling in a victim and
23 saying, well, you know, the victim said this, the victim
24 said that without having to put the victim on. It's
25 self-serving hearsay. We can't do it; they can't do it.

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1 THE COURT: It's not an admission by a party
2 opponent, because you're asking the question --

3 MR. HUTCHINS: I'm --

4 THE COURT: -- so you can't get in his hearsay
5 statements.

6 MR. NORRIS: Okay.

7 THE COURT: It's not an admission by a party
8 opponent. They can offer it as a party opponent. Now,
9 under rule of completeness, if something's been taken out
10 of context, you're allowed to complete and put it in
11 context his statement.

12 MR. NORRIS: Well, actually the whole thing --

13 MR. BAJOCZKY: Just having sex --

14 MR. NORRIS: -- she said that they said they just
15 had sex. That's not what's on that video. And so under
16 that, I would like to publish that to the jury and let
17 the jury see that that is not what he said. She said
18 they just -- he said they had sex. That is not what that
19 interview is about. She mentioned a statement of his.
20 And you're exactly correct under the rule of
21 completeness. I offered to him to let the jury see that
22 statement.

23 MR. HUTCHINS: Judge, no. He can't sit there and
24 play his client's statement and not put his client on the
25 stand. That's subjecting him to cross-examination.

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1 MR. NORRIS: You opened the door and said what did
2 he say and she, she -- he told me that they had sex.
3 They opened the door, Judge.

4 MR. HUTCHINS: Judge, that's not opening the door.
5 I've done this lots of times. I specifically tailored
6 the question I asked. And it's not like that issue right
7 there is something that is in contention. Mr. Norris
8 stood up and told him that the evidence is going to be my
9 client had sex with him. He said that in his opening
10 statement. So --

11 MR. BAJOCZKY: If the issue wasn't in contention, it
12 shouldn't have been brought up --

13 MR. NORRIS: He shouldn't have been asked that,
14 that's correct.

15 MR. HUTCHINS: Well, Judge. No. He got up and said
16 it in opening that, you know, my client had sex with him.
17 He said that in opening statement.

18 MR. NORRIS: No. I said that he never --

19 MR. HUTCHINS: That's not going to be --

20 THE COURT: She can't take down both of --

21 MR. HUTCHINS: Sorry.

22 THE COURT: -- y'all talking. So do you want a
23 record or not?

24 MR. HUTCHINS: Judge --

25 MR. NORRIS: The question was asked, Judge, and it

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1 was presented to the jury that that's all he said. That
2 is not what he said.

3 THE COURT: How quickly can you get that back? Let
4 me see if I'm going to.

5 (Brief pause.)

6 MR. HUTCHINS: The question I asked was, did he tell
7 you that he had sex with her. And the answer to that was
8 yes. But that's not opening the door, Judge. That
9 doesn't allow them to sit there and then play this entire
10 taped statement and not subject their client to
11 cross-examination.

12 MR. BAJOCZKY: Could we hear the question?

13 MR. HUTCHINS: Sure.

14 MR. BAJOCZKY: That you asked.

15 THE COURT: Quit talking. She can't look it up.

16 MR. BAJOCZKY: I'm sorry.

17 THE COURT: What do you want her to do, type or look
18 it up?

19 MR. HUTCHINS: And, Judge, the rule of
20 completeness -- sorry.

21 (Sidebar discussion concludes.)

22 THE COURT: Okay. We need to take a brief
23 ten-minute recess.

24 (Jury exits.)

25 THE COURT: You may look.

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1 (Court reporter reads requested material.)

2 MR. NORRIS: Your Honor, let me tell you --

3 THE COURT: Hang on. Are you ready, Ms. Gutierrez?

4 THE COURT REPORTER: Yes, ma'am.

5 THE COURT: Okay. Now, Mr. Norris.

6 MR. NORRIS: To proffer what is going to come next.

7 Did he give you any other details? How long was that
8 statement?

9 MR. HUTCHINS: Judge --

10 MR. NORRIS: Did he tell you about his massage
11 routine? Did he ask -- did he tell you that she rubbed
12 his penis? They opened the door. Otherwise it leaves
13 the impression that all he said to her was we had sex.
14 They opened the door to the statement by asking, did he
15 give a statement? Yes. It should have ended there, not
16 and then did he basic -- just right there, basically.

17 That's a summation trying to sum up the testimony
18 right there. We need the completeness. That's where the
19 rule of completeness comes in. He even summarized his
20 testimony by saying he basically said he had sex with her.
21 It can come in, Judge.

22 MR. HUTCHINS: Judge, this is self-serving hearsay
23 by the defense.

24 MR. NORRIS: He shouldn't have asked it.

25 MR. HUTCHINS: He can take the stand and tell the

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1 jury exactly what he told the law enforcement officer.
2 He can take the stand and tell the jury whatever he
3 wants. But he can't sit there and hide behind his
4 attorney and say, well, I want to introduce all these
5 statements through my attorney and get them in. We did
6 not open the door, Judge. I've done this many times
7 before. And the issue of whether or not they had sex,
8 that's not even something that's in contention. I mean,
9 Mr. Norris stood up in his opening statement and said,
10 basically, yeah, they had sex. He can't get in
11 self-serving hearsay, Judge. He can't.

12 MR. NORRIS: What, what --

13 MR. HUTCHINS: The door was not opened with that one
14 comment.

15 MR. NORRIS: We're not talking --

16 MR. HUTCHINS: The rule of completeness, Your Honor,
17 talks about recordings. If the State has a recording of
18 the defendant and they play only a portion of it, if
19 there's a video or if there's a taped statement and the
20 State only plays a portion of it, the def -- and if we
21 only play a portion of it and it doesn't give a true idea
22 of exactly everything it says -- now, this is a long
23 statement. He can't sit there and bring out every single
24 thing that he told this officer.

25 MR. NORRIS: Your Honor --

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1 MR. HUTCHINS: Because it's self-serving hearsay.

2 MR. NORRIS: -- he could have ended it at, did you
3 give a statement, except he went into one of the
4 elements. He went into one of the elements. It doesn't
5 matter that I argued during opening whether they had sex
6 or not. He, he got into the element and summarized it
7 with the word basically. I don't see how it can't come
8 in now, because, otherwise, the jury's under the
9 impression that he gave this little statement without me
10 being able to ask these, these questions to clarify what
11 the statement was.

12 MR. HUTCHINS: He can ask those questions of his
13 client, Judge. He can take the stand and -- he can get
14 on the stand and tell them whatever he wants.

15 THE COURT: Hang on.

16 MR. NORRIS: That's right. It is -- Mr. Thorpe has
17 the right to cross-examine and confront witnesses before.
18 And, Judge, and they brought up his specific statement
19 and characterized his statement.

20 MR. HUTCHINS: We didn't ask any specifics regarding
21 it, Judge. And, therefore, we didn't open the door. So
22 we can't cross-examine on any specifics if we didn't ask
23 her about anything.

24 MR. NORRIS: Basically, he admitted having sex.
25 Basically is a summarization --

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1 MR. HUTCHINS: That's argument.

2 MR. NORRIS: -- having sex is an element.

3 MR. HUTCHINS: His argument that we should be able
4 to cross-examine, we didn't talk about any of the
5 specifics, Judge. So he can't cross --

6 THE COURT: Okay. Y'all are repeating yourselves at
7 this point.

8 (Pause.)

9 MR. HUTCHINS: Judge, can I step outside for one
10 second?

11 THE COURT: Yeah. But don't go far.

12 MR. HUTCHINS: I'll be right outside.

13 (Pause.)

14 THE COURT: Please have a seat.

15 MR. HUTCHINS: Judge, I have some case law.

16 THE COURT: Sure. *Pulcini v. State*.

17 MR. HUTCHINS: Yes, Your Honor. It is at 41 So. 3d
18 338. It is a Fourth DCA case. It's 2010. Judge, in
19 this case the, the Court held that there was no violation
20 of rule of completeness at trial -- and the trial court's
21 refusal to admit the entirety of defendant's statement
22 for police.

23 In this case, Your Honor, no writing or recorded
24 statement, part thereof is introduced by a party. An
25 adverse party may require him or her at that time to

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1 introduce any other part. Other writing or recording that
2 is fairly -- that in fairness ought to be considered
3 contemporaneously. An adverse party is not bound by the
4 evidence introduced under this section.

5 Now, it talks specifically about a writing or a
6 recorded statement. In this case we haven't introduced a
7 writing on the part of the defendant. And we also have not
8 introduced a recorded statement. It goes on to talk about
9 the purpose of the rule of completeness is to avoid the
10 potential for creating misleading impressions by taking
11 statements out of context.

12 Now, Mr. Norris stood up and said that the issue in
13 this case is consent, not to sex. The victim in the case
14 just testified that the defendant engaged in sex with her.
15 The statement that was asked to the officer was, basically,
16 that they engaged in sex.

17 So that statement, Judge, is not misleading. The
18 issue of whether sex occurred or not, that's not the issue
19 in this case. The issue is consent. And whether or not
20 sex occurred, that doesn't go to consent. So the statement
21 that we brought out, Judge, it's not misleading in any way,
22 shape, or form, which is the whole purpose for the rule of
23 completeness, which, as I said before when I think we were
24 out in the hall, I think it applies to writings and
25 recorded statements which one party has introduce, which we

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1 clearly have not done that in this case. We didn't
2 introduce the taped statement. We haven't introduced any
3 witness statements from the defendant. And, Judge, this is
4 on page 10 on the right-hand side, the specific portion
5 that I'm referring to in the case law.

6 MR. NORRIS: Judge, I'd refer you to *Somerville v.*
7 *State*, 584 So.2d 200. That's a First DCA case. When the
8 State called officer to testify to certain statements
9 made by the defendant, the trial court erred in
10 sustaining an objection to cross-examination concerning
11 the balance of the statement. It's a discretion issue.
12 This whole case, it is about sex. He, he said, again,
13 didn't he, basically, tell you that they had sex? That
14 is summarizing the testimony. I mean, that is, that is
15 misleading --

16 MR. HUTCHINS: No.

17 MR. NORRIS: -- the jury. This tape consists a very
18 detailed statement made by Mr. Thorpe to Investigator
19 Bush saying that they, basically, had -- basically, he
20 told you they had sex is very misleading to the jury. We
21 can't unring that bell now, Your Honor. Now, I've got to
22 either violate another constitutional right of his, which
23 is to remain silent, because the State introduced a
24 statement made by him and characterized it. We have the
25 right now that they said -- he said they, basically, had

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1 sex. No. That's not what this tape is about. I think
2 you need to review the tape. It -- before you excluded
3 it.

4 MR. HUTCHINS: No, you don't.

5 MR. NORRIS: The rule of completeness is that is not
6 what the statement was, basically. They got into the
7 great detail about this sexual encounter. I think it's
8 within the discretion of the trial court. There is a
9 statement before the jury. They know about the
10 statement, and it has been characterized as, basically,
11 they had sex. Now I'm entitled to cross-examine her on
12 it. And then if we get into that, the rule of
13 completeness says we should just view the tape instead
14 of --

15 THE COURT: No. I think that's --

16 MR. NORRIS: -- did he say this, did he say that?

17 THE COURT: -- more of a stretch to review the tape.
18 But I think the tension is here, you know, how many
19 questions you can ask about -- well, let me say a couple
20 of things. It's true that it's not disputed they had
21 sex. But the State's called several witnesses to testify
22 about sex.

23 MR. HUTCHINS: Well, no. We only called one to
24 testify about the sex, Your Honor. I mean --

25 THE COURT: You called an FDLE expert to talk about

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1 the rape kit. I mean, everybody concedes they had sex.
2 So why we needed to hear from an FDLE expert, the nurse,
3 except for the injury part that you talked about. But
4 we --

5 MR. HUTCHINS: Judge --

6 THE COURT: -- had witness after witness talk about
7 the sex part of it.

8 MR. HUTCHINS: Judge -- and all of that is relevant
9 to show that law enforcement did their due diligence.
10 Judge, if I don't present that evidence in a criminal
11 case, then the defense attorney stands up and argues
12 where's the DNA? Why didn't they have this analyzed?
13 Why didn't -- we have to put that on, Judge, to show that
14 law enforcement did what they were supposed to do in this
15 case, that they collected the evidence and it was
16 analyzed. I mean, that doesn't go to the ultimate issue
17 of sex. I mean . . .

18 MR. NORRIS: Did he give a statement? Yes. That
19 should have been the end of it, not the characterization
20 of what he said that got into Mr. Thorpe's statements.
21 They have to be --

22 THE COURT: Okay. Well, there's a tension
23 between -- I agree with the State that you -- the defense
24 is not allowed to get up and admit self-serving hearsay,
25 because it's not an admission by a party opponent. Okay?

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1 But I think, in some respects, the State's opened the
2 door in characterizing the fact and leading the jury to
3 believe that the defendant simply went into law
4 enforcement and said, yeah, we had sex.

5 I think Mr. -- but I don't think, also, that the
6 defense can spend the next however many -- I mean, I think
7 you can say, well, didn't he say that -- didn't he talk
8 about the fact that they had oral sex? Didn't he talk
9 about the fact they had vaginal sex with his penis? Didn't
10 he discuss the fact that -- I mean, those sorts of things,
11 but I don't think you can --

12 MR. NORRIS: Then we're just playing the tape.

13 THE COURT: Well, I don't think -- I don't
14 necessarily know that you can do that. I mean, I might
15 have to review the tape, but I don't think that you
16 necessarily get to admit -- I haven't seen it.

17 MR. NORRIS: That's what the rule is, is about.
18 It's so that it's not --

19 THE COURT: But it's --

20 MR. NORRIS: -- characterized.

21 THE COURT: -- there's a rule of completeness -- I
22 agree. But the rule of completeness also says you have
23 to make sure that it's not -- the point of the rule of
24 completeness is not to mislead the jury, not to get in a
25 bunch of rank hearsay. And that's not subject to any

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1 cross-examination, because it's kind of prior consistent
2 statements coming in through the back door, in a way, if
3 you follow what I'm saying.

4 MR. NORRIS: The defendant has a right to not make
5 any statements --

6 THE COURT: I agree.

7 MR. NORRIS: -- and they introduced one of the
8 statements.

9 THE COURT: But the defense is not entitled to
10 introduce a bunch of self-serving --

11 MR. NORRIS: No, they're not.

12 THE COURT: -- defendant hearsay statements.

13 MR. NORRIS: And there's cases that consider that.
14 And they say that the right of the defendant and to not
15 confuse the jury -- I mean, it's a balancing test within
16 your discretion. I'm just very concerned that they will,
17 they will be misled by that.

18 MR. HUTCHINS: Judge, we didn't characterize how the
19 sex occurred. We didn't characterize the nature of the
20 sex. So to say that we were misleading the jury in that
21 statement is just disingenuous. And the rule of
22 completeness, Judge, talks about misleading the jury.
23 And that's not what we've done at this point.

24 The rule of completeness clearly talks about, you
25 know, if we introduce a part of a written or recorded

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1 statement. We haven't done that at this point. He can't
2 get up and ask a bunch of self-serving hearsay. He can't
3 introduce a bunch of self-serving hearsay, Judge. We've
4 provided a case, a Fourth DCA case. Also, the rule that
5 talks about self-serving hearsay statements from defendants
6 in Ehrhardt's. There's a line of cases that says, you
7 know, he can't introduce those.

8 And again, the rule of completeness, it says, when a
9 writing or recorded statement or part thereof is introduced
10 by a party, an adverse party may require him to, at that
11 time, introduce any other part or any other writing or
12 recorded statement that in fairness ought to be considered
13 contemporaneously. And that's on page 61 of Ehrhardt's,
14 Judge.

15 (Pause.)

16 MR. HUTCHINS: So the statement, basically, they had
17 sex, Judge, I don't think that's misleading to the jury
18 in any way, shape, or form. Now, if I had asked her, you
19 know, did he say we didn't have sex, well, then, yeah,
20 clearly. But I think they can get into -- but that's not
21 misleading the jury, Judge.

22 (Brief pause.)

23 MR. HUTCHINS: And further, Judge -- I know. I'm
24 sorry. I don't mean to interrupt, but we didn't
25 introduce any specific statement made by the defendant.

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1 The question was, did he, basically, tell you that they
2 had sex? She answered yes. That's not a specific
3 statement that was made by the defendant.

4 MR. NORRIS: Your Honor agree that I can now -- if
5 I'm understanding part of your ruling, I can now ask some
6 follow-up cross-examinations about the statement that
7 they opened the door a little bit, correct?

8 MR. HUTCHINS: No. She hasn't made that ruling.

9 THE COURT: Well, that's what I'm inclined to rule.

10 MR. NORRIS: Okay. The state -- the statement is --
11 that I'm going to ask Investigator Bush, did he admit to
12 having sex? That's not even what, what happened. They
13 went through what is a massage routine, how did you
14 start, when you met Ms. [REDACTED]. I've got to clear all
15 that up so the jury doesn't think that he comes in and
16 just says -- and then what if it's inconsistent?

17 MR. HUTCHINS: Judge, clearly --

18 MR. NORRIS: I mean, we'll cross that bridge when we
19 get there, and then we may have to end up having to play
20 the tape anyway.

21 MR. HUTCHINS: Clearly, that's improper. We didn't
22 touch that, so, I mean, to get into the fact that they
23 talk about massage and all the other stuff, the victim's
24 testified to that. So we didn't even -- you know, the
25 only statement that we ask is, basically, did they have

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1 sex? So the conversation before massage and draping
2 shouldn't be able to allowed -- they shouldn't be allowed
3 to introduce any of that stuff, Judge.

