IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR-20132921-001
	)	
	)	2 CA-CR 2014-0200
THOMAS STEVEN YATES,	)	
	)	
Defendant.	)	
_____	)	

BEFORE: THE HONORABLE BRENDEN J. GRIFFIN
Judge of the Superior Court
Division 1

REPORTER'S TRANSCRIPT ON APPEAL

PENDING MOTIONS

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TUCSON, ARIZONA

APRIL 8, 2014

CHERYL L. CUMMINGS, Official Reporter
RDR-RMR-CRR, Certified Reporter No. 50029

Prepared for: COURT OF APPEALS

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2 APPEARANCES:
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5 BY: DEBORAH LEE, Esq.
6 Deputy County Attorney
7 on behalf of the State; and
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11 PIMA COUNTY PUBLIC DEFENDER'S OFFICE,
12 BY: JOHN M. SANDO, Esq.
JOSHUA FERMAN, 38(D)
13 Assistant Public Defender
14 on behalf of the Defendant.
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P R O C E E D I N G S

THE COURT: State vs. Yates, 20132921.

MS. LEE: Deborah Lee on behalf the State.

MR. SANDO: John Sando for Mr. Yates who is not present, out of custody. And I'm here with my 38(D), Josh Ferman.

THE COURT: So we have two motions in limine. We have the State's motion in limine. I read that and I read the response. Let's deal with that one first.

Let me hear from the State first.

MR. SANDO: Are you talking about my motion to preclude?

MS. LEE: No, my motion in limine.

THE COURT: There were two motions in limine filed, and I --

MR. SANDO: You want to hear from the State?

THE COURT: I want to deal with the State's motions first.

MR. SANDO: I ask Mr. Ferman be able to address this. I will address the 404 question.

THE COURT: Sure. Let me hear from the State first on its motion.

MS. LEE: Your Honor, I will start with the fact that defense just filed their notice of defenses on March 27, and their one and only defense is lack of

sexual interest pursuant to A.R.S. 13-1407(E), which is a valid defense, but now they've completely opened the door regarding a lot of things that the State is seeking to admit at trial. But that's more, I think, relevant to the 404 issue so I'll put that aside for a moment.

So there are a few things that I would -- the State wants to preclude. One -- the first one is any testimony regarding impotence. That really doesn't say or go one way or another to show whether or not he had a sexual interest, and I think that would confuse the jury. I don't think that that's relevant --

THE COURT: It goes to what?

MS. LEE: I don't think that it goes to the issue of whether or not he had a sexual interest because they're independent of each other, your Honor. The fact that he can't physically do something doesn't necessarily mean that he have any sexual interest at all.

Regarding the prescriptions, again, I think it's irrelevant as to whether or not they cause him to be impotent. Again, that's something that would distract the jury and would be irrelevant. I especially think he shouldn't be able to talk about the effects of the prescription because I think that kind of testimony would be more appropriate coming from a doctor and there is no doctor that's noticed for trial.

Regarding the phone calls, the defense, in their response, said that it's relevant to show the defendant's fear and that fear testimony generally isn't hearsay. That's beside the point. What the defendant tells the police is that a few weeks or months after the incident, he got some phone calls from unknown numbers and some text messages that didn't make any sense, essentially. He said he switched his number because he was annoyed by getting calls from other dancers, and he was done with all that so he switched his number.

I know that the inference that's going to be made by defense if this testimony comes in is that the victim was trying to harass him for money. There is no evidence to that, your Honor. Not once did the defendant ever tell police that she had tried to ask him for any type of money. Not once did the victim ever allude to any of that. There's one text message the defendant says he received that had dollar signs on it, but he didn't know who it came from and he didn't recognize the number.

And so I think that that's -- I don't think that that's indicative of fear if that's the defense's argument. I don't think that that's admissible because there's just not enough evidence to connect that to anyone or anything.

THE COURT: Okay. Let's deal with them one at a

time. So that's the State's motion in limine, Paragraph 1. Let me hear from the defense on all of those.

MR. FERMAN: Your Honor, I think first it's important that the language of the State's motion in limine is extremely broad. Now understanding that you're referring to out-of-court statements only, but in terms of the language of the motion, it appears that it's referring to any discussion of impotence, whatsoever. I think depending on how the impotence comes into trial would affect whether or not it could even be qualified as hearsay or not. If it's said in court by a doctor, which we haven't decided if we're going to put one on the stand or not, or by the defendant, that's not hearsay.

