IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0587

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSE MARTINEZ JR.,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, the Honorable Gregory R. Todd, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
JAMES REAVIS
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
jreavis@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

SCOTT D. TWITO
Yellowstone County Attorney
SARAH L. HYDE
JACOB A. YERGER
Deputy County Attorneys
P. O. Box 35025
Billings, MT 59107

ATTORNEYS FOR PLAINTIFF AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Authorities

Other Authorities

STATEMENT OF THE ISSUE

Did the State violate Jose Martinez's constitutional right to confront his accuser when the State chose to use S.M.'s SANE exam instead of her live testimony at trial?

STATEMENT OF THE CASE

The State charged Jose Martinez Jr. (hereafter "Jose") with three counts of Incest against his stepdaughter S.M., distributing drugs to S.M., solicitation to tamper with witnesses for statements made to S.M.'s mother Tammie Martinez (hereafter "Tammie"), and three counts of misdemeanor criminal contempt for jail calls to Tammie. (Doc. 94.) The State listed S.M. and Tammie as witnesses in the original information and the first, second, and third amended information. (Docs. 3, 14, 89, 94.)

Eight days before trial, the State disclosed it believed S.M. and Tammie would not appear to testify, despite being served with subpoenas. (Doc. 103.01 at 4; Doc. 106 at 1.) Simultaneously, the State sought admission of several statements made by S.M. during her Sexual Assault Nursing Examination (SANE) exam to nurse Susan Woods and during follow-up appointments to Dr. Cynthia Brewer. (Doc. 103.01 at

1-4.) Jose argued the statements were hearsay and violated the confrontation clauses of the U.S. and Montana Constitutions. (Doc. 106 at 2-5.)

Four days before trial, the district court held an evidentiary hearing on the admissibility of the SANE exam statements. (Doc. 112.) The district court granted the State's request in full. (Doc. 122.002 at 10; 4/5/21 Motions Transcript at 136-138, hereafter "Motion Tr.".)

S.M. and Tammie flouted their subpoenas and failed to appear for trial. (4/9/21 to 4/14/21 Jury Trial Transcript at 543-551, hereafter "Trial Tr.".)[1] Woods and Dr. Brewer testified about what S.M. told them. (*See* Trial Tr. 463-469, 486-498.) The State moved to admit S.M.'s written SANE examination as Exhibit 9 and the jury had access to the exhibit during deliberations. (Trial Tr. 463, 693; Doc. 129.) During closing rebuttal, the State said, "Please return to the testimony that you heard. Look at the evidence in your binders. Return to the SANE narrative." (Trial Tr. 693.)

[1] The trial transcript is continuously paginated across four different documents, each presenting as one day of a four-day trial, excluding the weekend. Day One, 4/9/21, contains pages 1-219. Day Two, 4/12/21, contains pages 220-444. Day Three, 4/13/21, contains pages 445-629. Day Four, 4/14/21, contains pages 630-709.

The jury convicted on all counts except one count of Incest. (Trial Tr. 701; Doc. 133.) The jury acquitted on Incest, Count II, whose jury instruction used the words "sexual intercourse" when describing Incest for conduct on September 26th. (Doc. 132, Instruction # 21; Doc. 133. The district court sentenced Jose to 40 years at Montana State Prison with a 20-year parole restriction, all counts concurrent, credit for 832 days of time served. (Doc. 146 at 1-2.) Jose filed a timely appeal. (Docs. 146, 149.)

STATEMENT OF THE FACTS

1. S.M.'s family life.

Jose has helped raise S.M. with Tammie since she was three years old. (Trial Tr. 582-583.) Jose and Tammie married in a Crow Nation tribal court ceremony. (Trial Tr. 581-582.) S.M. took Jose's family name. (Trial Tr. 583.) S.M. had an older sister, Bria Reed, who lived in her own place with a husband and daughter. (Trial Tr. 194, 329, 334, 573, 579, 582; Ex. 5 at 0:24-0:40, 1:32-1:45.)[2] S.M. would spend time with Bria and help babysit Bria's daughter. (Trial Tr. 579.)

[2] Cited exhibits are lodged under Doc. 130.

Jose worked as a roofer for over a decade but had to stop due to knee and back issues. (Trial Tr. 564-565.) Jose eventually sought and received social security disability income. (Trial Tr. 565.) S.M., Tammie, and Jose all lived in a crowded room at the Bourbon Street Motel in Billings. (Trial Tr. 186, 200, 210; *see also* Ex. 1(a), 1(b), 1(c), 1(d).)

Unable to work, Jose helped the family by driving Tammie to work and taking S.M. to school and social events. (Trial Tr. 569-570, 587-588.) When home, S.M. primarily played games on the internet, but she would also leave and spend time with friends. (Trial Tr. 571-572.) Jose spent time with Tammie during her work lunches and afternoon breaks, as well as chiropractor appointments following a car accident. (Trial Tr. 567-570.) To manage his back pain and other medical needs, Jose was prescribed to Oxycontin (oxycodone), Lyrica, Flexeril, and other medications, but not hydrocodone. (Trial Tr. 199, 575-576.)

Jose's biological daughter, A.M., joined the family in 2012 after Jose won a custody dispute. (Trial Tr. 366-367, 369-370, 567, 573, 582.) A.M. and S.M. got along at first, but the relationship deteriorated.

(Trial Tr. 573-574.) A.M. bullied S.M. and she was taunted on social media. (Trial Tr. 528, 568.) A.M. was eventually placed at the Yellowstone Boys and Girls Ranch in 2016 due to behavioral issues. (Trial Tr. 369, 567-568, 574.) S.M. wanted to drop out of school, which Jose opposed because he wanted S.M. to graduate as he was unable to graduate himself. (Trial Tr. 568, 590, 592-593.) S.M. eventually dropped out of school altogether in 2017. (Trial Tr. 198, 567.)

During April 2018, 16-year-old S.M. arrived for an appointment at SCL Health in Billings with Jose. (Trial Tr. 464, 523, 525-526.) S.M. had gotten pregnant from a boyfriend she'd met at school. (Trial Tr. 534-535.) S.M. had her hood up over her face and gave one-word answers. (Trial Tr. 527.) Jose had a very friendly demeanor and was caring about S.M. (Trial Tr. 526.) S.M. wanted to terminate her pregnancy and Jose asked where they could do that. (Trial Tr. 526.) Nurse Kristen Beck asked S.M. if the sex was consensual, and S.M. said yes. (Trial Tr. 534-535.)

At follow-up appointments in June 2018 and August 2018, Beck helped S.M. get prescribed to Depo-Provera, an injection-based birth control. (Trial Tr. 528-529.) S.M. and Beck also talked about S.M.'s

mood. (Trial Tr. 528-529.) S.M. was having significant anxiety, especially social anxiety when being around groups of people. (Trial Tr. 528.) Much of her anxiety stemmed from A.M. bullying her and some resulting fallout on social media. (Trial Tr. 528, 533.)

Around early September 2018, Tammie and Jose found out S.M. had been stealing Jose's prescription medications and argued with S.M. about it. (Trial Tr. 575, 598-599.) Jose recalled, "I got really mad," and yelled at S.M. (Trial Tr. 575, 599.)