4 MR. NORRIS: I have to ask, Judge. Now I have to --

5 THE COURT: I know. I know. Is this -- is Ms. Bush
6 your last witness?

7 MR. HUTCHINS: Yes.

8 (Brief pause.)

9 THE COURT: Okay. Well, Ehrhardt cites the case of
10 *whitfield v. State*, First DCA, 2006 at 933 So. 2d, 1245,
11 which I'd have to pull the case and read it. Noting that
12 while 90.108, rule of completeness, applies to writings
13 and recorded statements, Courts have applied the
14 principle to verbal communications. When the State
15 introduced inculpatory statements made by the defendant,
16 rule of completeness required that other parts of
17 defendant's statement be admitted, which were
18 exculpatory, since fairness required that the jury hear
19 that portion of the statement which otherwise -- which
20 was otherwise inadmissible hearsay.

21 So I think, at this point, what we probably need to do
22 is probably just break for the day and let me research this
23 issue to determine if and how far the defense is going to
24 be allowed to go and if I ultimately find that the State's
25 opened the door, because the officer's been called. She

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1 was asked about the defendant coming and giving the
2 statement. And then the summary of, basically, so he came
3 in and told you that they had sex. I mean, I got the
4 point. So the question is, is that enough to open the door
5 to at least some additional cross-examination of -- is it
6 Detective?

7 THE WITNESS: Investigator.

8 MR. NORRIS: Investigator.

9 THE COURT: Investigator Bush and I don't want to
10 make the wrong decision but --

11 MR. NORRIS: I have a witness here that cannot come
12 tomorrow. Can we take her out of order?

13 Mr. Hutchins, do you . . .

14 MR. HUTCHINS: Well, Judge --

15 THE COURT: Well, we scheduled this for two days.

16 MR. HUTCHINS: I mean, we hadn't closed our
17 case-in-chief yet, Judge.

18 THE COURT: I understand. I, I will say this. I'm
19 inclined to let the defense at least ask some sort of
20 questions to at least not leave with the jury that the,
21 that the defendant came in and, basically, said, yeah, we
22 had sex and that's it, if in fact the interview was much
23 longer. I haven't seen the interview, but I -- how long
24 was it?

25 MR. NORRIS: Long, 20, 30 minutes.

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1 MR. HUTCHINS: It's not that long.

2 THE WITNESS: I'm sorry. I don't know. I would
3 have to . . .

4 THE COURT: Well, whatever. If it's --

5 MR. HUTCHINS: What questions would you be inclined
6 to allow him to ask at this point?

7 THE COURT: Well, I'd first like to know which
8 questions Mr. Norris wants to ask. But I would be
9 inclined, so we don't leave the jury with the wrong
10 impression, that the defendant came in, he talked about
11 his business -- what kind of business. He talked about
12 they -- what kind of sex they had.

13 MR. NORRIS: Can I proffer some --

14 THE COURT: How long the -- I mean, what questions
15 do you want to ask, Mr. Norris? I mean, I don't think,
16 at this point, I would be inclined to play the whole
17 recording, because I'm sure portions of it don't -- if
18 anything, the State opened the door to the sex part.

19 MR. HUTCHINS: And that's the only part, Judge.

20 THE COURT: Okay.

21 MR. HUTCHINS: I think --

22 THE COURT: So questions of that nature.

23 MR. NORRIS: Well, then, then -- but the sex is
24 intertwined with the massage is the problem. Mr. Thorpe
25 starts with the massage routine. He talks about how

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1 Ms. [REDACTED] was moaning, moaning abnormally for a
2 massage, which the State has asked about that, too, asked
3 the vic -- Ms. [REDACTED] that. They got to the part with
4 the oil, where she agreed about the oil. we don't
5 even -- we can skip all the form.

6 MR. HUTCHINS: Well, Judge.

7 MR. NORRIS: We've gone through that. Let me, let
8 me -- then when -- he also talked about her using his
9 foot to massage his penis [sic], talked about how she
10 continued to moan, that she stuck her butt up in the air.
11 And so he touched her, that he then stopped the massage,
12 told her to turn over, and started again on top of her
13 shoulders.

14 This isn't just having sex, because -- I mean, let's
15 talk about the -- you know, they're -- it's massage
16 therapist. So he kind of reset the routine, started again
17 at the top, they went down, same moaning. He talks about
18 fingering her, giving her oral sex, and then the sexual --
19 you know, completing the sexual act. That's not us just
20 having sex when you go for a massage.

21 I mean, there's some -- they're very specific things
22 there. But it's a, it's a portion of the tape. It's not
23 the entire tape where he describes just the sexual conduct.
24 And now I've got to ask her about that stuff instead of
25 leaving the jury the impression that he wanted -- told her,

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1 oh, we just had sex.

2 Well, it wasn't that simple. Some of it, in Mr.
3 Thorpe's view, was initiated by Ms. [REDACTED] by the
4 moaning, by the touching of his penis, by the, you know,
5 raising her butt in the air. That isn't just having sex.
6 Now that that was said, I have to -- I mean, I have to ask
7 her those questions now, Judge. He didn't just, we just
8 had sex. He told you that he was massaging her and she
9 started moaning and that that moaning was not normal,
10 correct? Correct. He told you that she stuck her butt in
11 the air when you would get close to her vaginal area; isn't
12 that correct? Yes. And you touched her and he told you
13 that he touched her there. Yes. He also told you that he
14 stopped the massage at that point.

15 Now, he also -- I mean, these are and I'll go in line
16 with what he says happened, not about the massage therapy,
17 what happened afterwards, or any of that, just the portion
18 about the sex. Because it wasn't just the normal sex. I
19 mean, this evolved as a -- during a massage.

20 MR. HUTCHINS: Well, Judge, there's a double hearsay
21 issue if he's going to try to ask this officer about
22 statements that the victim said to this defendant. So --

23 MR. NORRIS: Then you shouldn't have asked.

24 THE COURT: Well, you can't get in double hearsay
25 that way, Mr. Norris.

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1 MR. NORRIS: I'm not getting into double hearsay.

2 THE COURT: You can't get in what she told --

3 MR. NORRIS: Oh, what she said to him. No, I won't
4 do that.

5 THE COURT: Right.

6 MR. NORRIS: Just what he said happened. And I'm
7 going to --

8 THE COURT: But he can't testify about what he told
9 Officer Bush the victim said.

10 MR. NORRIS: That's right.

11 THE COURT: Because that would be hearsay.

12 MR. NORRIS: Uh-huh.

13 (Pause.)

14 MR. HUTCHINS: Well, Judge, I would suggest that
15 Mr. Norris proffer the specific questions he wants to ask
16 and that way you can rule on them and maybe we can finish
17 up.

18 MR. NORRIS: Huh-uh. I just proffer my questions
19 now and then maybe we'll come back and -- I'm not
20 understanding what you're saying.

21 THE COURT: Well, I think he wants me to rule
22 today --

23 MR. HUTCHINS: Right.

24 THE COURT: -- so we can finish up with Investigator
25 Bush, but I don't know if I'm going to be able to do

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1 that.

2 MR. NORRIS: Then -- yes. Thank you. I'm not going
3 to . . .

4 THE COURT: Well, here's another case. Are you
5 ready, Ms. Gutierrez?

6 THE COURT REPORTER: Yes, ma'am.

7 THE COURT: I'm just reading amendments out of
8 Ehrhardt on these police cases. But *Sweet v. State*, 693
9 So.2d 644, page 645, rehearing denied. Clarification
10 granted. When officer testified on direct a defendant
11 admitted committing a robbery is an abuse of discretion
12 under 90.108 to prohibit cross-examination concerning
13 whether the defendant had also said that at the time of
14 the robbery he had been smoking cocaine and had a drug
15 problem.

16 *Guerrero*, G-U-E-R-R-E-O, v. *State*, 532 So.2d 75,
17 Florida Third DCA, 1988, when State examined arresting
18 officer concerning portions of conversations with
19 defendant, error to prohibit cross-examination concerning
20 exculpatory statements made by the defendant during the
21 conversation.

22 (Pause.)

23 MR. NORRIS: Yeah, that's exactly . . .

24 THE COURT: Here's *Husseain v. State*,
25 H-U-S-S-E-A-I-N, v. *State*, 805 So.2d 1066. When State

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1 elicited testimony concerning statement made by the
2 defendant at the time of his arrest, it was error to
3 exclude the remainder of the statement on the ground that
4 it was self-serving hearsay. The rule of completeness
5 allows for a defendant to exculpatory out-of-court
6 statements to be admitted into evidence when the State
7 witness has testified to incriminating statements
8 contemporaneously made by the defendant. I guess we
9 could argue whether or not that was an incriminating
10 statement.

11 MR. NORRIS: Well, it --

12 MR. HUTCHINS: Judge --

13 MR. NORRIS: -- one of the elements is sex.

14 MR. HUTCHINS: No.

15 MR. NORRIS: Basically, we had sex, that's
16 inculpatory? The rest --

17 THE COURT: You've conceded that point. So --

18 MR. NORRIS: The fact that I conceded it in opening
19 and he's saying -- those are two totally different --
20 that's not me conceding it in an op -- what I believe the
21 evidence will show, that's not the same as establishing
22 it from an evidentiary standpoint.

23 MR. HUTCHINS: Judge, he basically --

24 MR. NORRIS: Lawyers say it's argument.

25 MR. HUTCHINS: When he -- when an attorney gets up,

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1 basically, in opening statement and says sex happened,
2 sex isn't the issue here, this whole case is about
3 consent, my argument would be to the judge that, you
4 know, the statement that we've introduced, one, is not
5 misleading. And second, it's not, it's not, it's not an
6 exculpatory statement in this situation.

7 I mean, it's, it's a -- it's not really at issue. I
8 mean, there's been testimony from the victim. He's
9 obviously -- he told the officer that they engaged in sex.
10 Had I played the entire statement, then, you know, I'm sure
11 they wouldn't have any objection to that, the fact that it
12 came in that way. But I chose not to do that, because I'm
13 not going to introduce the entire statement.

14 Now, the defendant can take the stand and he can
15 testify and say whatever he wants. But to be able to
16 introduce his entire statement, Judge, is self-serving
17 hearsay and it clearly --

18 THE COURT: I just read cases that say it doesn't
19 matter if it's self-serving hearsay.

20 MR. NORRIS: That's right.

21 MR. HUTCHINS: I understand that, Judge. But I
22 think that's a situation when a statement is introduced
23 out of context, and that is misleading to the jury.

24 MR. NORRIS: That is misleading --

25 MR. HUTCHINS: That's not what's happened here.

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1 MR. NORRIS: That he, basically, told you they had
2 sex.

3 MR. HUTCHINS: Okay. We didn't characterize
4 the sex --

5 MR. NORRIS: Just watch the video. You'll -- I
6 have --

7 MR. HUTCHINS: If I could finish, Judge, and . . .

8 MR. NORRIS: Go ahead, Mr. Hutchins.

9 MR. HUTCHINS: We didn't characterize whether the
10 sex was forced. We didn't characterize the nature of the
11 sex. We didn't characterize whether it's penile. We
12 didn't characterize whether it was oral. We didn't
13 characterize whether it was digital penetration. So we
14 didn't really comment on the evidence.

15 I mean, Mr. Norris, as you said, Judge, he stood up
16 and said that sex isn't the issue here. So how that is --
17 how that harms their case, Judge, I don't see it. I don't
18 think it's, it's a statement that is misleading to the jury
19 at all, especially when defense attorney stands up and
20 says, you're going to hear this stuff happened in this
21 case, and the issue is consent, whether it was consensual.
22 And the elements of the ca -- and the elements which
23 Mr. Norris keeps referring to of the crime are the age of
24 the victim, whether it was without her consent, and whether
25 the defendant digitally penetrated her vagina, whether he

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1 performed oral sex on her, and whether it was
2 penile-vaginal sex.

3 Now, how the statement that we had sex goes to one of
4 those essential elements, Judge, I don't exactly see. I
5 mean, Mr. Norris has argued, oh, well, that's no -- now
6 that sex is an element. But we didn't characterize the
7 nature of the sex and we asked this specific limited
8 question, Judge, because it wasn't something that wasn't
9 even at issue in the case.

10 MR. NORRIS: I just want to repeat myself, again.
11 Basically, he said we had sex is characterizing sex,
12 especially when you say that to a police officer. It's a
13 whole lot different than giving a very detailed
14 interrogation, very detailed narrative.

15 MR. HUTCHINS: I don't see --

16 MR. NORRIS: That is misleading in a rape case. And
17 to say otherwise is -- that's disingenuous.

18 MR. HUTCHINS: How is it a characterization on the
19 sex to say that, basically, they had sex? How is that a
20 mischaracterization on what happened? I mean, that's a
21 very neutral statement.

22 (Pause.)

23 THE COURT: Well, let me be clear what you're
24 arguing, Mr. Norris. Are you arguing whether or not to
25 ask Investigator Bush questions related only to the sex

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1 part of the interview, or are you asking to publish that
2 part of the recording?

3 MR. NORRIS: Both. Other parts of the writing or
4 statement which relate to the same subject and tend to
5 explain the meaning of the portion already received are
6 admissible under 90.108. I want to cross-examine her and
7 I -- and then I think at that point the rule of
8 completeness would -- the tape is the best evidence of
9 what he, of what he said, to explain the meaning of the
10 evidence already admitted, admitted sex.

11 MR. HUTCHINS: Judge, we haven't introduced the
12 tape. It's not in evidence. I don't see how he can
13 publish it.

14 MR. NORRIS: They introduced his statement.

15 MR. HUTCHINS: We didn't introduce the tape, Judge,
16 which is what you asked about.

17 MR. NORRIS: You can't mention it and not -- the law
18 says you can't mention it and just because you didn't use
19 the tape, say all the substance of the tape. But they
20 characterize the statement made by him a written or
21 recorded statement. It is recorded and they
22 characterized it as, basically, he said we had sex.

23 MR. HUTCHINS: It's not a characterization, Judge.
24 I mean --

25 THE COURT: Well --

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1 MR. HUTCHINS: It's . . .

2 MR. NORRIS: How you construe the word basically.

3 THE COURT: Okay. Well, at this point, I'll go let
4 the jury go for the day, because even if I allow the --
5 even if I decide that the -- we can play the portion of
6 the CD that has the -- whatever he says about the sex,
7 based on what I've heard -- and I haven't reviewed the
8 recorded statement, but there's also double hearsay in
9 there that has to be redacted out, right?

10 MR. NORRIS: Yes, ma'am.

11 THE COURT: So I'll read -- I'm going to have to
12 read up some more on this tonight and figure out what the
13 correct ruling is so we don't have to do this over.

14 MR. NORRIS: Would you like a copy of the interview?

15 THE COURT: I guess I'm going to have to look at it.
16 So let me bring the jury in and let them go. We can come
17 back and start up at 8:30 in the morning.

18 MR. NORRIS: Oh, yeah, Judge. We had that witness.
19 Can we call the witness out of turn?

20 THE COURT: Well, I don't know. If Mr. Hutchins
21 doesn't agree to call the witness out of order, then the
22 answer would be no.

23 MR. BAJOCZKY: Can you call the witnesses in, Your
24 Honor, and instruct them that they must be here tomorrow?

25 THE COURT: Sure. They're under subpoena?

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1 MR. BAJOCZKY: Yes.

2 THE COURT: I would be happy to.

3 MR. BAJOCZKY: Okay.

4 (Jury enters.)

5 MR. NORRIS: May I have permission to approach? I
6 have shown this to Mr. Hutchins. It's the -- it's all.

7 MS. LOWE: We have one that is not here.

8 MR. NORRIS: Who's that? She's not here? Go ahead.

9 THE WITNESS: She was in that hallway.

10 MS. LOWE: She was in that room?

11 THE WITNESS: Yes.

12 (Jury enters.)

13 THE COURT: Please have a seat. Ladies and
14 gentlemen, I'm sorry we kept you waiting longer than I
15 anticipated, but at this time I think it would be better
16 use and more efficient and productive if we go ahead and
17 let you-all recess for the day instead of having you wait
18 any longer. And I'll go ahead and let you go about your
19 business today and ask you to be back here at 8:30 in the
20 morning.

21 And, again, with the reminder please don't do any
22 research, watch TV, newspapers, read newspapers, or
23 anything, and no discussion with anybody about this case.
24 Okay?

25 All right. If you'll just leave your notes, we'll

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1 secure those and lock them up overnight. And I'll see you
2 at 8:30 in the morning.

3 (Jury exits.)

4 THE COURT: All right. Have a seat.

5 Investigator Bush, I guess you will come back
6 tomorrow.

7 THE WITNESS: There's this.

8 THE COURT: We'll get that to the clerk.

9 THE WITNESS: Thanks.

10 THE COURT: We also have witnesses here for the
11 defense, Mr. Norris?

12 MR. NORRIS: Yes, ma'am.

13 THE COURT: Okay. So this was -- trial was
14 scheduled for two days. I know that we were hoping to
15 get done with most of the testimony today, but that's
16 just not possible. So I understand that there are
17 witnesses for the defense that are subpoenaed to be here
18 today. You are directed to be -- you're still under
19 subpoena, and you are going to need to report tomorrow
20 morning to testify in this matter. That is a Court
21 order. Okay?

22 So you'll need to make arrangements with work. If you
23 need a note that you're required to -- if you need a note
24 you're required to be here by Court order, then we'll be
25 happy to accommodate you. But you do need to report back

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1 here tomorrow morning. Okay? All right. Thank you. You
2 can step outside.

3 (Prospective witnesses exit.)