And furthermore, it is extremely relevant. I mean, the State even says that, you know, we don't know how the jury is going to take it one way or the other. But that, right there, implies the jury is going to consider this and tell us which way it goes. That's a jury question.

THE COURT: What about the medications?

MR. FERMAN: The medications go to physical ability, more than just impotence. I think the impotence is an element, but it's a statement of present physical condition, a statement of health. And I think that that

is relevant because there are parts in the testimony of Mr. Sumner and of Ms. Marlborough that indicate positions of the defendant at certain times or the way he's moving. How drugs -- how drugs that he could have potentially been on would've affected his ability to move in the way they described is all relevant. Statements of his physical condition in terms of his disability --

THE COURT: What about the phone calls?

MR. FERMAN: The phone calls we would say are admissible because they do go to his fear. But that's not necessarily the main thrust here. I think the really important part of this first part is the impotence and the prescription medications which I believe are very relevant, and I don't see how they confuse.

THE COURT: I'm going to rule on the first part of the State's motion that deals with self-serving hearsay.

To the extent that -- I'm going to grant that part of the motion to the extent it deals with hearsay. Hearsay is not admissible. I'm not going to allow it unless somebody at trial can show some sort of exception to that hearsay rule or can demonstrate that the hearsay is being offered for something other than the truth of the matter asserted.

In terms of the State's comments about impotence

1 and whether it is or isn't relevant to sexual intent, I
2 don't read the motion as covering that at this point.
3 That's something that the State brought up. I will say
4 that as with any testimony, people have to lay the proper
5 foundation for testimony and show that it's relevant and
6 so on and so forth. So, you know, I don't know if
7 impotency has any sort of connection with sexual
8 motivation or not. My guess is that we'd have to have
9 some sort of doctor tell us about that, and my guess is
10 that the defendant may have foundation to talk about what
11 impotency means to him and how it impacts him. He would
12 have to lay foundation to talk about that. But again,
13 those are just the Court's guesses at this point. I
14 would need to have briefing or at least argument on those
15 issues.
16 Let's move to the State's second paragraph in
17 its motion in limine about testimony regarding the
18 charging decisions. Let me hear from the State on that
19 first.
20 MS. LEE: Yes, your Honor. The reason why I
21 filed this motion in limine is because, during pretrial
22 interviews, Mr. Sando asked my case agent some questions
23 that -- regarding the charging and the decision to take
24 it to charging or not.
25 And first of all, charging decisions are within

the county attorney's office's discretion, and it's inappropriate to ask law enforcement regarding whether they thought our charging decision was appropriate or not. I mean -- and you know, it goes the other way, too. I mean, if the defense is allowed to ask my case agent on the stand if he thought that there was sufficient evidence, or proof beyond a reasonable doubt, or maybe not using that specific language but basically asking my officer or detective to make an assessment as to the strength of evidence in the case, there's no way defense would ever be okay with the State asking us -- our law enforcement officer that same question, you know, knowing that the answer is going to be, yes, I think there's proof beyond a reasonable doubt.

I mean, comments to the strength or weight of evidence are generally not appropriate. Charging questions are not appropriate, and we would ask that the defense be precluded from going into those areas at trial.

THE COURT: Let me hear from the defense on that one.

MR. FERMAN: I think first we'd like to distinguish between getting into charging decisions by the State versus the charge that the defendant was arrested on. The officers have discretion in their

1 investigation to arrest or not arrest somebody. And at
2 the time they choose to arrest them, they, you know,
3 state -- they're obligated to state what they're
4 arresting an individual for.
5 So in this instance, discussing the impressions
6 and opinions of the officer during the course of his
7 investigation, why he waited four months for forensics to
8 come back in order to go about actually arresting the
9 defendant is relevant in the sense that he's -- that an
10 officer is an expert in the area of law enforcement
11 investigation, and they have opinions that are relevant
12 to whether or not they felt there was enough weight to
13 issue an arrest.
14 THE COURT: Thank you. I heard enough. I'm
15 going to deny this aspect of the State's motion. It's
16 just too broad. It says, Any testimony regarding
17 charging decisions. I'm denying it, though, without
18 prejudice for the State to raise appropriate objections
19 at trial. For example, I do think it would be
20 inappropriate to ask a police officer, Do you think this
21 is a weak case or a strong case. I don't think that's
22 appropriate. But I think it's definitely appropriate to
23 ask a police officer why you did something. Why did you
24 arrest somebody? What was -- what did you see, those
25 sorts of things. I think I -- either me or whoever the

