

1 about a conspiracy -- what about a coaching would account for the fact that Megan
2 described her parents as having shocked looks on their faces; that it looked like
3 ghosts were in the house?

4 I submit to you, nothing other than what actually took place is this child
5 was touched by this man on Saturday night and disclosed to her mother, her
6 grandmother, and then to her aunt the very first opportunity she had to talk to
7 someone that she felt comfortable talking to. Now, Defense argues well how come
8 she didn't tell Fred? How come she didn't tell Uncle Mikey? How come she didn't
9 tell the people at church? Who know? But a little four year old, who's been touched
10 and had her privates dug in and her butt dug in by her uncle, someone she trusts,
11 someone she's familiar with, why would she tell someone -- anyone other than her
12 mother? Her mother's her safe place. Her mother's the same gender as she is.
13 The first opportunity she had to get her mother alone, she told.

14 And how come Megan would have to be part of the coaching? Well,
15 what did Megan know that other people didn't? Megan knew where Levi was
16 sleeping. Megan knew where Josh was sleeping. Megan knew that Dustin had
17 gotten up and gone in to that room. Now, we're all focusing on one night because
18 one night is when it happened. But there were two nights that Jocelyn was at their
19 house. There was Sunday night -- and if you'll recall the testimony from Megan:
20 Everybody was sleeping in different places that night. So, the first night Jocelyn's in
21 the room with Josh, the crib, on the futon. Dustin comes in, he digs in her privates.

22 And then there's Sunday night. She's sleeping with Levi and Katelyn in
23 a different room. And don't forget that on Saturday night when Jocelyn has her
24 privates dug in, Levi and Katelyn are on the floor in Megan and Dustin's room. You
25 heard from Megan that Levi wanted his dad to lay down with him. So he did. Dustin

1 comes home, lays down on the floor with Levi. So Dustin knows Le -- where Levi is.
2 He knows where Katelyn is. Obviously he knows where his wife is. He also knows
3 Jocelyn's somewhere in the house. He has to. He knew the girls were over there.
4 He knew Nicole was in the hospital. He knew to expect them to stay the night. So,
5 where's his son Josh? In his room.

6 If you remember from Megan's testimony, they'd just moved him from
7 the bassinet in their room to the crib. This was new for everybody with Josh being in
8 that crib; in that room. So where else could Jocelyn be? Either Josh's room or
9 Levi's room. But don't forget Megan testified he actually had gone in the room more
10 than one time that night; more than one time. So more than one time he'd been in
11 that room but only the second time or the third was when he forgets she was in
12 there? If you're going to go check on your child, aren't you going to make sure you
13 can see where he is in the room?

14 Megan testifies to the lighting issues in the room. In order to see
15 Josh -- Josh's face in the crib, the light from the bathroom would have to be on to
16 shine some light in to that room. So if he can see where his son was, he could
17 obviously see that Jocelyn was sleeping or trying to sleep anyway on the futon in
18 that room. So, Megan would have to be in on the coaching and she would have to
19 be in on this conspiracy to get Dustin. It still doesn't make any sense. And why
20 doesn't it make any sense other than what we've already talked about? Look at the
21 ramifications to everybody's life because of what this man did to Jocelyn Coleman.

22 Megan lost everything. There is no doubt. She lost everything. She
23 doesn't talk to her sister anymore. She didn't talk to her parents for a really, really,
24 really long time. And even now, she says her sons don't have a relationship with
25 their grandparents. Megan says she had no relationship with her sister. She can't

1 even talk about her nieces to her children because then they'll ask what happened.
2 And she'd have to explain to them she doesn't have contact between her sons and
3 her nieces because of what that man did to Jocelyn Coleman. Her ex-husband.
4 She had everything to lose.

5 You also heard from Megan, she's supposedly in on this coaching and
6 conspiracy. She told Dustin to get out that night. She said you need to be out of the
7 house before I come back to the house with the boys. And he was gone. And he
8 never moved back in the house. So if this is coaching or some conspiracy, why
9 would she be in on it? And it couldn't have happened without her.

10 And let's fast-forward. It's been almost three years since July of 2010.
11 If that little girl is going to come in to court and they did such a great job coaching
12 her before she talks to Detective Hatchett, don't you think they would've reminded
13 her at least what Josh's name is? I submit to that they were truly coaching her, this
14 was truly a conspiracy to get at Dustin Barral, she would've been able to spit-out
15 verbatim in court everything she said to Detective Hatchett.

16 And here's the other thing. How much information is a little four year
17 old mind going to hold if someone's sitting there feeding them all this information? I
18 submit to you there is no way a four year old could remember that vivid of details,
19 that descriptive of language, if someone's feeding her the information. So, it's not a
20 She had everything to lose.

21 You also heard from Megan, she's supposedly in on this coaching and
22 conspiracy. She told Dustin to get out that night. She said you need to be out of the
23 house before I come back to the house with the boys. And he was gone. And he
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8 old mind going to hold if someone's sitting there feeding them all this information? I
9 submit to you there is no way a four year old could remember that vivid of details,
10 that descriptive of language, if someone's feeding her the information. So, it's not a
11 CSI issue. It's not a coaching issue. So what else do we have? We have motive.

12 Well, I submit to you we don't actually have any motive and that's the
13 entire point. What motive does this family have to go after that man and get him out
14 of the family? The time to jump on the opportunity, the time to seize was in 2006
15 before they got married. But now it's 2010. Megan and Dustin had two children. In
16 fact, Josh was a newborn. He was just born in January of that year. Why would you
17 try to cause such a rift in the family and use a four year old to accomplish that goal?
18 It just makes no sense. There is no motive to make him the evil guy to kick him out
19 of the family.

20 Now, I'll submit no one's going to give him son-in-law of the year. No
21 one up here testified he was the best thing that ever happened in the Hammonds
22 family. But who cares? There's a huge difference between someone not being your
23 favorite person in the whole entire world or not exactly fitting in to the family just fine
24 and levying allegations of sexually assaulting a four year old. That is a giant chasm
25 that you have to leap in logic from we really don't like him, wish he didn't come to

1 some of the barbeques, wish he didn't come to some of the family events to jump all
2 the way to accusing him of sexual assault to get him out of the family. It just makes
3 no sense.

4 And that is why we have the common sense instruction which is
5 Instruction Number 18 I believe. You're only to consider the evidence in the case in
6 reaching a verdict. You must bringing in to the consideration of -- you must bring to
7 the consideration of the evidence your everyday common sense and judgment as
8 reasonable men and women. Thus you are not limited solely to what you see and
9 hear as the witnesses testify. You may draw reasonable inferences from the
10 evidence which you feel are justified in the light of common experience. Keeping in
11 mind that such inferences should not be based on speculation; speculation or
12 guess.

13 So, let's talk about what evidence we actually have. There's a lot of
14 corroboration in this case that Ms. Fleck went over like I said. But let's play it out --
15 I'll do it in a short version in day by day. Friday, Nicole goes to the hospital. Friday
16 night the girls stay the night with David and Joanna. Did we give you a bunch of
17 testimony about what they did with them Friday night after she went to he hospital?
18 Where they slept? What they ate for dinner? No. Why waste your time?

19 Saturday evening they go over to Megan and Dustin's. Saturday
20 evening -- we didn't even talk about everything they did at the house Saturday
21 evening or Saturday during the day. Jocelyn goes to sleep Saturday evening in the
22 room with Josh-Josh or Josh. Joshua's in the crib. Jocelyn's on the futon. And
23 then there's this monitor.