4 THE COURT: Okay. Well, I'll try to do as much
5 reading tonight as I can so I'll have a ruling in the
6 morning.

7 MR. NORRIS: And I'll redact. Judge, can -- we can
8 leave stuff in the courtroom? I'll ask the bailiffs.

9 THE BAILIFF: Yes, you may.

10 THE COURT: All right. We'll see you-all in the
11 morning. If we could be here about 8:20.

12 MR. NORRIS: Thank you, Your Honor.

13 (Court in recess; continues in Volume II.)

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CERTIFICATE

STATE OF FLORIDA:

COUNTY OF LEON:

I, VERONICA M. GUTIERREZ, Court Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED this 31st day of January, 2014.

Veronica M Gutierrez

VERONICA M. GUTIERREZ
OFFICIAL COURT REPORTER
LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301

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IN THE CIRCUIT COURT OF THE PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT, IN 2nd JUDICIAL CIRCUIT
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2012-CF-1190

COPY

STATE OF FLORIDA

VS.

CHRISTOPHER THORPE,

Defendant.

VOLUME II
Pages 212 - 358

PROCEEDINGS: JURY TRIAL

BEFORE: THE HONORABLE DAWN CALOCA JOHNSON

DATE: July 3, 2013

TIME: Commencing at 8:30 a.m.
Concluding at 3:18 p.m.

LOCATION: Leon County Courthouse
Tallahassee, Florida

REPORTED BY: VERONICA M. GUTIERREZ, Court Reporter
Notary Public in and for the
State of Florida at Large

VERONICA M. GUTIERREZ
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

1 APPEARANCES

2 REPRESENTING THE STATE:

3 JOHN HUTCHINS, ASSISTANT STATE ATTORNEY
4 OFFICE OF THE STATE ATTORNEY
4 LEON COUNTY COURTHOUSE
5 TALLAHASSEE, FLORIDA 32301

6

7 REPRESENTING THE DEFENDANT:

8 CHRISTOPHER B. NORRIS, ESQUIRE
9 ANTHONY L. BAJOCZKY, ESQUIRE
BAJOCZKY, FOURNIER & NORRIS
125 NORTH FRANKLIN BOULEVARD
10 TALLAHASSEE, FLORIDA 32302

11

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1 PROCEEDINGS

2 THE BAILIFF: Court is now in session.

3 THE COURT: Please have a seat.

4 Ms. Gutierrez, are you ready?

5 THE COURT REPORTER: I am. Thank you.

6 THE COURT: So we left off yesterday with this issue
7 of Investigator Bush's testimony. I reviewed the
8 videotaped statement of the defendant last night. I have
9 a couple findings. First, based on the State's
0 questions, I find that the State has opened the door.
1 And based on review of the tape -- CD, if the defense
2 wishes to play 10:22:34 through 10:29:32, Mr. Norris, you
3 may play that with any portions where the defendant says
4 what the victim said deleted.

15 MR. NORRIS: Yeah, that's almost precisely the
16 numbers we had.

17 MR. HUTCHINS: Judge, well, if you're going to allow
18 them to play the tape, then I'm going to ask the entire
19 thing be played. I mean, obviously, I'm objecting to
20 this --

21 THE COURT: Right.

22 MR. HUTCHINS: -- but if -- and I want the record to
23 be clear that they're the ones that are introducing this,
24 that they're the ones that are publishing this.

25 THE COURT: Okay. So that's fine. We can -- I was

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1 limiting it strictly to his testimony about the sexual
2 encounter that he describes during that portion. But if
3 the State wants the whole DVD played, I don't have a
4 problem with that. They can play it.

5 MR. NORRIS: Okay. Except for the portion about
6 witness tampering. It wasn't even --

7 THE COURT: Right.

8 MR. NORRIS: -- charged.

9 THE COURT: Except for that portion. But this is,
10 this is the further ruling of the Court, Mr. Norris. If
11 you want, if you-all want -- based on the Court's ruling,
12 if we're going to play the DVD, then when Investigator
13 Bush gets up, you're not allowed to then start asking her
14 all those questions.

15 MR. NORRIS: No. That's fine.

16 THE COURT: It's one or the other.

17 MR. NORRIS: The tape -- yes, ma'am. I understand.

18 THE COURT: Because I -- that would be --

19 MR. NORRIS: Improper.

20 THE COURT: -- in my mind, too cumulative and
21 redundant to do that. So, at this point, I need to know
22 if you want to stop your cross-examination of
23 Investigator Bush and then call her in your case-in-chief
24 and authenticate the DVD and introduce it.

25 MR. NORRIS: Well, there's some . . .

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1 THE COURT: And ask her any further questions that
2 you want to ask her.

3 MR. NORRIS: Okay. Can you give me just one minute?
4 (off-the-record discussion.)

5 THE COURT: Because if I believe I understand
6 Mr. Hutchins, that was their last witness, the State's
7 last witness, unless there's any rebuttal. But, I mean,
8 in the State's case, correct, Mr. Hutchins?

9 MR. NORRIS: Okay.

10 MR. HUTCHINS: Now, obviously, if they call her, I'm
11 able to ask the officer questions if they play that,
12 because, technically, I haven't had a chance to redirect
13 the witness. He's cross-examining her, so I haven't --

14 THE COURT: Well, he can, he can get up and say he's
15 done cross-examining her. You can ask her whatever
16 redirect questions you want to ask her. If they call
17 her, then of course you're entitled to cross-examination.

18 What do you want to do, Mr. Norris?

19 MR. NORRIS: We want to close and play the tape.
20 We're going to -- I'm going to close my cross-examination
21 at this time. And I've spoken with Mr. Thorpe about that
22 and he agrees.

23 THE COURT: And you agree?

24 MR. HUTCHINS: Well, Judge, I think -- well, I
25 haven't had a chance to redirect my witness. So -- and

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1 here's the thing. If we're going to play the tape, then
2 I need to obviously be able to ask her questions about
3 what he tells her. So, I mean, it's a small technical
4 point, but we haven't closed our case yet. Our case is
5 still open. We haven't rested in front of the jury.

6 I don't have any problem -- I will play the tape
7 through her if you will let me get up and do whatever. And
8 then I think probably I, I should have an opportunity to
9 ask her questions, and that will be that.

10 MR. NORRIS: That is absolutely proper, Your Honor.

11 THE COURT: Okay. Now, who has a redacted version?

12 MR. HUTCHINS: I can go upstairs and do that right
13 now, Judge. The portion that you don't want in are the
14 parts about witness tampering at the end.

15 THE COURT: Witness tampering and there's some
16 statements that the defendant makes on the video where he
17 says what --

18 MR. NORRIS: Ms. [REDACTED] says.

19 THE COURT: -- Ms. [REDACTED] said, which will be
20 hearsay.

21 MR. HUTCHINS: All right. I'll run upstairs.

22 THE COURT: And I don't know if Mr. Norris already
23 has -- did you-all redact --

24 MR. NORRIS: I have it redacted to almost the same
25 time, but that's not the issue now. We spent last

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1 night -- we -- that's what we did.

2 MR. HUTCHINS: If I can have just a few minutes,
3 Judge, I'll be back.

4 THE COURT: Okay. And, well -- and what we'll do
5 when we bring the jury in is we'll, we'll pick up right
6 where we left off yesterday with Mr. Norris'
7 cross-examination.

8 You'll, I guess, say you're finished with your cross.
9 Then you can get up and redirect, Mr. Hutchins. Okay?

10 MR. HUTCHINS: Fine. Yes, ma'am.

11 MR. NORRIS: Okay. As long as I obviously get a
12 chance to follow up on his. I know we're re-, re-,
13 re-ing, and a lot of Courts don't like that. I just want
14 to clarify that.

15 THE COURT: Okay. So we'll take a break.

16 MR. NORRIS: Thank you, Your Honor.

17 (Brief recess.)

18 THE BAILIFF: Court is now in session.

19 THE COURT: Please have a seat. Where did
20 Mr. Norris go?

21 MR. BAJOCZKY: Right. He's here, Your Honor. I
22 think he stepped out for just a second. Your Honor, if
23 there are any -- I believe those are two witnesses.
24 You're one of the witnesses?

25 UNIDENTIFIED SPEAKER: Yes, sir.

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1 MR. BAJOCZKY: okay. You're going to have to wait
2 outside, sir. You know the rule.

3 THE COURT: Any witnesses --

4 UNIDENTIFIED SPEAKER: I'm, I'm a law student. I'm
5 not testifying.

6 THE COURT: Okay.

7 MR. BAJOCZKY: Okay.

8 THE COURT: So you have the --

9 MR. HUTCHINS: Judge, it's going to take us a couple
10 more minutes to make those redactions.

11 MR. NORRIS: That's fine.

12 MR. HUTCHINS: You know, obviously, we're working as
13 fast as we can.

14 THE COURT: So you think five more minutes?

15 MR. HUTCHINS: I just want to make sure we're clear,
16 and that's why I came back down here. The only thing
17 that the defense in the case is requesting be redacted
18 out is the portion where the officer talks about witness
19 tampering and where she says she feels like that's highly
20 inappropriate. That's the only thing that the defense is
21 requesting to be redacted; is that correct? So I --

22 MR. NORRIS: Well -- and then the portions where
23 Mr. Thorpe and I have discussions, of course --

24 MR. HUTCHINS: Obviously. We're not going to play
25 anything that the attorney and -- his attorney-client

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1 privilege. So -- okay. I just wanted to come down --

2 THE COURT: So she only makes one statement on
3 that -- he only says one thing she said?

4 MR. HUTCHINS: Well, Judge, I mean, based on the
5 Court's ruling, you've ruled that the State's opened the
6 door. Under the rule of completeness then, you know,
7 they requested that the tape be played in its entirety
8 with, with the things that are redacted out. We're
9 making those redactions. We're obviously going to go
10 ahead and play those. I just wanted to make sure there's
11 nothing else and -- so we don't have to keep running back
12 and forth.

13 How many witnesses do you have?

14 MR. NORRIS: Two.

15 THE COURT: You have two witnesses?

16 MR. NORRIS: Yes, ma'am.

17 THE COURT: Short?

18 MR. NORRIS: Short.

19 MR. HUTCHINS: Okay.

20 THE COURT: And you've reviewed the jury
21 instructions?

22 MR. BAJOCZKY: I would, Your Honor.

23 THE COURT: If somebody would look at those, I want
24 to deal with that. And then we'll have the charging
25 conference --

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1 MR. HUTCHINS: Judge, I --

2 THE COURT: -- but --

3 MR. HUTCHINS: Do you want to go ahead and start
4 that now?

5 THE COURT: -- if -- I mean, we can start that now.
6 I don't know if there's things that we need to revisit.
7 We can certainly do that.

8 MR. HUTCHINS: Judge, I sent jury instructions to
9 your judicial assistant last night taking out -- there's
10 a portion that talks about mental incapacitation, mental
11 deficits. I don't think that really applies. So I cut
12 those out. And the State is going to be requesting a
13 special jury instruction in the case, Judge.

14 THE COURT: You took out mentally incapacitated on
15 page 2 and mentally defective.

16 MR. HUTCHINS: Yeah. That's under all of the sexual
17 battery stuff. I'm going to run upstairs.

18 (Brief recess.)

19 THE COURT: Please have a seat.

20 MR. HUTCHINS: The CD -- the redaction should be
21 down here. Judge, it's just taking a while.

22 THE COURT: Okay. Well, we can't do anything until
23 it's down here.

24 MR. BAJOCZKY: Thank you.

25 MR. HUTCHINS: we have a program where we're able to
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1 have the text run underneath, which is, I think, helpful
2 for the jury.

3 THE COURT: Subtitles you mean?

4 MR. HUTCHINS: Yeah. Like closed caption.

5 MR. BAJOCZKY: You need to go look at them. You
6 need to go look at them.

7 MR. HUTCHINS: I'll show it to them.

8 MR. BAJOCZKY: We can play it. We just want to pick
9 whatever parts we don't -- that you ruled that aren't
10 admissible, we just blanket. The rest of it doesn't need
11 to be subtitled or anything. I don't know what he's
12 talking about.

13 THE COURT: So y'all are objecting to subtitles?

14 MR. BAJOCZKY: I don't know. I don't -- I have no
15 idea what format is going to be showing. We have a tape
16 already ready.

17 MR. HUTCHINS: I'll show it, I'll show it to them --

18 THE COURT: Why don't y'all go upstairs and do this,
19 because we've now had the jury waiting an hour. Go look
20 at it, Mr. Norris. Let me know if we have a problem. We
21 should have been started an hour ago.

22 MR. HUTCHINS: Well, Judge, I mean, we just got to
23 rolling this morning regarding redactions. So we
24 couldn't start on it last night.

25 THE COURT: I know. But, I mean . . .

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1 (Brief recess.)

2 THE COURT: Please have a seat. Okay. So,

3 Mr. Norris, have you seen the DVD?

4 MR. NORRIS: We're ready to go, Judge.

5 THE COURT: Any issues?

6 MR. NORRIS: No, ma'am.

7 THE COURT: Okay. Anything else before we bring the
8 jury in?

9 MR. HUTCHINS: Judge, I think, procedurally, I'll --
10 and I think Mr. Norris doesn't have any objection to
11 this. I can ask the officer have you had -- you know,
12 was this recorded? Did you have a chance to review it?
13 Is it a fair and accurate depiction of the recording?
14 And then at that point we can move to introduce it into
15 evidence and publish it for the members of the jury.

16 For the record, we're objecting to this. I just want
17 that to be clear. I just think procedurally it moves
18 things along if we allowed them to just use this -- I want
19 to be clear that they're the ones introducing it. So we
20 can have it marked as Defense Exhibit 1. And then that way
21 they don't have to call her and it drags out the case.

22 THE COURT: Okay. That's fine?

23 MR. BAJOCZKY: That's fine, Your Honor.

24 THE COURT: Okay.

25 MR. HUTCHINS: Do you want her on the stand?

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1 THE COURT: Are there any witnesses in the
2 courtroom?

3 MR. BAJOCZKY: No, Your Honor.

4 THE COURT: okay.

5 (Jury enters.)

10 MR. NORRIS: Not at this time.

11 THE COURT: Mr. Hutchins, any redirect?

12 MR. HUTCHINS: Yes, Your Honor, briefly.

13 whereupon,

14 SONYA BUSH

15 was recalled as a witness, having been previously duly sworn,
16 was examined and testified as follows:

17 REDIRECT EXAMINATION

18 BY MR. HUTCHINS:

19 Q Good morning, Investigator Bush, yesterday we
20 discussed the fact that the defendant came in and spoke with
21 you with attorney at TPD; is that correct?

22 A Yes, sir.

23 Q Was that interview recorded?

24 A Yes, sir, it was.

25 Q Have you had a chance to review that interview?

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1 A Yes, I have.

2 Q And is what we're about to see a fair and accurate,
3 I guess, recording of the interview that occurred --

4 A Yes, it is.

5 Q -- back on April the 2nd, 2012?

6 A Yes.

7 Q Okay.

8 MR. HUTCHINS: Judge, at this point we would move to
9 introduce in -- well, the defense is going to move to
10 introduce to publish to the members of the jury the
11 recorded interview of the defendant.

12 THE COURT: Okay.

13 MR. NORRIS: That is correct.

14 THE COURT: All right. And we've got that set up
15 and ready to play, Mr. Hutchins?

16 MR. HUTCHINS: Yes, Your Honor.

17 THE COURT: Okay. I'll go ahead and dim the light.
18 I think we can dim those or turn them off or something.

19 (Defense Exhibit No. 1 plays as follows):

20 INVESTIGATOR BUSH: My name is Investigator Sonya
21 Bush, and I'm in Interview Room No. 1 with Christopher
22 Thorpe and his attorney, Toby Norris, N-O-R-R-I-S?

23 MR. NORRIS: Yes, ma'am.

24 INVESTIGATOR BUSH: Okay. Christopher, even though
25 you have your attorney with you, I'm still going to read

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1 you your Miranda rights, okay, if you'd like to read
2 along with me. Okay. Is this the correct spelling of
3 your name?

4 MR. THORPE: Yes.

5 INVESTIGATOR BUSH: Okay. And what's your date of
6 birth?

7 MR. THORPE: 7/27/79.

8 INVESTIGATOR BUSH: Okay. Before you answer any
9 questions or make any statement, you must fully
10 understand your rights. You have the right to remain
11 silent. Anything you say can and will be used against
12 you in a court of law. You have the right to talk to a
13 lawyer and have him present with you while you're being
14 questioned. If you cannot afford to hire a lawyer, one
15 will be appointed to represent you --

16 MR. BAJOCZKY: Your Honor, we have a few jurors able
17 to move over? I can --

18 THE COURT: Pause a second.

19 (Defense Exhibit No. 1 is paused.)

20 MR. BAJOCZKY: Can I ask -- could we -- the last two
21 jurors over there, could they move up on the second seat
22 behind --

23 THE COURT: Sure.

24 MR. BAJOCZKY: -- so they don't have to lean over to
25 look at what's going on?

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1 THE COURT: Sure. If you need to move in a chair in
2 the jury box to see --

3 MR. BAJOCZKY: Could we also dim these lights, Your
4 Honor, too?

5 THE COURT: I don't have a problem with dimming the
6 lights. Okay. Go ahead.

7 (Defense Exhibit No. 1 continues as follows):

8 INVESTIGATOR BUSH: My name's Sonya Bush. Do you
9 understand each of these rights as I've explained them to
10 you?

11 MR. THORPE: Yes.

12 INVESTIGATOR BUSH: Have you previously requested
13 any law enforcement officer to allow you to speak to an
14 attorney? It doesn't seem very relevant, but I have to
15 ask it. You have your attorney present with you.