1 trial judge is just needs to hear that testimony to
2 figure out if it is relevant or not.
3 Any questions on that ruling?
4 MS. LEE: No, your Honor.
5 THE COURT: Let's move to the third one in the
6 State's motion. Any testimony related to alleged past
7 drug use by Stephen Sumner or Meagan Marlborough. Let me
8 hear from the State first.
9 MS. LEE: Your Honor, there's no evidence that
10 on the night of this incident, either the victim, Meagan
11 Marlborough, or the witness, Stephen Sumner, were under
12 the influence of any type of medications. There was
13 mention by both of them that they were on pain killers in
14 the past and possibly around that same time. And also
15 there was testimony from someone, and I can't recall who
16 off the top of my head, that perhaps Meagan might have
17 smoked marijuana when she was younger.
18 Specifically, the marijuana questioning is what
19 I'm really trying to get at. I don't think that that's
20 relevant at all. I think that that would cause the jury
21 to paint a certain type of picture of the victim. So
22 that's the marijuana.
23 And then any other medications, again there's no
24 evidence that at the time that they gave statements or at
25 the time that this incident occurred they were under, you

1 know, any type of medication --
2 THE COURT: Thank you.
3 MS. LEE: -- or drugs.
4 THE COURT: Let me hear from the defense.
5 Do you have any evidence that would suggest that
6 any of these people were under the influence of drugs at
7 the time of the events in question?
8 MR. FERMAN: Yes. In defense interview of
9 Stephen Sumner on March 21st or 22nd, the most recent
10 time that he was spoken to, he indicated that Meagan and
11 him were both on -- at least were prescribed and taking
12 prescription medications. And I believe that at the time
13 that she -- that he -- at some point in the interview he
14 said that she was on her prescription medications at the
15 time.
16 THE COURT: What were those?
17 MR. FERMAN: I don't recall off the top of my
18 head, but --
19 MR. SANDO: Oxycodone and OxyContin.
20 MR. FERMAN: That's right.
21 And I recall -- and so it's important to
22 distinguish here, we're not necessarily bringing it up to
23 say that she's a drug addict or impeach her character.
24 The defense would be bringing it up because she spoke to
25 the police and said, "I'm not on prescription

medications," "I don't abuse them," "I'm currently not taking any drugs," "I haven't taken any drugs." Those are statements that are directly contradicted by what Mr. Sumner would say, and that is impeachment evidence, and that's the reason why we bring it.

THE COURT: I'm denying the State's motion in limine as to that, which is Paragraph 3, with the caveat that if the defense intends to cross-examine the witnesses on this sort of stuff, the defense needs to make sure it has the foundation for it and a good faith basis for making sure that it supports the question. I do think that drug use and being under the influence of drugs during the events in question is potentially relevant. And obviously the State -- this doesn't preclude the State from making appropriate objections at trial.

Paragraph 4 of the State's motion, any testimony alleging suspected prostitution activity involving victim Meagan Marlborough. Let me hear from the State first.

MS. LEE: As your Honor's aware, the victim in this case is a dancer. And the reason why I filed this is because -- just based on the impression I got in pretrial interviews, defense pretrial interviews, and just the nature of case, your Honor. I just wanted to be safe and file this motion because I don't want the

1 defense to allude to any type of accusation that perhaps
2 Ms. Marlborough was prostituting herself, and that that's
3 what was going on at the time of the offense or that she
4 has a history of doing this.
5 You know, any past activity is specifically
6 precluded under the rape shield law, 13-1421, and should
7 not be admissible at trial. There is no evidence that
8 Ms. Marlborough prostituted either in the past or the
9 present. Nothing that the defendant said to police,
10 nothing that Ms. Marlborough said to police. In fact,
11 they agreed there was never any deal or any arrangement
12 for anything sexual going on.
13 And so I do want to address the defense's
14 response. They broke it down into four different, I
15 guess, categories or whatever. I do think that it's
16 appropriate to get into the fact that they met at a
17 gentlemen's club. I think that we need that information.
18 It's going to get out to the jury that she was a dancer,
19 so I don't necessarily oppose that. But they're
20 classifying the massages that Mr. Yates performed on
21 Ms. Marlborough as sexual acts. They weren't sexual
22 acts. They were massages. And so for that reason --
23 THE COURT: Is there a statutory definition of
24 what is sexual conduct or what a sexual act is?
25 MS. LEE: There isn't anything statutory,