24 MS. EDWARDS: Can I have the exhibit? The monitor.

25 THE COURT: Leave your exhibits right up there please.

1 MS. EDWARDS: Thanks.

2 THE COURT: But you have to --

3 BY MS. EDWARDS:

4 There's this monitor in the room that the Defense has made much
5 about. There's the monitor. Now there was -- he offered many, many things you
6 could think about the monitor. Well, let's go to what the actual testimony was. The
7 testimony was if he unplugged the monitor, there's going to be a beeping showing
8 up in Megan's ear. Fine, there was no beeping. She didn't hear a beeping. Then
9 there was much argument about how -- well Megan should've heard Jocelyn say
10 stop and Megan should've heard the Defendant say he wants to do it again and
11 again. But she didn't testify that she heard that. So?

12 What she testified to was you could manipulate the monitor in Josh's
13 room to turn down the volume. That's not turning it off. Not going to cause a
14 beeping sound. But she said you could turn it down --

15 MR. BECKER: I'm going to object that it misstates the testimony.

16 MS. EDWARDS: Absolutely does not.

17 THE COURT: Ladies and gentlemen, just remember what the attorneys tell
18 you is not evidence. Jury Instruction 15 and 22. Go ahead.

19 BY MS. EDWARDS:

20 She said you could turn it down -- and you can review it. Maybe I'm
21 mistaken as far as exact words she used but she testified you could turn down the
22 volume so you wouldn't hear anything. So what if he turns down the volume -- he
23 manipulates the monitor in Josh's room to turn down the volume. She's not going to
24 hear Jocelyn say stop. She's not going to hear him say he wants to do it again and
25 again. And I submit to you, why would a four year old make up some adult man

1 who's just dug in her privates and her butt, say that -- he's going -- he stands up and
2 says he wants to do it again and again and then he goes bye-bye.

3 It just doesn't make any sense. So the monitor in the room doesn't
4 provide any evidence that this didn't happen. In fact, you can put all of the
5 testimony about the monitor -- all the testimony from the case together to find out
6 that Dustin placed himself in that room with that child on Saturday which the -- which
7 was the 10th. He says he's in the room. He supposedly forgets that she's there
8 though this is not the first time he's been in the room that night; that he accidentally
9 sits on her and that he sits on the futon next to her.

10 Okay. Maybe he did. Maybe he completely forgets she was in the
11 room sleeping on the futon. Maybe he just didn't tell the whole story. Maybe he
12 forgot she was in there. He sat down on the futon and was like oh, opportunity. I'm
13 in the room, child's right next to me. There's your opportunity to stick his hand down
14 her pants, up in to her vagina, to dig and did. And then he moves to her bottom
15 where he digs and digs again.

16 Now, the Defense has suggested based on Dr. Cetl's testimony that
17 you -- that pressure on the vagina or the anus of child can feel like pressure inside.
18 Maybe it can but let's look at the entire facts that we have about what happened.
19 She describes in not as pressure. Not as simply pain. She describes it as digging.
20 That he dug in her privates. She describes it as sinking; that his fingers were
21 sinking in to her privates. And she describes pain; lasting pain. Not just pain that
22 night. In fact, the Defense asked her well, she's sitting right here. They asked her
23 well how come you weren't asleep. Because it was hurting. Her privates were
24 hurting from what that man had done to her. So she couldn't sleep.

25 I submit to you pressure on the outside of her vagina or privates as she

1 calls it -- pressure on the outside of her butt may have been momentary pain but
2 there was lasting pain that night and in to the next day in her privates and in her butt
3 because of the digging. And if it was just pressure, why would she describe it as
4 digging? Why wouldn't she just say he touched her? Why wouldn't she just say that
5 he put his on her privates or put his hands on her butt? She says digging. She says
6 sinking.

7 Now, during the course of the Defense's argument they also referred
8 you to some of her statements. One specifically was they say that her statement to
9 Detective Hatchett -- that it should be interpreted as he was hurting her as opposed
10 to recording her. Yes, the child does not pronounce her "R's" perfectly. I will give
11 you that. But if you listen to the interview -- if you review the interview, there is a
12 clear distinction between hurting and how she says recording. Hurting versus
13 recording are two very different things. And she says she believed he was recording
14 me, which is consistent with the monitor, which is consistent with the light, and
15 which is consistent with the Defendant manipulating the monitor to turn the sound
16 down so Megan can't hear what's going on.

17 And I'll -- another thing as far as that monitor goes. Maybe he turned
18 the sound down. You heard no evidence that he ever got up with Josh again for the
19 rest of the night. You heard no evidence that they heard Josh fuss again for the rest
20 of the night. So maybe he turned the monitor down. Maybe the reason he never got
21 up with Josh is because you couldn't hear anything anymore because he forgot to
22 turn it back up as he was walking out the door. Because remember what that child
23 says he did when he left the room. She didn't say anything about the recording
24 anymore. She says he went and washed his hands. And if you watch the interview
25 with Detective Hatchett the reason he -- she knows he went to wash his hands,

1 because she saw him; because she was awake. And as Megan testified you could
2 see the bathroom across the hallway from Josh's room.

3 There was one other thing as far as her statement goes that was
4 mentioned in the Defense's argument. Has to do with the privates and moving to
5 the butt. They emphasize that he was trying -- supposedly only trying to dig in her
6 butt. She makes other statements -- not that he tried but that he did in fact dig in her
7 butt. She also make statements -- she says -- she talks about him trying to dig in
8 my butt. Who was trying to dig in my butt? That it happened at Mae-Mae's house
9 on the same day.

10 And on the -- she says -- Detective Hatchett asks: Oh and how did her
11 try to dig in your butt? She responds: He was trying to -- um, his try to -- he was --
12 he was like -- he was digging in my privates and like he moved to my -- he moved to
13 my bottom. Two separate things. Detective Hatchett doesn't ask a question, he just
14 says: Mm-hmm. And she says: And he -- and I feeled him but I didn't -- How did
15 that fell? Feeled like it was hurting too. Okay. And did that go inside, outside, or
16 something else? Goes inside.

17 Clearly she's describing more than trying to dig his fingers in his -- her
18 butt. And clearly she was specific about what he did and what he didn't do. In that
19 interview Detective Hatchett also asks whether or not the Defendant showed him
20 her privates; whether or not he asked her to touch his privates. She clearly says no.
21 She knew exactly what he'd done and what he hadn't done.

22 So, pay attention to the testimony, pay attention to the exhibits, pay
23 attention to what has been presented to you. And look at the whole entire picture.
24 Sure go in and look at pieces of evidence that you have questions about.
25 Absolutely. But when you're done looking at those pieces of evidence, come back

1 up and look at the global picture as a whole. Dustin places himself in that room with
2 that child on the night in question when -- the only night she's sleeping in that room
3 with Josh, he places himself on the futon next to her. He digs in her privates, he
4 digs in her butt, he washes his hand, and then he goes back and he wakes up his
5 wife to tell her that he'd just accidentally sat on Jocelyn. Why would you wake your
6 wife up to tell her something so benign as he accidentally sat on the child? He didn't
7 hurt Jocelyn or he didn't say he hurt Jocelyn while she sat of the futon -- when he
8 accidentally sat on her. He didn't say anything. He said: I accidentally sat on her.
9 She was asleep. She was exhausted. She testified that she'd had the kids the
10 weekend before and this current weekend where all these things happened. She
11 was tired. Why would you disturb and wake her up to tell her you sat on this child?
12 And then it was repeated more than one time. Megan repeated it the next morning.
13 And remember what Megan said about Jocelyn's reaction. Jocelyn looked confused
14 like she didn't know what I was talking about. It's repeated again at church to
15 Joanna Hammonds about how funny it was that Uncle Dustin sat on Jocelyn. And
16 this time the Defendant reported back to Megan that Jocelyn still looked like she
17 didn't understand what he was saying. So look at the entire scope of the evidence.
18 Look at the big picture. And answer the ultimate question. Where would the four
19 year old come up with this? Who would think to tell a four year old, use the words
20 dug and sink? Where would a four year old come up with this? And I submit to you
21 the only place a four year old would come up to this is if she had done it. And the
22 Defense hasn't answered that question for you in their arguments. They address all
23 these peripheral things but never answered the question in their argument, where
24 would a four year old come up with this? So when you go back to the jury room,
25 when you go back and deliberate, come back and tell the Defendant you know what

1 happened. You know there's more to the story than that he accidentally sat on her
2 in that room. He used his fingers and he dug in her privates and he dug in her butt.
3 And find him guilty of both counts. Thank you for your time.