2. S.M.'s accusation.

A couple weeks after Jose confronted S.M. about stealing drugs, Tammie called the Yellowstone County Sheriff's office on September 27th. (Trial Tr. 184.) Jose had just caught S.M. stealing his oxycodone again earlier that day. (Trial Tr. 598-599.)

Tammie told the dispatcher that S.M. said Jose was molesting her. (Ex. 5 at 1:15-1:30.) S.M. first told Bria over Facebook messenger around 2:00 p.m., and then Bria contacted Tammie around 4:00 p.m. (Ex. 5 at 2:30-3:47.) Tammie said that S.M. said it had started when she was 10 years old and Jose had slept with her today. (Ex. 5 at 1:51-2:02.) Tammie said Jose "was denying the whole thing." (Ex. 5 at 2:19-

2:22.) Tammie asked Jose in person, "Have you been touching my daughter?" (Ex. 5 at 3:52-4:02.) Tammie said Jose responded, "What do you mean?" (Ex. 5 at 4:02-4:04.) Tammie said she meant being sexual with S.M.; Jose responded, "I never did!" (Ex. 5 at 4:04-4:12.)

Tammie took S.M. away and brought her to Bria's apartment. (Ex. 5 at 0:24-0:40, 1:32-1:45, 4:26-4:34.) Jose did not leave and stayed at the motel. (Ex. 5 at 5:37-5:44; Trial Tr. 197.) S.M. never returned to the motel. (Trial Tr. 537.)[3]

Officer Holly Newsome went to speak with S.M. and Tammie at Bria's place. (Trial Tr. 194, 205-206.) Newsome kept her conversation with S.M. short; as a patrol officer, she knew the investigation would be left to other professionals. (Trial Tr. 196, 206-208, 319-320; Motion Tr. 29.) Newsome still asked questions to determine safety needs and to collect perishable evidence. (*See* Trial Tr. 318-319.)

S.M. said to Newsome they had intercourse on that day, September 27. (Trial Tr. 205, 208-209.) S.M. said Jose laid out a towel before starting, and he had ejaculated. (Trial Tr. 208-209, 211-212;

[3] The State's closing rebuttal argument on page 692 contains multiple statements unsupported by the evidence presented at trial.

Motion Tr. 32; Ex. 9.) Newsome concluded S.M. needed to get a SANE exam right away and took her to Billings Clinic within the hour. (Motion Tr. 31-33; Trial Tr. 196, 322.)

Susan Woods was the SANE nurse on-call when S.M. and Tammie arrived. (Trial Tr. 449, 451, 463.) Woods received S.M.'s consent to take a SANE exam and to report the results of the exam to law enforcement. (Trial Tr. 452, 454; Ex. 9.) S.M. could have done the SANE exam without providing information to the police if she had wished to do so. (Trial Tr. 452; Motion Tr. 40.) S.M. signed the consent form to begin the exam. (Trial Tr. 464; Ex. 9.) Tammie signed as well. (Trial Tr. 464; Ex. 9.) Tammie was present with S.M. during the exam. (Trial Tr. 463-464; Ex. 9, Step 11.)

Woods asked S.M. what happened. (Trial Tr. 464-465.) This is known as the "narrative" and its function "allows the patient to tell me what happened, from leading up to the exam, in their own words." (Trial Tr. 454.) To take the narrative, Woods wrote down the words as S.M. spoke them onto the form. (Trial Tr. 454-455, 466, 468.)

Woods wrote down that S.M. said her stepfather Jose had started doing stuff to her when she was 10 years old. S.M. said Jose gave her

pain pills that made her feel sleepy. S.M. talked about how he laid towels on the bed before having sex, and that he put his penis in her vagina. Afterwards, S.M. said Jose made her wash and douche. S.M. said Jose had her take a pregnancy test. S.M. said Jose made her get an abortion. S.M. then got on birth control with Depo Provera shots. S.M. said Jose said not to tell her mom because they would both get in trouble. (Ex. 9, attached as App. A.)

Woods wrote that S.M. said sexual intercourse happened the day before on September 26th, and today "it happened" but he couldn't get hard, contrary to what she told Officer Newsome an hour earlier, which was that Jose had ejaculated inside of her earlier that day in the morning, September 27th. (*See* Trial Tr. 208-209; Ex. 9.) The sentences in the narrative read: "It happened today at 9 or 10 am. He wasn't able to get hard[.] [Y]esterday[,] he got hard enough to put his penis in my vagina.[4]" (Ex. 9.) Later in the SANE records (Step 4) Woods listed the most recent assault as occurring on September 27 with vaginal

[4] It is unclear in Exhibit 9 if there is a period between the word "hard" and the word "Yesterday." There is a mark indicating a period, but it is obscured by a letter y written from the line above. The Y in Yesterday may or may not be capitalized and the marker after Yesterday is either a comma or a period. (*See also*, Trial Tr. 471-472, 557-558; Motion Tr. 74-75.)

penetration by a penis with ejaculation. (Ex. 9; *see also*, Trial Tr. 472-474; Motion Tr. 74-75.)

After taking the narrative, Woods carried out a "head-to-toe" examination of S.M., looking for injuries. (Trial Tr. 457, 469-470.) This included a genital examination where Woods collected biological evidence using swabs. (Trial Tr. 457-458, 469.) S.M.'s labia minora had abrasions and redness. (Trial Tr. 469.) Woods then referred S.M. to see Dr. Cynthia Brewer, the SANE medical director, for follow-up appointments. (Trial Tr. 459, 470.)

Woods also took S.M.'s blood and urine, and they were mailed to the crime lab. (Trial Tr. 390, 458-459; Motion Tr. 66-69; Ex. 6.) The crime lab analyzed the blood and found S.M. tested positive for oxycodone, marijuana at levels more than double the legal driving limit, and hydrocodone. (Ex. 6; Trial Tr. 392, 395-396, 398-399.)

3. The police investigation.

Officer Newsome and Sergeant Chaney went to the motel to talk to Jose. (Trial Tr. 197-198; Motion Tr. 30-31.) Jose was dumbfounded and didn't understand why they were there. (Trial Tr. 600-601.) Jose said S.M. was taking some time off from school because she was having

emotional issues. (Trial Tr. 198.) Jose did not want to talk to officers about S.M.'s sexual activities, calling it "family business," but when asked said he did help S.M. get an abortion. (Trial Tr. 198.)

Chaney asked Jose if he took medications, and Jose said he took Oxycontin. (Trial Tr. 199.) Jose initially told the police under questioning he had given a pill to S.M.—thinking he needed to protect S.M. from legal trouble at the time—but later retracted that statement. (Trial Tr. 199, 575, 599.) Officers seized towels and a douche bottle belonging to Tammie. (Trial Tr. 200, 203, 210-211, 418; Ex. 7.)

Jose voluntarily supplied his DNA to the police. (Trial Tr. 199, 216-217, 577.) Crime lab tests did not return any of S.M.'s DNA from samples provided by Jose. (Ex. 8; Trial Tr. 433.) None of Jose's DNA was found on any samples provided by S.M.'s SANE exam. (Ex. 7; Ex. 8; Trial Tr. 411, 413.) Neither towel had semen. (Ex. 7, Trial Tr. 411, 436.) Tammie's douche bottle and a portion of S.M.'s underwear had sperm cells, but the crime lab could not identify whose. (Trial Tr. 411-412, 418, 429-430; Ex. 8.) To identify the sperm's carrier, the crime lab would need to send the material to a private laboratory to perform a Y-chromosome specific (Y-STR) DNA analysis; the crime lab does not run

this test. (Ex. 8, Trial Tr. 430.) The prosecutors chose not to run a Y-STR analysis. (*See* Trial Tr. 433-435.)