1 your Honor.
2 THE COURT: All right. Let me hear from the
3 defense.
4 MR. FERMAN: I think this kind of falls into the
5 category of what we were talking about earlier with the
6 officer's impressions and investigations and experience.
7 Because we're not necessarily trying to portray her as a
8 prostitute because there's, I mean, no hard evidence of
9 that. I think the reason why it's been brought up in
10 interviews is because the officers seem to have the
11 impression that that's actually what was going on here.
12 And that was the motivation for her to potential have
13 maybe, you know, made things up, because her boyfriend
14 might be getting upset about it.
15 And I think in interviews with the officers,
16 that kind of became clear that some of the reason why
17 there's so much extra investigation, they were waiting
18 for the DNA and forensics to come back was because it was
19 a bizarre situation. To them it looked like it might be
20 prostitution, and I think that's officer impression and
21 investigation.
22 THE COURT: Why is that relevant? Did they rule
23 it out?
24 MS. LEE: Yes.
25 MR. FERMAN: They're not charging her with

prostitution.

THE COURT: And does it in any way relate to your defense?

MR. FERMAN: Well, I mean, I think their suspension is relevant to maybe whether or not her testimony about what was happening there was credible.

THE COURT: Thank you. I'm ready to rule on this one. I'm going to grant the State's motion on this aspect, Paragraph 4, based on the statute A.R.S. 13-1421. I don't think it's relevant to have any sort of reference to prostitution or anything along those lines.

Where I think this gets a little tricky is we do -- I agree with the State, that we need to talk about the facts which this was a gentlemen's club. There was dancing going on. I mean, I don't think dancing, in and of itself, is a sexual conduct so I think we could talk about that. But if we get to the trial and someone is -- wants to bring in something that they think is getting close to the line of sexual conduct, then approach the bench to make sure you're not violating this order and that we are following the statutory prescription.

Any questions on that?

MS. LEE: No, your Honor.

MR. FERMAN: No, your Honor.

THE COURT: I think that covers all aspects of

1 the State's motion in limine. Does anybody disagree?
2 MS. LEE: No.
3 MR. SANDO: No.
4 THE COURT: Let's move to the defendant's motion
5 in limine. It's a motion in limine to preclude evidence.
6 I read the defense's motion. I read the response. And
7 then I did get a reply from the defense. I read that as
8 well.
9 Let me hear from the defense first.
10 MR. SANDO: Your Honor.
11 THE COURT: And I'd like to focus on the merits
12 rather than the arguments about lateness.
13 MR. SANDO: Okay. Your Honor, I believe we
14 discussed this before regarding the complete
15 untimeliness, that you don't want to hear about now.
16 THE COURT: Well, I said I would like to focus
17 on the merits.
18 MR. SANDO: Well, that -- they didn't even file
19 the motion until after I filed the motion to preclude.
20 But they say, Oh, well, she was listed as a potential
21 witness. Listing somebody has a potential witness
22 doesn't mean you can get around Rule 15 -- 15.1. It says
23 that you have to file a notice of any evidence, any
24 evidence of prior acts. But I think I stated everything
25 I need to state in the motion about this complete

1 untimeliness here.
2 In their response they cite State v. LeBrun, the
3 Court might have noticed, for the proposition 404(B)
4 doesn't require evidentiary hearing. Well --
5 THE COURT: I think they're right. I don't
6 think it requires it. I think it's at my discretion.
7 MR. SANDO: Yes. Well, first of all, LeBrun
8 talked about 404(C), not 404(B). And there can't be any
9 two rules that are more opposite. 404(B) generally
10 disallows any evidence of prior bad acts to show a
11 propensity, whereas paragraph (C) does the exact
12 opposite. You can show prior sexual indiscretions as
13 propensity, but not in 404(B). And the State's elected
14 to go 404(B).
15 THE COURT: What's your defense to this case?
16 MR. SANDO: My defense is that -- is that it
17 didn't happen. That he did not place his hand, could not
18 have physically been able to do it off her -- his hand on
19 her panties with the other hand with a thumb in the
20 mouth. It's just not possible.
21 And that was one of the reasons why we filed
22 these motions, because the boyfriend goes out for two
23 hours while she's getting either her third, fourth, or
24 fifth massage that she's requested from him. And he
25 comes back just -- just happens to come in at the time

where he hears her yell, Get the "f" off me. And walks in, and Mr. Yates is getting up, and she's getting up, although all she had on was bra, panties, and a towel.