4 THE COURT: Swear the two officers in.

5 I can tell you now who the alternates are. Russell Hepler, you're an
6 alternate. And Larry Karp, you're an alternate. If you'll go with Susanne as soon
7 she's sworn in. Swear these two officers in please.

8 [The Clerk swore in the officers to take charge of jury during deliberations]

9 THE COURT: And be within twenty or thirty minutes. I don't know where
10 your homes are but be available in case something happens; someone gets deathly
11 on the other -- on the regular jury panel. You may have to be called in. Thank you.

12 And the rest of the jury will go with Joe. He's the substitute Marshal.
13 Jill will bring you the evidence back. Tom had to go do some class.

14 [The jury retired to deliberate at 12:00 p.m.]

15 [Outside the presence of the jury]

16 THE COURT: All right. Make sure we have all of your cell numbers so we
17 can get in touch with you. If I have to -- if there's a question from the jury, we'll do a
18 three-way call --

19 MS. FLECK: We probably --

20 THE COURT: I plan on keeping them here until 4:30, send them home for the
21 weekend. They can come back Monday morning at 9:00.

22 MS. FLECK: Has lunch been delivered yet?

23 THE COURT: Yes.

24 MS. FLECK: Okay. They might need a computer if they want to watch it.

25 THE COURT: Yes.

1 MS. FLECK: I --

2 THE COURT: You'll have to provide one. The D.A. has one that's clean.

3 MS. FLECK: Yeah. I'll have to call down and get one that is --

4 THE COURT: All right.

5 MS. FLECK: Because this one doesn't really even work.

6 THE COURT: Just bring it up and leave it with Tom.

7 MS. FLECK: Okay.

8 MR. BECKER: Your Honor, if I may ask. Our office is in the U.S. Bank
9 building across from Palace Station. We could absolutely get dropped off if we need
10 to come back. The time is about probably 15 or 16 minutes --

11 THE COURT: That's fine.

12 MR. BECKER: -- to get here.

13 THE COURT: That's fine.

14 MR. BECKER: Okay.

15 MR. CASTILLO: And for the record, Your Honor, I believe your clerk was
16 provided with both of our business cards with cell numbers. If not, I can read you
17 that right now.

18 THE COURT: Just make sure that we have --

19 [Colloquy between the Court and the Law Clerk]

20 THE COURT: All right. The jury instruction actually says 13. I didn't catch it.

21 MS. EDWARDS: Which one?

22 THE COURT: The jury instructions.

23 MS. FLECK: What does it say?

24 THE COURT: 13. Department 13.

25 MS. EDWARDS: Oh. The X instead of the V.

1 MS. FLECK: Oh.

2 THE COURT: Yeah.

3 MR. BECKER: We -- we can -- we have no objection to it.

4 THE COURT: Do you have an objection ma --

5 MR. BECKER: No.

6 MS. FLECK: No. No.

7 THE COURT: Okay. She can change that and then it's not dated. There
8 wasn't a date line. So I'm going to date it. What is today? 29th?

9 MS. EDWARDS: 31st.

10 MS. FLECK: 31st.

11 THE COURT: Oh. Okay.

12 MS. EDWARDS: May 20 -- 31st.

13 THE COURT: All right.

14 THE CLERK: Thank you.

15 THE COURT: Change that to Roman numeral 8 and then I'll initial it.

16 Thank you. You guys did an excellent job.

17 MR. CASTILLO: Thank you, Your Honor.

18 MR. BECKER: Thank you.

19 [Recess taken at 12:03 p.m]

20 [Trial resumed at 3:00 p.m.]

21 THE MARSHAL: All rise, please.

22 [In the presence of the jury]

23 THE MARSHAL: And be seated.

24 THE COURT: This is C269095, State of Nevada versus Dustin Barral.

25 Record reflect the presence of the Defendant, his two attorneys, the

1 Deputy District Attorneys for the State, and all twelve members of the jury.

2 Did you select a jury foreperson and if so who is the --?

3 THE FOREPERSON: It is me.

4 THE COURT: Have you reached a verdict?

5 THE FOREPERSON: Yes, we have.

6 THE COURT: Is it unanimous?

7 THE FOREPERSON: Yes.

8 THE COURT: All right. Would you hand that to the marshal?

9 THE FOREPERSON: Sure.

10 THE COURT: The clerk will now read the verdict to -- out loud and inquire of
11 the -- poll the jury.

12 THE CLERK: District Court, Clark County, Nevada, the State of
13 Nevada, plaintiff, versus Dustin Barral, Defendant. Case Number C10269095-1,
14 Department VIII.

15 Verdict: We, the jury, in the above entitled case find the Defendant
16 Dustin Barral as follows:

17 Count 1, sexual assault with a minor under 14 years of age. Guilty of
18 sexual assault with a minor under 14 years of age.

19 Count 2, sexual assault with a minor under 14 years of age. Guilty of
20 sexual assault with a minor under 14 years of age.

21 Dated this 31st day of May 2013, signed by foreperson, Nicole Virga.

22 Ladies and gentlemen of the jury, is -- are these your verdicts as read,
23 so say you one so say you all?

24 THE JURY: Yes.

25 THE COURT: Poll the jury, please.

1 THE CLERK: Okay.

2 Howard Robbins --

3 THE COURT: No. It's Juror Number 1.

4 THE CLERK: Oh. Juror Number 1, is this your verdict?

5 JUROR NUMBER 1: Yes.

6 THE CLERK: Juror Number 2, is this your verdict?

7 JUROR NUMBER 2: Yes.

8 THE CLERK: Juror Number 3, is this your verdict?

9 JUROR NUMBER 3: Yes.

10 THE CLERK: Juror Number 4, is this your verdict?

11 JUROR NUMBER 4: Yes.

12 THE CLERK: Juror Number 5, is this your verdict?

13 JUROR NUMBER 5: Yes.

14 THE CLERK: Juror Number 6, is this your verdict?

15 JUROR NUMBER 6: Yes.

16 THE CLERK: Juror Number 7, is this your verdict?

17 JUROR NUMBER 7: Yes.

18 THE CLERK: Juror Number 8, is this your verdict?

19 JUROR NUMBER 8: Yes.

20 THE CLERK: Juror Number 9, is this your verdict?

21 JUROR NUMBER 9: Yes.

22 THE CLERK: Juror Number 10, is this your verdict?

23 JUROR NUMBER 10: Yes.

24 THE CLERK: Juror Number 12, is this your verdict?

25 JUROR NUMBER 12: Yes.

1 THE CLERK: Juror Number --

2 THE COURT: Wait.

3 THE CLERK: -- 14, is this your verdict?

4 JUROR NUMBER 14: Yes.

5 THE CLERK: Thank you.

6 THE COURT: All right. When we do that it's just 1 through 12 because
7 there's only 12. 11 and 14 -- or 11 and 13 are gone.

