

District Court, Adams County, Colorado,
Adams County Justice Center
1100 Justice Center Drive
Brighton, CO 80601

^COURT USE ONLY^

Plaintiff:
People of the State of Colorado

Case No: 06CR3590

Defendant: Adam Kennedy

Div: F

For Plaintiff:

Courtroom: 405

Office of the District Attorney
1000 Judicial Center Drive, Ste. 100
Brighton, Colorado 80601
Ph: (303)659-7720

For Defendant:

Lisa Polansky
Attorney at Law
4450 Arapahoe Rd., Ste. 100
Boulder, CO 80303

REPORTER'S TRANSCRIPT

The matter commenced on October 5, 2007, before the
Honorable C. Vince Phelps, Judge of the District Court

Mark A. Peterson, CSR/RPR
Adams County Justice Center
1100 Judicial Center Drive
Brighton, Colorado 80601

Index for October 5, 2007

Chronological Witness Index

<u>Defendant's</u>	<u>DIRECT CROSS REDIRECT RECROSS</u>
--------------------	--------------------------------------

Jean McAllister	4
-----------------	---

1 Case Number: 06CR3590
2 Case Name: People v. Adam Kennedy
3 Brighton, Colorado Friday; October 5, 2007
4 Division F Hon. C. Vince Phelps
5 Reporter: Mark A. Peterson, RPR
6 Time: 8:32 a.m.
7

8 Appearances: The Defendant present in court represented by
9 Rachel Lanzen, Deputy Public Defender; the People present in
10 court represented by David Goddard and Rhoda Hofiz, Deputies
11 District Attorney.

12 * * *

13 (Whereupon the proceedings were had in open court:)
14

15 The Court: Calling 06CR3590. People versus Kennedy.

16 Anyone not involved in this case needs to leave
17 the courtroom at this time, all right.

18 State your appearances.

19 Mr. Goddard: David Goddard and Rhoda Hofiz for the
20 People, Your Honor.

21 Ms. Lanzen: Rachel Lanzen appearing with Mr. Kennedy,
22 present out of custody.

23 The Court: Thank you.

24 Mr. Goddard: Your Honor, I know we are set over today
25 to talk about the continuing motions we weren't able to address

1 in the last motions hearing.

2 My understanding The Court at the end of the last
3 motions hearing had indicated that he didn't -- or that you
4 didn't think that we probably needed any additional testimony,
5 that it was legal argument. However, I know that the defense
6 counsel has subpoenaed Jean McAllister, who is the People's
7 endorsed witness. I don't know if there is any intent to
8 elicit any testimony.

9 I would defer to Ms. Lanzen.

10 The Court: Ms. Lanzen.

11 Ms. Lanzen: We did file a motion to preclude the
12 testimony of Jean McAllister, and not just on grounds that we
13 believe she is not qualified to render an opinion, but also the
14 opinion she intends to render does not assist the trier of fact
15 with determining any type of fact in issue.

16 I have read through her report and I don't
17 believe anything in there would be of assistance to the jury in
18 rendering a decision about whether or not a sexual assault
19 actually occurred in this matter. In fact, I think the only
20 purpose of calling Ms. McAllister to testify would be an
21 attempt to bolster -- bolster the testimony of a shaky
22 witness -- with a shaky witness and shaky testimony. They are
23 going to call an expert to try to bolster that, have the
24 jury -- have her comment on her credibility in front of the
25 jury. And that's improper.

1 And so I want to call Ms. McAllister to the stand
2 to present evidence that nothing about her testimony is going
3 to assist the trier of fact.

4 The Court: Then let's do it.

5 Ms. Lanzen: The second prong (phonetic) of Rule 702.

6 At this time the defense calls Jean McAllister to
7 the stand.

8 The Witness: (Indicating.)

9 The Court: Yes, ma'am.

10 If you will step over here, please.

11 If you will face me there. Raise your right
12 hand.

13
14 Jean McAllister,

15 Called as a witness on behalf of The Defense,

16 was sworn and testified as follows:
17

18 The Court: Do you solemnly state that the testimony you
19 may give in the cause now pending before this court shall be
20 the truth, the whole truth and nothing but the truth, so help
21 you God?

22 The Witness: I do.

23 The Court: Have a seat here, please.

24 The Witness: Thank you.

25 The Court: Once you are comfortably seated and have

1 adjusted yourself up to the mike so we can all hear you,
2 clearly, if you would, say and spell your first and last name
3 so we can get it correct.

4 The Witness: My name is Jean McAllister, J-e-a-n;
5 last name McAllister, M-c-A-l-l-i-s-t-e-r.

6 The Court: Thank you very much.

7 Go ahead, Ms. Lanzen.

8 Direct Examination

9 By Ms. Lanzen:

10 Q Ms. McAllister, what is your occupation?

11 A I am -- actually have two occupations. Currently
12 half time I serve as program director for a program called The
13 Health Bridge Alliance, which actually does intervention with a
14 variety of different professionals who experience trauma in
15 their work. And half time I serve as an independent trainer
16 and consultant, and I work for myself in that arena.

17 Q As an independent trainer and consultant, do you
18 usually provide training to law enforcement and District
19 Attorneys' offices and prosecution offices?

20 A Those are some of the People that I provide
21 training to, yes.

22 Q And how long have you been doing those trainings?

23 A I have been training a variety of different
24 professionals in the arena of sexual assault for probably over
25 20 years. I have been working in the field for over 25 years

1 and in a variety of different positions I provided training to
2 a variety of different professional groups.

3 Q Do prosecution offices also hire you to be an
4 expert in cases that are going to trial?

5 A Yes, they have.

6 Q Now what exactly is your education?

7 A I have a bachelor's degree in sociology and a
8 master's degree in social work from the University of Denver.

9 Q And are you -- do you participate in any type of
10 groups or organizations at this time?

11 A I am -- do I participate in organizations?

12 Q Are you involved in professional organizations?

13 A Yes. I work with the Colorado Organization for
14 Victim Assistance. I was asked to chair their training
15 committee for their statewide conference on sexual assault this
16 year.

17 I serve on the board of directors of a program
18 called Victim Outreach Information in Jefferson County. I have
19 been extensively involved with the Sexual Assault Prevention
20 and Response Training programs for the Air Force and Space
21 Command Arena at Peterson Air Force Base and Buckley Air Force
22 Base.

23 I am not certain what you are looking for in
24 terms of professional involvement. I serve on the training
25 team for Ending Violence Against Women Project for the State of

1 Colorado. I serve as faculty for the Victim Assistance
2 Training Academy for the Colorado Organization for Victim
3 Assistance.

4 Q And do you have published articles that you have
5 personally written?

6 A I have some articles in the Colorado Coalition
7 Against Sexual Assault newsletter. I have published training
8 and materials in cirricula. I just recently wrote an --
9 actually wrote one in 2006. It was re-published again through
10 the Space Command Sexual Assault Prevention and Response
11 Programs on responding to sexual assault in the military
12 services, its training handbook.

13 I have -- I was invited to present at the First
14 National Symposium on Non-Stranger Sexual Assault and was --
15 wrote an article for that symposium curricula.

16 So, yes, I have written some.

17 Q And you have also testified as an expert at prior
18 hearings?

19 A Yes, I have.

20 Q Then you testified as an expert at prior criminal
21 proceedings?

22 A Yes, I have.

23 Q And you have been called by the prosecution to do
24 so?

25 A Most of the time. Periodically by the defense.

1 Much more often by the prosecution.

2 Q And your practice is geared towards victim
3 advocacy?

4 A Victim -- actually I would consider my practice
5 to be geared toward understanding trauma and trauma response,
6 victim advocacy and training victim advocates is one component.
7 But also an offender management and offender policy development
8 is another approach.

9 I served as the program administrator for the sex
10 offender management for the State of Colorado for almost
11 five years. So I have done both of those things in response to
12 sexual assault.

13 Q And in response to sexual assault accusations,
14 have you ever done any sort of training assistance regarding
15 the disruption of the lives of people who are falsely accused
16 of sexual assault?

17 A I have worked with people when I was a therapist
18 at the Assault Survivors Assistance Program, who have been
19 identified as officially falsely accused. And I understand
20 that there can be serious disruption. And because of the great
21 risk of re-offense with sex offenders, I have a very strong
22 belief that's important we appropriately identify offenders and
23 not misidentify them.

24 Q Have you also worked with people that have made
25 these false sexual assault accusations?

1 A Yes, I have.

2 Q Okay. Now when -- you were asked, you were hired
3 to assist the prosecution in this particular case, People
4 versus Mr. Kennedy, correct?