The State arrested Jose almost nine months later on June 13, 2019. (Doc. 12; Trial Tr. 326, 336.) On that same day, Jose called Tammie from the jail, which was recorded. (Trial Tr. 345, 378.) Jose apparently referenced a prior conversation and said, "This is the only way it's going to help right now. You gotta do what I told you, what I'm telling you, baby, ok? You heard? I can't say no names on …remember what I talked about?" (Ex. 3(a) at 0:42-0:56.) Jose said, "You gotta go talk to the prosecutor." (Ex. 3(b) at 1:20-1:30.)

The next day Jose called again and talked to Tammie for a half hour about the logistics of making further phone calls, depositing money in his commissary account, problems getting his meds, and to sell things to make money. (Ex. 3(c).) Jose would occasionally ask Tammie to do what he told her. (Ex. 3(c).) Jose said to Tammie, "You better tell Pebbles to switch up like really fast if you want me out, no matter what. You hear me? You hear me? Cause' if that don't happen I'm fucked." (Ex. 4(b) at 2:36-2:54.)

After one week of phone calls, no evidence was presented of Jose having further calls with Tammie for the rest of 2019, 2020, or 2021.

4. The evidentiary hearing.

The case was not set for trial until almost two years after Jose's arrest, scheduled for April 9, 2021. (Doc. 123.) S.M. was now 19 years old. (Trial Tr. 566; Ex. 9 at 1.)

Officer Brandon Lange served Tammie and S.M. with subpoenas after making considerable effort to find them. (Trial Tr. 540, 545-548, 555-556.) Lange and the prosecutor made it very clear to S.M. and Tammie they were required to appear for court. (Trial Tr. 546-549.) S.M. and Tammie acknowledged the subpoenas, their significance, and understood they could be held in contempt of court. (Trial Tr. 546-547, 549, 553.) Tammie told Lange she would be disobeying the subpoena. (Trial Tr. 549.) S.M. completely shut down when Lange told her about the subpoena. (Trial Tr. 546.)

Jose's attorney requested to interview S.M., and an interview was set up by the County Attorney's Office to take place on April 1, 2021, eight days before trial. (Doc. 106 at 1.) At 12:05 p.m., prosecutors cancelled the interview, said S.M. refused to testify, and that they

intended to introduce hearsay statements from Woods and Dr. Brewer instead. (Doc. 106 at 1.) Later that same day the State notified the district court for the first time in a point brief it did not believe S.M. or Tammie would appear for trial. (Doc. 103.01 at 4.)

The State requested admission of S.M.'s statements to Woods and Dr. Brewer, acknowledging they were hearsay, but arguing they met the medical statements exception. (Doc. 103.01 at 4-6.) Jose responded, explaining the statements were testimonial evidence that violated the confrontation clauses of the U.S. and Montana Constitutions, as well as hearsay that did not meet any exception. (Doc. 106 at 2-5.) Both parties requested a hearing. (Doc. 103.01 at 1; Doc. 106 at 1.)

Four days before trial, the district court held a sizeable evidentiary hearing on the matter. (Doc. 112.) The State did not move to exclude witnesses, so Woods remained in the courtroom and listened to all of Officer Newsome's testimony. (Motion Tr. 24, 61.)

Officer Newsome was the first person to speak to Tammie and S.M. after Tammie had dialed 911. (Motion Tr. 28.) Newsome spoke to S.M. briefly and determined she needed to get a SANE exam. (Motion Tr. 29.)

Newsome said the only reason for law enforcement to take somebody to get a SANE is for evidence collection. (Motion Tr. 34.) Newsome explained a SANE exam was an "absolutely critical" piece of evidence from a law enforcement perspective. (Motion Tr. 35.) When asked if a SANE is used as an extension of law enforcement to gather more evidence, Newsome answered, "Yes. It's done by a registered nurse to collect the evidence. Yes." (Motion Tr. 37.) Newsome further anticipated that evidence gathered from the exam would be used in a future prosecution. (Motion Tr. 37.)

Woods, the nurse who conducted S.M.'s SANE exam and had just listened to Officer Newsome's testimony, testified next. (Motion Tr. 24, 53-54, 61; Ex. 9.) Woods stated the SANE was a medical examination, not a law enforcement-related examination. (Motion Tr. 41.) Woods takes a patient narrative so she can identify injuries a patient might not realize they have. (Motion Tr. 44.) She asks patients for their health history and looks for health concerns. (Motion Tr. 44-45.) Woods said law enforcement was not in the room and that she did not take instructions from law enforcement. (Motion Tr. 46, 49.)

Woods acknowledged she collected evidence during a SANE exam, and she gave that evidence to the police department for investigative purposes. (Motion Tr. 49, 60-61.) If S.M. did not want to report to the police, the collected evidence would have been referred to the FREPP program as "storage only" for up to two years. (Motion Tr. 71-72; Ex. 9.) S.M. reported to law enforcement. (Ex. 9, SANE Discharge Instructions at 3.)

Woods said she heard Office Newsome testify that S.M. told her sexual intercourse and ejaculation had occurred on September 27th. (Motion Tr. 62, *see also*, Motion Tr. 31-32.) Woods said S.M. told her that on September 27th Jose could not get an erection and did not penetrate. (Motion Tr. 62-63.) Rather, the erection and sexual intercourse occurred on September 26th. (Motion Tr. 72-73.)

This prompted questioning from the district court. (Motion Tr. 74-75.) The district court said based on their interpretation of the SANE documents, penetration and ejaculation occurred on September 27th. (Motion Tr. 74-75.) Woods then changed her answer and said she swapped the two days. (Motion Tr. 75-76.) S.M. was not present at the hearing.

The State brought in the SANE exam documentation for the district court's consideration. (Motion Tr. 52.) The full document is confidentially attached as Appendix A to this brief. The document contains multiple references that evidence is being collected for law enforcement purposes, the exam is not a routine medical checkup, and the clinician administering the exam "will not be held responsible for identifying, diagnosing, or treating any existing medical problems." (Ex. 9.)

Dr. Brewer, the medical director of the SANE program in Billings, also testified at the hearing. (Motion Tr. 77-78.) Woods referred S.M. to Dr. Brewer for follow-up care after the SANE exam. (Motion Tr. 58-59, 82; Ex. 9, SANE Discharge Instructions at 2.) Dr. Brewer asked S.M. why she had gotten a SANE. (Motion Tr. 95-96.) Dr. Brewer said S.M. said that a friend heard Jose say nasty stuff to her like "horny and are you ready." (Motion Tr. 96.) This worried S.M.'s friend and prompted S.M. to tell Bria. (Motion Tr. 96.) S.M. told Dr. Brewer "she had bleeding after the first time he did it and when he would do it rough." (Motion Tr. 96.) Dr. Brewer also said S.M. said Jose said he was upset about S.M.'s pregnancy and she had to get an abortion.

(Motion Tr. 98-99.)