8 THE CLERK: All right.

9 THE COURT: Ladies and gentlemen, as you know the right to a jury trial is
10 one of our basic fundamental constitutional guarantees. I firmly believe in this right.
11 I -- and it's the right of every person accused of a crime to be judged by a fair and
12 impartial jury. But to have a fair and impartial jury, you have to have jurors and
13 unfortunately jury service is something that many people shirk. They don't wish to
14 become involved. I'm please that twelve men and women have been willing to give
15 of the value -- valuable time and you've been most attentive and most
16 conscientious.

17 On behalf of Counsel, the Parties, the Eighth Judicial District Court, I
18 wish to thank you for your careful deliberation this -- in this case. Question now may
19 arise as to whether you may now talk to other persons regarding this case. I advise
20 you that you may if you wish -- speak to someone if they want to talk to you they'll
21 come down to the third floor. The verdict of the jury shall now be recorded in the
22 minutes of the court.

23 You're not required to talk to anyone however. And if any person
24 persists in discussing the case with you after you have indicated that you don't wish
25 to talk to them or raises an objection as to your result or how you deliberated, you'll

1 report that fact directly to me and you'll do that through the marshal. And I can
2 guarantee I'll take care of it.

3 The jury is excused to the jury room with Tom and he'll collect.

4 [Outside the presence of the jury]

5 THE COURT: All right. The Defendant is remanded to the Department of
6 Parole and Probation to set a sentencing date and in custody he'll be held without
7 bail and his sentencing date is?

8 THE CLERK: July 31, 8 a.m.

9 MR. BECKER: Your Honor, if I may.

10 THE COURT: Sure.

11 MR. BECKER: I'm gone the last two weeks of the month of July. Could we
12 get a date in the first week of August --

13 THE COURT: Sure.

14 MR. BECKER: -- perhaps?

15 THE CLERK: August 8, 9 a.m.

16 MR. BECKER: Thank you.

17 THE COURT: Thank you.

18 THE CLERK: 8 a.m., sorry.

19 MR. CASTILLO: 8 a.m., ma'am?

20 THE COURT: 8 a.m.

21 MR. CASTILLO: Thank you.

22 THE CLERK: 8 a.m.

23 THE COURT: Thanks. Good job everyone.

24 ...

25 ...

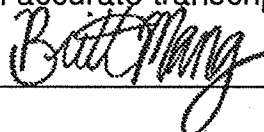
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MR. CASTILLO: Thank you, Your Honor.

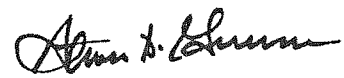
MS. FLECK: Thank you, Your Honor. Thank you, everyone.

[Trial concluded at 3:05 p.m.]

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

A handwritten signature in cursive script, appearing to read "Britt Mang", is written over a horizontal line.

Brittany Mangelson
Independent Transcriber



CLERK OF THE COURT

1 RTRAN

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DISTRICT COURT
CLARK COUNTY, NEVADA

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STATE OF NEVADA,

9

Plaintiff,

CASE NO. C269095

10

vs.

DEPT. VIII

11

12

DUSTIN JAMES BARRAL,

13

Defendant.

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BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE

15

MONDAY, JULY 8, 2013

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**TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION FOR ACQUITTAL
OR IN THE ALTERNATIVE A NEW TRIAL**

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MICHAEL V. CASTILLO, ESQ.

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RECORDED BY: JILL JACOBY, COURT RECORDER

1 MONDAY, JULY 8, 2013 AT 7:56 A.M.

2
3 THE COURT: C269095, Dustin Barral, page 1a.

4 It's Defendant's motion for acquittal or in the alternative a new trial.

5 Go ahead.

6 MR. CASTILLO: Good morning, Your Honor, Mike Castillo and Michael
7 Becker on behalf of the defense.

8 MS. EDWARDS: Michelle Edwards, deputy district attorney for the State.

9 MR. CASTILLO: For the most part, Your Honor, everything's sufficiently set
10 forth in our moving papers and in our reply. Just very brief, there's three primary
11 grounds. And I'll address Grounds 1 and 2, Mr. Becker will address Ground
12 Number 3.

13 Ground Number 1 is that the State failed to present sufficient legal
14 evidence to support the Defendant's convictions. And the main point here is that by
15 statute, they're required to prove that there was penetration, however, slight. And
16 our argument essentially is that the entire case hinged on Jocelyn's testimony and
17 also statements that Jocelyn purportedly made using the words dig or dug and that
18 alone is not sufficient to establish that there was penetration. That's our grounds as
19 to Count 1.

20 As to Count 2, we're asking -- Ground Number 2, rather, Your Honor.
21 We're asking for a new trial based upon conflicting evidence. And essentially this
22 Court should grant a new trial because totality of the evidence failed to prove him
23 guilty beyond a reasonable doubt. And specifically for the Court's attention, there
24 was conflicting evidence presented between Megan Barral in terms of the baby
25 monitor and Jocelyn's testimony. And in order for the jury to have found the

1 Defendant guilty, they essentially would have had to found that Jocelyn's testimony
2 was believable over Megan's testimony. Specifically, was anything heard over that
3 baby monitor? And the Court, pursuant to statute, has the ability to judge the
4 evidence differently and grant a new trial.

5 And everything else is sufficiently set forth. And I'll turn to Mr. Becker
6 as to Count Number 3.

7 MR. BECKER: With regard to Issue Number 3, Your Honor, NRS 16.030(5)
8 is unambiguous. It says that the jury venire shall be administered the oath. That is
9 something that was not done. The defense did bring it to the attention of the Court.
10 We do believe that it adequately preserved the issue as an objection. And I think
11 that the law is clear that under those circumstances that the Court shall order a new
12 trial.

13 THE COURT: Thanks.

14 MS. EDWARDS: If I may be heard, Your Honor.

15 THE COURT: Go ahead.

16 MS. EDWARDS: Just for the record. Your Honor, as to Counts -- Count 1, as
17 far as the evidence of digital penetration to sustain the sexual assault against a
18 minor under 14, as Your Honor heard, and even defense acknowledges the 51.385
19 testimony of Jocelyn Coleman that she described him digging in her privates, that
20 she testified that he used his hands to dig in her privates.

21 But during the course of reviewing the video of her interview by
22 Detective Hatchett which also came in pursuant to 15.385, she describes Dustin's
23 hands sinking into her privates. She describes in detail words that a four year old
24 would use to describe digital penetration. The jury's the finder of fact. They heard
25 all of that evidence and clearly made a decision that they thought that the words dig,

1 dug, and sinking were sufficient to constitute digital penetration.

2 As far as the conflicting evidence, Counsel is clearly relying on one
3 simple piece of testimony that they belabored quite a bit during closing arguments.
4 But the fact of the matter is there was testimony that the monitor could have been
5 turned down. There's no testimony that she didn't fall asleep or didn't otherwise, as
6 far as the monitor is concerned.

7 As far as the oath issue which is the third point. There are two oaths in
8 a jury trial. Obviously the oath to the jury venire and then the oath that the actual
9 jury panel takes before the start of evidence. This all relies and centers upon
10 whether or not the oath was given to the jury panel before voir dire started.
11 Obviously there was a bench bar about that. I note that the case law that Defendant
12 cites in their initial motion, *Fulminante* and *Diomampo*, we addressed in our
13 opposition as not being remotely on point.

14 The case law that they cited in their reply, the *Ex parte Deramus v*
15 *Alabama* and *People v Allen* out of Michigan, I note that neither of those cases are
16 on point, they both address whether or not the actual jury panel that sat for the
17 entire trial had been administered the oath to listen to the evidence and follow the
18 law. That's not the issue here. I'd also note that even in the case that Defendant
19 cites, the *People v Allen*, that they applied the plain error standard which we
20 addressed in our opposition.