5 A That's correct.

6 Q Did they pay you as a consultant?

7 A Yes.

8 Q And you did not read any of the discovery or
9 police reports in this case?

10 A I did not.

11 Q You did not meet with any of the witnesses
12 involved in this case?

13 A I did not.

14 Q And are you also reporting that you don't know
15 what the accusation is in this case exactly, details of the
16 accusations?

17 A I have a verbal description of the kind of
18 general overview of the case from when I met with the
19 prosecution team, but I don't have any specific materials about
20 the case at all.

21 Q When you met with the prosecution team in regards
22 to this case, had a verbal discussion, what information did
23 they provide you about the case?

24 A General information about what was reported and
25 that. And then primarily questions about -- they had about how

1 people would be likely to behave if sexual assaults were
2 happening, particularly in non-stranger cases. I can be more
3 specific if you like. They asked about trauma reactions. They
4 asked about -- and you can see pretty much in my report the
5 topics they addressed because those were the topics that were
6 identified to me that might be considered in this case.

7 Q What I am asking... what specifically were you
8 told about the sexual assault?

9 A I was told that -- and I do not remember the
10 victim's name -- but that the victim made a report about a
11 sexual assault from a known assailant that there -- that she
12 had attended a party with people that she knew, that she did
13 not immediately outcry or leave the party after she reportedly
14 experienced the sexual assault. I believe if I remember
15 correctly that there was -- there was alcohol involved, that
16 she had been drinking. I said not immediately outcry --

17 Q Did you take any notes of this with the
18 prosecution?

19 A I did take notes. I did not bring them with me.

20 Q Your report that you wrote, was that provided as
21 based on the information that the prosecution team provided
22 you?

23 A It's actually based on the information that I
24 identified. I actually did a lot of asking them questions
25 about issues related to sexual assault and what they understood

1 or didn't understand. I advised them that I thought they
2 needed to understand trauma reactions. I gave them general
3 information about sexual assault response, that typical kind of
4 dynamics that happen in non-stranger sexual assaults. And then
5 they asked me questions about why would somebody not report
6 immediately, why would someone say that someone they knew or
7 agreed to be with would sexually assault them, questions that I
8 find very typical when I spoke to anyone whether that's in a
9 community-based training session or with prosecutors, because
10 many people have a great deal of misinformation about sexual
11 assault and what a typical assault looks like.

12 Q Ms. McAllister, the report that you wrote, then,
13 isn't kind of a stock report that you would hand out to
14 somebody that's questioning you about sexual assault? There is
15 things in your report that are specifically geared towards this
16 particular case, correct?

17 A It's geared -- much of the language is language
18 that I would use if somebody identified for me an adolescent or
19 young adult non-stranger sexual assault, if they said that the
20 person -- that there was drinking involved, that there was
21 delayed report, it would be a different report if somebody
22 identified a general assault that was a stranger assault
23 breaking into someone's home, the information on trauma would
24 be exactly the same but the dynamics of reporting patterns and
25 things like that would be different. So I guess what I would

1 say is the report is designed to address issues that were
2 identified for me. But it is general language that I would
3 use. And I have actually used some of this language in
4 training curricula I have written because they are general
5 descriptions of trauma dynamics of common victim reactions of
6 reporting patterns in non-stranger sexual assaults and victim
7 behavior post-assault and in the involvement of alcohol. So
8 there is a degree to which it was directed to the type of case
9 that was described to me. And there is a degree to which it's
10 generally information that I would use in any case like that.
11 It's not specific in the way it would be if I had reviewed
12 documents and been able to identify issues myself based on
13 interviews or other things.

14 Q So, for example, had you been told that the
15 alleged victim in this case was not drinking, or at least had
16 denied having anything to drink, your report would have been
17 somewhat different?

18 A If -- um, I may still have included a sentence or
19 two.

20 Let me look and see what I wrote about alcohol.
21 Because alcohol is a very common factor in sexual assaults. So
22 I may have included some sentence about that it is the most
23 commonly used drug by offenders, they target victims who have
24 been drinking. Victims often are drinking and often don't
25 disclose how much they have been drinking. Those are common

1 responses to sexual assaults. So I am not certain. I may have
2 included it if somebody had told me that, unless they said
3 please don't include anything about alcohol, and I would answer
4 questions about alcohol accurately because it is a common theme
5 in sexual assault.

6 Q So in your report you -- but in your report you
7 had been provided information the alleged victim was drinking?

8 A I believe so, yes. I know there was drinking at
9 the party and I believe that I was told the victim was
10 drinking.

11 Q Okay. Now also had you been told that someone
12 observed the sexual assault and the alleged victim asked for
13 help right away, would that have changed the report?

14 A I would have said that's -- actually wouldn't
15 have changed the report in terms of the content of the report.
16 It would have added one thing that immediate outcry is very,
17 you know, unlikely, even when other people are present. And so
18 I would have said that's the most unlikely sort of outcry.

19 Q Okay.

20 A I would have added one sentence, but the rest of
21 the content wouldn't have changed.

22 Q By "immediate outcry," what do you mean by that?

23 A Most people believe that victims as soon as they
24 are assaulted the first person they see after they are
25 assaulted they are overtly distressed and try to tell people as

1 quickly as possible and as many as possible until someone helps
2 them. And actually that is the least common type of outcry.
3 It often only happens when someone is violently assaulted by a
4 stranger which is the rarest form of sexual assault. And so
5 most people believe that an outcry that is delayed -- a victim
6 that continues to stay in a situation where she is in some
7 proximity to an offender or doesn't try to immediately escape
8 the immediate area, many people believe that indicates that a
9 victim is being untruthful. Actually the literature indicates
10 that most victims of non-stranger sexual assault will leave a
11 situation even after an assault in a way that doesn't appear to
12 attract attention to them and that their outcry is rarely to
13 the first people they see. In fact only about 16 percent of
14 sexual assault victims ever report and those who do are most
15 likely to report to someone they trust. Often that's a friend
16 or a family member or somebody they see some period of time
17 after the assault. Often those people will say to the person
18 you have got to do something about this and then a report is
19 made to law enforcement. That's the most common report made by
20 an adolescent or young adult woman who has been a victim of a
21 assault.

22 Q You mentioned some percentages and what's more
23 common and less common. Would it be your testimony then that
24 someone that did an immediate outcry, that is less likely to
25 have been sexually assaulted?

1 A No, that would not be my testimony.

2 Q Okay. So someone that does an immediate outcry
3 that's consistent with being sexually assaulted but also
4 waiting an hour to outcry is consistent with being sexually
5 assaulted?

6 A In some cases. And in some with some sets of
7 information, yes, that's very common. And waiting even longer
8 is common as well.

9 Q Okay. So all three of those -- as far as are
10 common or consistent with having been sexually assaulted?

11 A Immediate outcry is not common in non-stranger
12 sexual assaults. It's very rare, but it's possible.

13 Q Okay. So you are not saying that somebody
14 immediately outcries is less likely to have been sexually
15 assaulted?

16 A No, I am not. I am saying it's just less common
17 to happen.

18 Q I want to know specifically what information you
19 have had about the case and how the alleged victim responded --

20 Ms. Hofiz: I am going to object to this line of
21 questioning. I believe this has gone way beyond how she is
22 qualified as an expert to testify about trauma and rape trauma
23 I think.

24 The Court: I think it involves her report, what the
25 basis of her report is.

1 Overruled. Let's proceed.

2 By Ms. Lanzen:

3 Q Could you specifically tell me what the
4 prosecution team told you in regards to how the alleged victim
5 in this case responded?

6 A My understanding is that the victim didn't leave
7 immediately. One of the things they were concerned about is
8 she was at -- as I understand -- a party, that she described
9 later being sexually assaulted outside of the party, I believe,
10 in a car, and that she returned to the area where the party was
11 being held and stayed there for some period of time before she
12 left.

13 Q Would it be consistent -- or did they tell you
14 she continued to make out and have contact with the person
15 while inside the party?

16 A I don't remember being told she was making out.
17 I remember being told she continued to have contact and didn't
18 appear to be acting distressed or trying to get away from the
19 person.

20 Q Okay.

21 A And they basically asked me why would somebody
22 behave that way.

23 Q And did they tell you how the outcry was actually
24 reported?

25 A Trying to remember. They told me that she

1 eventually connected with some of her friends. And at some
2 point -- I don't remember the very specific details. I
3 remember her connecting with some of her friends and telling
4 them what happened to her. And then at some point -- I am not
5 certain if they took her somewhere or if she went somewhere on
6 her own to report or called someone -- I just remember that she
7 connected with some friends. And I apologize. I don't have
8 all the detail.