THE COURT: So you're going to admit that your client was there --

MR. SANDO: Oh, yes.

THE COURT: -- and that there was massaging going on.

MR. SANDO: Yes.

THE COURT: Just going to say it didn't happen the way that the victim claims it happened?

MR. SANDO: Yes. Now, that's going to be the defense, but --

THE COURT: That sounds like, you know, a mistake, accident, misunderstanding-type defense.

MR. SANDO: Or it would be like the police thought, that the boyfriend walked in and she claimed this to -- so her boyfriend wouldn't get mad. That was the police's conclusions and not ours and it went from there. And we have other reasons to believe she wasn't telling the truth such as the pills she received. Well, they were tested and no toxin, no drugs in them. I guess they were sugar pills.

But again, we're talking about Maria Estrella.

THE COURT: I'm sorry?

1 MR. SANDO: About the 404(B), about Maria
2 Estrella, the other act.
3 THE COURT: Right.
4 MR. SANDO: Okay. See, LeBrun was easy. That
5 didn't require an evidentiary hearing. They had a video
6 and an audiotape of the defendant doing these things so
7 the Court could assess the credibility of the witness
8 easily. We don't have a videotape or an audiotape.
9 As I said earlier --
10 THE COURT: My understanding is we're going to
11 have Ms. Estrella's testimony, we're going to have her
12 written statement which I've read. I think she has a
13 statement that I read. And is her manager going to be
14 testifying as well?
15 MS. LEE: Yes, your Honor.
16 THE COURT: So we'll have those three people and
17 the documentary evidence. Why isn't that enough to show
18 clearly and convincingly? Why do I need to have an
19 evidentiary hearing to do that?
20 MR. SANDO: To assess the credibility since it's
21 a high standard. It means highly probable, clear and
22 convincing. But if the Court doesn't want that, there's
23 no way that this would be admissible under -- they only
24 cite one of the factors in 404(B) about the probative
25 value. He asked Maria Estrella in a dance club a year

1 and a half before the alleged sexual assault, "Could I be
2 your sub?" That's it. There was no massaging, no giving
3 of pills --
4 THE COURT: Her statement says, "He offered me a
5 free massage expecting nothing in return." And the
6 statement also goes on to say, "He also offered me
7 pills." And I think those are the two main aspects of
8 that prior act that the State wants to get in. Is that
9 correct from the State?
10 MS. LEE: Yes, your Honor.
11 MR. SANDO: Except in the second statement she
12 never mentions anything about pills.
13 THE COURT: That goes to impeaching her and I
14 think the weight of her evidence, not necessarily whether
15 it's admissible.
16 MR. SANDO: So they're claiming that -- anyway,
17 they have to show that it has a tendency to make it more
18 or less probable. So saying -- asking for a massage and
19 saying a "sub," does that make it more or less probable
20 that two years later he would commit the criminal act of
21 sexual assault? There's no way it's probative toward his
22 intent on the day in question that he was charged with
23 sexual assault.
24 And also, they never even have explained in
25 their pleadings whether or not this would be admitted for

a proper purpose, and there is no proper purpose. Probably why they didn't argue it. It does not show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident as required under 404(B).

THE COURT: Okay. Let me hear from the State.

MR. SANDO: But one other thing, your Honor, is that I believe on page 6, I've outlined all the differences between these two, showing that there's no way it's any kind of a common scene, motis operandi or anything like that.

THE COURT: Okay. Let me hear from the State, and specifically on the merits rather than the timeliness.

MS. LEE: Yes, your Honor.

THE COURT: Please.

What are you going to use this evidence to show? What's the purpose?

MS. LEE: Yes, your Honor. There are several purposes that the State intends to use this evidence for, and I'll go back to the fact that defense has filed notice of defenses, specifically states lack of sexual motivation or interest.

This evidence specifically -- I mean, he's completely opened the door wide open at this point

because Maria Estrella also states that the defendant wanted her to be his sex slave. This is a year and a half ago when allegedly the defendant was impotent and had no sexual desire, but yet he was frequenting gentlemen's clubs. And for the record, Maria Estrella and the victim do not know each other. They actually work in separate gentlemen's clubs. And so it definitely goes to show his motive and intent to commit these acts against Ms. Marlborough.