21 And finally, in *People v Carter*, which we cited in our opposition, there's
22 a detailed analysis of how you address failure to give the jury panel the actual oath.
23 And in that, they look at whether there's prejudice, they look at whether or not there
24 were sufficient indicia that the jury venire had to answer truthfully. And I note for the
25 record, voir dire's replete with yourself, with Ms. Fleck, with Mr. Becker,

1 admonishing the jury that they have to tell the truth, that the goal is to get truthful
2 answers. At length that was gone into during the course of the voir dire, which is
3 something that they looked at in *People v Carter*, not just the evidence or the notes
4 that defense makes in its reply as far as *People v Carter* and the sworn paperwork
5 that the jury filled out before they were impaneled in that case.

6 On that, Your Honor, I'd also note that defense in its reply tries to make
7 it your fault that they didn't make a better record. But they only bring that up in their
8 reply. And I just note for the record that during the course of the trial, they clearly
9 had no problem trying to control the courtroom, make objections, tell Your Honor
10 how and when we should take breaks and those kinds of things.

11 So for all those reasons, the State contends all their arguments should
12 fall flat and that the motion should be denied.

13 THE COURT: All right. Thank you. I'll tell you the reason, and I think I put it
14 on the record last time. I don't -- I don't swear a jury in until after they come back
15 and evidence starts in case somebody doesn't show up, we can -- we do not then
16 have to declare a mistrial but we can call other potential jurors up and finish the voir
17 dire process.

18 I have analyzed the cases that you've presented. I don't see a reason
19 to override the jury decision. Defendant got a fair trial, Defendant was represented
20 zealously by two attorneys. Motion to dismiss or to acquit is denied. Motion for new

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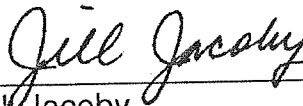
1 trial, I guess, is denied. State will prepare a findings of facts, conclusion of law
2 consistent with their opposition.

3 Thank you.

4 MR. CASTILLO: Thank you, Your Honor.

5 [Proceeding concluded at 8:03 a.m.]
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21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
22 recording in the above-entitled case.

23 
24 Jill Jacoby
25 Court Recorder

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN BARRAL

Appellant,

VS.

THE STATE OF NEVADA,

Respondent.

CASE NUMBER: 64135
(District Court Case No. 135)

Electronically Filed
Mar 18 2014 09:26 a.m.
Case: 13-00095
Trade K. Lindeman
Clerk of Supreme Court

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(VOLUME IV)

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INDEX

PLEADING


PAGE NO.

Arrest Report filed on 8/4/2010.....	1-4
Information filed on 11/29/2010	14-16
Judgment of Conviction filed on September 23, 2013.....	85-86
Motion for Acquittal or in the Alternative a New Trial filed on June 7, 2013 ..	47-59
Motion for Extension of Time filed on January 28, 2014.....	91-94
Motion for Extension of Time Second Request filed on February 25, 2014.....	96-99
Notice Approving Extension of Time filed on January 28, 2014.....	95
Notice of Appeal filed on September 27, 2013.....	87-90
Order Denying Defendant's Motion for Acquittal or in the Alternative, a New Trial filed on July 19, 2013	83-84
Order Denying Defendant's Request for Admissibility of Prior Sexual Conduct Pursuant to NRS 48.069 filed on June 28, 2013	81-82
Order Granting Extension of Time filed on March 6, 2014.....	100
Reply to State's Opposition to Defendant's Motion for Acquittal or in the Alternative a New Trial filed on June 28, 2013.....	75-80
Request for Admissibility of Prior Sexual Conduct.....	17-36
State's Opposition to Defendant's Motion for Acquittal or in the Alternative a New Trial filed on June 20, 2013.....	60-74
State's Opposition to Defendant's Request for Admissibility of Prior Sexual Conduct filed on May 29, 2013.....	37-44
Transcript of Day I of Trial Proceedings dated May 28, 2013	101-307


1	Transcript of Day II of Trial Proceedings dated May 29, 2013.....	334-509
2	Transcript of Day III of Trial Proceedings dated May 30, 2013.....	544-734
3	Transcript of Day IV of Trial Proceedings dated May 31, 2013	734-815
4	Transcript of NRS 51.385 Proceedings of May 29, 2013	308-333
5	Transcript of NRS 51.385 Proceedings of May 30, 2013	510-543
6	Transcript of Proceedings of Defendant's Motion for Acquittal or in the	
7	Alternative a New Trial date July 8, 2013	816-821
8	Verdict filed on May 31, 2014	45-46
9	Voluntary State of J.C.	5-13
10		
11		
12		
13		
14		
15		
16		
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Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct. 


An employee of Las Vegas Defense Group

1 through 22?

2 MS. FLECK: Yes, Your Honor.

3 THE COURT: Are you satisfied with them?

4 MS. FLECK: Yes.

5 THE COURT: Do you have any further you wish to propose?

6 MS. FLECK: No, Your Honor.

7 THE COURT: You've reviewed the verdict form?

8 MS. FLECK: Yes, Your Honor.

9 THE COURT: You satisfied?

10 MS. FLECK: Yes, Your Honor.

11 THE COURT: Just make sure it's got the case number right.

12 All right. Defense, are you familiar with jury instructions 1 through 22?

13 MR. CASTILLO: Yes, Your Honor. Just one brief question regarding number

14 19. Just whether or not the language was changed the last sentence of 19.

15 THE COURT: In your deliberation you may discuss -- your duty is confined to

16 the determination whether a defendant is guilty or not-guilty based on the evidence.

17 MR. CASTILLO: That's fine, Your Honor. Thank you.

18 THE COURT: All right. So, you're familiar with 1 through 22?

19 MR. CASTILLO: Yes, Your Honor.

20 THE COURT: You're satisfied with them?

21 MR. CASTILLO: Yes, Your Honor.

22 THE COURT: You have any further you wish to propose?

23 MR. CASTILLO: No. And just clarification as to the verdict form, it simply has

24 Count 1: The charge and then Count 2: The charge.

25 THE COURT: Yes.

1 MR. CASTILLO: Understood, Your Honor.

2 THE COURT: And you're sat -- you've reviewed the verdict form?

3 MR. CASTILLO: Yes, Your Honor.

4 THE COURT: You're satisfied with the verdict form?

5 MR. CASTILLO: Yes, Your Honor.

6 THE COURT: Okay. Is the computer set up?

7 MS. EDWARDS: I believe so.

8 THE COURT: Okay. Here's what'll happen?

9 MS. FLECK: What is this?

10 THE COURT: That's a television.

11 MS. FLECK: Oh.

12 THE COURT: We --

13 MS. FLECK: Thank you.

14 MR. CASTILLO: They're not flat anymore.

15 THE COURT: Now we'll call the jury in. State has not rested yet.

16 MS. FLECK: Correct.

17 THE COURT: You're going to rest.

18 MS. FLECK: Yes.

19 THE COURT: Defense is going to rest?

20 MR. CASTILLO: Yes, Your Honor.

21 THE COURT: Then I will read the jury instructions to the jury. Well, you
22 better go copy them. Put that on the blue thing. He'll make 19 copies. One for the
23 court reporter, one for each of you attorneys, and then 14 for the jurors.

