IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0266

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRENT JAMES OLSON,

Defendant and Appellant.

REDACTED BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Leslie Halligan, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
THAD TUDOR
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
thad.tudor@mt.gov

MATTHEW C. JENNINGS
Missoula County Attorney
RYAN MICKELSON
BRITTANY WILLIAMS
Deputy County Attorneys
200 West Broadway
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

COLIN M. STEPHENS
Stephens Brooke, P.C.
315 West Pine
Missoula, MT 59802

PETER F. LACNY
McFarland Molly Lacny & Duerk
283 West Front Street, Suite 203
Missoula, MT 59802

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the district court correctly required Appellant to establish that the victim had seen or was aware of pornography on her brother's cell phone before allowing Appellant to place the existence of that pornography into evidence for the purposes of showing an alternative source of the victim's sexual knowledge.

2. Whether the district court correctly precluded inquiry into vague allegations of touching between the victim and her prepubescent brother, which were not relevant to the nine-year old victim's ability to describe the feel of her father's semen and the size of his erect penis as compared to her own hand.

STATEMENT OF THE CASE

On September 24, 2021, the State filed an Information charging Brent James Olson (Olson) with one count of sexual assault involving a minor, in violation of Mont. Code Ann. § 45-5-502(2)-(3). (Doc. 3.) The State alleged that nine-year-old Jane Doe [hereinafter, "M.O."] disclosed that Olson had been abusing her for the past several years.[1] (Doc. 1 at 2.) Olson would have M.O. touch the part of his

[1]Per the children's mother, Amy Schuster, M.O. and C.O. are Olson's biological children. (3/24/23 Tr. at 635.) M.O. was born on March 1, 2011. (*Id.* at 640.) M.O.'s older brother, C.O., was born on December 18, 2008. (*Id.* at 639.) Amy Schuster divorced Olson in 2015. (*Id.* at 642.) Amy Schuster had since remarried to M.O. and C.O.'s stepfather, Dennis Schuster. (*Id.* at 635.)

body which he used to go "pee." (*Id.*) M.O. described that this part felt "hard" when she touched it. (*Id.*) Further, M.O. described a "weird liquid" that came from Olson's penis that felt like "mixed slime." (*Id.* at 3.)

On March 21, 2023, the State filed a motion and affidavit for leave to file a Second Amended Information, charging two counts of incest, in violation of Mont. Code Ann. § 45-5-507(1)-5(a). (Doc. 39.) The State's affidavit revealed that on February 3, 2023, M.O.'s older brother, C.O., gave a forensic interview at First Step in regards to "someone possibly touching his penis." (*Id.* at 4.) C.O. disclosed that Olson had sexually abused him. (*Id.*)

On July 26, 2023, Olson moved to sever the counts. (Doc. 49.) On August 24, 2023, the State filed a response. (Doc. 52.) [redacted][2] On September 5, 2023, the district court severed the counts. (Doc. 61.)

On October 6, 2023, the State filed a motion in limine for an order "prohibiting the defendant from introducing any other sexual conduct of the victim or any sexual interaction between [M.O.] and the other victim, [C.O.]." (Doc. 70 at 8 (capitalization and bold omitted).) The State argued that, along with pornography

[redacted]

that had been found on C.O.'s phone, these "sexual acts" were "statutorily precluded, not relevant, and are far more prejudicial than probative." (*Id.* at 12.) The State pointed out that C.O. "is also an alleged sexual abuse victim of the Defendant in a charged case," and that "where there is information that [C.O. and M.O.] sexually interacted solely because they were both being sexually abused by Defendant, such testimony is highly inappropriate." (*Id.*)

On March 12, 2024, Olson filed his response. (Doc. 109.) He acknowledged that, "Olson does intend to elicit evidence and cross-examine on these topics *to show where [M.O.] may have learned about sexualized behaviors*." (*Id.* at 12 (emphasis added).)