S.M. told Dr. Brewer she was having a heavy flow during her period. (Motion Tr. 106.) When Dr. Brewer suggested to S.M. she get back on Depo-Provera to control her period's flow, she said S.M. had a meltdown. (Motion Tr. 106.) S.M. said she did not want to go back onto Depo-Provera because she associated that with Jose, saying he started her on Depo-Provera after she had the abortion. (Motion Tr. 106-107.) Dr. Brewer's office received a signed medical consent for release of records from S.M. and her receptionist faxed the records to law enforcement. (Motion Tr. 110-112.)

The district court, noting S.M. and Tammie had been served but indicating they would skip trial, asked if the State would issue any mandatory appearance requirements. (Motion Tr. 129.) The State replied it was aware it had the ability to seek a material witness warrant in the event Tammie or S.M. elected not to appear on their trial subpoena. (Motion Tr. 129.) The State, however, said it would not be issuing a material witness warrant in the interest of justice. (Motion Tr. 129.)

The district court held S.M.'s statements were not meant for law

enforcement and did not have the primary purpose of creating an out-of-court substitute for trial testimony. (Motion Tr. 137-138; Doc. 122.002 at 9-10.) "So my ruling will be that the State is not precluded from offering testimony from both Nurse Woods and Dr. Brewer because of either Rule 803-4 or the confrontation clause. So that will aid in your preparation for trial." (Motion Tr. 138.)

On the day before trial, Jose's counsel filed a trial brief acknowledging the adverse ruling from the evidentiary hearing and explaining a shift in trial strategy. (Doc. 120.) Counsel stated he would not object to testimony from witnesses that discussed S.M.'s and Tammie's statements. (Doc. 120.) The district court acknowledged, "Obviously, defense objects and you're not waiving any objections." (Trial Tr. 438.)

5. The trial.

S.M. did not appear for trial. Tammie did not appear for trial.

Woods and Dr. Brewer appeared for trial. As permitted by the district court's order granting the State's motion, they testified about their conversations with S.M. in detail. (*See* Trial Tr. 463-469, 493-498.) Woods read most of the SANE exam narrative verbatim to the

jury. (*See* Trial Tr. 465-469; Ex. 9.)

During the trial, S.M. might have arrived at the courthouse but left before she was called as a witness. (*See* Trial Tr. 436.) It was also revealed during a break in the proceedings the State knew where Tammie was, but Tammie said she couldn't come because her water was out. (Trial Tr. 440.) Jose's counsel said the State could get a warrant to secure her appearance. (Trial Tr. 441.) The State said the statutory remedy of seeking a material witness warrant was elective. (Trial Tr. 441.) "I do not have to seek a material witness warrant for any witness if I choose not to." (Trial Tr. 441.) The State did not seek material witness warrants for either S.M. or Tammie. (Trial Tr. 441-442.)

At closing argument, the State told the jurors they heard S.M.'s words through Woods and Dr. Brewer:

> He needed you to not hear her words. But despite his best efforts, you got to hear her words, drawn from statements given to Susan Woods and Dr. Brewer. You've learned from S.M.'s statements how that man made her life a waking nightmare, how he raped her almost every day from the time she was 10 years old.

(Trial Tr. 654.)

At the conclusion of its closing rebuttal, the State emphasized the importance of the SANE narrative and to return to the narrative in their exhibit binders. (Trial Tr. 693.) "Susan Woods told you that the SANE narrative is written verbatim, and what was said is written in that narrative, and that, two and a half years later, Susan may not be able to testify from memory as accurately as will be described in the SANE narrative. Return to that." (Trial Tr. 693-694.)

STANDARD OF REVIEW

"This Court's review of constitutional questions is plenary and we therefore review de novo a district court's interpretation of the Sixth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution." *State v. Tome*, 2021 MT 229, ¶ 17, 405 Mont. 292, 495 P.3d 54. A district court's conclusions of law are reviewed for correctness. *Tome*, ¶ 17. "A district court has no discretion in the correct interpretation of the Constitution." *State v. Norquay*, 2011 MT 34, ¶ 13, 359 Mont. 257, 248 P.3d 817.

SUMMARY OF THE ARGUMENT

Testimonial evidence, including hearsay evidence, is prohibited under the confrontation clauses of the U.S. and Montana Constitutions

without an opportunity for cross-examination. Montana's "face to face" confrontation clause provides greater protections over and above the federal constitution. Evidence is testimonial when the primary purpose of the conversation is to gather evidence for a criminal prosecution. *Tome*, ¶ 27; *Ohio v. Clark*, 576 U.S. 237, 247 (2015). This is an objective inquiry that considers all the relevant circumstances as well as the statements and actions of both the interrogator and the declarant.

The SANE exam exists to gather evidence of alleged sexual assaults for future criminal prosecutions. S.M.'s hearsay was the sole basis for the prosecution's case once it became clear days before trial S.M. and Tammie would not testify. They disobeyed lawful subpoenas and deprived Jose of a cross-examination of his accuser. Instead, Jose experienced a trial by hearsay.

S.M. provided testimonial evidence. When S.M. told Tammie in the late afternoon about a sexual assault she said happened in the morning, Tammie did not take S.M. to a hospital for medical treatment. Tammie called the police. S.M. spoke to Officer Newsome about the assault. Newsome kept the conversation short and escorted S.M. to

Billings Clinic for a SANE exam to preserve and collect evidence for a future criminal prosecution.

At the exam, S.M. had the choice to report to law enforcement or to withhold reporting and have evidence kept in storage for a couple of years. S.M. chose to report to law enforcement. She signed the consent form and provided detailed information to Nurse Woods and later Dr. Brewer. S.M. understood the SANE exam was not a routine medical checkup. S.M. agreed Woods would not be held responsible for identifying, diagnosing, or treating any existing medical problems. S.M. waived all medical privileges and permitted law enforcement to use any gathered information in a future criminal prosecution against the assailant she accused of assaulting her.

S.M.'s testimony was the State's case. When S.M. nonetheless ignored her lawful subpoena, refused to give her story under oath, and fled the crucible of cross-examination, she deprived Jose of the right to confront his accuser. Knowing S.M. was going to disobey her subpoena, the State could have secured S.M.'s presence to testify at trial but chose not to do so. The district court erred when it permitted S.M.'s hearsay

statements into evidence without an opportunity for cross-examination. The Constitution requires a new trial to correct this injustice.

ARGUMENT

The State unconstitutionally deprived Jose of a cross-examination when it brought out S.M.'s testimony through a SANE exam in place of S.M.'s live testimony at trial.

A. Evidence is testimonial when the primary purpose of the conversation is to gather evidence for a criminal prosecution.

1. Federal and Montana precedent consider all relevant circumstances when determining whether statements qualify as testimonial evidence.

"The Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee a criminal defendant the right to confront or face the witnesses against him." *Tome*, ¶ 23. The essential purpose of the right is to secure the opportunity to test a witness's testimony "in the crucible of cross-examination." *State v. Baker*, 2013 MT 113, ¶ 18, 370 Mont. 43, 300 P.3d 696; *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

An opportunity to cross-examine is essential because "Cross-examination is the hallmark of our system of justice because it produces

truth." *State v. Ronald Clark*, 1998 MT 221, ¶ 23, 290 Mont. 479, 964 P.2d 766. Face to face confrontation also produces information like a witness's demeanor, body language, and the presence of hesitancy while giving testimony. *Ronald Clark*, ¶¶ 22-23. This information often communicates as much to the jury as spoken words and would be lost in a written deposition. *Ronald Clark*, ¶ 23.