It also is relevant to show that there's a lack of mistake, you know, that this wasn't any type of accidental touching, that it was just a by-product of performing a massage in the general area. And it corroborates Ms. Marlborough's account of what the defendant told her, the plan or the deal would be. "I'll give you pills," "I'll give you massages for free, for nothing in return." And I think those are proper purposes under 404.

I do want to briefly address the defense's arguments that there needs to be a hearing.

THE COURT: You don't need to address that.

MS. LEE: Okay. I also do want to put on the record that the State has tried to offer opportunities for Mr. Sando to interview Ms. Estrella, but he has either not responded or said that he wanted to postpone

1 those interviews. Your Honor, I think that the facts in
2 this case and the defenses that the defendant may raise
3 at trial, now he's saying that it never happened, or, you
4 know, if it did happen there was a lack of sexual intent,
5 either way, your Honor, I think that this evidence is
6 critical. And it's definitely probative and it's
7 critical to the State's case, and it's for a proper
8 purpose, your Honor. So we would ask that it be
9 admissible.
10 MR. SANDO: Your Honor, there's two problems
11 with the State's argument here. They keep talking about
12 motis operandi. It has to be a method or manner of
13 procedure or pattern of criminal behavior so distinctive
14 that investigators attribute it to the work of the same
15 person. It also must show that the defendant was
16 carrying out a common scheme or plan. He never gave
17 massages to Maria Estrella. He said he wanted to be the
18 sub.
19 Now, with the alleged victim here, he was coming
20 over to her house all the time. They were watching TV,
21 go out and run errands with her. He gave her massages on
22 several occasions, two-hour long massages. She
23 considered him, in her words, "a trusted friend." There
24 was no sexual interest whatsoever between these two
25 according to the alleged victim. All he was doing was

1 giving a massage. And then she wakes up after she fell
2 asleep during the massage and says his hand is in her
3 crotch.
4 But even if it were, the prejudice is -- a jury
5 is going to think that he's a drug dealer going around
6 giving free massages to prostitutes or strippers. That's
7 going to be the impression on the jury. It's not only
8 not probative of anything and it's not a tendency and so
9 remote in time, but the prejudice here of this act that
10 occurred two years is devastating. That means he can't
11 testify. And when you have an act that has nothing to do
12 with the criminal charge of sexual assault, -- when
13 you're trying to bring in any kind of dirt like this, it
14 basically, if it gets in, the jury is going to convict
15 him because they're going to think he's a creep or a
16 pervert or whatever.
17 And this act was not criminal, the one that
18 occurred with Maria Estrella. She was a little bit
19 offended by it, but, your Honor, you can only imagine the
20 number of comments made in strip clubs over the years.
21 It doesn't make any difference, and it doesn't have
22 anything do with intent, what his intent was, did he
23 sexually assault the alleged victim. And the unfair
24 prejudice here is manifest and basically cuts off any
25 right of him to testify.

THE COURT: Thank you. I'm ready to rule.

I am denying the defendant's motion in limine to preclude evidence for the following reasons: As to the lateness of it, I don't think there was any late disclosure here. The Maria Estrella was disclosed early on. Her statement was disclosed early on. The substance of what we're talking about here was disclosed early on. The fact that it wasn't labeled until closer to trial I think is insignificant.

I also note that Rule 15.6(C) talks about a final disclosure deadline being seven days before trial, and the notice of other acts was definitely filed before those seven days. So I do not think that there is any late disclosure here.

The motion in limine also argued that the response to that motion, the State's response to that motion was late and somehow that precludes the State from opposing the motion. I don't agree with that. I get late responses all the time from all walks of life and I usually consider them. I think it's my discretion. And I'd rather decide an issue on the merits rather than a technicality.