On March 19, 2024, the district court ordered, "The [c]ourt prohibits the parties from offering evidence that suggests [M.O.] and [C.O.] had sexual contact with each other separate from Olson's alleged sexual contact with them, and that [C.O.] had pornography on his phone." (Doc. 113 at 2-3.)

The parties revisited these issues a number of times and, prior to testimony, the district court clarified its order with respect to the alleged touching:

> So given my review of what typically is discussed under Rape Shield *in the balancing of information I guess I don't have enough information to indicate that any of this touching was similar enough* in—to the information here—and of course we haven't heard [M.O.'s] testimony, and certainly if it comes up that there was more, and there was more touching and that it's impacted her or had some bearing on the charges against Mr. Olson, then we may need to revisit it, but at this point I don't see it coming in.

> *I don't even know what it would be to come in that would have sufficient kind of similar contact, or nexus*, or even raise issues if—so ten, so she's probably eight—seven or eight when this is happening.

(Tr. at 201 (emphasis added).)

The district court concluded, "But at this juncture I guess in balance I would think that any of that would be omitted unless, as I said, [M.O.] testifies to something different, and in fact the contact they had was more of a sexual nature with [C.O.]." (*Id.* at 202.)

Olson's counsel then moved to readdress the pornography on C.O.'s phone, and the district court responded, "Well, again, I think the pornography depends on what [M.O.] says, did she ever access his phone and did she ever see any pornography." (*Id.*) The district court explained:

> But, you know, unless [M.O.] says she was influenced by it, unless she says she saw it, unless it had some bearing on her knowledge or the statements that she's made—*I'd hate to have this trial become all about the pornography on [C.O.'s] phone, which could very well turn to that.*
>
> And she may—*I don't know if she even knows that [C.O.] had pornography on his phone at this juncture.* So I'm not going to raise it—or allow it to be raised unless she independently provides that information, *and then we can readdress the scope*.

(*Id.* at 205 (emphasis added).)

On March 29, 2024, a jury convicted Olson of incest. (Doc 128.)

STATEMENT OF THE FACTS

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] A search of M.O.'s cell phone did not reveal pornography. (3/20/24 Tr. at 25-26.)

[redacted]

[redacted]

[redacted]

At trial, Olson's attorney asked M.O. if C.O. had a cell phone, and she responded, "Yes. And I would play video games on his phone . . . And then pretty sure that's all." (Tr. at 563.)

[redacted]

[redacted]

IV. Pretrial arguments

On March 20, 2024, Olson's attorney readdressed the district court's order excluding the pornography on C.O.'s cell phone:

> I'm worried that maybe I didn't brief that clearly enough. The images that we sought to talk about and evidence found on [C.O.'s] phone ***don't relate at all to [M.O.]***, so in other words not selfies or similar, it's evidence of images—thumbnails, likely, that were downloaded onto from [C.O.'s] phone from looking at adult, legal pornographic websites—albeit, very graphic and there's also evidence of certain websites that [C.O.] visited, things like that.

(3/20/24 Tr. at 23 (emphasis added).)

The district court responded, "I don't know in that timeframe when [C.O.] may have downloaded pornography and whether it had any relevance to statements made by his sister early on. So I can't assess, I guess, your motion until I know that." (*Id.* at 24.)

The State pointed out that after M.O.'s parents brought the children's cell phones to police to be forensically searched, C.O.'s phone contained pornographic images, but M.O.'s phone did not. (*Id.* at 25-26.) Further, the investigation revealed that M.O. used C.O.'s phone to play video games. (*Id.* at 26.) The State acknowledged that "cross-examination [of M.O.] regarding any child pornography—or excuse me, pornography in general might be an appropriate inquiry into source of information." (*Id.*)

[redacted]

On March 22, 2024, the parties readdressed the pornography on C.O.'s phone, and Olson's attorney contended, "So I'll say this, I think that to tie admissibility, again, to what [M.O.] would say if she had access to the phone or not

or looked at it or not shouldn't be the determinative factor."[3] (3/22/24 Tr. at 28.) He added, "It's just a relevant topic to explore." (*Id.* at 29.)