16 Having these rights in mind, do you wish to talk to me
17 now?

18 MR. THORPE: Yes.

19 INVESTIGATOR BUSH: May I have your signature right
20 there? And you're simply signing that you understand
21 these rights. And you can at anytime stop answering
22 questions if you don't want to answer something.

23 Do you mind (indiscernible), please?

24 Okay. Mr. Thorpe, I guess I'm just going to cut to
25 the chase. You know what's going on here.

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1 MR. THORPE: Yes, ma'am.

2 INVESTIGATOR BUSH: Okay. Do you want to just tell
3 me your side of it and we'll go from there?

4 MR. THORPE: Yes, ma'am.

5 INVESTIGATOR BUSH: Okay. Before we do that, I just
6 want to ask you real quick about this paper you gave me
7 downstairs. This is the form that she filled out when
8 she first arrived at your facility. Is this something
9 you have everybody fill out?

10 MR. THORPE: Yes.

11 INVESTIGATOR BUSH: Okay. Do you maintain these
12 records on all of your clients?

13 MR. THORPE: Yes.

14 INVESTIGATOR BUSH: Okay. All right. Go ahead.

15 MR. THORPE: On the morning of April 2nd,
16 Ms. [REDACTED] had an appointment at 9:30 am. She
17 came in. You know, we spoke. I asked her to fill out an
18 intake form. She filled it out. We discussed it. We
19 discussed what was on the intake form and her compliance
20 with it and her being comfortable with everything that's
21 on the intake form. We went to the room. Massage room
22 set up normally. She didn't seem to be under any --

23 INVESTIGATOR BUSH: Is that the room you and I were
24 talking in?

25 MR. THORPE: Yes.

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1 INVESTIGATOR BUSH: Okay.

2 MR. THORPE: She wasn't under any duress or distress
3 or seemed to be under the influence of any substance.
4 The -- I told her -- you know, I asked her if she was
5 familiar with massage and how a massage goes and she said
6 yes.

7 So I said, okay, I'm going to leave the room now, Let
8 you get disrobed and get onto the table however you feel
9 comfortable.

10 And she said okay. And so I proceeded to leave the
11 room, close the door, and I gave her a few minutes to get
12 on the table. Okay. I came back in. I knocked.

13 She said, come in. I went into the room. She was on
14 the table facedown. And so when I approached the table, I,
15 I covered her back to start my massage routine on her back.
16 I adjust the draping. The procedure started on her
17 shoulders for my massage routine. From there, I did her
18 left arm -- I mean, I'm sorry, her left shoulder, in this
19 area (indicating.)

20 And then I got up and went to the right side, did her
21 right shoulder and -- I mean, it's the massage routine. I,
22 you know, did her back and stuff and did underneath -- to
23 tell you about it would take a very long time, but I, you
24 know, I proceeded to do all that.

25 But to back up, when I first started even doing her

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1 left shoulder, Ms. [REDACTED] started, you know, the moaning
2 and the sounds and things like that. You know, I kind of
3 just played it off, you know, as her --

4 INVESTIGATOR BUSH: What kind of sounds, like . . .

5 MR. THORPE: Like the sexual moaning, like mmm, mmm,
6 you know. And, and --

7 INVESTIGATOR BUSH: Is that not normal for the
8 clients?

9 MR. THORPE: No. It's not normal. I mean,
10 everybody enjoys my massage but that's not normal. And
11 so I kind of played that off. But throughout the
12 duration of the massage, while I'm doing her back and
13 everything and she's still, you know, making those same
14 sounds. So I said, okay, well -- and I'm just going to
15 continue the massage.

16 And from that point, I start on left gluteal muscle,
17 which is, you know, her butt. And I, I do that one. I go
18 through the whole massage routine on that and then I
19 re-drape that. And then I uncover her left leg. And while
20 I'm doing the foot and working my way up to her calf and,
21 and, and onto her thigh and everything like that, she's
22 still making those these sounds. I'm still downplaying it,
23 you know, ignoring it.

24 And so when I go to cover back up that leg, I go over
25 to her right gluteal, because this is all in the massage

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1 routine. So I massage her, her gluteal there, go through
2 that whole routine. She's still making the sounds. I
3 ignore it. Then I redress the right. And then I start
4 on -- I uncover her right leg and start there. okay. So I
5 do her foot, do the calf muscle and work my way up the leg.

6 And by this point in time, I have to, I have to do a
7 lunge, because I'm standing at the foot of the table and
8 her head is on the opposite side, you know, and she's kind
9 of tall. So I'm lunging over her leg doing the massage
10 routine on her upper thigh.

11 And at that point in time, she starts massaging my
12 penis with her foot. And now she's, she's going up and
13 down the shaft and, you know, and fondling me. And, you
14 know, at that point in time I, I should have stopped the
15 massage, because, you know, it was, it was -- got to a
16 point where it was really inappropriate. And -- but I did
17 not. I let her continue.

18 And while I'm doing her upper thigh and going towards
19 the inner thigh, she starts to push her butt up in the air
20 as to meet my hand with her crotch. I did not stop it
21 there, regrettably, but I continued with the massage, and
22 I'm still continuing to massage her thigh. And during the
23 massage, that part of the inner thigh, I did rub my hand up
24 her crotch. And I said, do you like that?

25 And she said, yes. And so I proceeded to, to fondle

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1 her, and, and digitally penetrate her with my fingers. And
2 she continued to buck backwards and stick her butt in the
3 air as she was enjoying it and still making the sounds and,
4 and meeting me with her force.

5 And so I stopped at that point in time, because I
6 didn't, I didn't want to -- I wanted to make sure that I
7 wasn't pushing the issue on this, that she was comfortable.
8 And so I stopped, redressed her leg, and told her it was
9 time to turn over so I could continue to do the rest of her
10 body.

11 And so she turned over. And then I started doing the
12 anterior side of her body. And so I started with her left
13 arm and then did a massage on her left arm. And then I
14 went around to the right side. And then I did her right
15 arm. And then I came back around to her right leg. I
16 undraped the right leg and started there on -- at her --
17 the lower leg, then to the tibia. And so I massaged the
18 tibia and on up around the knee and the upper thigh.

19 You know, as I'm doing the upper thigh, she, you know,
20 opens her legs slightly to invite me in. And so I'm still
21 doing her upper thigh, and then she begins to arch her
22 back, and, and -- of course, I went -- my hand again and,
23 and started massaging her genitals. And she was still
24 arching her back as to, you know, really get into it. She
25 opened her leg and I'm still doing that right there. My

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1 fingers are inside her.

2 And I go down across her leg to start giving her oral.
3 And I do that and then I back up, again. And at this point
4 in time, you know, it's getting hot in the room, so I take
5 my shirt off and I lay it to the side. And then I already
6 had my shoes off. And so I take my pants off and fold them
7 and laid them on the counter. And I come back and I'm, you
8 know, then I'm still giving her oral. She puts her leg up
9 over my shoulder as to easy access.

10 And so I'm giving her oral, digitally penetrating with
11 my finger. And at that point in time, I go to, to push
12 back, because I'm assuming she's finished. I mean, this
13 goes on for about, you know, 20, 25 minutes. And so I go
14 to get up and she asked me if I have a condom. And I said,
15 yes.

16 And so I went over to my pants. I got the condom. I
17 put the condom on and came back over to her and then
18 proceeded to have sex. And while having sex, I mean, she
19 was, she was into it, you know. I rechanged positions two
20 or three times. You know, she would, you know, put her leg
21 out to the side one time. I, you know, pushed her legs on
22 me back one time.

23 Not at one time was she restrained or not at one time
24 did she say, stop, that she didn't want it. That she --
25 she never said no. And, you know, all this time -- and we

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1 finished having sex, and I asked her if she wanted a towel
2 to clean up. And she said yes. At that point in time, I
3 reached up in the cabinet, I got a towel. I gave her one.
4 I took my clothes and my shoes and went to the bathroom to
5 clean up for my next client.

6 I'm cleaning up and I -- I really wasn't expecting her
7 to still be there when I came out. But after I cleaned up
8 and came out, she was standing there in the hallway waiting
9 on me. That's when we -- I saw her key chain and we spoke
10 about her being in SISTUHS. I saw her key chain. I said,
11 oh, I didn't know you were in SISTUHS. And she said, yeah.
12 I'm a member over at Florida State.

13 I said, okay. Well, you know, they're cool, too, but
14 I went to FAM. I'm used to those SISTUHS over there. And
15 so she said -- and I said, oh, and you're a student at
16 Florida State. So what's your major?

17 She said, oh, I'm a triple major. I do criminal
18 justice, political science, and history. And so I said,
19 okay, well, not only are you beautiful, you're smart, as
20 well. And she said, yeah, something like that. And so I
21 proceed to walk her to the door. I said, you know, at any
22 point in time, whenever you want to make another
23 appointment, please feel free. And so she said, okay. And
24 I walk her to the door.

25 And as I open the door, a friend of mine was standing

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1 there outside. And he says, man, why don't you go put some
2 shoes on? Like you doing martial arts in there. I said,
3 man, you know I do that, too. He said, oh, I didn't know
4 that. And, and Ms. [REDACTED] Laughs, you know. And we're
5 both, you know, sitting there laughing.

6 And, you know, by this point in time, we're standing
7 outside on the sidewalk. And, and then she's going to get
8 in her car. I waive at her. And she gets in the car. And
9 as she gets in the car and starts to back out, I, you know,
10 did that (indicating), waived, again. She waived and drove
11 off. And I didn't know that anything --

12 INVESTIGATOR BUSH: Was your next client there?

13 MR. THORPE: Alecia (phonetic) drove up soon after
14 that, right after that. And so I didn't know anything
15 had, you know, gone on to that, to that point until you
16 showed up in my office. I didn't know that she, you
17 know, had felt any kind of way about what went on. I was
18 actually shocked. I didn't even know you were there for
19 me. And that's, that's, I mean, that's the whole story.
20 Then I had three clients after her who -- I mean, I never
21 had that problem with a client. And I've never had --

22 INVESTIGATOR BUSH: Okay. Let me, let me back up
23 here. How many clients do you see normally in a week?

24 MR. THORPE: I just started a new -- a special,
25 Living Social and Groupon special.

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1 INVESTIGATOR BUSH: Are those two in -- are they the
2 same or separate?

3 MR. THORPE: They're separate.

4 INVESTIGATOR BUSH: They're separate. Okay.

5 MR. THORPE: In -- I mean, normally, in a day -- it
6 depends on what day it is -- I'll see three or four.

7 INVESTIGATOR BUSH: Well, let's say a week, in a
8 week time.

9 MR. THORPE: Well, this one just started, like, last
10 week. And so 15.

11 INVESTIGATOR BUSH: Okay. Are you -- you've been
12 licensed since when?

13 MR. THORPE: December 2010. Yeah, it's been a year
14 now.

15 INVESTIGATOR BUSH: Have you been, have you been
16 actually working since you were licensed?

17 MR. THORPE: Yes.

18 INVESTIGATOR BUSH: Do you see lots of clients?

19 MR. THORPE: I do.

20 INVESTIGATOR BUSH: Are the majority of your clients
21 women?

22 MR. THORPE: Yes.

23 INVESTIGATOR BUSH: Okay. Have you ever had sex
24 with any of your other clients?

25 MR. THORPE: No.

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1 INVESTIGATOR BUSH: Why this one?

2 MR. THORPE: Why this one? I really -- I mean, I
3 couldn't answer that. She really just started pressing
4 the issue with, you know, rubbing my genitals and stuff
5 with her foot and really -- I don't know why she did what
6 she did. I really can't explain that. I've never had
7 this issue with a client. I've never had to go, go on in
8 that area with a client, for these exact reasons, because
9 I don't want to make it seem like, you know, I'm that
10 kind of person.

11 There's a lot of people put their trust in me and a
12 lot people who, who, rely on me to uphold that code of
13 ethics, to really do that. This is really out of character
14 for me to even go there with this client. I don't -- I
15 can't say why this client.

16 INVESTIGATOR BUSH: Let me ask you another question.
17 You said that when you finished with sex with her, you
18 got up so she could dress and you went to clean up in the
19 bathroom.

20 MR. THORPE: Yes.

21 INVESTIGATOR BUSH: Okay. And you said that you
22 really expected that she'd already be gone when you
23 walked out.

24 MR. THORPE: Right.

25 INVESTIGATOR BUSH: You know, I find it, I find it
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1 odd that you would expect that she would be gone. You
2 just had sex with a woman you've never met before. You
3 wouldn't have any -- after -- I mean, just -- I find it
4 odd. I find it very odd, especially if it's something
5 you've never done before.

6 The friend of yours that was out there, what was he
7 doing there?

8 MR. THORPE: I think he was getting a haircut down
9 at the barbershop.

10 INVESTIGATOR BUSH: Where's the barbershop?

11 MR. THORPE: It's about two doors down.

12 INVESTIGATOR BUSH: Okay. And how do you know him?

13 MR. THORPE: Well, he's a firefighter but I work
14 with him at, at The Coliseum and at Baja's. You know, he
15 originally got me interested in, in filling out paperwork
16 and going through the process in becoming a firefighter.
17 I was -- you know, that's how I know him.

18 INVESTIGATOR BUSH: Your next client, according to
19 this young lady right here, when she left, your next
20 client was actually out on the sidewalk. Is she somebody
21 that would be willing to talk to me and also give me the
22 condition that she was in when she left?

23 MR. THORPE: I believe so.

24 INVESTIGATOR BUSH: Okay. Are you at liberty to
25 give me that person's name, or do you want to give her my

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1 information?

2 MR. THORPE: I will give her your information.

3 INVESTIGATOR BUSH: Okay. I'm not sure what your
4 clientele privileges or, you know, confidentiality are.

5 MR. NORRIS: I'm not sure either. We'll look at
6 that.

7 INVESTIGATOR BUSH: Okay.

8 MR. NORRIS: We'll give it to you.

9 INVESTIGATOR BUSH: What I can do is give you my
10 business card and have her call.

11 Now, since you've been contracting at this particular
12 facility -- what, what exactly, specifically, do you
13 contract at this facility? I know you do your own massages
14 there, as well. But do you contract with the owner of that
15 facility, as well?

16 MR. THORPE: Yeah. For her, for her clients, if
17 she's -- if she has any physical therapy clients and
18 stuff needing massage therapy, then, you know, I will do
19 those for her.

20 INVESTIGATOR BUSH: Okay. What are your normal
21 hours that you run there?

22 MR. THORPE: Generally from 11:00 to 6:00 am.

23 INVESTIGATOR BUSH: Okay. I want to go back to you
24 said she was moaning. Okay? Now, that's another thing
25 that I find a little bizarre, as well, because, you know,

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1 I think that it is probably more common than not that
2 people make moaning noises when they're get a massage.
3 what, what was so different? I mean --

4 MR. THORPE: That hasn't been my experience.

5 INVESTIGATOR BUSH: That has not been your
6 experience?

7 MR. THORPE: No.

8 INVESTIGATOR BUSH: Okay. Is there anything else
9 that you think I need to know right now pertaining to
10 this?

11 MR. THORPE: She never once asked me to stop or said
12 no. She was the initiator in all of this. I had no
13 intention on even proceeding to do any of that until
14 she -- I mean, she started rubbing my genitals and stuff
15 with her foot and then pushing her butt back towards me
16 to, to meet her crotch with my hand. I, I -- that is not
17 in, in my character. That is not in my nature. I mean,
18 I . . .

19 (Defense Exhibit No. 1 concludes.)

20 THE COURT: Turn the lights back on.

21 THE WITNESS: There's a second tape.

22 THE COURT: Oh, there's a second tape? We're not
23 done?

24 MS. HURST: No, ma'am.

25 (Off-the-record discussion.)

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1 MR. HURST: So we're done?

2 MR. NORRIS: Yeah.

3 MR. HUTCHINS: It's there.

4 MR. NORRIS: That's, that's good.

5 THE COURT: That's it?

6 MR. NORRIS: Yes, ma'am.

7 THE COURT: Okay. Mr. Hutchins, do you have any
8 other questions?

9 (Brief pause.)

10 REDIRECT EXAMINATION (cont)

11 BY MR. HUTCHINS:

12 Q Investigator Bush, isn't it true the defendant's
13 been charged with sexual battery on another client in the
14 course of a massage?

15 A Yes.

16 MR. NORRIS: Object -- objection, Your Honor.

17 THE COURT: Do we need to take a sidebar on that?

18 (Sidebar discussion held as follows):

19 THE COURT: What's your objection?

20 MR. NORRIS: He's asking if he's been charged with
21 another crime? That's improper impeachment.

22 MR. HUTCHINS: Judge, they've absolutely opened the
23 door at this point. And I can point you directly to the
24 portions of his testimony, if you want to take a look.
25 There's a transcript of his testimony. I sat there and I

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1 wrote this down as he's talking. On page 13, lines six
2 through -- six and seven. And I'll read this, "I've
3 never had a problem with a client, ever. And I've never
4 had" -- and then the officer asked him a question. On
5 page --

6 THE COURT: Wait, wait.

7 MR. HUTCHINS: On page 13, Judge.

8 THE COURT: You said page 6.

9 MR. HUTCHINS: I'm sorry. Page 13, lines six and
10 seven. Page thirteen.

11 THE COURT: I'm sorry.

12 MR. HUTCHINS: No. You're fine. On page 13, "I've
13 never had a problem with a client, ever."

14 MR. NORRIS: And at that point he hadn't had a
15 problem with a client, ever. That case is pending,
16 Judge. You ruled that that -- that's similar fact
17 evidence --

18 MR. HUTCHINS: Can I just finish going through the
19 rest of this, Judge?

20 MR. NORRIS: Yeah. Go ahead.

21 MR. HUTCHINS: On line 14, Judge, lines -- the next
22 page, 14, lines ten and 11, "Have you ever had sex with
23 any of your other clients?" He says, "No."