Under the Confrontation Clause, hearsay against criminal defendants is admissible only when: (1) for testimonial evidence, if the declarant is unavailable and the defendant had a prior opportunity for cross-examination, and (2) for nontestimonial evidence, if the hearsay bears adequate indicia of reliability or particularized guarantees of trustworthiness. *State v. Mizenko*, 2006 MT 11, ¶ 10, 330 Mont. 299, 127 P.3d 458. The admissibility of nontestimonial evidence can be generally addressed by the rules of evidence. *See Crawford*, 541 U.S. at 68. Testimonial evidence, however, requires a higher demand of reliability by testing through cross-examination. *See Mizenko*, ¶¶ 14-15.

a. Federal Precedent- *Davis*, *Bryant*, and *Clark*.

The United States Supreme Court initially ruled testimonial evidence was interrogation with the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006). The Court cautioned statements could still be testimonial even when made in the absence of an interrogation. *Davis*, 547 U.S. at 822, note 1. Statements are more likely to be testimonial when describing past events hours after they have occurred, as opposed to events happening at the same time the statements are being given. *Davis*, 547 U.S. at 827.

In *Michigan v. Byrant*, 562 U.S. 344 (2011), the Court held that statements made during an ongoing emergency fell outside the Confrontation Clause's scope. *Byrant*, 562 U.S. at 358. The Court said that to determine the primary purpose of whether an interrogation is testimonial evidence, a court should "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Bryant*, 562 U.S. at 359.

When the interrogation occurs in a medical setting, a declarant's medical state can be considered, however, a declarant's medical state

does not render all statements made by an injured victim non-testimonial. *Bryant*, 562 U.S. at 364-365. Rather, a declarant's medical condition is one of many circumstances relevant to the primary purpose inquiry. *Bryant*, 562 U.S. at 364-365, 367. A combined inquiry of both the declarant and the interrogator provides objective evidence of the primary purpose of an interrogation. *Bryant*, 562 U.S. at 367.

The Court in *Clark* recently reiterated the primary purpose inquiry "must consider all of the relevant circumstances." *Clark*, 576 U.S. at 244. Statements made for the primary purpose of stopping an ongoing emergency would not constitute testimonial evidence, but statements made for the primary purpose of gathering evidence for a prosecution would. *Clark*, 576 U.S. at 246-247. Additionally, the Court declined to adopt a categorical rule excluding individuals who are not law enforcement officers from the Sixth Amendment's reach. *Clark*, 576 U.S. at 246.

b. Montana Precedent- *Porter* and *Tome*.

This Court has applied *Clark* in *Porter* and *Tome*. In both cases, this Court applied the primary purpose test for testimonial evidence by carrying out an objective inquiry, considering all the relevant

circumstances, and looking to statements and actions of both the interrogator and declarant. *See State v. Porter*, 2018 MT 16, ¶¶ 22-26, 390 Mont. 174, 410 P.3d 955; *Tome*, ¶¶ 24-27.

In *Porter*, Michelle Allen arrived for treatment in an emergency room with a black eye and bruises. *Porter*, ¶ 2. During treatment, Allen told the physician she had been strangled and that Porter did it. *Porter*, ¶¶ 2, 9. Allen did not testify at trial and Porter raised a confrontation clause violation when the physician testified as to Porter's identity instead. *Porter*, ¶¶ 1, 8, 16.

The Court affirmed. *Porter*, ¶ 26. Looking at all the relevant circumstances, the Court explained the physician's role was to provide medical care for Allen's injuries. *Porter*, ¶ 25. While she did sign a medical release to a police officer, Allen's presence at the hospital was primarily to receive medical treatment. *Porter*, ¶¶ 25-26. The physician asked for the identity of Allen's attacker not to submit information to law enforcement, but to guarantee patient safety and have an alternative place for her to stay upon emergency room discharge. *Porter*, ¶¶ 8-9, 24.

In *Tome*, a deaf and developmentally delayed child accused "Ricky" and "China" of having sexual intercourse with her. *Tome*, ¶¶ 4, 7. Tome's counsel attempted to secure a deposition of the child but was denied. *Tome*, ¶ 10. The child was found to not be competent, and her hearsay was brought in through other witnesses, including the nurse who carried out her SANE exam. *Tome*, ¶¶ 6, 13, 27.

The Court reversed. *Tome*, ¶¶ 35, 38. Looking at all the relevant circumstances, this Court explained that after the child initially disclosed to school counselors, she had follow-up interactions with a police officer, a SANE nurse, and a forensic interviewer. *Tome*, ¶ 27. All these encounters came well after any potential emergency and were not informal or spontaneous. *Tome*, ¶ 27. The SANE exam was used to gather evidence for the police officer's investigation and a future criminal prosecution. *Tome*, ¶ 27. The child's statements made in the SANE exam was testimonial evidence. *Tome*, ¶ 27.

c. Different phrasings of the primary purpose test.

The United States Supreme Court has presently phrased the primary purpose test for testimonial evidence in two different ways and

the precise phrasing has not been definitively settled. The distinction between the phrasings of a primary purpose of "creating an out-of-court substitute for trial testimony" and "gathering evidence for a criminal prosecution" is more academic than substantive. Jose's legal claim prevails regardless of the phrasing used. Nonetheless, this Court should understand these different phrasings and why their application to the facts in this case remains unaffected.

In *Davis*, the United States Supreme Court first used "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. *Bryant* adhered to this language and applied *Davis* but also phrased the test as a "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 358, 366, 375. When the Court issued *Clark*, both phrasings of the primary purpose test were used throughout the opinion. *See Clark*, 576 U.S. at 244-247, 250.

This Court, borrowing language from *Clark*, *Bryant*, and *Davis*, has also phrased the primary purpose test in these two different ways. In *Porter*, this Court said a statement is testimonial if the primary

purpose of the conversation was to create an out-of-court substitute for trial testimony. *Porter*, ¶¶ 22-23. In *Tome*, this Court said a statement is testimonial if the primary purpose of the conversation is to gather evidence for a prosecution. *Tome*, ¶ 27.

The larger point is the importance of conducting an objective inquiry that considers all the relevant circumstances of the encounter in addition to both the statements and actions of the declarant and the interrogator. *Clark*, 576 U.S. at 244-247; *Bryant*, 562 U.S. at 364-365, 367; *Porter*, ¶¶ 18-19, 22; *Tome*, ¶¶ 24-27. If one phrasing is preferable over the other, then the phrasing of "primary purpose of gathering evidence for a criminal prosecution" provides the most practical test for determining whether evidence is testimonial or not. If "primary purpose of creating an out-of-court substitute for trial testimony" was taken too literally, then not even the interrogation in *Crawford* would qualify as testimonial evidence.

Regardless of the precise phrasing, the test for testimonial evidence is still an objective fact-based inquiry that considers all the relevant circumstances.

2. The Montana Constitution's right to confront witnesses face to face provides increased protections above and beyond the confrontation clause in the U.S. Constitution.