The State responded:

> And from the State's perspective *I don't think it would be inappropriate for them to inquire with [M.O.] if she had seen anything anywhere else or was aware of this material*. So I think if she doesn't say that she was watching that on [C.O.'s] phone I don't know the relevance of its presence."

(*Id.* at 30 (emphasis added).)

V. Relevant testimony

At trial, M.O. testified that she was 13 years old, and her brother, C.O., was 15. (Tr. at 473.) She had been living with her mother and stepfather for "maybe seven years." (*Id.* at 478.) M.O. identified Olson as her "dad." (*Id.*) Olson and her mother had split up when M.O. was "about three." (*Id.*)

M.O. spent time with both parents after they separated, and would "switch weekends and days" to spend time with Olson. (*Id.* at 480.) M.O. recalled that, "Brent took me a lot of places, like, restaurants, and, like, we'd just play playhouse

[3] *C.f.*, 3/22/24 Tr at 17: Olson's attorney arguing that a grooming video found in Olson's residence should be excluded, stating, "I think it's irrelevant and prejudicial to this case *because we have no indication that [M.O.] ever saw it or ever watched it*." (Emphasis added).

together kind of—when I was six or seven." (*Id.*) She added that she liked going to Olson's because "[i]t was a lot less strict." (*Id.* at 482.)

At Olson's house, M.O. slept in her own bedroom. (*Id.* at 488.) On weekends, she would occasionally sleep with Olson in his bedroom. (*Id.*) Olson would lay with M.O. in her bed "once or twice a week, probably." (*Id.* at 489.) She did not sleep in the same bed with her mother or stepfather at their residence. (*Id.*)

When asked if anything "inappropriate" would happen at Olson's house, M.O. responded, "He would touch me at night." (*Id.* at 489-90.) The touching occurred in her bed. (*Id.* at 491.) M.O. explained that Olson would touch her "chest and [her] private area," and clarified that she meant her vagina. (*Id.* at 493.) When Olson touched M.O.'s vagina, "[h]e would rub it with his hands." (*Id.*) When asked if he touched her vagina over or under her clothing, M.O. responded, "Just depended." (*Id.* at 494.) There were times when the touching involved "skin to skin" contact. (*Id.*)

M.O. estimated the touching lasted "usually like, two to ten minutes." (*Id.* at 500.) She demonstrated for the jury how Olson's hands would move when he touched her, in a "circular motion." (*Id.*)

Olson would also have M.O. touch him. (*Id.* at 502.) This occurred during the same occasions when he touched M.O., and she explained that Olson had her touch his penis with her hand. (*Id.* at 503.) When asked to describe it, M.O. responded, "It was, um, hard." (*Id.*)

M.O. demonstrated to the jury how she would touch Olson's penis and stated that it would not fit inside of her hand. (*Id.* at 503-04.) Olson was clothed when this occurred, and M.O. touched his penis under his clothing. (*Id.* at 504.)

M.O. described that a "liquid" would come out of Olson's penis, but that she did not actually see the liquid and only felt it. (*Id.* at 505.) She described the feel of the liquid as "like if you mix like flour and water, kind of making a thick kind of consistency." (*Id.* at 506.)

M.O. had difficulty recalling specific instances of this occurring, and explained, "I mean it was three years ago, and I would go months without even thinking of it—about it." (*Id.*) M.O. did recall her interview at First Step and recalled telling the interviewer that it "felt good" when Olson touched her vagina. (*Id.* at 509.)

M.O. first disclosed the abuse to her stepfather on the Wednesday before her birthday. (*Id.* at 510.) Her stepfather had seen C.O. giving her a hug and asked her why she was sad. (*Id*. at 513.) Eventually, M.O. told her stepfather that Olson had been touching her chest and privates. (*Id.* at 516.)