24 Then if you go down, also on page 14, line 20, "I've
25 never had this issue with a client. I've never had to go,

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1 go in that area with a client for what -- these exact
2 reasons, because I don't want to make it seem like, you
3 know, that I'm that kind of person."

4 On page 15, on lines two and four -- or lines two
5 through four, "It was really out of my character for me to
6 even go there with this client."

7 And then, Judge, on page 18, lines 12 and 13, "I --
8 that is not my character. That is not my nature."

9 I mean, we objected to it being played, Judge. They
10 want it in. They've got it in and they've opened the door.

11 MR. NORRIS: Not me. He --

12 MR. HUTCHINS: He, basically, put these statements
13 out there. He's never had a problem with a client. He's
14 never done anything, that it's out of his nature. The
15 door has been opened so --

16 MR. BAJOCZKY: Your Honor --

17 MR. NORRIS: Can I finish? Can I? They opened the
18 door --

19 MR. HUTCHINS: No, we didn't.

20 MR. NORRIS: -- to sex.

21 Yes, they did.

22 THE COURT: Hold on.

23 MR. NORRIS: The opening the door by the State
24 initially was, basically, he came in and said that we had
25 sex. Okay? Then we, we agreed to play the portion of

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1 the tape that only talked about the sex. He wanted to
2 put the rest of it in. You can't open the door by
3 opening the door. He didn't say anything about being
4 accused -- she didn't say, were you accused of fingering
5 another client? Did some lady wake up and say to -- he's
6 never had a problem. You can't open the door by opening
7 the door, Judge.

8 This is entirely improper to, to charge -- to
9 introduce evidence of another crime has a very specific
10 statutory requirements that have not been met. This Court
11 has already found that. We didn't open the door by doing
12 that. He originally opened the door by asking about the
13 sex.

14 MR. BAJOCZKY: And we never, we never -- we didn't
15 ask to play the rest of the tape.

16 MR. NORRIS: That's correct.

17 MR. HUTCHINS: That's --

18 MR. BAJOCZKY: He wanted to. Now, excuse me. If he
19 plays the rest of the tape, he can't put it out there,
20 play it. We could have redacted anything he didn't want.
21 He can't play -- put it out there and play it and then
22 claim we opened the door when he played it.

23 MR. NORRIS: That's right.

24 MR. BAJOCZKY: That he had a chance to redact
25 anything he didn't want to.

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1 MR. HUTCHINS: But --

2 MR. BAJOCZKY: And then, basically, go around behind
3 the back door to try to *Williams* rule in something he
4 didn't do before.

5 MR. HUTCHINS: Let's be very clear. This morning, I
6 objected. Now, the rule of completeness says that if a
7 tape is coming in, it's coming in in its entirety. I
8 offered Mr. Norris several opportunities this morning to
9 look at the tape. And I came down specifically and said,
10 is there anything else you want redacted out? I will
11 redact out anything else you want redacted out. He
12 agreed that he wanted the tape played in its entirety. I
13 stated for the record, Judge, that, you know, look, if
14 we're going to play it, the rule of completeness says we
15 have to play the entire thing.

16 Now, on the record, he says several times there's
17 nothing else I want redacted out. I've had a -- you even
18 came in and asked him, have you had a chance to look at it?
19 He said there was no -- he didn't have any objection to the
20 tape being played in its entirety. And, you know, by them
21 agreeing to let the tape be played in its entirety, then
22 they've opened the door.

23 MR. NORRIS: No, they haven't. You introduced it in
24 its entirety.

25 MR. HUTCHINS: No --

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1 MR. NORRIS: I have to --

2 MR. HUTCHINS: -- it's a defense exhibit.

3 MR. NORRIS: -- move some --

4 THE COURT: Y'all stop argue withing each other.

5 MR. NORRIS: Judge, he's invited a mistrial is what

6 he's done.

7 MR. HUTCHINS: No, I haven't opened the door.

8 MR. NORRIS: Yes, he has.

9 MR. BAJOCZKY: Okay.

10 MR. NORRIS: The Court's ruling was the portions

11 about sex, then the State asked to play the rest, and we

12 didn't object. Not objecting is not the same thing as

13 introducing something and opening the door. It is not

14 the same thing.

15 MR. HUTCHINS: Judge, they've opened the door. They

16 put in statements made by their client. Obviously, he's

17 not even going to take the stand.

18 MR. NORRIS: What --

19 MR. HUTCHINS: We have a right to impeach those

20 statements. If he's going to -- they're going to play a

21 statement where he said I've never had a problem with a

22 client, I've never done anything inappropriate, the fact

23 that he's been charged with a sexual battery, Judge,

24 that's absolutely relevant. And that comes in for

25 impeachment purposes.

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1 MR. BAJOCZKY: Generally, I don't think that just
2 because you've been charged is proper but --

3 MR. NORRIS: No. You have to be convicted.

4 MR. HUTCHINS: No. Judge, he says, I've never had a
5 problem with a client.

6 MR. BAJOCZKY: He had --

7 MR. NORRIS: And at that point, he hadn't --

8 MR. HUTCHINS: It's out of my nature.

9 MR. BAJOCZKY: At that point, Your Honor, he had
10 never been charged with a client. He never had a problem
11 with a client. He never had a complaint with a client.
12 After this arrest is made, they go out and try to come up
13 with other people and they --

14 MR. NORRIS: Then they had --

15 MR. HUTCHINS: And they found someone --

16 MR. NORRIS: Never said anything then. She never
17 said she had a problem either. She didn't complain until
18 afterwards. So at that point, there's nothing
19 impeachable about what he said. He had not had a problem
20 with a client. Judge, this is improper.

21 MR. HUTCHINS: The fact that he has been charged
22 with sexual battery --

23 MR. NORRIS: Later.

24 MR. HUTCHINS: -- the other victim during the course
25 of a massage --

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1 MR. NORRIS: He was charged.

2 MR. HUTCHINS: -- it's highly relevant that he's
3 going to -- if they're going to put in a client's
4 statement, basically, saying that he's never done
5 anything wrong, this is out of my character, we should be
6 able to introduce this evidence.

7 MR. NORRIS: At the time he had not been charged.

8 The only reason --

9 THE COURT: I get that. I get that.

10 MR. NORRIS: -- would be to impeach, right? That's
11 why we do that, to say what you said was untrue. It
12 wasn't untrue at that point. When he made that statement
13 on April 5th, he had not been charged --

14 THE COURT: The second client.

15 MR. NORRIS: -- with the second client. He had not
16 been charged.

17 THE COURT: Wait.

18 MR. NORRIS: Sorry.

19 THE COURT: The second person that came forward, the
20 allegation was that he had sex with her prior to having
21 sex with Ms. [REDACTED], right?

22 MR. HUTCHINS: Correct.

23 MR. NORRIS: No.

24 THE COURT: Yes.

25 MR. NORRIS: But that he had -- no.

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1 THE COURT: She came forward later. But the sexual
2 act that she's complaining about happened prior to
3 Ms. [REDACTED]

4 MR. NORRIS: But she never -- there was no problem.
5 There was no --

6 MR. BAJOCZKY: No indication of our client --

7 MR. NORRIS: There was no indication. She left.

8 Her -- read her depo. She talks about it. She left the,
9 the place and there was no problem. She said she was
10 asleep and, and woke up and maybe he was fingering her.
11 He immediately stopped.

12 MR. HUTCHINS: Judge, the fact that he was fingering
13 her during the course of a massage is absolutely
14 relevant. They put the statement in because it's --

15 THE COURT: Okay. This is what I'll allow you to
16 do. The rule of completeness, what's sauce for the goose
17 is sauce for the gander --

18 MR. HUTCHINS: Yes.

19 THE COURT: -- Mr. Norris, you can't have your
20 client's self-serving statements admitted because the
21 State opened the door. They are entitled to play the
22 entire thing. You may ask, because he insinuates that
23 he's never had sex or done anything inappropriate with
24 another client. You may ask -- we don't even have to get
25 into the charging part. You may impeach him based on

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1 what this lady alleges he's done. Okay? Because,
2 because his statements are now before the jury.

3 MR. BAJOCZKY: Well, could you clarify how he's
4 going to --

5 THE COURT: Have someone else come forward saying
6 the defendant's had inappropriate sexual contact with her
7 before Ms. [REDACTED] -- that occurred before Ms. [REDACTED]
8 made her complaint. You don't have to get into charging
9 or any of that. He's led this jury to believe he's never
10 had inappropriate contact with anybody else. And this
11 victim, despite the fact that she came forward after, it
12 occurred before and that's impeachable, because that's
13 not what he -- it simulates in the tape.

14 MR. BAJOCZKY: To what extent -- how is this going
15 to go and to what extent so we can understand it? He's
16 to have another witness come in and testify about that?

17 MR. NORRIS: Wow.

18 MR. HUTCHINS: No, Judge. Because this investigator
19 is the investigator that's on both cases, so she has
20 knowledge she can certainly testify.

21 MR. NORRIS: Let me tell you --

22 THE COURT: She can't testify to the hearsay
23 statements, but she can testify that someone else has
24 come forward to -- that he allegedly had sexual contact
25 with during a massage prior to Ms. [REDACTED] because this

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1 is an outright impeachable issue since his statement is
2 before the jury.

3 MR. BAJOCZKY: Okay. Now, is that, is that the
4 extent of it?

5 THE COURT: I don't know, Mr. Hutchins. What else
6 do you want to ask, Mr. Hutchins?

7 MR. HUTCHINS: Well . . .

8 THE COURT: I mean, I ruled that the *Williams* rule
9 evidence wasn't coming in, but now we've got an issue
10 where -- this jury is not -- this is not fair to let the
11 jury think that that statement is necessarily true. It's
12 a credibility issue.

13 MR. NORRIS: At the point he had no -- he didn't
14 know there was any problems with her. He didn't have sex
15 with her.

16 THE COURT: The question is, did he have -- he says
17 in here, the gist of what he says is he's never had
18 inappropriate --

19 MR. NORRIS: He's never had problems with a client
20 like this before. And he didn't have a problem. Ms. █
21 never made it a problem. That's why -- now I'm going to
22 have to bring all of that up to be fair. Now I need to
23 stop the trial -- this is how it prejudices me -- get all
24 my witnesses back about Ms. █.

25 MR. HUTCHINS: Judge, he states on page 13, lines

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1 six and seven, I've never had a problem with a client,
2 ever. Now, there were several women that came forward
3 and indicated that the defendant had touched them
4 inappropriately or had been inappropriate with them.

5 To say that I've never had a problem, Judge, I think
6 that opens the door. And the investigator should be able
7 to testify not only about Ms. █ but any other women that
8 came forward and said that the defendant was inappropriate
9 with them.

10 MR. NORRIS: But the --

11 THE COURT: Page 14, "Are the majority" -- at line
12 seven, "Are the majority of your clients women?"

13 "MR. THORPE," line nine, "Yes."

14 Line ten, "INVESTIGATOR BUSH: Okay. Have you ever
15 had sex with any of your other clients?

16 "MR. THORPE: No."

17 MR. NORRIS: And he hadn't had sex with any of his
18 other clients.

19 THE COURT: What did he do with allegedly victim two
20 that came forward --

21 MR. NORRIS: Victim --

22 THE COURT: -- before Ms. █.

23 MR. NORRIS: Victim two says, again, that she was --
24 dozed off, woke up, and believed he was -- you found it's
25 not even clear and convincing. we already have a ruling

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1 from the Court that it's not clear and convincing that
2 she woke up and she believes he was fingering her.

3 MR. HUTCHINS: No. You did not rule that.

4 MR. NORRIS: To say a word -- yes, she did rule
5 that. Let me finish, John.

6 Now I have to, if he gets into this, Judge --
7 otherwise, it causes extreme prejudice to Mr. Thorpe. I've
8 got to get into those facts, because there, there are more
9 people . . .

10 MR. HUTCHINS: Judge, that evidence is not relevant
11 to this case. Not only that, Judge, but like I said
12 before, on lines -- on page 13, he said he never had a
13 problem with a client, ever. On page 14, he talks about,
14 I have never had this issues with a client. I've never
15 ever had to go in that area with a client for these exact
16 reasons, because I don't want to make it seem like, you
17 know, I'm that kind of person. This really is out of
18 character for me to even go there with a client.

19 I mean, he makes statements and statements and
20 statements talking about he's never had a problem -- I
21 mean, it's not like he makes one statement, Judge. During
22 the course of this, he makes several statements talking
23 about he's never had a problem with women. He's never had
24 a problem with clients during the course of a massage. You
25 know, and I think we should be able to explore that.

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1 I mean -- and regarding what Mr. Norris was saying
2 earlier, you found there wasn't clear and convincing in the
3 sense that it wasn't similar enough for *Williams* rule
4 evidence. There's obviously been a finding of probable
5 cause that he's been charged with sexual battery in that
6 case. So . . .

7 THE COURT: My -- this is my ruling. You can --
8 because he clearly, on page 14, flat out says to
9 Investigator Bush that he's never had sex with any other
10 clients. And you may impeach on that basis. Okay? So
11 you can ask her are -- during the course of your
12 investigation, have you gathered information that
13 Mr. Thorpe has engaged in --

14 MR. NORRIS: Sexual conduct --

15 THE COURT: -- sexual conduct --

16 MR. NORRIS: -- with another client.

17 THE COURT: -- with any other clients.

18 MR. HUTCHINS: Well, Judge, it's not sexual conduct.
19 It's a sexual battery. That's what he's been charged
20 with.

21 MR. NORRIS: No. It's not been proven. That is --
22 no.

23 MR. BAJOCZKY: The battery --

24 MR. HUTCHINS: Judge, there's probable cause.

25 MR. BAJOCZKY: Conduct is, conduct is an act. The

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1 battery is getting into evidence, other charges --

2 MR. NORRIS: Convictions.

3 MR. BAJOCZKY: -- that are pending against the
4 defendant that are not a matter of *Williams* rule.

5 MR. HUTCHINS: Judge, this isn't a *Williams* rule
6 argument now. This is --

7 THE COURT: This is impeachment.

8 MR. HUTCHINS: -- for impeachment.

9 MR. NORRIS: It's impeachment. You can say sexual
10 conduct, did anyone else come forward saying sexual
11 conduct with this --

12 MR. HUTCHINS: No, Judge. Sexual conduct implies
13 that it's consensual sexual conduct. And the issue here
14 is consent. And I mean, he says he's never had sex
15 with --

16 MR. BAJOCZKY: well, that --

17 MR. HUTCHINS: we didn't --

18 MR. BAJOCZKY: -- claim it was sexual conduct --

19 THE COURT REPORTER: One at a time, please.

20 THE COURT: If y'all are going to go back and forth,
21 we'll just stop and we'll decide to take turns. Then we
22 can come back.

23 MR. HUTCHINS: I've never had a problem with a
24 client, ever. He knew he was in there being questioned
25 about a sexual battery, Judge. Obviously, if he's had

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1 any problems with clients, we're able to bring that up,
2 especially if it involves touching or anything of a
3 sexual nature.

4 MR. BAJOCZKY: Can I respond, Your Honor?

5 THE COURT: Uh-huh.

6 MR. BAJOCZKY: I've never had a problem with a
7 client.

8 MR. NORRIS: Uh-huh.

9 MR. BAJOCZKY: At that point he never had a problem.
10 What you called there about I never, never had sex with
11 any other client, I think a proper impeachment, if the
12 Court's going to allow it, would be to have him say have
13 you, have you ever had sex with a client? It doesn't say
14 have you ever been -- you know, had sex against a
15 client's will --

16 MR. NORRIS: That's right.

17 MR. BAJOCZKY: -- which is what comes out of sexual
18 battery.

19 MR. NORRIS: Uh-huh.

20 MR. BAJOCZKY: For him to say -- to Sonya Bush, have
21 you had any other -- in your investigation, any other
22 evidence that he, that Mr. Thorpe has had sex with a
23 client and for her to say, I've -- yes, we've received a
24 report like that.

25 Now, to go on and go further, that is what would

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1 impeach him when he says I've never had any other sex with
2 a client. To go into the battery charges is just to
3 contaminate it probably -- horribly contaminate it.

4 MR. HUTCHINS: I disagree, Judge. I think it's
5 absolutely relevant at this point. I think it comes in.
6 He's been charged with sexual battery with this case. He
7 goes on and on about six different times on that tape
8 where he talks about he's never done anything
9 inappropriate. He's never had a problem with a client.
10 He's never gone there with a client. The fact that he's
11 been charged with sexual battery is absolutely relevant.
12 It's absolutely -- it should come in for impeachment
13 purposes.

14 MR. NORRIS: And if he gets acquitted of that?

15 MR. BAJOCZKY: At that time he had never been
16 charged with anything. At that time --

17 MR. HUTCHINS: He is charged now.

18 MR. BAJOCZKY: -- he had to have sex with a client.

19 THE COURT: All right.

20 MR. BAJOCZKY: The jury shouldn't be required to
21 guess whether he lied about never having been charged,
22 because that's not -- the charge didn't come till later.
23 Where he says he's never previously had sex with a
24 client, I think it would be proper if the Court's going
25 to allow for Investigator Bush to find out that there had

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1 been other persons or person to say that he has been
2 inappropriate in a massage.