9 Q Would that be in your notes from when you met
10 with the prosecution?

11 A Not likely. What I usually write in my notes are
12 the issues I need to have in my reports, so I wouldn't have --
13 I don't take detailed notes. I will ask -- I will write notes
14 about general descriptions of, like, non-stranger adolescent.
15 I write -- there were probably two pages of notes which I don't
16 keep after I write my report, because when I keep notes
17 are when specific notes on a case when I review a lot of
18 documents. But I think I had about two pages of handwritten
19 kind of -- these are the topics that I need to cover. And I
20 had, of course, non-stranger sexual assault victim, trauma,
21 delayed report. Trying to remember alcohol involvement, notes
22 about the likelihood when the case would be, things like that.
23 So I don't keep -- I think you are trying to -- um --

24 Q I can -- I actually am trying to figure out --
25 what I want to know is what information you had about this case

1 when you wrote your report, what information about this case is
2 your report based on?

3 A I have told you so far what I had. I know there
4 was a delayed report. I know there was alcohol involvement. I
5 know this happened at a party where the victim who reported
6 knew the offender and other people at the party I believe. I
7 am trying to think if there were other things. I knew -- I
8 knew she stayed afterwards. I knew her initial outcry was to
9 friends, some friends. That she did not outcry to authorities
10 immediately and that she didn't outcry at the party to people.
11 She didn't act distressed at the party.

12 Q Okay.

13 A That was my understanding.

14 Q Then you also in your report wrote about what
15 general behaviors are after an assault?

16 A Yes.

17 Q Were you told about the alleged victim in this
18 case's behavior after the assault?

19 A I actually recall that there was some little bits
20 of information closer to immediately after the assault. I
21 asked the prosecutors to check about -- themselves for their
22 case about how her behavior changed according to other people
23 around her. It's one of the things that I commonly ask anybody
24 who is responding to a victim in any way to look at is do you
25 see changes in behavior. Because the literature is very clear

1 that behavioral changes post assault over time are often likely
2 and most people don't understand they need to look at anything
3 bigger than the immediate time around the assault.

4 Q And were you provided with any information about
5 what the alleged victim's case in this -- or what the alleged
6 victim's behavior post assault was in this case?

7 A Not after I asked them to look into it. I
8 believe that was a recommendation I made to them.

9 Q In your report you listed numerous different
10 things that adolescent victims may engage in after an assault
11 correct?

12 A Yes.

13 Q And one of them you listed that a person that
14 becomes sexually promiscuous?

15 A That is common in post sexual assault. And the
16 dynamic that is related to that that most people don't
17 understand, again many people take a -- that to assume that
18 someone wasn't assaulted and actually victims that I have
19 worked with and what you see in the literature identify it as a
20 misguided and often unconscious attempt to have some control
21 over their sexual behavior. People who have been sexually
22 assaulted, particularly by someone they know, often develop a
23 belief they are not going to be able to decide who has sex with
24 them. And in an attempt to have some control over their sex
25 life they will become promiscuous and actively decide to have

1 sex with numbers of people giving them the misperception they
2 have more control over what happens to them sexually. It's
3 something I have worked with many adolescent victims on is
4 trying to undo some of that behavior post assault.

5 Q You didn't mention it in your report, but it also
6 can be consistent when somebody that has been the victim of a
7 sexual assault to abstain from sexual activity?

8 A That happens in -- as I understand it in the
9 literature -- about less than a third of cases. So it is not
10 in the most common reaction, people often understand those
11 reactions and they are not -- things that I would consider that
12 the general public would not understand if someone said I
13 didn't feel like having sex. When I am writing a report, when
14 I am asked to address sexual assault, typically what my
15 understanding of my role is is to explain things about sexual
16 assault that the research clearly indicates that most people in
17 the general public have misinformation or misunderstanding
18 about.

19 Q And when you are referring to a person becoming
20 sexually promiscuous after a sexual assault, that's an
21 indication that it's maybe a change in behavior as to how that
22 person acted prior to the sexual assault?

23 A That can be a response. It's important to
24 remember that anybody can be sexually assaulted. So someone
25 who has been promiscuous or had multiple partners prior to

1 being sexually assaulted can still be sexually assaulted, but
2 in terms of a changed behavior post assault that is a common
3 changed behavior. More common in older adolescents and young
4 adults than any other age group of sexual assault victims.

5 Q So you are saying becoming sexually promiscuous
6 is the change. If they were already sexually promiscuous then
7 it's not necessarily a changed behavior?

8 A If -- that may not be a change related -- there
9 may be changes. But if someone had multiple partners prior to
10 being assaulted and continued to have multiple partners, that
11 particular behavior wouldn't appear to be changed. But I
12 would -- you know, that's a general question.

13 Q Okay. You said that the general public doesn't
14 understand that a person may become sexually promiscuous after
15 being sexually assaulted?

16 A That's my common experience. Most people,
17 including parents of victims that I have worked with, typically
18 assume that the victim is -- somehow they don't understand the
19 relationship to the assault and the -- they assume the victim
20 is being bad or that this is evidence of the victim's
21 culpability for the sexual assault in some way. Those are
22 common misbeliefs that I have had from victims, from victim's
23 family members, from their friends. And when I do
24 presentations in situations in the general public about sexual
25 assault prevention, when I do training in high schools and

1 colleges, and have done presentations there, it's a common
2 misbelief.

3 Q Now when you are saying that the general public
4 doesn't understand that a person may delay reporting, is that
5 also what you are saying?

6 A That is a very common misperception. Actually a
7 number of these misperceptions have been identified in a major
8 national study done in the early nineties by a Dr. Kilpatrick
9 called Breaking Rape In America, which is referred to in my
10 report. They identified what they called myths about sexual
11 assaults which are commonly held in the United States,
12 misperceptions about how sexual assaults typically happen.
13 There has been research that's been replicated in various
14 studies and in any number of other studies that indicate over
15 the years the general population has more misinformation and
16 misperceptions about sexual assault, about victims and
17 offenders of sexual assault, than they do about any other
18 crime.

19 Q So one of the reasons that you would explain to a
20 jury that the delayed reporting is potentially common in sexual
21 assaults is to alleviate the concern that a jury may have that
22 it didn't happen because of the delayed reporting?

23 A It's actually -- so -- that my understanding of
24 my role so that jurors have accurate information about sexual
25 assault. It's not my job to decide what's right or wrong about

1 the case. It's my job to make sure jurors have adequate,
2 accurate information to make assessments for themselves about
3 the case. So my goal is that they have full, accurate
4 information about sexual assaults so that whatever judgments
5 they make can be based on accurate information rather than
6 misperception. That's how I see my goal.

7 Q Ms. McAllister, based on the research and the
8 things you have testified to, the opposite could also be true?

9 A Yes. And when it is a very violent stranger
10 assault and it is immediately reported, the literature is very
11 clear across all the research that I have ever read that people
12 don't misunderstand those and don't misperceive those at all as
13 potentially real sexual assaults. They evaluate those sorts of
14 cases based on facts that aren't based on misinformation. And
15 so that's one of the reasons that I am often asked to testify
16 is because the amount of misinformation there is, particularly
17 about non-stranger sexual assaults.

18 Q But even when you're referring to the forced
19 violent stranger rapes there could be delayed reporting in that
20 for reasons of fear or --

21 A There could. And I am sometimes called to
22 explain delayed reporting when it is a stranger assault. That
23 is one what people identify as the issues that sometimes -- I
24 testified two months ago in the Springs in a case of a violent
25 stranger assault where someone broke into someone's house and

1 the person did not report immediately. And I testified about
2 reporting patterns in sexual assault in that case.

3 Q So -- I am going to ask some conclusionary
4 questions.

5 Sometimes in cases where there is violent
6 stranger rape there is an immediate reporting and that's
7 consistent with having been sexually assaulted?

8 A Sometimes there is immediate reporting and it can
9 be consistent.

10 Q And sometimes there are delays by a couple hours
11 of stranger violent rape, and that delay of a couple hours can
12 also be consistent with having been sexually assaulted?

13 A There can be a delay from an hour or two to many
14 days to years. Most -- the most common response to any sexual
15 assault is a failure to report. The next most common is a
16 delayed report. And the least common is an immediate report.
17 That single fact by itself can't ever determine whether
18 somebody has been sexually assaulted or not.