24 I'll read the jury instructions and then I'll give the State their
25 opening -- how long's your opening -- about?

1 MS. FLECK: Really it's not going to be very long; probably half hour.

2 THE COURT: Okay. So you can't even say good morning in a half hour; so
3 45 minutes. And then do you know how long your --

4 MR. BECKER: I would guess around 45 minutes --

5 THE COURT: Okay.

6 MR. BECKER: -- to an hour.

7 THE COURT: And rebuttal couldn't be more than --

8 MS. EDWARDS: I'm not a person of many words.

9 THE COURT: All right. So we'll be to the jury -- because I have to buy their
10 lunch.

11 [Colloquy between the Clerk and the Court]

12 [Pause in proceedings]

13 THE COURT: You guys ready?

14 MS. EDWARDS: Yes, Your Honor.

15 THE COURT: They've been out 40 minutes, so we better get them in.

16 Bring them in, Tom.

17 THE MARSHAL: All rise, please.

18 [In the presence of the jury]

19 THE MARSHAL: And be seated.

20 THE COURT: Stipulate to the presence of the jury.

21 MS. FLECK: The State stipulates. Thank you.

22 MR. BECKER: Yes, Your Honor.

23 THE COURT: Thanks.

24 Good morning, ladies and gentlemen. Again, sorry, we're running a
25 little behind.

1 State?

2 MS. FLECK: Yes, Your Honor?

3 THE COURT: You ready to call your next witness?

4 MS. FLECK: With the understanding that the evidence is admitted the
5 State -- oh and the stipulation between the State and the Defense that there were no
6 physical findings in that sexual assault examination, I believe we rest at this time.

7 THE COURT: All right. And Defense?

8 MS. FLECK: Oh. I'm sorry, Your Honor, one more thing. I know that we did
9 this yesterday but is -- as long as the amended information also that's just had the
10 Jocelyn's last name --

11 THE COURT: Typographical -- yeah.

12 MS. FLECK: Thank you.

13 THE COURT: All right. Defense?

14 MR. CASTILLO: Yes, Your Honor. And with the understanding that Defense
15 Exhibit A has been admitted, which I believe --

16 THE COURT: Yes.

17 MR. CASTILLO: -- it has, the Defense at this time rests on the state of the
18 evidence.

19 THE COURT: Thank you.

20 All right. Ladies and gentlemen, I'll instruct you on the law and then
21 they'll start the argument this morning.

22 And you can follow along. You can make notes on your instructions.
23 This is relatively a new procedure for me too; is to make one for each. I usually
24 don't give you one or haven't been but I like it.

25 [Jury instructions read, not transcribed]

1 THE COURT: State ready?

2 MS. FLECK: Yes. Thank you, Your Honor.

3 **CLOSING ARGUMENT BY THE STATE**

4 BY MS. FLECK:

5 On July 14th of 2010, Nicole Hammond faced every parent's worst
6 nightmare when her four-year old daughter, Jocelyn pulled her to the side, asked
7 her to sit down, and uttered six small words; that when strung together would
8 change the course of their entire families' lives. Uncle Dustin dug in my privates.

9 Now before July of 2010 the family was cohesive; they were loving.
10 There were bumps in the road but it was nothing that the family couldn't recover
11 from. They would -- worked together to get through things and they would help each
12 other out. At that point in time their lives became, before July of 2010 and after July
13 of 2010. And after July of 2010 they were no longer able to work through things.
14 They were no longer able to work together. After that day sister was pit against
15 sister, parents against daughter, cousins were split up. And of this was because of
16 the actions of but one man. And that's the defendant, Dustin Barral.

17 This didn't happen to this family because the father didn't want Megan
18 and the Defendant marrying at such a young age. This didn't happen because at
19 times various members of the family thought that Dustin was odd because he didn't
20 speak. The split in this family occurred because this man made the choice to walk
21 into a room in his home, to take his finger and insert it in his four-year old niece's
22 vagina and her anus. And because of that ladies and gentlemen we've spent the
23 week listening to testimony, listening to evidence, and ultimately it's been the State's
24 job to prove to you two things. First, that crimes were committed and second, that
25 the Defendant in this particular case, Dustin Barral, committed those crimes.

1 I'm going to start with the second of those first because it's kind of the
2 easiest in this case; this isn't really a who-dun-it. No one's going to stand before
3 you and tell you that Jocelyn said that somebody else was in the room that night;
4 that somebody else besides Dustin came in. But what did we hear from her? Well,
5 you heard from Jocelyn at seven-years old, when she testified before you and she
6 specifically said that her Uncle Dustin dug in her privates when she lived with her
7 grandma and grandpa. She also went on to identify the Defendant as her Uncle
8 Dustin.

9 When she was four-years old in July of 2010, she told her mom Nicole:
10 Uncle Dustin dug in my privates. She told her grandma: Uncle Dustin dug in my
11 privates. And she told her Aunt Megan: Uncle Dustin touched me and he hurt me.
12 She was also interviewed by Detective Hatchett and she told him: Levi's daddy,
13 who did that to my privates. She repeatedly said Uncle Dustin; Uncle Dustin was
14 the person who had touched and come into the room. She said that she saw him.
15 She said that it was dark. She said it was time to go night-night but that she saw
16 him. And she went on to describe that in fact, she heard him speak.

17 She was able to give those descriptors and she did spontaneously.
18 She said: He talked to me. When she said: Stop; he said: He wanted to do it
19 again and again. There was no question in her mind anytime that she spoke about
20 this case that but one person came into that room and put his finger in her vagina
21 and in her anus and that's the Defendant; so, identity in this case, not an issue.

22 So let's talk about what crimes occurred and what crimes the State
23 needs to prove beyond a reasonable doubt. Between July 10th and July 12th of
24 2010, count 1 is the sex assault on a minor under the age of 14. You know that
25 Jocelyn was four-years old when this occurred. And count 1 is for digital penetration

1 of her genital area. Count 2 is sex assault with a minor under the age of 14; digital
2 penetration of her anus.

3 Now the law says that where a child has been the victim of a sex
4 assault and doesn't remember the exact date, we're not required to prove the exact
5 date that it happened and that's because of the mind of a child. Circumstances in
6 their lives will tell them when something happened. Other people will be able to lend
7 credibility to when the dates occurred and we know in this case that it was the
8 weekend that Nicole was put into the hospital, which was that weekend of the 10th
9 and 11th and 13th of July. So, there's no question as to when it took place but that
10 specific date didn't need to come necessarily from Jocelyn herself.

11 So what is a sex assault? In the state of Nevada a sexual assault is a
12 person who subjects another person to a sexual penetration against the person's
13 will or under conditions in which the person knows or should know that that other
14 person is entirely incapable physically or mentally of understanding what is going
15 on; understanding the nature of the conduct. If those things occur, the person is
16 guilty of a sexual assault.

17 What's a sexual penetration? Sexual penetration includes any
18 intrusion, however slight, of any part of a person's body into the genital or anal
19 openings of the body of another including digital penetration. As adults we think of
20 penetration as maybe, you know, full penis into the vagina, all the way into the cavity
21 penetration. Legally, penetration is an intrusion however slight; that's between the
22 labial folds; that's in the plane of the vagina.

23 It doesn't have to be full penetration in the way that adults think and
24 that's pretty obvious why. With a child, full penetration like that could severely
25 damage a child. Just the tip of a finger, just the tip of a penis, for legal purpose,

1 that's a sexual penetration. And digital penetration is just a fancy legal way of
2 saying finger in the vagina. So it's placing one or more fingers of the perpetrator
3 into the anal or into the genital opening of another. So an intrusion however slight of
4 the finger is a sexual penetration for purposes of this particular case.

5 Physical force isn't necessary in the commission of a sex assault. A lot
6 of times in TV shows or in movies or in books when people think of a sexual assault
7 they think of a stereotypical kind of rape; that a woman or a child has to be held
8 down; that it has to be violent. That's not required for a sexual assault. The crucial
9 question isn't whether the person was physically forced to do something; rather was
10 it against the person's will without their consent or again under conditions in which
11 the Defendant knew or should have known that the person is incapable of
12 understanding.