Turning to the merits, I find that based on the evidence I have now there is clear and convincing evidence that these other acts occurred. That clear and

1 convincing evidence is based on what I understand the
2 State's offer of proof is as to Ms. Estrella's testimony,
3 the written statement I have here and the transcript of
4 the recorded statement I have from Ms. Estrella, as well
5 as what that State has represented her manager is going
6 to speak to. I do not think an evidentiary hearing is
7 required on that point.
8 If during trial defense counsel wants to voir
9 dire those witnesses to show that those other acts didn't
10 happen, that that clear and convincing evidence doesn't
11 exist, the Court would entertain that. But based on what
12 the Court has heard now, it thinks that that clear and
13 convincing evidence exists. I think the State is
14 correct, that these other acts go to lack of intent,
15 mistake, accident. The defense that was recently
16 disclosed of lack of sexual motivation, I think the other
17 acts go to all of that and that they're relevant to all
18 of that.
19 This is not like the case of State v. Ives, 187
20 Ariz. 102, where the defendant in that case was saying he
21 didn't touch the victims at all. It wasn't a matter of
22 he touched them, but it was just a mistake or a
23 misunderstanding. His defense was, "I didn't touch them
24 at all." It's completely made up. I think that's
25 different than the facts of this case and makes the other

1 acts that the State wants to introduce relevant.
2 I also note that these other acts tend to
3 corroborate what the victim in our case alleges what
4 happened here. So for Rule 403(B), I believe there's a
5 proper purpose. For Rule 402, I think the other acts are
6 relevant. As for Rule 403, I don't think that there is
7 any unfair prejudice that substantially outweighs the
8 evidence of this evidence. And for purposes of 105,
9 allowing a limiting instruction, I will entertain and I
10 will grant some sort of limiting instruction that the
11 defense requests in this regard. Just I would ask that
12 you work with the State on that limiting instruction if
13 you can and submit one that's stipulated.
14 I also give the caveat that we're talking about
15 what I've read and what counsel are saying. Trial
16 develops in different ways, so if it turns out that the
17 defendant's defense changes or the evidence doesn't turn
18 out, I obviously can change that ruling. But at this
19 point for the reasons stated, I'm denying the defendant's
20 motion.
21 Any questions on any of that?
22 MR. SANDO: Yes, your Honor. Earlier when we
23 were arguing this, you were kind of inclined --
24 THE COURT: Earlier today or --
25 MR. SANDO: No, the last time we were here.

THE COURT: Okay.

MR. SANDO: A week or two ago. That you were inclined to allow it in if he took the stand. Is that still your ruling?

MR. SANDO: Well --

THE COURT: Well, it's -- my thinking is not based on whether he takes the stand or not. It's really focused on, among other things, what his defense is. Because I think the defense is what can implicate this other act evidence.

MR. SANDO: Well, then if the defendant doesn't testify, it's not coming in. Is that correct?

THE COURT: No, that's not what I'm saying.

MR. SANDO: Are you going to allow that in in the case in chief?

THE COURT: Pardon me?

MR. SANDO: Are you going to other act evidence in the State's case in chief?

THE COURT: Based on disclosed defenses from the defense, yes. If you were willing at this point to go on record of a defense that does not implicate these other acts, then I would reconsider my ruling.

MR. SANDO: Well, I thought I had, but obviously the Court's not in agreement.

THE COURT: Well, I'm not clear on what you're

1 saying. If the defendant doesn't take the stand, that
2 doesn't really close the door on any defenses. You, as
3 the defense counsel, can make arguments and you can
4 elicit testimony to support inferences that go to certain
5 defenses. And I don't hear you ruling that out.
6 MR. SANDO: No, I'm just saying is this going to
7 come in if he gets on the stand and say it was an
8 accident, for example, when he told the police or to
9 rebut that, would that -- would it then could in?
10 THE COURT: The State is allowed to bring this
11 evidence in in their case in chief based on what I
12 understand are the facts of the case and the defenses
13 being put forth.
14 All right. Thank you.
15 MS. LEE: Thank you, your Honor.
16 (Proceedings closed.)
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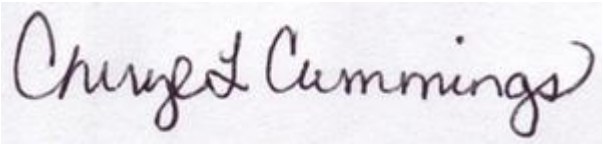
STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, CHERYL L. CUMMINGS, Certified Reporter #50029, Official Reporter for the Superior Court, in and for the County of Pima, do hereby certify that I took the shorthand notes in the foregoing matter; that the same was transcribed under my direction; that the preceding pages of typewritten matter are a full, true and accurate transcript of all the matters adduced, to the best of my skill and ability.



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CHERYL L. CUMMINGS, Official Reporter
RDR-RMR-CRR, Certified Reporter No. 50029