3 THE COURT: I think you can ask, Mr. Hutchins -- I
4 don't want a mistrial issue --

5 MR. HUTCHINS: Judge, there's not a --

6 THE COURT: -- at this point. I think you can ask
7 Investigator Bush during the course of her investigation
8 has become aware of any other of Mr. Thorpe's clients who
9 have complained of inappropriate sexual conduct by
10 Mr. Thorpe towards --

11 MR. BAJOCZKY: During a massage.

12 MR. NORRIS: During a massage.

13 THE COURT: During a massage. Because that's what
14 they've done.

15 MR. BAJOCZKY: And that's what he denied. That's
16 what they would have something to impeach on. The charge
17 of the battery part is inappropriate.

18 THE COURT: Well, inappropriate touching, I think
19 the jury is going to get -- I mean, there's been other
20 folks that have exclaimed that he's inappropriately had
21 sexual contact with them during the course of the massage
22 that they came in to get. So I think that door's been
23 flung open.

24 MR. HUTCHINS: Okay. And, Judge, for the record,
25 you know, I think the fact that he's been charged about

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1 sexual battery, I think I can mention that, as well.

2 MR. NORRIS: No.

3 MR. HUTCHINS: It's impeachment, Judge. I mean, for
4 him to --

5 MR. NORRIS: Impeach.

6 MR. HUTCHINS: -- you know, for him to sit there and
7 say, you know, I've never had any problems. I haven't
8 done anything. But the fact that he was charged with
9 sexual battery on another client --

10 THE COURT: The question is, was he lying at the
11 time?

12 MR. NORRIS: That's right.

13 THE COURT: So --

14 MR. HUTCHINS: He knew what he had done. No
15 inappropriate conduct. No -- I never had sex with a
16 client. This happened before this day, and he knew that
17 at the time he's sitting there giving this statement to
18 law enforcement.

19 MR. BAJOCZKY: But he did not --

20 MR. HUTCHINS: You're absolutely right about that,
21 Judge. That happened before this.

22 MR. BAJOCZKY: Your Honor, he had sex with a client
23 before.

24 MR. HUTCHINS: No, it's not sex. It's sexual
25 battery.

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1 THE COURT: Y'all.

2 MR. BAJOCZKY: Can I go first? I didn't interrupt
3 you. He had sex with a client before. At the time his
4 statement was given, he had no indication that the client
5 was angry, mad, going to make a complaint, ever made a
6 complaint. He may have misled in that tape that he never
7 had sex with a client --

8 MR. NORRIS: I didn't --

9 MR. BAJOCZKY: -- before, but he was never charged
10 with it -- with an offense. And it would be totally
11 improper and I will, I will respectfully warn everybody
12 that is mistrial. And you can, you can resolve the
13 difference with the fact that Officer Bush can say that
14 there is evidence or she had other people complain of sex
15 with a client. And if you're going to go into he's
16 presently pending -- other pending charges, that's going
17 to be absolutely reversible.

18 MR. NORRIS: He didn't say that. He didn't say --

19 MR. HUTCHINS: Judge, the problem with that --

20 MR. NORRIS: -- prior pending charges --

21 MR. BAJOCZKY: He asked him that.

22 MR. NORRIS: -- it also implies a conviction. Okay?
23 That case can very likely come out that the jury doesn't
24 believe him. She was asleep and said that he, he touched
25 her crotch, inappropriate sexual conduct.

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1 MR. HUTCHINS: I was at the depo, Judge. And she
2 was very clear that the defendant inserted his finger
3 inside her vagina.

4 MR. BAJOCZKY: Yeah, that's not -- the question is,
5 Your Honor, what was it at the time --

6 MR. HUTCHINS: Very particular.

7 MR. BAJOCZKY: -- Officer Bush asked him, what was
8 he aware of. And at that time he lied, basically, about
9 having sexual conduct -- or sexual contact with another
10 person, not necessarily that it was inappropriate.

11 Nobody complained to him it was inappropriate. It was
12 his oath. But he had never been charged with a crime.

13 And now to expand it, the claim you want to impeach
14 him and somehow go beyond the scope of the sexual battery
15 is -- it will be reversible error.

16 MR. HUTCHINS: Judge, the problem with
17 Mr. Bajoczky's argument is he's saying that he had sex
18 previously with another client, but that's not what we're
19 talking about. We're not talking about consensual sex,
20 because certainly the fact that he's charged with sexual
21 battery in the other case, the fact that he's charged
22 with sexual battery in this case is absolutely relevant.
23 I mean, if -- nobody cares if he engages in -- if a
24 client wants it then, you know, whatever.

25 But, you know, to say that he previously engaged in

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1 sex with another client when what we're talking about is a
2 sexual battery, I think, is misleading the jury, because it
3 implies that the sex that occurred was consensual. And
4 clearly, the victim has said it wasn't. She came to law
5 enforcement. She's given a deposition. The case is
6 pending before Your Honor. This is the same investigator
7 who conducted investigation into that case.

8 So I think when you go and you just stop at saying he
9 had sex previously with a client, it's misleading to the
10 jury, because it wasn't sex, because it was against her and
11 she said that. It was a sexual battery. And that --
12 there's a difference between consensual sex between two
13 adults and --

14 MR. NORRIS: Sexual battery implies a conviction,
15 Judge.

16 MR. BAJOCZKY: Sexual battery --

17 THE COURT: What you're going to ask about -- we're
18 not going to argue. You're just rearguing and restating
19 and rearguing and restating.

20 I want you to stay away, Mr. Hutchins, from the term
21 sexual battery. But you can ask her, during the course of
22 your investigation, have, have other -- I don't know how
23 many clients, but have you learned of --

24 MR. BAJOCZKY: As any would ask.

25 THE COURT: -- have you heard of other clients who

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1 have, that you've interviewed, that have indicated to you
2 that Mr. Thorpe has had inappropriate sexual contact with
3 them without their consent.

4 MR. HUTCHINS: Okay.

5 MR. BAJOCZKY: And are we then going to say -- is he
6 then going to be allowed to say, well, how many? Who are
7 they? I think that would be improper.

8 MR. NORRIS: Because then we're prejudiced --

9 MR. BAJOCZKY: Then he's just, then he's just
10 continuing to open the door to more stuff. And I want to
11 be sure to know --

12 MR. NORRIS: Uh-huh.

13 MR. BAJOCZKY: -- how far the door is open.

14 MR. NORRIS: And I'm not even sure we opened the
15 door. I don't agree on that.

16 MR. HUTCHINS: This is, this is what I intend to do.
17 You can tell me -- I just wrote down what you just
18 asked -- or what you just told me what I can ask,
19 basically, about. Inappropriate sexual contact with
20 anyone else. And I think the fact that, that he has been
21 charged with the sexual battery, I think that's
22 absolutely relevant.

23 MR. BAJOCZKY: I thought we just ruled on that.

24 THE COURT: No. I already ruled on that,
25 Mr. Hutchins.

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1 MR. HUTCHINS: Well, Judge, you said I couldn't use
2 the term sexual battery but could I indicate that he's
3 been charged with an offense stemming from one of his
4 massages? And then that way it's not sexual battery
5 but -- it's absolutely relevant, Judge, for them to know.
6 For him to sit there and on this tape and say six
7 different times that he's never done anything wrong, he's
8 never had a problem with women that he's massaged and
9 he's never had a problem, the fact that he has been
10 charged as a result of one of his massages is absolutely
11 relevant. And I can't mention the sexual battery. I
12 think in doing it that way, I'm not --

13 MR. NORRIS: Judge, the relevance is rearguing
14 *williams* rule. The question is impeachment. He wasn't
15 asked was he charged. He was asked about his contact --
16 THE COURT: You can ask -- here's what you can ask
17 him. You can ask the nature of the inappropriate --
18 alleged inappropriate conduct.

19 MR. HUTCHINS: Judge, and I'm not -- we're not
20 talking about *williams* rule, because that's bringing in a
21 witness to testify about the facts of that case. I'm not
22 trying to get into the facts of that case, Judge. I'm
23 simply trying to establish that he was charged --

24 MR. NORRIS: No.

25 MR. HUTCHINS: -- with the offense.

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1 THE COURT: No. You can ask what I told you you can
2 ask. And you can ask what inappropriate, what
3 inappropriate -- what kind of inappropriate sexual
4 conduct the investigator's learned about.

5 MR. HUTCHINS: Okay.

6 (Sidebar discussion concludes.)

7 THE COURT: Are you ready, Ms. Gutierrez?

8 THE COURT REPORTER: Yes, ma'am. Thank you.

9 THE COURT: Mr. Hutchins, you may continue with your
10 inquiry.

11 REDIRECT EXAMINATION (cont)

12 BY MR. HUTCHINS:

13 Q Now, I believe you testified that you were the lead
14 investigator on this case; is that correct?

15 A That's correct.

16 Q Were there any other clients of the defendant that
17 complained of inappropriate sexual conduct during his
18 massages?

19 A Yes, sir.

20 Q How many?

21 A There was one that filed a actual police report and
22 it had at least eight women that came forward with
23 inappropriate conduct that didn't reach the level of criminal
24 conduct.

25 Q Now --

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1 A I believe it was eight.

2 Q Now, what type of inappropriate conduct are we
3 talking about? Are we talking about digital penetration?

4 A No --

5 Q And -- well, in one of the cases, are we talking
6 about digital penetration?

7 A Yes. In one of them. That was the criminal one.

8 Q Do you see the person sitting here in court today
9 that, back on April the 5th, sat in your office -- sat in the
10 police station and told you that he had never had any problem
11 with women?

12 A Yes.

13 Q Isn't it true he told you, I've never had a problem
14 with a client, ever?

15 A Yes. Excuse me, yes.

16 Q Isn't it also true he told you he never had this
17 issue with a client?

18 A Yes.

19 Q He told you that this was totally out of his
20 character?

21 A Yes, sir, he did.

22 Q And at least eight different women have come forward
23 and said he was inappropriate with them during the course of a
24 massage?

25 A I think it was eight.

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1 MR. HUTCHINS: No further questions.

2 THE COURT: Mr. Norris, any further questions?

3 MR. NORRIS: Yes, ma'am.

4 RECROSS-EXAMINATION

5 BY MR. NORRIS:

6 Q Good morning, Investigator Bush.

7 A Yes. Good morning.

8 Q You first got involved in this case on April 2nd?

9 A Yes, sir.

10 Q And did you -- you went to Enjoy Life Rehab Center?

11 A Yes, sir, I did.

12 Q Where is that located?

13 A It's on South Monroe Street. Pardon me. I didn't
14 bring my glasses with me. 1533 South Monroe Street.

15 Q In Omnimax Plaza?

16 A Yes, sir.

17 Q How many other businesses are there?

18 A I'm not sure. There are a couple business. I know
19 there's a hair salon.

20 Q Can you --

21 A I'm not sure about the other ones.

22 Q Can you name all those businesses?

23 A No, I cannot.

24 Q Were any of them opened during the morning hours of
25 April 2nd?

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1 MR. HUTCHINS: Objection, calls for speculation.

2 BY MR. NORRIS:

3 Q Were you able to determine whether any of them were
4 open?

5 A No, sir.

6 Q You didn't go next door and talk to all the other
7 businesses?

8 A No, I did not.

9 Q You didn't look for people who might have seen
10 Mr. Thorpe and Ms. [REDACTED] together?

11 A I spoke with Mr. Kirsten.

12 Q But you didn't go and ask the other businesses --

13 A No, I did not.

14 Q You didn't even have the names of all of them,
15 right?

16 A That's correct.

17 Q Did you go in and take photographs of the inside of
18 Enjoy Life Rehab Center?

19 A I did not take photographs.

20 Q Did you check the lock?

21 A I didn't know to check the lock until after the
22 interview. I spoke -- I went there before I knew that the
23 lock was an issue.

24 Q And you didn't go back?

25 A No, I did not.

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1 Q You didn't take a picture of the lock?

2 A No. Because I was told by both of them that it was
3 unlocked by Mr. Thorpe.

4 Q Okay. Did you subpoena Ms. [REDACTED] phone records?

5 A No, I didn't.

6 MR. HUTCHINS: Objection, Your Honor, relevance.

7 BY MR. NORRIS:

8 Q You talked a lot about his phone --

9 THE COURT: Overruled.

10 MR. NORRIS: Thank you.

11 BY MR. NORRIS:

12 Q Did you speak to Veronica Vasquez?

13 A No, I did not.

14 Q Did you even discover Veronica Vasquez?

15 A I believe Derek Kidd had spoken with Ms. Vasquez.

16 Q You didn't reinterview her?

17 A No, I did not.

18 Q How about Ms. Sciba, her supervisor, did you talk to
19 her?

20 A No, I did not.

21 Q How about Belen Kelly?

22 A I do not know who that is.

23 Q Are you aware that Ms. [REDACTED] called Ms. Belen
24 Kelly immediately following this alleged incident?

25 A Is that the coworker she talked to? I don't know --

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1 Q It's her other friend.

2 A -- who that is.

3 Q Don't you think that's important who she talked to
4 immediately following this alleged incident?

5 A In some cases it is, yes.

6 Q How about the lady -- were you ever able to
7 determine the lady with the next appointment?

8 A No. Because you did not provide that to me as you
9 said you would.

10 Q You took Mr. Thorpe's telephone, didn't you?

11 A Yes. But you told me in the interview that you were
12 going to provide me with that interview if you could, or she
13 was going to contact me.

14 Q And --

15 A Due to HIPAA, I would not go through that phone to
16 find that person.

17 Q The, the information was all, as you also said, was
18 all on his phone, correct?

19 A And I wouldn't know who that is on his phone.

20 Q Are you aware Mr. Thorpe surrendered his massage
21 therapy license?

22 A I'm sorry. What?

23 MR. HUTCHINS: Objection, relevance.

24 THE COURT: Sustained.

25

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1 BY MR. NORRIS:

2 Q You still have Mr. Thorpe's phone? TPD still have
3 it?

4 A Yes.

5 MR. NORRIS: Thank you.

6 THE COURT: Can Investigator Bush be released at
7 this time, or do you need to retain her?

8 MR. HUTCHINS: Judge, we'd ask she be retained.

9 THE COURT: Investigator Bush, you'll need to stick
10 around.

11 THE WITNESS: Yes, ma'am.

12 (Witness exits.)

13 THE COURT: Mr. Hutchins, does the State any further
14 witnesses?

15 MR. HUTCHINS: The State has no further witness,
16 Your Honor. The State would rest its case.

17 THE COURT: All right. At this time we will take a
18 15-minute recess, and then we can begin the defense.

19 I'll just remind you-all again, please don't discuss
20 this case with each other or anybody else.

21 (Jury exits.)

22 THE COURT: Okay. Please have a seat.

23 All right. Mr. Norris, do you need a few minutes to
24 speak with Mr. Thorpe?

25 MR. NORRIS: Yes.

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1 THE COURT: Okay.

2 MR. NORRIS: No. If it's about him testifying,
3 we've spoken about that at length, Judge.

4 THE COURT: Okay. All right. Anything before I
5 begin my inquiry about whether or not he wishes to
6 testify?

7 MR. NORRIS: No, ma'am.

8 THE COURT: Okay.

9 MR. NORRIS: Oh. Yes, Your Honor. I move for
10 directed verdict. There -- the State has not met its
11 burden beyond a reasonable doubt that the victim -- that
12 Mr. Thorpe committed sexual battery, certainly on three
13 counts against Ms. [REDACTED] Ms. [REDACTED] herself
14 testified that she froze, that he held -- pushed her legs
15 for a minute but didn't ever tell him no. She actually
16 indicated yes, yeah -- yeah once, yes, and do you have a
17 condom? I don't think the State has met its burden that
18 a sexual battery was committed, certainly on three.

19 THE COURT: All right. And I --

20 MR. HUTCHINS: Your Honor, the --

21 THE COURT: The victim testified that these
22 encounters were against her will. So I believe that's a
23 jury question. And the request for the judgment of
24 acquittal is denied, because the State's met a prima
25 facie case as to all three elements.

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1 MR. HUTCHINS: Thank you.

2 THE COURT: And, Mr. Thorpe, have you made a
3 decision as to whether or not you wish to testify, sir?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: And what is your decision?

6 THE DEFENDANT: I've decided not to, Your Honor.

7 THE COURT: And you understand that this is your
8 decision? You can certainly heed the advice of your
9 attorneys, but, ultimately, you're the captain of the
10 ship in this regard and that this has to be your
11 decision, not your lawyers' decision. And it wouldn't be
12 a basis to come back later to say that you listened to
13 your lawyers and it really wasn't your decision. I need
14 to know if this is your decision not to testify.

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: And do you understand, sir, that the
17 decision not to testify, you would be entitled to an
18 instruction regarding the jury -- to the jury regarding
19 that you aren't required to -- that the State has the
20 burden. You don't have the burden to prove anything, and
21 you're not required to prove your innocence. You're
22 aware of that instruction, sir?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: Okay. So you would be entitled to that.
25 Do you also understand, sir, that, if you do not testify,

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1 that your attorney may not argue to the jury anything
2 that has not come into evidence in this trial? Now,
3 there can be fair inferences made, but if there's -- if
4 it's not in evidence and it's something that you've told
5 your lawyer but hasn't come before the jury, that your
6 attorney is not allowed to, allowed to argue that. Do
7 you understand that?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Okay. So Mr. Norris, may only argue
10 facts that are in evidence. Do you understand?

11 THE DEFENDANT: Correct.

12 THE COURT: Okay. All right. And let's go ahead
13 and talk about the jury instructions if we can. How many
14 witnesses, besides Mr. Thorpe, will you have, Mr. Norris?
15 I mean, Mr. Thorpe is not testifying. Who are your other
16 witnesses?