During her cross-examination, M.O. elaborated on why she wanted to live with Olson, stating:

> He would take us to a lot more places, and he would, like—he would do, like, what you would want all the time. He would, like, always—it was like movies every night, stay up a little past bedtime sometimes, and like—he'd just kind of do fun things. There was a lot

> of video games, he wasn't strict, he never really yelled at us, he never really got mad at us or anything, and there was a lot less work at Brent's—than my mom.

(*Id.* at 543.)

Olson's attorneys covered the names of M.O.'s pets (*id.* at 530, 534), the layout of Olson's residence and sleeping arrangements (*id.* at 532-39), and M.O.'s "nighttime routine," which included saying her prayers with Olson, who would lay down with her so she could fall asleep (*id.* at 539-40). Further, they asked why M.O. considered Olson's residence to be the "fun house," and why she wanted to live with him. (*Id.* at 543-45.) They also asked about the circumstances surrounding M.O.'s disclosure to her stepfather. (*Id.* at 549-56.)

With respect to her access to C.O.'s phone, M.O. testified, "I would play video games on his phone . . . And then pretty sure that's all." (*Id.* at 563.)

Olson's counsel did not ask about the content of what M.O. had disclosed to her stepfather, nor did they challenge her descriptions of the incest. They did not inquire into potential alternative sources of M.O.'s sexual knowledge, nor did they establish a motive for M.O. to fabricate her allegations.[4]

Olson testified in his defense and denied molesting M.O. (Tr. at 860.) His attorney asked, "In your mind do you know why [M.O.]'s saying these things?"

[4] Olson's attorney later argued that "I believe that [M.O.] believes it, I believe that Amy [Schuster] believes it. But it didn't happen." (Tr. at 1002.)

(*Id.*) Olson responded, "I—I don't know. I can speculate, but that's what—we're in this courtroom, so I'm not going to do that." (*Id.*)

Olson claimed that upon learning of M.O.'s disclosures, his initial shock turned to fear—not for himself, but for M.O. (*Id.* at 891.) Olson explained, "Because these allegations came from somewhere and somehow in her head, so where did they come from and how did she get them." (*Id.* at 891-92.) He later repeated, "So I—I have no idea where she got them, and it was scarier than hell to find out that she was saying those things." (*Id.* at 894.)

When asked if he knew whether M.O. had been molested, Olson responded, "I have no idea." (*Id.* at 901.)

While he denied that he had molested M.O., most of Olson's testimony corroborated previous witnesses. (*See, e.g.*, *id.* at 863-64: Olson agreeing that his divorce from Amy Schuster had been "amicable," and that they had been cooperative in sharing custody of the children.)

Significantly, Olson did not identify a motive for M.O. to fabricate her allegations. (*See, e.g., id.* at 920-21: Olson describing having a "good relationship" with M.O. and acknowledging that he "loved her more than any woman I've ever met in my life.") After Olson's testimony, the defense rested. (*Id.* at 926.)

After being accurately instructed on the law, the jury found M.O.'s testimony credible, rejected Olson's denials, and convicted Olson of incest. (*Id.* at 1032.)

On February 24, 2025, the district court sentenced Olson to 100 years to the Montana State Prison, and stayed 85 years. (2/24/25 Tr. at 134.) This appeal follows.

SUMMARY OF THE ARGUMENT

Despite the repeated encouragement from the district court and the State to demonstrate how pornography on the victim's brother's cell phone was relevant, Olson failed to do so. There was no evidence that M.O. knew about the pornography. As the district court recognized, without evidence that M.O. had seen or was even aware of the pornography on her brother's phone, it could not have been relevant to her allegations.

Likewise, whatever touching may have occurred between M.O. and C.O.—when they were both prepubescent, could not possibly explain M.O.'s description of the feel of her father's semen or the size of his erect penis as compared to her own hand. The district court correctly precluded this evidence because it was vague, irrelevant, and barred by Mont. Code Ann. § 45-5-511(2).