This Court has refused to march lock-step with the decisions of the United States Supreme Court. *State v. Schneider*, 2008 MT 408, ¶ 15, 347 Mont. 215, 197 P.3d 1020. Although this Court considers federal authority and has concluded the Montana Constitution provides equivalent protections or similar analytical frameworks as the U.S. Constitution in some instances, "we nonetheless conduct an independent review to determine the separate and particular intent of the framers of the Montana Constitution." *Schneider*, ¶ 15. To undertake this review, this Court first looks to the plain meaning of the words used, then to the relevant legislative intent—including interpretation by constitutional convention delegates—and then to precedent that has already interpreted the clause at issue. *Schneider*, ¶ 15.

While the U.S. Constitution provides, "the accused shall enjoy the right …to be confronted with the witnesses against him," the Montana Constitution states, "the accused shall have the right …to meet the

witnesses against him face to face." U.S. Const. Amend. VI; Mont. Const. art. II, § 24. The language emphasizes a more personal face to face encounter between a witness and an accused over the U.S. Constitution's more general wording of "confront." The Indiana Supreme Court—having a clause like Montana's—agreed, concluding the phrase has a "special concreteness" and recognizing "there is something unique and important in requiring the face-to-face meeting" between the accused and witness. *Brady v. Indiana*, 575 N.E.2d 981, 986-987 (Ind. 1991). The clause's language today is identical to Montana's first 1889 Constitution. 1889 Mont. Const. art. III, § 16.

The drafters of the 1889 Constitution adopted the face to face clause from the 1876 Colorado Constitution, still in effect today as Colo. Const. art. II, § 16. After copying the language from Colorado, the clause was reported out of the Committee on Preamble and Bill of Rights at the 1889 convention. Montana State Library, *Proceedings and Debates of the Constitutional Convention, Held in the City of Helena, Montana, July 4th, 1889, August 17th, 1889* (1921) [hereinafter

1889 Conv.], at 47. [Accessible at https://archive.org/details/proceedingsdebat00montrich/mode/2up][5]

During convention deliberations, a debate broke out that addressed the tension between the right to meet a witness face to face and the practice of imprisoning witnesses prior to trial to secure their testimony. *1889 Conv.* at 254-261. Faced with an amendment that would allow witnesses to provide a deposition outside the presence of the accused and their counsel if they failed to appear, Delegate Joseph K. Toole gave a fierce defense of the face to face clause. *1889 Conv.* at 255-256. Toole said the right is complied with "if the defendant has been permitted to meet the witness face to face before the committing magistrate where he had the opportunity to cross examine." *1889 Conv.* at 255. Toole said the idea of taking a deposition and then using that deposition against the defendant in court without meeting witnesses face to face "was never intended by the Constitution of the United States, and which not ought to be permitted under this Bill of Rights." *1889 Conv.* at 255.

[5] Appellant counsel wishes to thank Zoe Ann Stolz of the Montana Historical Society for her assistance in locating these documents.

Delegate Toole then went on to explain that jurors are summoned to determine guilt or innocence by looking into the face of the witness and ascertaining whether the witness is telling the truth, explaining:

> It frequently happens, sir, or might happen that a witness taken out to some place away from the solemnities of the law, out from under the eye of the court and the jury and the multitude, that he might be able to tell a fair and plausible story; but that if he was subjected to the cross examination before a court and jury where they might look into his face, that he would break down under the fire of the cross examination, which might be had under such solemnities.

1889 Conv. at 255.

Toole then put forward an argument by a lawyer and later judge from Missouri, who explained that "face to face" meant the following, which Toole deemed conclusive:

> The 'accused' shall meet the 'witness face to face.' He shall thus meet him in all criminal prosecutions; that is the right. A meeting might involve only presence, contiguity; but that is not enough. It shall be a meeting in the mode and fullness in which man must meet his God in the day of final judgment, and that is, 'face to face.'
>
> The whole purpose of the provision is to thwart falsehood. If perjury were impossible, the provision would be without meaning. Two objects were secured by the words; first, the witness must look upon the accused, the intended victim of a false oath, that he may see the value of what he is about to destroy, and the accused shall look upon the witness as he swears; second[,] the triers shall look upon the false witness

> and gather the perjury from his aspect. The means are simple, but human experience has established their efficacy as tests of truth.

1889 Conv. at 255-256.

Delegate James Callaway agreed with Toole. *1889 Conv.* at 259. Callaway said one of the most essential rights of the accused is that a witness on the stand should be seen by the jury so they could look in his eyes, understand his manner, and see whether he is telling the truth or not. *1889 Conv.* at 259.

Delegate Toole ultimately did not prevail on striking the amendment, *1889 Conv.* at 261, which is now located in today's constitution as the final twenty-one words of Mont. Const. art. II, § 23. But in defending their position for adoption, Toole's opposing delegates supported his larger point. *1889 Conv.* at 258-260. Delegate Hiram Knowles said, "The state does not want to convict anybody who is innocent …it is found in all prosecutions that it is best that the witness should be confronted by the defendant." *1889 Conv.* at 258. "I do not believe for one in taking the deposition of any witness, or having any witness testify against a criminal except face to face." *1889 Conv.* at 259.

Delegate George Stapleton strongly opposed Toole but nonetheless conceded a defendant shall meet face to face with the evidence against him, be present at the time the witness gives testimony, and allow counsel an opportunity to cross-examine. *1889 Conv.* at 260.

The 1972 Montana Constitutional Convention further preserved the intent of the face to face clause provided by the 1889 framers. Montana State Library, *Transcript of Proceedings, Montana Constitutional Convention (1971-1972)* (1972) [hereinafter *1972 Conv.*], at Vol. VII, pp. 5475-5477. [Accessible at https://archive.org/search.php?query=collection:MontanaStateLibrary%20AND%20oclc-id:606165] Delegate James stated the article was basically the same as the 1889 Constitution, and "It has stood the test of time and I feel that it should be adopted as is." *1972 Conv.* at Vol. VII, p. 5476. The convention adopted the section unanimously. *1972 Conv.* at Vol. VII, p. 5477, Vol. X, pp. 7642-7643, Vol. XII, p. 8874.

This Court's precedent has continued to acknowledge the special status of Montana's face to face clause, most notably in *Ronald Clark*, emphasizing that "cases analyzing the Confrontation Clause have made it abundantly clear that full cross-examination is a critical aspect of the

right of confrontation." *Ronald Clark*, ¶ 22; *see also*, *State v. Young*, 249 Mont. 257, 260, 815 P.2d 590, 592 (1991); *State v. Pease*, 222 Mont. 455, 463, 724 P.2d 153, 158 (1986); *State v. Fitzpatrick*, 186 Mont. 187, 203, 606 P.2d 1343, 1352 (1980). Following *Ronald Clark*, this Court reversed a conviction when the jury had access to a police interview with a critical eyewitness who "did not testify at trial, was not subject to cross-examination, and whose demeanor the jury was never able to observe." *State v. Parker*, 2006 MT 258, ¶¶ 21, 27, 334 Mont. 129, 144 P.3d 831.

Montana's "face to face" confrontation clause contains textual, historical, and jurisprudential support to conclude the clause has a separate and particular intent different from the U.S. Constitution. This Court need not march lock-step with its federal counterpart in interpreting Montana's confrontation clause. In addition to meeting the constitutional floor of United States Supreme Court precedent, this Court can and must apply an independent review of the Montana Constitution with its greater protections.