19 Q And the same thing -- the same statement --
20 blanket statement you just made is in regards to an
21 acquaintance allegation of sexual assault. It can be reported
22 right away?

23 A Very rarely, yes.

24 Q And it can be reported within hours?

25 A Yes.

1 Q And it can be reported within days?

2 A Yes. And it's most likely not to be reported at
3 all as is a stranger assault.

4 Q Okay. So my general conclusionary statement is
5 your testimony in regards to the timing of when an incident was
6 reported doesn't in itself determine whether or not a sexual
7 assault actually occurred because all different manners of
8 reporting can be consistent with the sexual assault?

9 A That's accurate. And no single fact or
10 understanding of any pattern about any response to a sexual
11 assault by itself could ever make a determination about whether
12 something happened, outside of serious -- certain kinds of
13 serious physical injury. All the other facts people need to
14 look at a big picture and make an assessment based on patterns
15 of many factors and how they relate to one another. So no
16 single piece of information by itself, absent any other piece
17 of information, has a great deal of value about anybody's
18 judgment about something like that.

19 Q Now based on the information provided to you by
20 the Mr. Goddard, your report indicates that the actions
21 described by the Mr. Goddard of the alleged victim are
22 consistent with someone that has been sexually assaulted?

23 A I am not certain what parts of my report you are
24 referring to. All of the information about trauma and about
25 how people have potentially freezing reactions, how they

1 disassociate and don't experience feelings, all the information
2 about people who commonly act as if they are not afraid or have
3 a pseudo judgment period, all of those things would be present
4 in any report I wrote about any sort of trauma. If you are
5 talking about something specific to non-stranger sexual
6 assault, then, yes, but some of those are reasons why someone
7 may not immediately report as well.

8 Q Most of these questions I have been asking you
9 about are in regards to your conclusions about the alleged
10 victim in this case. You also draw some conclusions about
11 offenders of sexual assault, correct?

12 A I didn't draw any conclusions about the alleged
13 victim in this case that I am aware of. If you can tell me
14 where. I draw my conclusions --

15 Q I am sorry. Conclusions about the behavior of
16 the alleged victim.

17 A Again I believe I refer to behavior of general
18 victims in sexual assault. I make it very clear in my report
19 that I am not making a statement statement about the victim per
20 se.

21 Q Okay. But, Ms. McAllister, my understanding is
22 that you were told that this was an acquaintance and this was a
23 delayed reporting. And so your conclusions regarding
24 acquaintances, delayed reportings are in this evaluation,
25 that's based on what you were told, correct?

1 A Yes. And as I said, any time I am asked to
2 describe sexual assault, if someone just said please write me a
3 report about a potential sexual assault case, I would cover
4 delayed reporting whether or not someone identified it for me
5 because it is the most common response to sexual assault. I
6 would cover acquaintance sexual assault if I didn't have any
7 information other than sexual assault because it is the most
8 common sexual assault. Depending on the research, between 78
9 and 95 percent of sexual assaults are committed by someone the
10 victim knows. That is not a commonly held piece of information
11 in our culture. So I would include that, even if someone said
12 to me just write a report about sexual assault. So I want to
13 be really clear about that because those pieces of information
14 are information about which we have a great deal of
15 misinformation in our culture.

16 And if someone said write a report about sexual
17 assault, absent those other two pieces of information is -- I
18 would have to cover non-stranger sexual assault and I would
19 have to cover delayed reporting patterns. I would have to
20 cover trauma and trauma reactions. I would have to cover the
21 range of possibilities of about how victims behaved again
22 because all those things would be included. Yes, I did include
23 those here, but I would include them and have included them in
24 reports where people have said nothing to me other than this is
25 a sexual assault.

1 Q But you are excluding information about stranger
2 or non delayed reporting because that wasn't the information
3 that was provided to you?

4 A Let me review my -- I excluded information -- let
5 me see. Actually I talk about stranger assault in the first
6 paragraph under nature and dynamics of sexual assault: Sexual
7 assault is typically believed to be a rare, physically violent
8 surprise in a public place such as an alley or parking lot by a
9 stranger with a weapon that results in serious bodily injury.
10 So then I go on to correct that information. I do indicate
11 that there are some stranger sexual assaults that include
12 serious physical injury.

13 Q Okay.

14 A So I did cover those issues and how rare they
15 are, yes.

16 Q I want to move on. The questions I was asking
17 were in regards to an alleged victim's reaction. You also
18 spoke about offender's behavior?

19 A Yes.

20 Q And were you provided information about the
21 offender's behavior in this case?

22 A That the offender was at this party and I -- it's
23 my belief that the offender was drinking as well, I am not
24 certain of that, but I believe because there was drinking at
25 the party I believe the offender was drinking. And my

1 recollection is that I didn't -- there was no very violent
2 there -- was no violent -- real violent action of any kind,
3 that it was a very typical non-stranger assault in that
4 physical force -- what was used -- and only the amount that's
5 needed to complete the assault is what most offenders typically
6 use.

7 Q And is that something that's not generally known
8 to the public? I mean is that a surprise, that offender's
9 behavior in that type of manner?

10 A It actually is a huge surprise. Most -- and I
11 have this information from being in charge of doing the --
12 running the sex offender management board and developing the
13 terms on the state's web site regarding the sex offender
14 registry and all of the materials developed to do community
15 notification regarding sexual assault, and it is very clear to
16 me that the general public believes that sex offenders are
17 identifiable criminals, strange-looking, scary people who are
18 very violent, who carry weapons. They do not understand that
19 most sex offenders, because of the nature of the crime, look
20 more like the natural demographic of any community that they
21 function in than any other set of criminals. Most people do
22 not believe that they are known to most victims, they believe
23 that they are strangers. We have information on our state Web
24 site that I was in charge of officially putting up there that
25 is a very large disclaimer that says the greatest risk to any

1 person is not from any identified convicted sex offender or any
2 stranger, but from people who're already involved in their
3 lives and already know them.

4 The reason we put that so clearly because people
5 want to think that sex offenders are some crazy-looking
6 stranger who they can avoid having contact with and that's not
7 accurate. That's very clear information that is misperceived
8 in our culture over and over again.

9 Q So the general public cannot accept that
10 acquaintance rapes happen or that people are raped by others
11 that they know?

12 A That is the least common fact that people can
13 accept about sexual assault. It's the hardest thing for people
14 to understand because they still hold this strong belief that
15 sex offenders are mean, awful, violent identifiable criminals
16 and if they really need to believe they are known offenders,
17 people need to understand that it could be somebody they know
18 and trust and it is really difficult for people to believe that
19 about sex offenders. It's one of the hardest things for people
20 to accept, including victims.

21 Q So you don't think that just someone in the
22 general public sitting in a chair there would be able to or
23 would believe that there could be acquaintance rape unless
24 somebody explains to them that, yeah, acquaintance rape does
25 happen?

1 A That is what is clearly indicated in the
2 literature over and over again and people don't have accurate
3 information about this.

4 Q And the same thing in regards to how an alleged
5 victim responds, you don't think the common person can think
6 that, yeah, there is occasions with people with delayed
7 response, there is reasons people delay response, unless you
8 get up there and tell them about the literature and the
9 studies?

10 A I understand that some people may have that
11 information. But if we look at the literature over and over
12 again it finds that people continue to hold very strong
13 misconceptions about the crime and misunderstanding also about
14 how it happens. And you are asking me to say that's not true.
15 I think you keep asking me the same questions. All of the
16 literature I have ever seen, my experience in speaking to the
17 general public about sex offenders to every professional group
18 I have ever spoken to from school teachers to mental health
19 practitioners, people don't have accurate information about
20 sexual assault generally. More people have inaccurate
21 information about this than any other crime. That's been my
22 personal experience. It's been repeatedly found in the
23 literature.

24 Q I am actually finishing up right now,
25 Ms. McAllister.

1 What you would be testifying to is what you have
2 learned from literature in reading of something that is
3 consistent or common with someone that has been sexually
4 assaulted when referring to delayed reaction or delayed
5 reporting and acquaintance rape, correct?

6 A Partially. And partially from my experience
7 working with somewhere over 3,000 victims in my life and either
8 working with or reading extensive materials from treatment on
9 thousands of sex offenders and working with many, many, many
10 people who provide treatment support or other kinds of
11 intervention with both offenders and victims. So all of those
12 things would be included in my understanding.

13 Q Okay. The but in this statement the very
14 specifics that you are testifying to do not mandate or infer
15 that a sexual assault actually did happen?