ARGUMENT

I. Standard of review

A district court has broad discretion to determine the admissibility of evidence and this Court generally reviews evidentiary rulings for an abuse of discretion. *State v. Twardowski*, 2021 MT 179, ¶ 14, 405 Mont. 43, 491 P.3d 711

(citations omitted). Where a district court's evidentiary ruling is based on its interpretation of a statute, this Court reviews the district court's ruling de novo for correctness. *Twardowski*, ¶ 14 (citing *State v. Lake*, 2019 MT 172, ¶ 22, 396 Mont. 390, 445 P.3d 1211).

II. The district court correctly excluded irrelevant evidence

A. Applicable law

Montana's Rape Shield Statute provides:

> Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.

Mont. Code Ann. § 45-5-111(2).

This statute "is designed to prevent the trial of the charge against the defendant from becoming a trial of the victim's prior sexual conduct," and to "protect victims from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior." *State v. Colburn*, 2016 MT 41, ¶ 22, 382 Mont. 223, 366 P.3d 258 (citations omitted).

The Rape Shield Statute "cannot be applied to exclude evidence arbitrarily or mechanistically." *Colburn*, ¶ 25. It is the district court's "responsibility to strike

a balance in each case between the defendant's right to present a defense and a victim's rights under the [rape shield] statute." *Id.*

Balancing the interests of the defendant with those protected by the Rape Shield Statute "should require that the defendant's proffered evidence is not merely speculative or unsupported." *State v. Awbery*, 2016 MT 48, ¶ 20, 382 Mont. 334, 367 P.3d 346 (citations omitted). "Speculative or unsupported allegations are insufficient to tip the scales in favor of a defendant's right to present a defense and against the victim's rights under the rape shield statute." *State v. Johnson*, 1998 MT 107, ¶ 24, 288 Mont. 513, 558 P.2d 1182 (citations omitted).

The court should consider whether the evidence is "relevant and probative," and whether the probative value of the evidence is outweighed by its prejudicial effect. *Awbery*, ¶ 20.

B. Pornography on C.O.'s phone was irrelevant.

It is axiomatic that M.O. could not have learned how to describe the consistency/feel of semen or the size of her father's penis compared to her own hand from pornography that she did not know existed. That was the essence of the district court's order:

> unless [M.O.] says she was influenced by it, unless she says she saw it, unless it had some bearing on her knowledge or the statements that she's made—*I'd hate to have this trial become all about the pornography on [C.O.'s] phone, which could very well turn to that.*

> And she may—*I don't know if she even knows that [C.O.] had pornography on his phone at this juncture.* So I'm not going to raise it—or allow it to be raised unless she independently provides that information, *and then we can readdress the scope*.

(Tr. at 205 (emphasis added).)

Olson's reliance on *Colburn* and *Twardoski* is misplaced. (*See* Appellant's Br. at 21-22.) Under these facts, there was no immediate relevant "straight-line connection" between the victim's sexual knowledge and pornography she had not viewed. *See Twardowsk*i, ¶ 35.

In *Colburn*, the defendant was charged with sexually abusing his daughter and a neighbor, R.W., both 11 years old. *Colburn*, ¶ 9. Colburn sought to admit evidence that R.W. had been sexually abused by her own father as "a motive to fabricate" and "an alternative source of R.W.'s sexual knowledge."[5] *Id.* ¶ 37. This Court observed that "the proffered evidence that R.W. was abused by her father was neither speculative nor unsupported, given that he was convicted on charges stemming from sexual assaults against his daughter." *Id.* ¶ 25.

Importantly, R.W. had explained that she felt comfortable disclosing her father's abuse because her allegations against Colburn had been taken seriously, "thus tying her disclosure in the two cases together." *Id.* ¶ 26. This Court concluded:

---

[5] In her forensic interview regarding Colburn, R.W. expressed that "she [R.W.] just recently felt comfortable disclosing this information because her mom 'believed' her about the sexual abuse by the neighbor, James Colburn." *Colburn*, ¶ 37.