B. The primary purpose of S.M.'s SANE exam was to gather evidence against Jose.

1. S.M.'s statements to Woods and Dr. Brewer constituted testimonial evidence.

Hearsay is testimonial evidence—requiring cross-examination—when the primary purpose of the conversation is to gather evidence for a prosecution. *Tome*, ¶ 27; *Clark*, 576 U.S. at 247. It is an objective inquiry that considers the circumstances of the encounter, the statements and actions of the interrogator, and the statements and actions of the declarant. *Tome*, ¶ 24; *Bryant*, 562 U.S. at 370.

A declarant alerting the police to an ongoing emergency or someone describing events that are presently happening to them has less of an expectation the government will seek to make prosecutorial use of the statements at trial. *Tome*, ¶ 24; *Mizenko*, ¶ 20; *Davis*, 547 U.S. at 827-828. The existence of an ongoing emergency is not dispositive but is one factor that informs the ultimate inquiry of the primary purpose of an interrogation. *Tome*, ¶ 24.

S.M.'s hearsay statements were not given during an ongoing emergency, and she described past events, not events happening as she spoke. S.M. alleged abuse to have happened in the morning at 9:00 or

10:00 A.M. (Ex. 9.) She texted Bria at around 2:00 p.m. (Ex. 5 at 2:30-3:10.) Tammie arrived at the motel and took S.M. to Bria's house sometime after 4:00 p.m. (Ex. 5 at 1:32-1:45, 3:10-3:47, 4:26-4:34.) Tammie called the sheriff's office at 5:08 p.m. and requested a police officer. (Trial Tr. 184.) Neither Tammie or S.M. called for an ambulance to seek medical attention for an injury. There was no ongoing emergency, nor were S.M. or Tammie describing events that were happening to them at that moment. (*See* Ex. 5 at 1:15-5:44; Trial Tr. 194, 205-206, 208-209, 211-212.)

Officer Newsome arrived at Bria's house. (Trial Tr. 194, 205-206.) S.M. talked to Newsome about what she alleged happened earlier that morning. (Trial Tr. 208-209.) Upon hearing the accusation, Newsome determined S.M. needed to get a SANE exam and drove her to the hospital within the hour to preserve perishable evidence. (Motion Tr. 31-33; Trial Tr. 196, 322-323.) Newsome referred S.M. to other professionals, including a registered nurse and a forensic interviewer, to conduct the examinations required to gather the evidence needed for law enforcement and future prosecution. (Trial Tr. 196, 206-208, 319-320; Motion Tr. 29, 37.)

At the evidentiary hearing, the State argued S.M.'s hearsay was admissible because her statements were made with an intention consistent with seeking medical treatment. (Motion Tr. 130.) The State said, "sexual assault is fundamentally a health condition and a health concern." (Motion Tr. 131.) The State argued the purposes of Woods and Dr. Brewer were to provide a health history to obtain treatment and discuss possible sources of injury. (Motion Tr. 133.) "It was medical." (Motion Tr. 134.)

A SANE exam "is not a routine medical checkup." (Ex. 9.) It is a forensic medical report requiring consent that allows medical personnel to:

- Obtain details of the alleged attack,
- Gather a medical history,
- Perform a physical examination,
- Collect evidence relevant to an alleged rape,
- Screen for pregnancy and STDs,
- Photograph any physical injuries, and
- "[R]elease all of this information and evidence to law enforcement to facilitate a criminal investigation."

State v. Nelson, 2014 MT 135, ¶ 4, 375 Mont. 164, 334 P.3d 345.

SANE exams are an opportunity to collect a lot of evidence from the victim and the suspect. (Trial Tr. 322-323.) Newsome was not a SANE nurse, but as a representative of law enforcement he brought S.M. to the hospital for the SANE exam so that someone with the proper training could preserve and gather evidence for a future arrest and prosecution. SANE exams can provide medical care, but this should not be a distraction from why SANE exams primarily exist, which is to collect and preserve evidence for future criminal cases against accused assailants. *See Nelson*, ¶ 24 (recounting State assertions that forensic medical exams, patient medical disclosure authorizations, and other reports to medical professionals documented in a SANE report are items of physical evidence).

S.M.'s SANE exam followed this path. S.M. and Tammie expressly authorized the use of information and evidence from the exam to be used in a subsequent criminal proceeding. (Ex. 9.) S.M. was in a medical setting and received some medical care, but she was there to provide Nurse Woods with a detailed description of her accusation. S.M. identified Jose and made accusations about what Jose did and

when. (Ex. 9.) She submitted swabs and hair. (Ex. 9.) This was not for medical care, but to gather and preserve evidence for a criminal case. The gathered material was provided to law enforcement and the crime lab. (Trial Tr. 390, 459-460; Motion Tr. 60-61, 69; Ex. 6, 7, 8, 9.)

Jose's counsel correctly reminded the district court below that Officer Newsome testified a SANE examination is used for the purpose of gathering information for a future prosecution. (Motion Tr. 134.) S.M. signed a release form to provide evidence to law enforcement before beginning the SANE exam and signed a release for Dr. Brewer's records to be faxed to law enforcement. (Motion Tr. 134-135.) "The statements were made so that it would get to law enforcement and were made, then, as testimonial statements for the proof of the case." (Motion Tr. 135.)

The multiple disclosures and releases on the SANE form further cement that S.M.'s SANE exam was used primarily for criminal prosecution, not medical treatment. S.M. consented to the sentence "I understand that this is not a routine medical checkup." (Ex. 9.) Further, S.M. and Tammie agreed Woods would "not be held responsible for identifying, diagnosing, or treating any existing medical

problems." (Ex. 9.) There are at least six different statements explaining that evidence collected during the exam would be shared with law enforcement. (Ex. 9.)

S.M.'s SANE exam is distinguishable from Allen's hospital visit in *Porter*. In *Porter*, Allen was hurt, and she went to the hospital to get medical treatment for being hurt. *Porter*, ¶¶ 2, 26. S.M.'s SANE exam is similar to the SANE exam in *Tome*. After the initial disclosure, the child reported details to the police, and then to a SANE nurse, and then to a forensic interviewer. *Tome*, ¶¶ 5-7. Each encounter was not informal or spontaneous, occurred well after any ongoing emergency, and was carried out to gather evidence for an investigation and future criminal prosecution. *Tome*, ¶ 27.

Officer Newsome took S.M. to Billings Clinic to meet a trained nurse to preserve perishable evidence of a possible crime. (Motion Tr. 29, 31-33; Trial Tr. 196, 206-208, 319-320, 322-323.) S.M. received some medical care, but Newsome had driven S.M. over specifically to collect evidence from a SANE exam. (Motion Tr. 34-35, 37.) S.M. signed consent forms authorizing law enforcement access. (Ex. 9.) S.M. reported the exam results to police, although she had the option to

decline to do so on the discharge instructions. (Ex. 9.) There was no ongoing emergency, S.M.'s encounter with Woods was neither informal nor spontaneous, and Woods submitted the gathered evidence to law enforcement with S.M.'s explicit consent.