16 A No. That is not -- people -- as I say, no
17 specific individual piece of information should ever be used
18 alone to confirm anything about a sexual assault. And then
19 people need as much accurate information as possible to be able
20 to fully assess whatever information they have access to.

21 Q You keep referring to this as accurate
22 information. There are studies that contradict some of the
23 points that you are referring to?

24 A I would be happy to -- if you can tell me studies
25 that you plan to address, I would be happy to refer to them.

1 Q Okay. I appreciate that.

2 Thank you, Judge. No further questions.

3 The Court: The People.

4 Ms. Hofiz: No questions, Your Honor.

5 The Court: Very well. Thank you, ma'am. You can
6 step down.

7 The Witness: Thank you, Your Honor.

8 The Court: Witness be excused?

9 Mr. Goddard: Yes, Your Honor.

10 Ms. Hofiz: Yes, Your Honor.

11 Ms. Lanzen: No objection.

12 The Court: Very well. You are free to go. Thank you
13 very much.

14 The Witness: Thank you.

15 Mr. Goddard: I believe that's all. The remainder of
16 the motions don't require testimony to my understanding.

17 The Court: That's correct.

18 Ms. Lanzen: I don't believe so.

19 The Court: Let's proceed.

20 Mr. Goddard: (Indicating.)

21 Your motions you want to --

22 Ms. Lanzen: Judge, I am arguing she should not --
23 that the prosecution should not be able to call Ms. McAllister
24 to testify as a witness. I don't think the information she is
25 presenting is going to be helpful to a jury in making any

1 determination regarding specific facts and issues here.

2 I think her testimony is inherently subjective
3 and it's not definite. It's not something someone can form an
4 expert opinion about, because according to her testimony, what
5 she in information she provides could be consistent with
6 someone that's been sexually assaulted. So the exact opposite.
7 I think it could be confusing to a jury that isn't really
8 logically relevant to the evidence at issue here. I don't know
9 that anything she testifies is going to assist the trier of
10 fact in understanding the evidence or determining a fact in
11 issue as required by Rule 702.

12 I would ask The Court to not allow her to testify
13 as an expert at trial.

14 The Court: Ms. Hofiz?

15 Ms. Hofiz: I think it's clear from just what.
16 Ms. McAllister provided The Court this morning that she is
17 sufficiently qualified in dealing with sexual assault, with
18 rape trauma, with rape victims. And that her testimony would
19 aid the trier of fact in understanding why victims act in a
20 certain way, why perpetrators act in a certain way.

21 We all have in this court, and I have done a
22 sexual assault trial in front of this court, even jurors have
23 to be separated when they have these issues. They don't want
24 to taint the jury pool during jury selection. This has
25 happened to them. I think Ms. McAllister is correct in

1 indicating the general public has a very large misconception of
2 how people react to sexual assaults and to trauma. I believe
3 The Court does have a copy of her report that was attached --

4 The Court: I read it.

5 Ms. Hofiz: -- her endorsement. And she talks very
6 generally about trauma, about sexual assault trauma
7 specifically, and I think that would aid the jury in
8 understanding why in our case the victim may have a delayed
9 outcry, may have -- might have spent time with the defendant
10 after this had occurred and explained to the jury that sexual
11 assaults happen with people they know. And as she indicated
12 that it's a very big misconception in the community. I think
13 it would be helpful for the jury to hear that.

14 She is not -- and we specifically did not provide
15 her with very detailed information about this case so she could
16 be objective and understand and just talk specifically about
17 the issues, and we presented the issues that we saw when she
18 asked us questions about certain events, about issues that she
19 saw that were important to include into her report about what
20 kind of red flags that you see when dealing with sexual assault
21 victims.

22 I think it would be very important for the jury
23 to understand about the myths about trauma and about sexual
24 assault. I believe it would aid them in understanding that.
25 Therefore we would ask The Court to allow Ms. McAllister be

1 called to testify as an expert in this case.

2 The Court: Final comments?

3 Ms. Lanzen: Judge, I think The Court needs to look at
4 whether an untrained layperson can be qualified to make the
5 determinations regarding the particular issues that
6 Ms. McAllister was testifying about and if an untrained
7 layperson can intelligently to the best possible degree,
8 without enlightenment from the expert, be able to understand
9 the issues presented, then I don't think the expert is
10 necessary and I don't think The Court should allow her to
11 testify.

12 The Court: Very well.

13 I have no doubt that Ms. McAllister based upon
14 her resume and her experience and training has a vast history
15 and knowledge of sexual assault, the public perception of same,
16 how the myriad of different ways which sexual assaults can and
17 do occur and the fact that, as many of us have heard before,
18 most sexual assaults that do occur are not even reported. I
19 think those numbers are -- probably have gone up in the last 15
20 to 20 years. But I think there are still a significant number
21 that probably go unreported, not as many as used to go
22 unreported. But the fact of the matter is you see, generally
23 speaking, when we talk about an expert witness and offering
24 expert opinions, that expert witness's points and opinions and
25 basis for those opinions is usually based upon, not only their

1 training and experience and background, but some association
2 with the facts in the case.

3 And while I don't see anything in.
4 Ms. Mcallister's report that jumps out and is a red flag that
5 this may not be in fact a logical opinion based upon her
6 experience and her training, I am not sure that all of these
7 things that she talks about have anything to do with anything
8 other than the fact that she has read all these things in some
9 books. And I don't think she has associated any of this with
10 this case. And I am not sure based upon what I have heard here
11 today and in reviewing her report that this report, while
12 overall interesting, and I believe has many factual bases and
13 has relied upon some learned treatises I presume would have
14 much to do with assisting the finders of fact in this case as
15 to what really happened.

16 Because what I heard Ms. McAllister say is, well,
17 this doesn't really prove anything or disprove anything. And
18 if it doesn't prove anything or disprove anything, I have
19 attempted to find the value. I can't place my finger on where
20 the value is as relates under 702 to assisting the triers of
21 fact in finding out what truly happened.

22 Because, for instance, she is talking here about
23 adolescents and behaviors that seem counterintuitive subsequent
24 to a sexual assault and then in the next paragraph talks about
25 the same person may feel (unintelligible) and very withdrawn

1 and so I am not sure that she -- I am sure she is absolutely
2 correct, but I am not sure that it relates to the People in
3 this case because it occurs to me in looking at her report
4 that she is talking about people in general, and we are talking
5 about this case and some specific individuals. And we know how
6 they responded. And it may be the way some people do, and it
7 may not be the way other people do.

8 For the reasons stated I believe that the motion
9 needs to be granted.

10 I believe it's going to be more confusing than
11 anything to the jury if Ms. McAllister would testify. I also
12 note here that the People have endorsed Mary Ann Lewis
13 (phonetic) as the S.A.N.E. (phonetic) nurse. That is the kind
14 of expert that I never have to rule on. Because, believe me,
15 all those things that I just said about expert testimony, they
16 fall right into place with that kind of a person, training,
17 experience, and their close association with individuals
18 involved in the case.

19 And I believe it's clear that I haven't heard any
20 objection at this juncture, but if we do, we can -- we will
21 have to have a hearing on that. I suspect it would be a much
22 shorter hearing than the one here this morning.

23 Ms. Lanzen: Judge, if you may recall a couple weeks
24 ago we did have that hearing because I did object and The Court
25 is allowing her to testify.

1 The Court: I thought so.

2 See, I have about six of these pending together
3 with four first-degree murder cases. So they kind of run
4 together. Sorry. I think that has to be the order today.

5 Mr. Goddard: Your Honor, we would ask The Court to
6 reconsider. And I would ask for clarification.

7 Ms. McAllister was not presented any evidence directly of this
8 case because the intent of the People was not to have her get
9 on the stand, bolster the outcry and judge behavior of this
10 particular victim then tell the jury this victim is telling the
11 truth, she this, this and that.

12 The Court: You can't do that.

13 Mr. Goddard: So I guess I am confused in what
14 situation an expert would be permissible by The Court if she
15 can't testify to rape trauma generally and not specifically to
16 the victim to avoid bolstering the victim's testimony that
17 that -- that she is not allowed to testify as an expert in this
18 case because there's not a close nexus to the events that
19 occurred in this case. But if she does have a connection to
20 the close nexus, she won't be allowed by this court because
21 it's improper bolstering of the witness. I am seeking
22 clarification.

23 The Court: Understand what I am telling you is that a
24 general shotgun opinion about sexual assault in general
25 probably is very helpful at the educational level. That's not

1 where we are here.