> In the present case the [d]istrict [c]ourt's statements excluding Colburn's proffered evidence show no weighing of his rights to present a defense with the interests represented by the Rape Shield Law. The [d]istrict [c]ourt abused its discretion by mechanistically applying the Rape Shield Law to exclude Colburn's proffered evidence.

Id. ¶ 29.

In *Twardoski*, the defendant wanted to admit evidence of "near contemporaneous" sexual abuse that the victim, I.A., had alleged against another individual named Hill. *Twardoski*, ¶¶ 22-23. In determining the district court erred in excluding the evidence, this Court stated:

> Here, as in *Colburn I*, there is a straight-line connection between I.A.'s prior sexual abuse by Hill and the allegations she made against Twardoski—the nature and circumstances of the allegations are quite unique and near identical right down to the very distinct allegation of enticing I.A. to play sexual "truth or dare" with the "dares" being identical in nature to those perpetrated by Hill.

Twardoski, ¶ 35.

However, where the defendant's proffered evidence "never progressed past conjecture and speculation," this Court has affirmed the district court's determination that there was insufficient foundation to admit the evidence and concluded that the district court properly balanced the competing interests when it excluded evidence of prior sexual abuse. *Awbery,* ¶ 21.

In *Awbery*, the defendant's proffered evidence was that three of the four alleged victims had been previously sexually assaulted, which increased the

chances that they had suffered PTSD, thereby increasing the chance that their allegations against Awbery were "erroneous."[6] *Id.* ¶¶ 12-13.

This Court observed that "there was no clear evidence of the prior acts, either the facts of the abuse or the effects of it upon the victims." *Id.* ¶ 22. Distinguishing those facts from *Colburn*, this Court stated:

> In this case, by contrast, the [d]istrict [c]ourt carefully considered Awbery's right to present a defense to the charges; weighed it against the interests protected by the Rape Shield Law; and ruled that Awbery might be allowed to present evidence of prior abuse if it were made relevant by trial testimony.

Id. ¶ 26.

Here, the district court made the same ruling:

> But, you know, unless [M.O.] says she was influenced by it, unless she says she saw it, unless it had some bearing on her knowledge or the statements that she's made—I'd hate to have this trial become all about the pornography on [C.O.'s] phone, which could very well turn to that.
>
> And she may—I don't know if she even knows that [C.O.] had pornography on his phone at this juncture. So I'm not going to raise it—or allow it to be raised unless she independently provides that information, and then we can readdress the scope.

(Tr. at 205.)

[6] The same perpetrator on two of the three victims of previous sexual abuse had been convicted for those offenses. *Awbery*, ¶ 12. The third victim's alleged perpetrator was "not fully investigated." *Id*.

Moreover, the State practically invited Olson's lawyers to inquire into alternative sources of M.O.'s sexual knowledge, including the pornography on C.O.'s phone: "And from the State's perspective I don't think it would be inappropriate for them to inquire with [M.O.] if she had seen anything anywhere else *or was aware of this material*." (3/22/24 Tr. at 30 (emphasis added).)

The record shows that Olson's attorneys failed to establish that the pornography on C.O.'s cell phone was relevant to any material issue in this case. Without anything to show that M.O. had seen or was aware of that pornography, it could not have affected her allegations against Olson, and the district court correctly excluded that evidence as irrelevant.

C. Alleged touching between M.O. and C.O. was irrelevant

As with the pornography on C.O.'s phone, the district court correctly precluded evidence of alleged touching between C.O. and M.O. because Olson failed to establish that it was relevant to M.O.'s allegations against him. This Court addressed a similar situation in *State v. Walker*, 2018 MT 312, 394 Mont. 1, 433 P.3d 202.