13 Consent is not even an issue. A four-year old child cannot consent
14 under any circumstances to any kind of sexual intercourse; digital penetration,
15 penile penetration, nothing. Was this under conditions in which the Defendant knew
16 or should have known that she's incapable of understanding what she's doing?
17 Clearly. She is four-years old. She would have no understanding of a man coming
18 into the room, taking his hand, putting it in -- into her pants, into her panties, and
19 penetrating her. Consent is absolutely not an issue and clearly it's under conditions
20 in which the person knew or should have known. Four years old.

21 So the real question then in this case is, was there sexual penetration?
22 Well let's look at her testimony. Jocelyn again testified during trial; she was seven
23 years old. She said that Dustin dug in my privates. His finger went inside my
24 privates. She stood up and pointed to her vagina as her privates so she indicated
25 where it was that he was digging and where he went inside. The word dug. What a

1 shockingly descriptive word for a child to use when talking about what somebody did
2 with their fingers in her privates.

3 I'm not sure an adult could evoke such an image if they tried. He dug.
4 He went inside. He penetrated her. Defense said to her well you don't remember
5 that do you? You don't actually remember? It has been three years and there are
6 details that she may not remember but she specifically said: Oh no, I remember.
7 She's been in counseling for three years. She remembers. But additionally, you
8 heard from her when she was four years old.

9 You didn't -- some of your instructions will say the testimony of a victim
10 -- the testimony of the victim. But it's not just the testimony that you heard from the
11 witness stand when she was seven, it's also the testimony that was admitted in the
12 case that you saw on the video and that's when she was talking to Detective
13 Hatchett; that's also her testimony for purposes of this trial. In there she said: He
14 went under my pants and panties. His hand was digging in privates.

15 Now, of course the Defense will say, well, she was prompted to say
16 that, she was led to say that. She wasn't led. It was a prompt by a detective who's
17 highly skilled and trained. Watch the interview again. See if he tells her anything; if
18 he lends anything to her. See how many different way he will suggest her speaking
19 to him and opening up and that there were certain words that a four year old may
20 not clue into as to you know, where he's going with this or that she might be
21 embarrassed.

22 She's just met this person. She's never had any conversations with
23 him. But when sh -- he says to her: Did you tell somebody that someone dug in
24 you? She said it through the interview probably every sentence out of her mouth;
25 digging, digging, digging. He dugged all the way from there. The detective said:

1 Well, what is digging in your privates? He didn't want to just presume. He wanted
2 to hear it from her. She said: That you hurting me. It hurt. That it hurts and waked
3 up because I feeled him.

4 Well, what was he digging with? He was digging with his hands. And
5 then she went on to show him her hands and what part of her hands being her
6 fingers that the Defendant was using. What was he doing with those he asked her?
7 Well, he was sinking. He was sinking inside my privates. Again, what a descriptive
8 word out of the mouth of babes.

9 Where would somebody come up with this? Where would a child come
10 up with the word sinking if his fingers weren't actually entering inside of her body?
11 And her, at four years old, trying to find a word that she can use to describe what
12 happened. Where did these fingers go? I mean, to her she doesn't know what's
13 going on down there. She just knows that all of the sudden, something went inside
14 of her body and it sunk into her. Absolutely penetration.

15 The detective asked: Can you show me on this picture where he was
16 touching you at? And she actually went to her body to say he was inside of her;
17 inside. She always said inside, always said dug and sinking. All words to prove that
18 there was actual penetration in this case; absolutely an intrusion, however slight, of
19 his fingers inside of her vagina. Was it outside of your skin or was it inside of your
20 skin? She said: Inside. She did -- went on to say things like: When it was still
21 nighttime he was in my privates. All his fingers are under and he like turned like
22 right to my privates.

23 Additionally, what condition was she in? How did this feel for her? It
24 was hurting her. It feeled like it was hurting. She said: He touched; he touched it
25 all the way like that and it hurts because because it hurted. Because because it was

1 getting red. It started to hurt all day and then it hurt all day and then I had to and
2 then it hurt all day. There were certain sentences that she said or certain
3 expressions where she would say hurt over and over and over again. Again, all
4 indications of penetration because to a four year old, even a finger is going to really
5 hurt her body. She said: That it was hurting in the morning and that then -- then
6 that they went to the doctor.

7 Now, in the law when you have a case of a sexual incident and there's
8 more than one act -- multiple sexual acts occur but it's same -- part of the same
9 criminal encounter, the Defendant can be found guilty for each of those separate
10 acts. So, in this case the Defendant first uses his fingers to penetrate her vagina
11 and then after that he moves to her butt. He is found guilty then of two counts of
12 sexual assault. He doesn't get a pass just because he did it all at once. It's not as
13 if, you know, since it happened one time that night he can do as much as he wants;
14 a free-for-all at that particular moment.

15 Separate penetrations. Separate events. I'm sorry separate counts.
16 Two separate sexual assaults. So, the detective asks her: So has anybody else
17 done anything that you didn't like, like that or was it just your uncle? Basically
18 asking anybody else and her response: He was -- well he was trying to dig in my
19 butt. Absolutely spontaneous.

20 Again, to a four year old processing these things; how questions are
21 asked? When they're asked? What she has in her mind? One minute she's talking
22 about her cousin's taking a bath and the next minute, well, he stuck his finger in my
23 butt. Absolutely spontaneous. Second count of sexual assault. And then detective
24 said, well, who was? Uncle Dustin. Consistent throughout. That was the same day
25 she said -- she said it only happened once. She said: He was digging in my

1 privates and he like moved to -- he moved to my bottom and -- and I feeled him
2 but --

3 The detective said well, okay, and did that go inside, outside, or
4 something else? Not suggesting. She said: It goes inside. He used his fingers.
5 The detective said: Well, how did that feel? It feeled like it was hurting too. And
6 what's kind of important about the two; indicative that first, he was in her privates
7 and it hurt her. Then he moved to her butt and it hurt there too.

8 Now, we talked a little bit about this during jury selection. There's a law
9 in the state of Nevada and around the country that says that there's no requirement
10 that the testimony of a victim of a sexual assault be corroborated. And that the
11 testimony standing alone if believed beyond a reasonable doubt is sufficient to
12 sustain a verdict of guilty. Why is this? Why would the law account for the fact that
13 if there's no one around to see a crime, the Defendant can still be guilty if the victim
14 is believed beyond a reasonable doubt?

15 Because the Defendant doesn't get the benefit of going in to a room in
16 the middle of the night when his wife is asleep, when the only other witness in the
17 room is a newborn baby. When the little girl is four and being able to violate her;
18 being able to perform sexual acts on her. And then get up and say well, no one saw
19 it. No one was around so what are you going to do? You can't prove that. The law
20 accounts for that. Defendants don't get the benefit of secluding somebody.

21 These kinds of crimes, ladies and gentlemen, don't happen in front of
22 other people. They happen exactly the way they happened in this case. They don't
23 happen with the carnie worker from the Carnival that everyone's scared of. They
24 happen with the person who's in your own home, the person that you invite into your
25 home, the person that you trust, the person that you leave your children around;

1 that's who has access to children. It's the people that you would least expect. It's
2 the Defendant. It's Uncle Dustin.

3 And that's why we have this law. So her testimony -- Jocelyn's
4 testimony here at the witness stand and back in 2010, if you believe her statements
5 beyond a reasonable doubt; that's enough. We have more here. But that's enough.