S.M.'s later statements to Dr. Brewer are also testimonial evidence. Dr. Brewer is the director of the SANE program and has a follow-up appointment with almost every patient who has had a SANE. (Motion Tr. 82.) S.M. would have never visited Dr. Brewer but for her SANE exam with Woods. S.M. signed a release and disclosed all of Dr. Brewer's records with law enforcement. (Motion Tr. 110-112.) Jose was entitled to cross-examine S.M. both as to what she told Woods as well as what she told Dr. Brewer.

After Officer Newsome testified at the evidentiary hearing, Woods testified next. (Motion Tr. 37.) It cannot be discounted that before Woods testified, she sat in the courtroom during Newsome's testimony and listened to the exchange between Newsome and the prosecutor. (Motion Tr. 24, 61.) The prosecutor tried to suggest a SANE examination was for medical purposes and Newsome did not provide the answers the State wanted to hear. (*See* Motion Tr. 33-36.) Woods

then took the stand and emphasized "it's a medical examination. It's not a law enforcement-related examination." (Motion Tr. 41.) Woods said the purpose of the patient narrative is to look for health concerns. (Motion Tr. 44.) Woods stated she was not an investigator and only performed nursing duties. (Motion Tr. 50.)

Woods's actions, however, conveyed more than just a medical purpose. Woods began the SANE exam by presenting S.M. with a consent form to a forensic medical examination that was "not a routine medical checkup." (Ex. 9.) S.M. agreed the clinician (i.e., Woods) would "not be held responsible for identifying, diagnosing, or treating any existing medical problems." (Ex. 9.) Furthermore, the consent form expressly authorized the gathered evidence to be used in any subsequent criminal proceeding. (Ex. 9.) Some of Woods's procedures had a relationship to medical care, such as providing medications or prophylaxis. (Ex. 9.) But Woods also took a "patient assault history" and followed a "Evidence for Crime Lab" checklist of gathering pubic hair and vaginal swabs that did not have any relationship to medical care. (Ex. 9.)

Because the primary purpose of the SANE exam was to gather evidence for a criminal case, not medical treatment, S.M.'s hearsay also did not satisfy the medical statements hearsay exception of M. R. Evid. 803(4). For statements to be admissible under this exception, the statements "(1) must be made with an intention that is consistent with seeking medical treatment, and (2) must be statements that would be relied upon by a doctor when making decisions regarding diagnosis or treatment." *Notti v. State*, 2008 MT 20, ¶ 41, 341 Mont. 183, 176 P.3d 1040. Following an analysis akin to the test for testimonial evidence, S.M. was not speaking to Woods with an intention to address an injury or infection, rather, S.M. spoke to Woods to provides details about her accusation against Jose.

Taking all the relevant circumstances together, an objective inquiry can only conclude that the primary purpose of S.M.'s interview with Woods was to gather evidence for a criminal prosecution. A SANE exam is a forensic procedure to help law enforcement investigations by gathering evidence to present to prosecutors to charge crimes. The fact that the exam itself is carried out by a nurse in a hospital setting does

not render such evidence categorically nontestimonial under both Federal and Montana precedent.

S.M. did not self-report to a hospital to complain of an injury to her genital area. S.M. disclosed to Bria and then Tammie, who did not take S.M. to the hospital but instead called a police officer, initiating a criminal investigation. The officer, outside of an ongoing emergency, listened to S.M.'s accusation and concluded a SANE was necessary to preserve evidence. Officer Newsome then transported S.M. to the hospital, where she participated in a SANE exam. Woods conducted the exam and refused to be held responsible for identifying, diagnosing, or treating any existing medical problems. Woods turned the results of the SANE exam over to law enforcement, which resulted in a criminal prosecution.

S.M. intended to accuse Jose and get out of the Bourbon Street Motel. Woods asked questions to gather evidence and additional details about S.M.'s accusation. Any medical benefit accruing from taking a SANE exam was, at most, secondary. The primary purpose of the SANE exam was to collect evidence for prosecution. S.M.'s statements to Woods and others were testimonial evidence.

2. When S.M. flouted her subpoena, Jose lost his power to cross-examine S.M. about significant inconsistencies in her sexual assault accusation and her motivations to falsely accuse Jose.

A cross-examination would have been quite helpful to Jose's defense had S.M. obeyed her subpoena and appeared for trial. Multiple aspects of S.M.'s story could have been addressed with the benefit of cross-examination. S.M.'s accusation allowed her to leave the Bourbon Street Motel, where she had been recently caught—twice—stealing Jose's prescription painkillers. S.M. told inconsistencies about whether sexual intercourse occurred on September 26th or September 27th and how she was impregnated months before that. Cross-examination could have addressed these matters.

According to Dr. Wendy Dutton, a child forensic interview expert, intentional or malicious false reports of sexual abuse can be provided by teenage girls when they have the motive or goal to "change their living situation -- they're unhappy living in one household and wish to go live elsewhere." (Trial Tr. 230-234, 278.) After S.M. made her accusation, she went to Bria's and stopped living at the Bourbon Street Motel. (Ex. 5 at 1:32-1:45, 4:26-4:34.; Trial Tr. 537.) Cross-examination would have

provided more details about how S.M. perceived her current circumstances living in a claustrophobic motel room under renewed scrutiny of parents who had recently caught her stealing drugs.

A cross-examination could have also addressed S.M.'s contradiction in her statement to Nurse Beck that she had been impregnated from a boy she met from school. Jose had a constitutional right to identify inconsistencies in S.M.'s story—many made mere hours after her accusation—and present evidence through cross-examination to demonstrate reasonable doubt that Jose had not committed the heinous acts S.M. and the government accused him of.

Jose expected to confront S.M. and Tammie at trial. Eight days before trial, on the day S.M. was to appear for a pre-trial interview with both the prosecutors and defense counsel, the prosecutors cancelled the interview and dropped the news that the government's case would no longer be S.M.'s testimony, but rather what S.M. told Woods and Dr. Brewer. (Doc. 103.01 at 4; Doc. 106 at 1.)

S.M. and Tammie were under subpoena and had recent contact with the State even as the trial was underway—S.M. herself may have been inside the courthouse during trial at one point. (*See* Trial Tr. 436.)

The State could have issued a material witness warrant to secure Tammie and S.M.'s presence. *See* Mont. Code Ann. § 46-15-201(3). The State chose not to do so, and instead chose the easier but unconstitutional path of trial by hearsay.

No DNA evidence tied Jose to sexual conduct against S.M. (Ex. 7, 8; Trial Tr. 411, 413, 433.) At trial, Woods read S.M.'s narrative to the jury almost word for word. (Trial Tr. 465-469; Ex. 9.) The State gave the jury the SANE exam documentation to deliberate in detail inside the jury room. (*See* Trial Tr. 463, 693; Ex. 9; Doc. 129.) At closing, the State asked the jurors to return to the SANE narrative in their binders and review S.M.'s words. (Trial Tr. 693-694.)

This trial violated Jose's constitutional right to confront his accuser. The multitude of evidence admitted because of the district court's erroneous legal ruling greatly prejudiced Jose's defense.

CONCLUSION

Jose Martinez respectfully requests this Court reverse and remand for a new trial.

Respectfully submitted this 24th day of March 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ James Reavis
JAMES REAVIS
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 10,000, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ James Reavis
JAMES REAVIS

APPENDIX

CERTIFICATE OF SERVICE

I, James Richard Reavis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-24-2023:

Scott D. Twito (Govt Attorney)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of James Richard Reavis
Dated: 03-24-2023