Walker's stepdaughter, R.W., who was 11 years old at the time of the incident, testified that Walker had sexually assaulted her. *Id.* ¶¶ 4, 5. Walker contended that R.W. had gotten into his bed, made sexual advances towards him, and "as soon as he realized what was happening, he jumped out of the bed." *Id.* ¶ 5.

Walker sought to introduce evidence of a prior incident when Stacy Wood (Wood) found then eight-year-old R.W. in bed with a three-year-old. *Id.* ¶ 50. R.W. ran away and the three-year-old told Wood that R.W. was touching her "hoo-hoo," which was the family name for private parts. *Id.* Walker contended that the past sexual behavior was relevant to R.W.'s "sexual awareness" and it corroborated that R.W. had been acting out sexually towards him. *Id.*

The district court excluded the evidence, but told the parties that it would "reconsider the issue if presented with different information." *Id.* ¶ 58.

Affirming the district court's exclusion of the evidence, this Court noted that "there was no clear evidence of the prior incident—Walker's proffered evidence of R.W.'s sexual conduct was speculative and unsupported." *Id.* ¶ 59. Further, this Court concluded that, "The type of evidence Walker sought to admit is precisely the type of probe into R.W.'s past sexual conduct that the Rape Shield Law was designed to exclude . . . ." *Id.*

Here, there was no evidence of what the touching between M.O. and C.O. actually involved, much less whether it had affected M.O.'s allegations against Olson. As the district court observed:

> So given my review of what typically is discussed under Rape Shield in the balancing of information I guess I don't have enough information to indicate that any of this touching was similar enough in—to the information here—and of course we haven't heard [M.O.'s] testimony, and certainly if it comes up that there was more, and there was more touching and that it's impacted her or had some bearing on

> the charges against Mr. Olson, then we may need to revisit it, but at this point I don't see it coming in.
>
> I don't even know what it would be to come in that would have sufficient kind of similar contact, or nexus, or even raise issues if—so ten, so she's probably eight—seven or eight when this is happening.

(Tr. at 201.)[7]

The district court concluded, "But at this juncture I guess in balance I would think that any of that would be omitted unless, as I said, [M.O.] testifies to something different, and in fact the contact they had was more of a sexual nature with [C.O.]. (*Id.* at 202.)

M.O. did not testify to anything that would have suggested that whatever took place between her and C.O. had any effect on her allegations. Allowing Olson to explore an allegation of touching this incredibly vague would have been exactly the type of probe into M.O.'s past sexual conduct that Mont. Code Ann. § 45-5-511(2) was designed to exclude.

As with the pornography that M.O. did not know existed, there is no plausible argument that this touching, whatever it was, would have enabled M.O. to describe the feel of semen or the size of her father's penis compared to her own hand.

---

[7] The only record evidence of when the touching may have occurred was that it was about four and a half to five years prior to C.O.'s February 23, 2023 First Step interview. (Doc. 52, State's Ex. D at 24: C.O. stating that the touching took place "two or—one or—one-and-a-half, two years" prior to them moving into their new residence, which had taken place about three years prior to the interview.)

CONCLUSION

The district court's ruling, which required Olson to establish the relevance of proffered evidence before allowing him to admit it, was consistent with this Court's precedent and followed the plain language of Mont. Code Ann. § 45-5-511(2). Olson's conviction should be affirmed.

Respectfully submitted this 14th day of November, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Thad Tudor*
THAD TUDOR
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 5,820 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Thad Tudor
THAD TUDOR

CERTIFICATE OF SERVICE

I, Thad Nathan Tudor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-14-2025:

Peter Francis Lacny (Attorney)
283 West Front Street
Suite 203
MT
Missoula MT 59802
Representing: Brent James Olson
Service Method: eService

Colin M. Stephens (Attorney)
315 W. Pine
Missoula MT 59802
Representing: Brent James Olson
Service Method: eService

Matthew C. Jennings (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Thad Nathan Tudor
Dated: 11-14-2025