2 We have got finders of fact.

3 And I suspect that Ms. McAllister would be
4 eminently qualified to present seminars, teach people, as she
5 does apparently in high schools and colleges, and her expertise
6 in that area is probably unsurpassed by very many people. But
7 based upon where we are in this setting, I don't find that kind
8 of information would be very helpful but may be even more
9 confusing than helpful.

10 Mr. Goddard: Thank you, Your Honor.

11 The Court: That's my concern. But I believe there
12 was another motion filed.

13 Ms. Lanzen: Judge, I previously filed a motion to
14 admit relevant evidence of prior sexual contact. I filed that
15 motion back on September 10th. In there I indicated specific
16 instances that I intended to bring up at trial that I didn't
17 believe fell under the rape shield. They fell under the
18 exception. So I did not -- I do not even believe I needed to
19 file a motion regarding those particular issues because I
20 didn't think they fell under the rape shield. I think they
21 fell under the exception to rape shield which does not require
22 compliance with the statutory scheme.

23 I had listed four things there. One of them is
24 that the alleged victim in this case -- or one of the things I
25 wanted to bring up was the alleged victim in this case was

1 reportedly involved in a committed relationship with another
2 individual at the time of this alleged offense. And I think
3 that very recent case law supports that there was a -- of the
4 ones I cited came out May 2007.

5 The Court: Cite, please.

6 Ms. Lanzen: In my motion it's -- but because it came
7 out in May, it's just a P 3d. I can give you the motion filed
8 on September 10th.

9 The Court: Not recent. Got it.

10 Ms. Lanzen: There was also a case that came out of
11 the Colorado Appellate Court recently in 2006 where it spoke
12 about how evidence of prior sexual contact is presumptively
13 irrelevant unless it is qualified by statutory exception. And
14 statutory exceptions in these cases fall under Subsection V
15 where some sections are evidence of specific instances of
16 sexual activity showing the source of origin of semen,
17 pregnancy, disease or any similar evidence of sexual
18 intercourse offered for the purpose of showing the act or acts
19 charged were or were not committed by the defendant.

20 One of the items I want to bring up that falls
21 under there I didn't know about at the time of this original
22 motion so I included in the second one, there was DNA testing
23 done of the alleged victim's -- the crotch of the underwear --
24 and they found a mixture of semen in which they identified a
25 male contributor where the major portion of that male

1 contributor of the DNA sample was not Mr. Kennedy. And so I
2 believe that showing that there is this alternate source of
3 semen falls under the exception. And that could also insinuate
4 there is an alternate source of any type of injury. In
5 addition, the alleged victim in the case has been diagnosed
6 with genital warts. I believe the evidence that she in fact
7 has been diagnosed with genital warts is relevant to show
8 alternate source of injury because one of the injuries the
9 S.A.N.E. nurse testified to was an edema, which is a redness,
10 and that redness can also be a symptom of genital warts. As
11 the S.A.N.E. nurse testified, it was possible some of the areas
12 she identified as being possible trauma could be attributed to
13 genital warts. But she couldn't diagnose that because she's
14 not an expert in that area. So I believe those two items are
15 relevant as exceptions to the rape shield statute.

16 Then the rape shield specifically does not allow
17 evidence of specific instances of prior or subsequent sexual
18 contact. It's my position that a committed relationship
19 doesn't necessarily insinuate or refer to a prior sexual
20 contact. It just goes to her motive to lie or motive to
21 fabricate the instance in order to protect the committed
22 relationship.

23 In addition, as I wanted to bring in evidence or
24 testimony regarding the alleged victim's flirtations and
25 feelings towards the person that she ultimately outcried to,

1 who may or may not have been a boyfriend at the time but it was
2 somebody she was interested in forming a relationship with, and
3 through witnesses I would like to establish this alleged
4 victim's actions towards this person prior to the offense,
5 trying to get his attention, and then that goes to explaining
6 why she called this particular person, she wants to get his
7 attention. That could be a motive or her testimony for this
8 outcry this was a sexual assault incident.

9 In this particular case someone came out of the
10 house and saw the two of them having this sexual intercourse
11 that she claims was forced and he claims was consensual. So
12 there is an opportunity for either the committed relationship
13 person, which I have identified as Phillip Grove (phonetic), to
14 find out about this sexual act. And there is also occasion for
15 the person that she was interested in and flirting with and had
16 even commented in her diary, which was disclosed to us that she
17 loved this person for what he had done, being Mr. Joshua Duran,
18 and that he would find out about this sexual act that she had
19 done and she would perhaps not lose her chances in pursuing a
20 relationship with Mr. Duran.

21 And so when I am referring to her actions towards
22 Mr. Duran, I am not referring to any specific sexual act that
23 has occurred, the information about her feelings towards
24 Mr. Duran would only be used to impeach her or show a motive or
25 bias to affect her credibility, which is extremely relevant in

1 this particular case. The same thing with Phillip Duran, not
2 specifically talking about sexual acts occurred between the two
3 of them, I am talking about the fact she was supposedly in a
4 committed relationship that this sexual act could have
5 affected, this committed relationship that she believed -- or
6 that she was in. So those four acts I -- or those -- the
7 relationship with Mr. Grove and the relationship with Mr. Duran
8 I believe are relevant and don't fall under the rape shield.

9 I also believe that the DNA of an adult male that
10 was located in her underwear and the existence of the genital
11 warts is relevant and falls under an exception. That doesn't
12 apply to rape shield.

13 Now I had initially filed the motion saying there
14 was a prior sex act with Aaron Cobb that had occurred shortly
15 prior to the incident. May have been a couple days prior to
16 this incident. Aaron Cobb is the individual that came out of
17 the party and is one of the individuals that was -- actually an
18 individual prior to Mr. Cobb that saw them in the vehicle
19 together. But Aaron Cobb is one of the individuals that came
20 out of the party and observed them having what he believed to
21 be consensual sexual intercourse in his car, got angry and
22 ordered him out of the vehicle and became very upset with
23 Ms. Garner and Mr. Kennedy, after he located them there and
24 continued to be angry with them even at the party. One of the
25 reasons that may have caused him to be extremely angry was the

1 fact that he thought he was in a position where he may be
2 pursuing a relationship with Ms. Garner and had thought that
3 Ms. Garner may have been planning on going home with him that
4 night or staying with him that night based on their prior
5 sexual intercourse that had been days earlier. I believe that
6 was relevant to show a motive or interest or bias and would not
7 necessarily fall under the reasons that the rape shield statute
8 prohibits the introduction of this type of evidence. It's not
9 an attack on her character to show she has a reputation for
10 being sexually promiscuous. That wasn't the intent of it. And
11 that's what the rape shield is intended to prohibit. It would
12 be to show her motive, her interest, her bias and to explain
13 Mr. Cobb's actions why he was so angry and why he reacted the
14 way he did after he saw them in this vehicle having sexual
15 intercourse.

16 I had subpoenaed Mr. Cobb to the last hearing to
17 present an offer of proof for The Court outside the presence of
18 the jury. Ms. Garner has denied that sexual relationship with
19 Mr. Cobb. I believe I am still entitled to present evidence
20 that Mr. Cobb claims that it existed even if she denies it.
21 And then that can be used to attack Mr. Garner's credibility
22 whether or not the jury believes that they in fact did have
23 that relationship or not.

24 So I was under the impression that the reason or
25 the purpose behind entering the evidence regarding that prior

1 sexual act did not fall under the rape shield. However, in an
2 abundance of caution earlier this week, I think a couple days
3 ago, I handed The Court and the -- Mr. Goddard an affidavit
4 which is required statutorily. And the only thing I included
5 in the affidavit which is one that I signed was information
6 essentially that has been reported to the detective in the
7 case. The detective has a taped interview with Mr. Cobb which
8 Mr. Cobb discusses his prior sexual act prior to these
9 allegations with the alleged victim in this case. So the
10 detective is aware of it, Mr. Goddard is aware of it. In fact,
11 the detective was aware of it at the time he interviewed
12 the victim and he brought it to the alleged victim's attention.

13 The Court: Any other issues?

14 Ms. Lanzen: I just believe that's also admissible.

15 Did The Court want a copy of the People v. Owens
16 case? People v. Owens. Do you have a copy?

17 The Court: I do. People's response?

18 Mr. Goddard: I do. I guess there is a couple
19 responses to make. I guess it would be just procedure.

20 I believe that Ms. Lanzen's original filing of
21 the motion to admit relevant evidence of prior sexual conduct
22 did occur more than 30 days before trial but was insufficient
23 because it wasn't accompanied by any affidavits or offer of
24 proof for The Court to find beyond a preponderance these facts
25 they are alleging exist.