17 MR. NORRIS: Two.

18 THE COURT: Who are they?

19 MR. NORRIS: Kirshner Saint -- Belen Kelly and
20 Kirshner Saint-Charles.

21 THE COURT: Okay. All right. Page 1, any
22 corrections?

23 MR. BAJOCZKY: No, ma'am.

24 THE COURT: Page 2, other than taking out mentally
25 incapacitated paragraph and mentally defective,

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1 anything --

2 MR. BAJOCZKY: That's the three paragraphs there,
3 correct?

4 MR. HUTCHINS: No.

5 THE COURT: Two.

6 MR. HUTCHINS: Judge --

7 MR. BAJOCZKY: Three.

8 THE COURT: Three.

9 MR. HUTCHINS: Judge, we're going to request a
10 special jury instruction be included. And I don't know
11 if the Court has a statute book but it's at 794.022.

12 THE COURT: 794.022?

13 MR. HUTCHINS: Yes, Your Honor. Under rules of
14 evidence, subsection five reads, "An offenders use of a
15 prophylactic device or a victim's request that offender
16 use a prophylactic device is not, by itself, relevant to
17 either the issue of whether or not the offense was
18 committed or the issue of whether or not the victim
19 consented."

20 THE COURT: Give me that number again.

21 MR. HUTCHINS: I have a -- I printed it out, Judge.
22 It's --

23 THE COURT: 794?

24 MR. HUTCHINS: 794.022. It's -- if I could
25 approach.

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1 THE COURT: Yeah.

2 MR. HUTCHINS: Subsection five. It's the last
3 paragraph.

4 THE COURT: Do you need to see it, Mr. Norris?

5 MR. NORRIS: Yes, ma'am.

6 MR. HUTCHINS: Okay. It's right here.

7 (Off-the-record discussion.)

8 THE COURT: So that's No. 5?

9 MR. HUTCHINS: Yes, ma'am.

10 THE COURT: Mr. Norris.

11 MR. NORRIS: I will make a standard objection. It's
12 not part of the regular jury instruction, but it is in
13 the statute.

14 THE COURT: All right. Where would you like that
15 inserted, Count . . .

16 MR. HUTCHINS: Judge, I think it should go under
17 consent in each count, under the definition of consent.

18 MR. NORRIS: Well, it would only go in the --

19 MR. BAJOCZKY: It would only go in the one where
20 there is actual intercourse, Your Honor, not penetration
21 by finger or oral sex. That would be the Count III.

22 MR. HUTCHINS: Okay. That's fine.

23 THE COURT: Okay. Count III.

24 MR. BAJOCZKY: So on page 2, we have three
25 paragraphs we have removed?

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1 THE COURT: Yes. The paragraph starting with,
2 evidence of the victim's mental incapacity --

3 MR. BAJOCZKY: Page 3, same thing?

4 THE COURT: Yes, sir.

5 MR. BAJOCZKY: Page 4, same thing?

6 THE COURT: Yes, sir.

7 MR. BAJOCZKY: And then you're going to add
8 underneath the page 4 and underneath consent what Mr. --

9 THE COURT: Yes.

10 MR. BAJOCZKY: -- Hutchins just talked about.

11 THE COURT: Yes.

12 MR. BAJOCZKY: Okay.

13 THE COURT: Page 5.

14 MR. BAJOCZKY: No change.

15 THE COURT: Now, let's talk about this. We're going
16 to have the lesser included of battery as to all three
17 counts, correct?

18 MR. HUTCHINS: Judge, I think -- well, it's --

19 THE COURT: So on the verdict form, you're going to
20 have Count I as charged, then battery, then not guilty,
21 right?

22 MR. HUTCHINS: On the verdict form, Judge, we'll
23 have defendant's guilty of sexual battery, defendant's
24 guilty of the lesser included offense of battery, and
25 then defendant is not guilty. If I can approach, I

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1 can --

2 THE COURT: But it's as to each count, correct?

3 MR. HUTCHINS: Yes, ma'am.

4 THE COURT: Okay. Page 6, any corrections?

5 MR. BAJOCZKY: No, ma'am.

6 MR. HUTCHINS: No, Your Honor.

7 THE COURT: Page 7? What --

8 MR. BAJOCZKY: Yes, ma'am. I don't believe No. 6 is
9 applicable.

10 THE COURT: Six, seven . . .

11 MR. BAJOCZKY: I think seven may be. But . . .

12 THE COURT: In what regard?

13 MR. BAJOCZKY: I -- just any kind of policeman picks
14 you up, questions you. The question, had there been any
15 pressure, I don't think there was any evidence of any
16 pressure or threat.

17 MR. HUTCHINS: Judge, I don't, I don't think
18 that's --

19 THE COURT: Well --

20 MR. BAJOCZKY: Okay. Then you can delete it.
21 That's not a biggie.

22 THE COURT: Right.

23 MR. HUTCHINS: I mean, I will just state for the
24 record Mr. Norris was with him when he talked to the
25 police. He wasn't in handcuffs. Actually left after --

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1 THE COURT: Well, and the defendant hasn't been a
2 witness, so it wouldn't apply.

3 MR. HUTCHINS: May I approach?

4 THE COURT: Eight.

5 MR. BAJOCZKY: Well, Your Honor, anyhow, No. 7
6 doesn't just apply to defendant. It applies to any
7 witness.

8 THE COURT: Sure. I don't think we need seven.

9 Eight probably needs to --

10 MR. BAJOCZKY: Yes, stay.

11 THE COURT: -- stay.

12 MR. BAJOCZKY: Nine, no. Ten, no.

13 THE COURT: Mr. Hutchins, do you disagree?

14 MR. HUTCHINS: we have two more witnesses, Judge,
15 but I don't, I don't think either one of them is a
16 convicted felon.

17 THE COURT: Okay.

18 MR. HUTCHINS: And ten.

19 THE COURT: We've had two experts qualify, so that
20 would stay.

21 MR. HUTCHINS: Yes.

22 THE COURT: The defendant has not testified. That
23 needs to come out. The defendant's statements were
24 admitted.

25 MR. BAJOCZKY: And proper.

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1 THE COURT: So that would be proper. I'll give the
2 instruction def --

3 MR. BAJOCZKY: Defendant not testifying is proper.

4 THE COURT: Uh-huh.

5 MR. BAJOCZKY: That's on page 9.

6 THE COURT: Anything --

7 MR. BAJOCZKY: I'm not sure anything about
8 eyewitness, Your Honor, although it seems innocuous.

9 But . . .

10 MR. HUTCHINS: That's now part of the standard. I
11 mean, if they want them taken out, I --

12 MR. BAJOCZKY: No. We --

13 MR. HUTCHINS: -- don't care.

14 MR. BAJOCZKY: -- don't want it taken out. I just
15 had a big question mark on it. Doesn't seem to be
16 relevant.

17 MR. HUTCHINS: I don't think identification is the
18 issue, Judge. So, I mean . . .

19 THE COURT: Do y'all want it in or out?

20 MR. HUTCHINS: Let's leave it in, Judge, in an
21 abundance of caution.

22 MR. BAJOCZKY: Right.

23 THE COURT: Okay. Page ten.

24 MR. BAJOCZKY: It's fine.

25 THE COURT: We need to take out No. 8 --

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1 MR. BAJOCZKY: That's correct.

2 THE COURT: -- on page 11. And the italics on the
3 bottom of page 10 I'll get rid of. Page 11, anything
4 else?

5 MR. BAJOCZKY: Just a moment, Your Honor.

6 THE COURT: Page 12.

7 MR. BAJOCZKY: No.

8 THE COURT: Thirteen.

9 MR. BAJOCZKY: No, ma'am. Fine.

10 THE COURT: Let me run upstairs and get this --
11 well, let's do -- let me, let me get these done so that
12 we can move straight into the defense's case and then
13 I'll read the instructions. We'll do closing arguments.
14 Okay?

15 MR. HUTCHINS: And I think Ms. Lee has the, the
16 requested --

17 THE COURT: Ms. Lee's father passed away yesterday.

18 MR. HUTCHINS: Oh, I'm sorry.

19 THE COURT: I don't know that she's here.

20 MR. HUTCHINS: I didn't know.

21 THE COURT: So . . .

22 MR. HUTCHINS: Well, Judge, do you want me to run
23 upstairs and e-mail you the jury instruction?

24 THE COURT: I have it. You e-mailed them to all of
25 us.

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1 MR. HUTCHINS: Okay.

2 THE COURT: Okay. Be right back.

3 (Brief recess.)

4 THE BAILIFF: Court is now in session.

5 THE COURT: Please have a seat. Mr. Hutchins and
6 Mr. Norris, a copy. Okay. Are ready to bring the jury
7 back in?

8 MR. NORRIS: Yes, ma'am.

9 THE COURT: Okay.

10 (Jury enters.)

11 THE COURT: Please have a seat.

12 Mr. Norris, are you ready to call your first witness?

13 MR. NORRIS: Yes, ma'am.

14 THE COURT: All right.

15 MR. NORRIS: Defense calls Belen Kelly.

16 JUROR SONNENFELD: May I ask you a question?

17 MR. NORRIS: No. I'm sorry.

18 JUROR SONNENFELD: What is the name of your partner?

19 MR. NORRIS: Oh, I can't.

20 THE COURT: If you'll stand and be sworn, ma'am, by
21 the clerk.

22 whereupon,

23 BELEN KELLY

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

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1 THE COURT: You can have a seat. And if you'll
2 speak into the microphone, please.

3 MR. NORRIS: May I inquire?

4 THE COURT: Uh-huh.

5 THE WITNESS: Can you hear me?

6 DIRECT EXAMINATION

7 BY MR. NORRIS:

8 Q Good morning, Ms. Kelly.

9 A Good morning.

10 Q Can you state your name and spell it for the record?

11 A My name is Belen Kelly, B-E-L-E-N, last name,
12 K-E-L-L-Y.

13 Q And what do you do, Ms. Kelly?

14 A I am -- work wise? Customer service representative
15 for Intuition Systems.

16 Q Where are you from?

17 A I'm originally from Brooklyn, New York, resided in
18 Fort Lauderdale for the last few years and now a resident of
19 Tallahassee.

20 Q Went to school here?

21 A Yes.

22 Q Do you know [REDACTED]

23 A Yes, I do.

24 Q How long have you known [REDACTED]

25 A From 2008. We've known each other -- well, we

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1 joined an organization together at school. So I met her then
2 in 2008.

3 Q Would you say she's an emotional person?

4 A She is.

5 Q Do you recall the events of April 2nd, 2012?

6 A I do.

7 Q Okay. Did you receive a phone call or a text from
8 Ms. [REDACTED] that morning?

9 A I received a phone call from Ms. [REDACTED].

10 Q Did -- what did Ms. [REDACTED] tell you?

11 MR. HUTCHINS: Objection, hearsay.

12 MR. NORRIS: Your Honor, the statements of an
13 alleged victim of a sexual battery, immediately after
14 that -- alleged incident are admissible as an exception
15 to the hearsay rule. I've got several cases on it,
16 beginning being *Pacifico v. State*.

17 THE COURT: Okay. Let's take a sidebar, again.

18 (Sidebar discussion held as follows):

19 MR. NORRIS: Make sure I have the right ones, Judge.
20 About the victims.

21 THE COURT: What exception?

22 MR. NORRIS: It's 9801 -- hang on. I'm trying to
23 find it. 98.03, subsection three, as the then existing
24 mental or emotional condition of the sexual battery
25 victim. And it cites the State which -- *Pacifico v.*

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1 *State*, which is 642 So.2d 1178.

2 (Brief pause.)

3 THE COURT: Do you have any response, Mr. Hutchins?

4 MR. HUTCHINS: I've never seen that. I haven't had
5 a chance to read it.

6 MR. NORRIS: I can also establish that she was in an
7 excited state.

8 MR. BAJOCZKY: Excited utterance.

9 MR. HUTCHINS: Well, excited utterance isn't
10 pursuant to the question that she's like, hey, what
11 happened, yada, yada, yada. Excited utterance is I see
12 something and I blurt something out. So --

13 THE COURT: Have you laid the proper foundation? I
14 don't think you have laid the foundation for either of
15 them yet, quite frankly.

16 MR. HUTCHINS: And I don't think that -- and,
17 obviously, I think you have to establish a time. And my
18 recollection was that there was a call made and she said
19 she couldn't understand her and asked her to call her
20 back.

21 MR. NORRIS: She made statements during that where
22 she was very excited.

23 THE COURT: Well, you haven't laid the foundation
24 for either at this point. You just asked her did she get
25 a call from her that morning.

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1 MR. NORRIS: How, how would not statements
2 immediately prior to, at the time of the sexual
3 encounter?

4 THE COURT: You just asked her if she got a call
5 from her that morning.

6 MR. BAJOCZKY: Yeah. About the same time.

7 THE COURT: What time?

8 MR. NORRIS: I'll ask her what time.

9 THE COURT: What time was the call, by the way?

10 MR. BAJOCZKY: 9:25.

11 MR. NORRIS: No, it was later. It was 10:00.

12 MR. BAJOCZKY: Well, wasn't there one prior to that
13 when she was walking up?

14 MR. HUTCHINS: No. She didn't make any calls --
15 well --

16 MR. NORRIS: She made calls 11:12 and 11:19. 11:19
17 is to 954 -- I'll lay the predicate for the -- on that,
18 Judge.

19 THE COURT: Well, if it's -- if you're going to try
20 to get it in under some sort of excited utterance, you're
21 going to have to lay that predicate, as well.

22 MR. BAJOCZKY: You need another one, Toby.

23 MR. NORRIS: It all seems to be pretty clear to me
24 that I can ask about hearsay statements immediately prior
25 to and after this alleged incident.

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1 THE COURT: And what is she going to testify to?
2 what's she going to say?

3 MR. NORRIS: She's going to say that they ended up
4 having sex.

5 MR. BAJOCZKY: Is this the one that said he was
6 cute?

7 MR. NORRIS: That he -- uh-huh.

8 MR. HUTCHINS: Well --

9 THE COURT: What is she going to say?

10 MR. HUTCHINS: -- she never said -- I don't think --
11 no. She never testified to that. I took her deposition.
12 She wasn't the one that said that.

13 MR. BAJOCZKY: Uh-huh.

14 MR. HUTCHINS: No. I have a copy of her deposition.

15 MR. NORRIS: And you -- if you asked her that --
16 just because you didn't ask her, doesn't mean she never
17 said that.

18 THE COURT: Okay. Anything else?

19 MR. HUTCHINS: Well, I think the question whether he
20 was cute or not, I think that was --

21 MR. BAJOCZKY: Huh-uh. We're not going to ask her
22 that question.

23 MR. NORRIS: I'm going to ask her what she said in
24 her excited state when she called her.

25 MR. HUTCHINS: I think she told Ms. Vasquez, when
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1 she talked to her that morning, that he -- I don't
2 think she --

3 MR. NORRIS: I don't know. We'll see what she says.

4 MR. HUTCHINS: She doesn't say in her depo.

5 THE COURT: So if you can lay the foundation.

6 MR. NORRIS: Okay.

7 THE COURT: I think if it's immediately after the
8 alleged incident, you can ask her. But you have to lay
9 all that foundation then. Okay?

10 (Sidebar discussion concludes.)

11 MR. NORRIS: May I inquire, Your Honor?

12 THE COURT: Uh-huh.

13 BY MR. NORRIS:

14 Q Ms. Kelly, you know [REDACTED] correct?

15 A Yes.

16 Q And you've been friends with her for some time by
17 2000 and -- April of 2012?

18 A Yes.

19 Q Are you aware that she had a massage on the morning
20 of April 12?

21 A Yes.

22 Q Do you have any idea what time that -- she left that
23 massage?

24 A It was the morning, so I would say maybe around
25 9:30, ten o'clock.

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1 Q Okay. Did you receive a phone call from her at
2 approximately 11:19 a.m.?

3 A I'm not exactly sure of the time, but I know it was
4 that morning.

5 Q Was she in an excited state?

6 MR. HUTCHINS: Objection, Your Honor.

7 THE COURT: Can you state the legal basis?

8 MR. HUTCHINS: I'll withdraw --

9 THE COURT: Okay.

10 MR. HUTCHINS: -- that question -- that objection.

11 BY MR. NORRIS:

12 Q Was she upset or in an excited state?

13 A She was upset.

14 Q Was she crying?

15 A Yes.

16 Q What did she tell you?

17 MR. HUTCHINS: Objection.

18 THE COURT: Overruled.

19 THE WITNESS: When she called me, she was crying and
20 she said that she had sex with him.

21 BY MR. NORRIS:

22 Q With who?

23 A With Christopher Thorpe.

24 Q The massage therapist?

25 A Yes.

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1 Q Did she say anything else to you about him?

2 MR. HUTCHINS: Objection, hearsay.

3 BY MR. NORRIS:

4 Q During that conversation?

5 A During that conversa --

6 THE COURT: Overruled.

7 BY MR. NORRIS:

8 Q That means you can go ahead.

9 A During that conversation, she didn't tell me
10 anything else. I spoke with her and told her to call me back
11 because she was crying.

12 Q Is Ms. [REDACTED] a passive person in your . . .

13 A She can be.

14 Q But she can also be very emotional, right?

15 A Yes.

16 Q Have you heard her crying and hysterical before?

17 MR. HUTCHINS: Objection, relevance.

18 MR. NORRIS: Judge, they've made this whole case
19 about how upset she was.

20 THE COURT: Overruled.

21 THE WITNESS: She is an emotional person. We've had
22 conversations before where she was upset, crying from
23 being stressed over different -- I mean, different
24 things.