1 We have now received an addendum which was filed
2 with The Court on Wednesday, was handed to me on Wednesday,
3 Judge. I am going to -- okay. It's insufficient notice.
4 First and foremost, if counsel and the defense wants to rely on
5 this, then I think we need a continuance of the jury trial,
6 charge the defendant, so this can be ferreted out.

7 Having said that, I want to respond to the
8 addendum of the notice. What I can tell The Court is
9 subsequent to the filing of Ms. Lanzen's motion we did receive
10 reports back from C.B.I. that did indicate that on a -- the
11 testing of the underwear in the crotch area there was a slide
12 where Mr. Kennedy could not be excluded as a minor contributor
13 of a sperm sample. There was an unknown major contributor of a
14 sperm sample on that segment of sample.

15 I think that changes the context which we talk
16 about rape shield. Prior to that we were objecting to any kind
17 of reference because there was nothing in the case that
18 indicated that an exception to rape shield had existed. I
19 think those results change that a little, little bit. But I
20 don't believe that gives the defense carte blanche to bring in
21 every potential prior sexual contact or relationship that
22 Ms. Garner had into the trial. I don't believe it
23 automatically makes those relevant.

24 With regard to Joshua Duran. If we are not
25 talking about sexual contact, then how is this relevant? It's

1 extrinsic evidence to show -- to impeach. Ms. Garner is going
2 to get on the stand and deny she was in a relationship. The
3 rules of evidence are clear: She can ask Ms. Garner about that
4 relationship. If she denies it, she cannot provide or present
5 extrinsic evidence to prove that. It's impermissible in the
6 rules of evidence. She is free to inquire, but she is stuck
7 with the answer. I think Mr. Duran's testimony is nothing more
8 than extrinsic evidence with regard to that subject matter.

9 Now Mr. Duran is the friend that picked her up at
10 the party. He will have relevant testimony about other issues
11 in the case. But with regard to that prior relationship, he
12 should not be allowed -- or suggestion of a prior
13 relationship -- he should not be allowed to testify to that.

14 With regard to Phillip Grove is Ms. Garner's ex
15 boyfriend. Judge, even though Ms. Lanzen wants to couch it as
16 a relationship, she is really talking about prior sexual
17 activity there. The jury is going to infer from a committed
18 relationship these two people had sex. I think that's a
19 natural leap for the jury to make. And so we can sugarcoat it
20 by calling it a relationship. What we are really talking about
21 is her prior sexual relationship with Mr. Grove. I think that
22 falls squarely under the rape shield prohibition. And without
23 further offer of proof from the defense that the relationship
24 with Phillip Grove somehow is going to explain the alternate
25 source of semen, which is the only exception that we possibly

1 have in this case, then his testimony is not relevant.

2 We don't have an affidavit from him. We don't
3 have any offer of proof from the defense that says Phillip
4 Grove is the source of semen. Now, if we have further time to
5 test and if we can get a consensual sample from Phillip Grove
6 and include or exclude his semen sample, that prior
7 relationship may in fact become relevant. Until we have some
8 of that evidence we have nothing from the defense as far as
9 offer of proof.

10 Judge, I don't think it comes in as far as rape
11 shield.

12 With regard to the DNA, I have commented on that.
13 I mean, that evidence will come in through C.B.I. Those
14 results are there. I don't think that's relevant to the rape
15 shield except that it sets up a potential exception.

16 With regard to Aaron Cobb, Judge, here we are
17 talking about specific allegations of sexual conduct. And
18 again we have the same situation that we do with Mr. Duran.
19 That the victim is going to patently deny any prior sexual
20 conduct. So we need an affidavit. If he is going to be the
21 suggested alternate source of semen we need an affidavit from
22 Mr. Cobb, not an affidavit from Ms. Lanzen, that just simply
23 restates his allegations that he makes to Detective Spellman
24 (phonetic). That is not enough for The Court to find beyond a
25 preponderance of evidence that in fact Mr. Cobb had sex with

1 Ms. Garner. All we have is the allegation that he had sex with
2 her and nothing more. There is nothing corroborating that
3 statement. In fact it's denied by the victim. There is
4 nothing in that offer of proof. There is nothing for The Court
5 to find even at the lower standard beyond a preponderance that
6 that relationship or that that sexual event occurred. It's
7 simply a statement by Mr. Cobb that was made to the detective.
8 It was denied immediately by the victim and Ms. Lanzen's
9 affidavit sheds no additional light. I believe that affidavit
10 is improper. We need an affidavit from Mr. Cobb, not from
11 Ms. Lanzen.

12 What if he gets on the stand and testifies to
13 something different. Now all of sudden Ms. Lanzen
14 is a witness in her own case because she gave a sworn affidavit
15 before The Court. It's filed improper. This is a vary serious
16 issue. This case probably turns on these issues. To have it
17 happen 10 days before trial is not sufficient time for the
18 People and for The Court to get a full grasp of these issues
19 and there has been nothing granted. The alternative source of
20 semen would be an exception under the rape shield. But of
21 these people the defense wants to call, there is nothing
22 showing this court that any of that testimony is going to shed
23 light on that source of semen. It should be denied outright by
24 The Court.

25 Thank you.

1 The Court: Understand.

2 Here is where we are.

3 I too have read 18-3-407, and it occurs to me
4 that everyone is pretty much in agreement about the DNA
5 evidence from C.B.I.

6 I believe that there is some evidence of some
7 medical history that had been made known that that was referred
8 to. But, ladies and gentlemen, let me tell you that 18-3-407
9 says... evidence of specific instances of a victim's or
10 witness' prior or subsequent sexual conduct, opinion evidence
11 of the victim's or witness's sexual conduct, and reputation
12 evidence of the victim's or witness' sexual conduct may be
13 admissible only at trial and shall not be admitted in any other
14 proceeding -- except this one we are doing this morning, very
15 late, by the way -- under 2(c) of the section. And at trial
16 that evidence shall be presumed to be irrelevant. Except A
17 does not apply. B: Evidence of specific instances of sexual
18 activity showing the source origin of semen, pregnancy, disease
19 or any similar evidence of sexual intercourse. Now we get to
20 the important part... offered for the purpose of showing that
21 the act or acts charged were or were not committed by the
22 defendant. That's the only exception, that those acts were or
23 were not committed by the defendant.

24 There is two. I find neither one apply.

25 I find that any -- now with regard to Mr. Cobb, I

1 think Mr. Cobb is probably going to be called to testify
2 concerning his observations. One or both parties. Don't know.

3 And whether or not -- and I also believe that
4 either side can elicit testimony as it relates to individual
5 observations of interactions between parties. So long as we
6 are not talking about sexual activity. Because the first
7 person who elicits, talks about sexual activity is going to be
8 in violation of 18-3-407 and then I will have to have a hearing
9 based upon that violation.

10 I don't want to go there, neither do either of
11 you.

12 So what I am suggesting to you is prior and
13 subsequent interactions between people or observations of those
14 interactions are probably admissible assuming that they go to
15 motive, intent or purpose. That will make them relevant.

16 But there can be no inference, veiled or
17 apparent, that we are talking about prior or subsequent sexual
18 conduct or activity. Don't go there.

19 The statute is clear.

20 Now if -- if there is an -- if there is
21 testimony, you see, that would involve conduct between two
22 people, and I will leave this up to -- the People have the
23 burden, so I presume that it falls in their court -- but if
24 there should be some testimony that came out relative to a
25 sexual relationship that was denied, I suspect maybe for

1 impeachment purposes, the person -- if there was another
2 alleged person involved that might be able to testify with a
3 limiting instruction, of course, that the only thing that the
4 jury could use this testimony for was to assess the credibility
5 of both of these witnesses and for no other purpose.

6 So I think you can see if you open that door as
7 it regards -- to her -- did know the victim in this case,
8 alleged victim in the case, did know on direct, no, I never had
9 a sexual intercourse with that individual, well, if that
10 individual prefers to get up and testify that ain't true,
11 that's probably admissible for impeachment purposes.

12 Understand?

13 Ms. Lanzen: Absolutely.

14 The Court: But insofar as 18-3-407 is concerned, and
15 any prior or subsequent sexual conduct of the alleged victim or
16 any witness in this case, I don't think you can go there
17 because I have found that neither A, subparagraph 1A or -B,
18 don't apply.

19 And the reason B doesn't apply is because I have
20 heard enough in this case to -- and Mr. Cobb is going to
21 testify that it happened. And I believe Mr. Kennedy is not --
22 did know that happened. It's a question of consent.