25 BY MR. NORRIS:

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1 Q And sometimes you'd tell her you don't want to talk
2 to her because she was --

3 MR. HUTCHINS: Objection leading.

4 THE COURT: Sustained.

5 MR. NORRIS: I'll rephrase. I'll rephrase.

6 BY MR. NORRIS:

7 Q Did you ever have to end phone conversations with
8 her?

9 A Yes.

10 Q Why?

11 A Honestly, me being the -- well, me, personally, I
12 don't deal with people who cry too much, mainly because I'm an
13 emotional person myself. And, also, we don't get anywhere in
14 the conversation when a person's crying.

15 Q So during the phone call immediately after this
16 massage, when she was upset --

17 MR. HUTCHINS: Judge, I'm going to object. Can we
18 go sidebar?

19 THE COURT: Yeah.

20 (Sidebar discussion held as follows):

21 MR. HUTCHINS: This is my objection, Your Honor.
22 She testified she doesn't know what time the massage
23 ended. Her testimony, specifically, was that it was
24 about -- she thinks it was 9:30. She doesn't know. So I
25 don't know that she can testify that this happened right

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1 after the massage. And, therefore, I don't think that
2 the case that they've cited to, in which there was an
3 outcry of the victim right after it happened.

4 I don't think there's times that has passed between,
5 you know, of her testimony, she left at 9:30 and then she
6 gets a call two hours later, which is what her testimony
7 is.

8 MR. NORRIS: I can clear that up. I think she said
9 the massage was at 9:30. I, I think she just missed -- I
10 think she thought I asked what time the massage started.
11 Excuse me.

12 MR. HUTCHINS: I think she said that's what time she
13 thought she left. That's what she testified to --

14 MR. NORRIS: I'll clarify.

15 MR. HUTCHINS: Well, I mean, she's answered the
16 question the best she can. I don't know that you can
17 clarify that. I mean, her testimony was she left --

18 THE COURT: What was your next question going to be?

19 MR. NORRIS: I wanted to ask her if she -- what else
20 she said during that -- when she was excited. Did she
21 tell you she was assaulted or, or raped? Did she use the
22 word -- any of those words?

23 THE COURT: She just told you that she told her.

24 MR. NORRIS: Okay. We'll move on.

25 (Sidebar discussion concludes.)

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1 MR. NORRIS: No further questions, Your Honor.

2 THE COURT: Okay. I need -- well, I've got to wait
3 for Ms. Gutierrez.

4 Any questions, Mr. Hutchins?

5 MR. HUTCHINS: Yes, Your Honor. I have a few.

6 (Brief pause.)

7 BY MR. HUTCHINS:

8 Q I believe -- well, let me ask you, Ms. Kelly: You
9 know the defendant in the case, don't you?

10 A Yes.

11 Q And isn't it true you met him right after all this
12 happened in June of last year?

13 A Not right after.

14 Q Well, you met him in June of last year, correct?

15 A Well, yes.

16 Q And isn't it true that, basically, he came up and
17 introduced himself to you while you were talking to his
18 mother?

19 MR. HUTCHINS: Judge, this is beyond the scope
20 of . . .

21 THE COURT: Overruled.

22 MR. HUTCHINS: Judge, I'm able to --

23 THE COURT: Overruled.

24 MR. HUTCHINS: Thank you.

25 BY MR. HUTCHINS:

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1 Q Isn't it true that he came up and approached you and
2 began talking to you when you were talking to the defendant's
3 mother?

4 A Not during the time I was speaking with her, no.

5 Q But he came up and introduced himself to you?

6 A It wasn't necessarily introduction. We began
7 speaking, casual conversation.

8 Q Well, you didn't know him and he came up to you and
9 you guys exchanged names, correct?

10 A It was never exchange of names. We're both members
11 of the same church. We --

12 Q He came up and approached you; is that correct,
13 Ms. Kelly?

14 A Correct.

15 Q Okay. And it was after this happened; is that
16 correct?

17 A Yes, sir.

18 Q And he knew that you were friends with the victim;
19 isn't that also correct?

20 A No.

21 Q Isn't it true that he asked you questions about the
22 victim?

23 A He never asked me about the victim, no.

24 Q He tried to talk to you about this case; isn't that
25 true?

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1 A No. He didn't talk to me about this case.

2 Q Do you remember giving a deposition?

3 A I do recall the deposition.

4 Q Okay. And before the deposition started, you know,
5 you swore an oath to tell the truth, correct?

6 A Yes, sir.

7 Q And you knew it was important, because this is a
8 serious case.

9 A Yes.

10 Q Okay. Do you remember me asking you about the first
11 meeting that you had with the defendant, Christopher Thorpe?

12 A Yes.

13 Q Okay. And do you remember what your response was to
14 that question?

15 A Not to detail but I also told you that was last
16 year, and I couldn't exactly tell you when --

17 Q I'm not --

18 A -- we actually met.

19 MR. HUTCHINS: If I could approach the witness.

20 THE COURT: Yes, sir.

21 BY MR. HUTCHINS:

22 Q I'm showing you a copy of your deposition. On page
23 5, line 20 --

24 THE COURT: Line what?

25 MR. HUTCHINS: Line 20, Your Honor.

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1 THE COURT: Okay. Page 5, line 20?

2 BY MR. HUTCHINS:

3 Q Does that help refresh your memory?

4 A That does refresh my memory. And it also states, I
5 don't, I don't even really, like, remember, remember to the
6 full extent of how we met.

7 Q What I asked you in the depo, your answer was:

8 "when we, like, met, he was, like, oh, I spoke -- well, I was
9 speaking with his mom" --

10 MR. NORRIS: Objection, Your Honor --

11 MR. HUTCHINS: "And she told me" --

12 MR. NORRIS: -- he's reading from the deposition.

13 MR. HUTCHINS: I can do it at this point, Judge --

14 MR. NORRIS: No.

15 MR. HUTCHINS: -- because she --

16 THE COURT: Overruled.

17 MR. HUTCHINS: Thank you.

18 BY MR. HUTCHINS

19 Q Now, in the depo, you were asked the question: "All
20 right. Tell me about the first meeting you had with the
21 defendant, correct?

22 And your answer was: "when we first met, he was,
23 like, oh, that. I spoke -- well, I was speaking with my mom
24 and she told me that you knew about the situation, and I don't
25 even really, like, remember, remember the full extent of how

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1 we met."

2 A Correct.

3 Q So you were talking with his mom and he came up and
4 he was talking to you about the situation with your friend,

5 [REDACTED] correct?

6 A He -- talking to me about my friend, [REDACTED]

7 [REDACTED]. He didn't approach me.

8 Q I'm not asking you if he approached you, Ms. Kelly.

9 A Okay.

10 Q I'm asking you: Did he -- was he talking to you
11 about this situation with [REDACTED]

12 A No. He didn't talk to me about the actual
13 situation.

14 Q Well, you said here that he was talking about the
15 situation, that you knew about the situation, correct?

16 A You asked the next question, did you talk about the
17 case at all? And I told you, no. No, not at all.

18 Q Did he approach you and tell you --

19 MR. NORRIS: Asked and answered.

20 MR. HUTCHINS: -- and talked to you about the
21 situation.

22 THE COURT: Mr. Norris, if you'll let him finish his
23 question, then you can object.

24 What's the rest of the question, Mr. Hutchins?

25 MR. HUTCHINS: Okay.

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1 BY MR. HUTCHINS:

2 Q Now -- I'll move on, Judge.

3 Ms. Kelly, you testified that you got a call from
4 the victim that morning; is that correct?

5 A Correct.

6 Q And she was crying hysterically.

7 A I wouldn't say hysterically. She was crying.

8 Q She was crying so much that you told her just to
9 call you back because you couldn't understand.

10 A And I stated before that I don't deal with criers.
11 That's why I told her to call me back.

12 Q Okay. So she was crying so much you couldn't
13 understand her, correct?

14 A I, I wouldn't say that to -- that I didn't
15 understand her. I told her to call me back. Like I stated
16 before, I don't deal with criers.

17 Q Okay. Now, you were -- you broke your lease in
18 August of 2012 and the victim let you move in with her; isn't
19 that correct?

20 A She let me stay with her. I wasn't necessary
21 considered a roommate.

22 Q But she let you -- she gave you a place to stay,
23 correct?

24 A Correct.

25 Q And some point she asked you to leave, because you

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1 were wearing her clothes and using her things; isn't that
2 correct?

3 A Without her -- not without her permission.

4 Q But she asked you to leave, because you were wearing
5 her clothes and using her things; isn't that correct?

6 A She never gave me the reason why.

7 Q Isn't it correct -- isn't it true, Ms. Kelly, that
8 you don't like Ms. [REDACTED] and you're upset with her, because
9 she kicked you out of her apartment, because you were using
10 her things without her permission?

11 A No.

12 Q Well, you hadn't talked to her since she kicked you
13 out of her apartment; isn't that correct?

14 A That's incorrect. She called me in December when
15 her graduation came around and invited me to come along. She
16 came over my house in December to retrieve a stole for her
17 graduation. And after that, we never talked because I spoke
18 with her and asked for the ticket to come. And she didn't
19 contact me until 30 minutes before the graduation. And I told
20 her that -- to enjoy her day and we would, you know, hang out
21 later. And that was the last time we actually spoke.

22 Q Did the victim in the case, when you spoke to her --

23 MR. NORRIS: Objection, Judge.

24 MR. HUTCHINS: -- did --

25 THE COURT: I've already ruled on that issue,

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1 Mr. Hutchins. If you'll address --

2 BY MR. HUTCHINS:

3 Q When Ms. [REDACTED] contacted you, did she ever say
4 that the sex was consensual between herself and the defendant?

5 A She never blatantly said that, no.

6 MR. HUTCHINS: No further questions.

7 REDIRECT EXAMINATION

8 BY MR. NORRIS:

9 Q Did she ever say it was nonconsensual?

10 A No.

11 Q So what was your understanding of what she was
12 saying?

13 MR. HUTCHINS: Objection, calls for speculation.

14 THE COURT: Sustained.

15 MR. HUTCHINS: Thank you.

16 BY MR. NORRIS:

17 Q You went to church -- where did you go to church?

18 A Jacob's Chapel.

19 Q You went to church there before April 2012?

20 A Yes.

21 Q Did Ms. [REDACTED] go to church there?

22 A Yes.

23 Q Did the Thorpes go to church there?

24 A Yes.

25 MR. HUTCHINS: Objection, Your Honor, relevance.

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1 THE COURT: Overruled.

2 MR. NORRIS: No more questions. Thank you.

3 THE COURT: All right. Thank you, Ms. Kelly.

4 May Ms. Kelly be released?

5 MR. NORRIS: Yes, ma'am.

6 THE COURT: Okay. Who's your next witness,

7 Mr. Norris?

8 MR. NORRIS: Kirshner Saint-Charles.

9 (Witness exits.)

10 THE COURT: If you will raise your hand, sir.

11 whereupon,

12 KIRSHNER SAINT-CHARLES

13 was called as a witness, having been first duly sworn, was

14 examined and testified as follows:

15 THE COURT: If you'll take a seat, sir, and speak
16 into the microphone.

17 MR. NORRIS: May I inquire?

18 THE COURT: Yes, sir.

19 DIRECT EXAMINATION

20 BY MR. NORRIS:

21 Q Good morning --

22 A Morning.

23 Q -- Mr. Saint-Charles.

24 Can you state your name and spell it for the record,
25 please?

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1 A It's Kirshner Saint-Charles, K-I-R-S-H-N-E-R,
2 Saint-Charles, S-A-I-N-T, dash, Charles, C-H-A-R-L-E-S.

3 Q What do you do, sir?

4 A I work with Tallahassee Fire Department, and I'm a
5 registered nurse.

6 Q Do you know the defendant in this case, Christopher
7 Thorpe?

8 A Yes, sir.

9 Q How long have you known Mr. Thorpe?

10 A About a year.

11 Q Are you guys real good friends?

12 A No. Mostly like associates from work when I worked
13 at the nightclub.

14 Q Do you get your haircut in Omnimax Plaza?

15 A Yes, sir.

16 Q Can you tell us about that plaza?

17 A It's -- it was a tattoo shop then a barbershop then
18 a salon and a therapy place and I think a thrift store right
19 next to it.

20 Q Several businesses there?

21 A Yes, sir.

22 Q Do you recall the -- April 2nd, 2012?

23 A Yes, sir.

24 Q Did you have an occasion to go to Omnimax Plaza
25 then?

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1 A Yes, sir. For a haircut.

2 Q Was it around 11:00 a.m. in the morning?

3 A Probably about 12:00.

4 Q But you're not sure of that --

5 A No, sir.

6 Q -- it could have been --

7 MR. HUTCHINS: Objection Your Honor, leading.

8 THE COURT: Sustained.

9 BY MR. NORRIS:

10 Q Did you see Mr. Thorpe that morning?

11 A Yes, sir.

12 Q How do you know it was April 2nd?

13 A Because I -- when I went there, I remember I told
14 him if he was going to be at work the next day, which was a
15 Tuesday. And -- because he worked at The Coliseum.

16 Q Okay. What did you see when you approached the
17 business?

18 A He was walking out of there with another -- with a
19 woman and he had his shoes, and I cracked a joke and I said,
20 damn, what -- sorry. Sorry about that.

21 I said, why do you have your shoes off? What are
22 you doing, kickboxing? And then he laughed and he said, yeah,
23 something like that.

24 Q Was there a young woman with her --

25 A Yes, ma'am.

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1 Q -- with him?

2 A Yes, sir.

3 Q Can you describe her?

4 A She was big and black and kind of short.

5 Q Big and black and kind of short?

6 A Yes, sir.

7 Q Do you know now that that was [REDACTED]

8 A Yes, sir.

9 Q Okay. What did -- how did Ms. [REDACTED] appear to
10 you?

11 A She walked out normal. She walked to the car and
12 she stood in the car while me and him was walking.

13 Q Did she hurry off?

14 A No, sir.

15 Q Did you -- did she stand there for a minute and talk
16 with you-all?

17 A Yes, sir. She was waiting for me to finish talking
18 to him. And then I just walked off, but when I did crack the
19 joke, she laughed, too.

20 Q She laughed?

21 A Yes, sir.

22 Q Are sure you saw her laugh --

23 A Yes, sir.

24 Q -- at this point?

25 And she's standing there, waiting for Mr. Thorpe?

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1 A Inside the doorway of her car.

2 Q Okay. Now, you're not such good friends with him
3 that you'd come in here and lie to --

4 MR. HUTCHINS: Objection, Your Honor, improper.

5 THE COURT: Sustained.

6 MR. HUTCHINS: Thank you.

7 MR. NORRIS: Thank you, Mr. --

8 THE WITNESS: Yes, sir.

9 MR. NORRIS: -- Mr. Saint-Charles.

10 THE COURT: Mr. Hutchins, any questions?

11 CROSS-EXAMINATION

12 BY MR. HUTCHINS:

13 Q Did the defendant in the case tell you that he had
14 something going on with the young lady that walked out?

15 A Later that day, yes, sir. Through a text message.

16 Q Basically, that he was in a relationship with her?

17 A No. He said he was just talking to her.

18 Q All right. So he told you he had something going
19 on, with the text message he sent you, with her; is that
20 correct?

21 A Yeah. That he was just talking to her. But it was
22 nothing like he was messing with her. He was, like, yeah, I
23 just talked to her.

24 MR. NORRIS: Your Honor --

25 BY MR. HUTCHINS:

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1 Q Now --

2 MR. NORRIS: Hearsay.

3 MR. HUTCHINS: It's a statement of the defendant.

4 MR. NORRIS: It's not an admission. It's not a --
5 it doesn't meet any of the exceptions. It's not an
6 excited utterance.

7 MR. HUTCHINS: Any statement of the defendant is --

8 THE COURT: Overruled.

9 MR. HUTCHINS: Thank you.

10 BY MR. HUTCHINS:

11 Q Now, the defendant sent you several text messages;
12 is that correct?

13 A Yes, sir.

14 Q And isn't it true that law enforcement officers came
15 out and talked to you --

16 A Yes, sir.

17 Q -- about what you had seen that morning?

18 A Yes, sir.

19 Q You met with Investigator Sonya Bush, correct?

20 A Yes, sir.

21 Q And you told her, basically, that the defendant told
22 you that he had something going on with the victim in the
23 case.

24 A Yes, sir.

25 MR. NORRIS: Judge, now we have double hearsay. He

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1 told you that you told her? Objection.

2 MR. HUTCHINS: It's a statement of the defendant,
3 Your Honor. He just testified to --

4 THE COURT: Overruled.

5 MR. HUTCHINS: Thank you.

6 BY MR. HUTCHINS:

7 Q Now, didn't the defendant also ask you to contact
8 his attorney before you spoke with the law enforcement
9 officers?

10 A No, sir. He said that his attorney was going to be
11 calling to contact me.

12 Q Before speaking with the investigator in the case.

13 A That was after. The investigator spoke to me
14 before.

15 Q Okay.

16 MR. HUTCHINS: No further questions.

17 MR. NORRIS: This witness can be re -- excused, Your
18 Honor. And the defense rests.

19 THE COURT: Okay. Thank you, Mr. Saint-Charles.
20 You're excused.

21 THE WITNESS: I can go home?

22 THE COURT: You can go home.

23 THE WITNESS: All right.

24 (Witness exits.)

25 THE COURT: All right. At this point, I would be
VERONICA M. GUTIERREZ, OFFICIAL COURT REPORTER