23 That's the issue.

24 All right.

25 Ms. Lanzen: And the only other thing I would add to

1 that, though, Judge, is that there was testimony regarding
2 possible injuries as a result of this claim, non-consensual
3 act, so the DNA found in the underwear could be a potential
4 alternate source of those injuries as the sexually transmitted
5 disease we discussed could also be an alternate source of those
6 injuries. So I believe both of those.

7 The Court: Those become relevant indeed if and when
8 that evidence is placed before the jury on The People's case.
9 But at this point in time I don't know because it's an
10 evidentiary issue.

11 Yes, Mr. Goddard.

12 Mr. Goddard: Again, if we talk about an alternate
13 source of injuries, I think the defense bears the burden if
14 they want to talk about prior sexual conduct of informing The
15 Court by an offer of proof that they are going to elicit
16 testimony specifically of the specific act about an alternate
17 source of injuries.

18 The Court: I don't think we are talking about any
19 specific sexual act.

20 Mr. Goddard: Wanted to clarify.

21 The Court: No, there won't be any talk about any
22 specific sexual act. What Ms. Lanzen is saying is that she
23 believes that she at least could argue circumstantially if
24 there was somebody else's DNA as a result of a semen deposit
25 that may or may not be cause to say, well, maybe that happened

1 because we don't know when it happened. But I don't think you
2 can go any farther than that on circumstantial evidence because
3 I don't think you can on circumstantial evidence. I suspect
4 she can argue that because --

5 Mr. Goddard: I don't know that I disagree with that,
6 Judge.

7 The Court: Because the C.B.I. is going to tell us
8 that it's there. So that's where we are. So you know what the
9 parameters are.

10 Ms. Lanzen: I understand. But I am going to clarify
11 the relationship with Joshua Duran, all testimony regarding
12 their relationship and her flirting with him is admissible but
13 no prior or subsequent sexual conduct?

14 The Court: Any observations how they were interacting
15 with one another. You have to be careful because what we are
16 talking about here you can't ask somebody how somebody else
17 felt about somebody, not unless you can bring somebody in here
18 and prove to me they are psychic. And I haven't ever had that
19 happen. I don't expect it will before I die. But observations
20 of the parties of conduct, those kinds of things, I suspect,
21 assuming they are relevant, is admissible.

22 Mr. Goddard: Judge, I guess the one question I have.
23 The exception I would take to flirting because that tends to --

24 The Court: I have no idea what that term means. It's
25 not a legal term of art. When I say observations, I think

1 people have to describe exactly what the People are doing and
2 not put their own subjective adjectives and attach it to that.
3 If they do, I will be expecting your timely objection.

4 Mr. Goddard: Thank you. The reason I raise it
5 because The Court has been pretty specific. There could be no
6 direct or allusion of sexual conduct.

7 The Court: I heard it. I agree with you 100 percent,
8 Mr. Goddard. What I was suggesting, if it's relevant and
9 somebody can testify as to what they observed without putting
10 their own subjective spin on it, it's probably admissible.

11 Mr. Goddard: Okay.

12 Ms. Lanzen: Judge, the same thing with Mr. Phillip
13 Grove, the fact they were in a committed relationship.

14 The Court: I don't think you can use committed.

15 Ms. Lanzen: And that's the case that I supplied to
16 The Court that got overturned because the trial court should
17 have -- actually People v. Golden, 140 P 3d. 1, Colorado
18 Appellate, 2005. The trial court should have allowed an
19 alleged sexual assault victim to be cross-examined about her
20 committed romantic relationship with a roommate. Not only did
21 the evidence not reference sexual activity, the evidence shed
22 light on a plausible motive for the victim to (unintelligible)
23 an allegation of sexual assault. And it was constitutional
24 error to prohibit introduction of that evidence. That's why I
25 used the language of "committed romantic relationship" because

1 that's what The Court of Appeals in that case determined was
2 constitutional error and not to allow that evidence.

3 And so my intention is to keep it phrased using
4 that particular language and not referring to... you were
5 sleeping with her, you were having sex with her, just the fact
6 they had a committed relationship and that may be a reason for
7 motive for her to make up these allegations.

8 The Court: Well, we will address that when we get
9 there. But I think if it comes in then it has to be again
10 perhaps with limiting instruction. I am not sure. I need to
11 look at some more law.

12 Ms. Lanzen: Then is The Court finding the evidence of
13 the sexually transmitted disease and the DNA is relevant?

14 The Court: I think --

15 Ms. Lanzen: If they bring up any evidence of
16 injury --

17 The Court: -- it's already been disclosed. Now the
18 question is is it admissible. I suspect C.B.I. will talk about
19 the DNA evidence and with the S.A.N.E. nurse, I suspect the
20 STD's also become relevant because it subjects of her
21 (phonetic) potential diagnosis.

22 Mr. Goddard: Well, then, Your Honor, I would agree it
23 becomes relevant for I think Ms. Lanzen's line of
24 cross-examination, well, this injury that you are seeing, could
25 that be herpes outbreak.

1 Ms. Lanzen: It does not become relevant to her prior
2 sexual activity. How we walk that line, I am not real sure.

3 The Court: I understand. But we just can't throw it
4 out there and say, well, she obviously was fooling around
5 because she got this. Don't go there.

6 Ms. Lanzen: Finally, Judge, in reference to Aaron
7 Cobb, he can still describe that he has a relationship with her
8 and just not go into the information that he claims he had sex
9 with her because we are not going to be allowed to refer to the
10 actual sexual act. He has to give some sort of explanation or
11 background to explain why he was so angry and why he was so
12 upset.

13 The Court: It could have been me. I would be angry
14 too. You are going to have to show me more than that.

15 Ms. Lanzen: Okay.

16 The Court: You are going have to show me more than
17 that. And will probably need some kind of offer of proof from
18 Mr. Cobb just exactly what kind of a situation we are talking
19 about because I will need to know that before we go into it by
20 way of an in camera hearing, by way of hearing from Mr. Cobb.
21 I will --

22 Ms. Lanzen: Okay. Um, I will just tell The Court,
23 Mr. Cobb is probably here because I continued his subpoena from
24 the last hearing, if the wants to address that at trial prior
25 to the admission of that evidence.

1 The Court: I do, because we have some other matters
2 we need to take up this morning and it was set for 8:15 and
3 it's now 10 --

4 Ms. Lanzen: I understand.

5 Mr. Goddard: If I may, I want to apologize to The
6 Court again. I had it written down as 8:30. Apologize to The
7 Court and staff and counsel for not being here at 8:15. That
8 was my error. I apologize.

9 The Court: Well, I am one of those guys that starts
10 early sometimes.

11 Mr. Goddard: I know, sir. Sorry.

12 (Proceedings Concluded.)

13 * * *

1 In The Adams County District Court

2 State of Colorado

3 Division No. F

Hon. C. Vince Phelps, Judge

4
5 The People of The State of Colorado,)

6 Plaintiff,)

7 V.)

8 Adam Kennedy,)

9 Defendant.)

No. 06CR3590

Reporter's
Certificate

10
11
12 State of Colorado)

13 County of Adams)

SS

14 I, Mark A. Peterson, Official Court Reporter in and for
15 the District Court of the State of Colorado, County of Adams, do
16 hereby certify that the foregoing reporter's transcript is a
17 full, true and correct transcript of my shorthand notes of the
18 proceedings held in the above-entitled matter on October 5,
19 2007.

20 Dated this 25th day of January, 2008.

21
22
23 Mark A. Peterson, RPR
24 Adams County Justice Center
25 1100 Judicial Center Drive
Brighton, CO 80601
(303)464-1107

EXPEDITED TRANSCRIPT REQUEST BILLING INVOICE
PDF ORIGINAL OF REPORTER'S CERTIFIED TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO,)
)
) PLAINTIFF,) NO. 06CR3590
)
) V.)
)
)
)
) ADAM KENNEDY,)
)
)
)
) DEFENDANT.)
)
)
)

ADAMS CNTY CT DIV F

REQUESTING PARTY: LISA POLANSKY, ESQ.

DATE OF REQUEST: 1-18-07 VIA EMAIL

DATE PAID: PENDING/\$210.00

HEARING/TRIAL DATES REQUESTED: OCT. 5, 2007

CASE NO.: 06CR3590

CASE TITLE: PEOPLE VS. ADAM KENNEDY

WITNESS: JEAN MCALLISTER

MARK A. PETERSON, CSR
4440 RED DEER TRAIL
BROOMFIELD, CO 80020
(303)4641107