6 What's reasonable doubt? So, reasonable doubt -- in order for doubt to
7 be reasonable, it has to be actual. It can't be based on speculation, can't be based
8 on possibility. It's not probably doubt. It's not maybe. It's beyond a reasonable
9 doubt. So why do we have the highest standard? Well that standard isn't -- or
10 should I say it's the highest standard in the system; absolutely. But it doesn't mean
11 beyond any doubt because if it was beyond any doubt in the world, we would never
12 convict people. Right? It's beyond a reasonable doubt.

13 So when you're going through it and if you think something in your
14 mind, well, you know, maybe this four year old just hated him so much that she
15 made this up. Is that reasonable? It's not reasonable and it's not reasonable doubt.
16 Well, maybe the family just hated him so much because he went against their
17 wishes by marrying the daughter and they somehow then colluded to make this up.
18 Not reasonable and it's not reasonable doubt. So for doubt to be reasonable it must
19 be actual, not based on possibility, not based on speculation.

20 So when you judge credibility of Jocelyn and the other witnesses there
21 are -- I'm sorry, when you go through their testimony, let's talk a little bit about
22 credibility. The credibility or believability of a witness should be determined by a
23 number of things: Their manner up on the stand, relationship to parties, fears,
24 motives, interests, feelings, opportunity to have observed the matter to which he or
25 she testified, and the reasonableness of his or her statements and the strength or

1 weakness of his or her recollection; manner up on the stand.

2 Look at the witnesses that testified in this case. Jocelyn presented to
3 you at seven years old. Look to your own experiences with seven year olds to see if
4 she was reasonable in this case. She presented well, she was nervous, she
5 brought her little stuffy with her. All what you would expect of a seven year old who
6 has to come in to a courtroom and testify in front of a room full of strangers about
7 something like this.

8 There was an insinuation by the Defense that she had somehow been
9 practicing. And she did use the word practice; I want to practice. What was
10 interesting is that the Defense didn't first asked [sic] Nicole about that. Did you
11 notice how they never asked her those questions? They never gave her the
12 opportunity to explain what that meant. No, they didn't. They waited until the seven
13 year old got on the stand. And then they said, well, isn't it true you practiced with
14 your mom. And she said, well, yeah. I wanted to practice.

15 Well, what's practice in her mind? Is it saying, mommy, how is going to
16 be when I get up there and testify? What am I going to have to do? Who's going to
17 be there? Is it preparing her for the fact that the man that violated her is going to
18 sitting right in front of her and she's going to have to talk about it front of him. But
19 they never gave Nicole that opportunity. She wasn't coached. Why would she be
20 coached in this case? Who is hurt in this case; but everyone?

21 Relationship to the parties. Again, the defense is throwing it out there --
22 almost shoved it down the witnesses throats that they hated Dustin. What you need
23 to remember? Questions from me, questions from Ms. Edwards, questions from the
24 Defense, any bickering that we have going on between us during sidebars; that stuff
25 is not evidence. What's evidence is what comes from that witness stand.

1 Just because the Defense asks a question, isn't it true you didn't like
2 Dustin? It's what this person says [indicating the witness stand] that matters. And
3 every single time this person, whoever it was, said that's not true -- yeah I didn't
4 appreciate that he married my daughter without my husband's blessing but we got
5 over it. We wanted them to seek counseling and wait. The Defense would ask
6 again, isn't it true he wasn't included in anything to Megan? Well, yeah, I've said
7 that but -- they wouldn't let her finish. Then she went on to say what her whole
8 statement was: He didn't really ingratiate himself either.

9 That's the evidence that you have to rely upon and that's the evidence
10 that you took the oath that you would include in your deliberations; not questions by
11 the State and not questions by the Defense. And think about that because
12 sometimes you'll remember that you heard something but you're not quite sure
13 where. Make it came from that witness stand because that's evidence.

14 So, relationship to the parties. Well, what was the relationship between
15 these parties? They were a cohesive, loving family. They went to church together,
16 they went to barbeques together, they watched out for each other. Did they have
17 issues? Of course but what family doesn't? There's lots of people in people's
18 families where you think, ugh, you know, my sister's husband bugs me, or my
19 sister's husband is annoying. I wish he wasn't around as much or my brother's wife
20 is annoying. You know, she can be rude and whatever it is.

21 But to rise to the level of making something like this up, how much
22 would you have to despise the person to accuse them of something like this? And
23 who ultimately got hurt in this case? It's not just the Defendant or Jocelyn. It's
24 Nicole, it's the parents, it's their brother. It's the -- all of the children; Levi and
25 Joshua. It's everybody. Fears, motives, interests or feeling; no motive. There

1 would never be a motive in the world for a child at four years old to come up with
2 something like this. I mean, just silence in terms of motive.

3 Opportunity to obser -- to have observed the matter to which he or she
4 testified. She had every opportunity to observe because she was there and then the
5 reasonableness of his or her statements and the strengths or weaknesses of the
6 recollections. At seven years old, there were things that she didn't remember as
7 well. But I ask you if you have any questions to go back and watch the video and
8 what her recollections were within days of this happening and the reasonableness of
9 her statements.

10 Some things were very expected of a child and other things were very
11 unexpected. Words like dug or sink. So let's go through Jocelyn's statement and
12 see how it's corroborated with the other evidence. I've told you that her testimony
13 standing alone is enough if you believe her beyond a reasonable doubt.

14 What does she know? She said that this happened while her mommy
15 was in the hospital. And we know that her mom was in the hospital. That's not
16 disputed; completely uncontroverted that she and Katelyn were spending the night
17 at her Aunt Megan's and Dustin's house. And we know that. We know that while
18 Nicole was in the hospital Aunt Megan said that she would take the girls and that
19 she did. And she took them over to the house on that Saturday. We know that
20 Dustin went to see his mom in the hospital and that he came home and the kids
21 were there.

22 Now, when Megan first talked to the police a week after the incident,
23 she told the police that she was getting the kids ready for bed. Three years later,
24 she doesn't necessarily remember if they were actually in bed or if they were getting
25 ready for bed. She did remember that the Defendant interacted with Levi in the

1 room. But a mere week after or ten days after the incident, she specifically told the
2 Defendant that he came that night and she was getting the kids ready for bed.
3 That's what Jocelyn testified to; that she was there again more or less
4 uncontroverted.

5 She said that Mimi was sleeping in her room with Levi and Katelyn;
6 that's what Megan also testified to; that she was asleep in her room and that the --
7 Levi and Katelyn were on the floor in that room. Jocelyn said that she slept in Josh-
8 Josh's room. Again, same thing that Megan testified too. And that Josh-Josh was in
9 the crib next to her. Megan described the layout of the home; that her bedroom was
10 kind of a little bit diagonal to where Josh-Josh's room was and that there was a crib
11 in there and a futon.

12 Corroboration of details that this four year old child had. She said she
13 was on the futon and that's exactly what Megan said. She said that her uncle came
14 in to her room to check on Josh-Josh. She actually, in her statement to the police in
15 2010, she said he came in the room and he forgot to check on Josh-Josh. But, we
16 know that he came in to the room, either checked on him or didn't but for the
17 purpose of supposedly checking on Josh-Josh. We know from Megan that at least
18 two to three times throughout that night, he got up and he left her bed and he went
19 in to Josh-Josh's room to check on the baby and to molest his niece.

20 She said that it was time to go night-night; that it was dark. It was
21 nighttime. We know from Megan that it was also the middle of the night that this
22 was happening. It was interesting she said in her statement to Detective Hatchett,
23 he was recording me. Now, physical evidence doesn't always come in the form of a
24 fingerprint or DNA, or something like that. He was recording me. Well, what do we
25 know is in that room? The baby monitor. We've always known that. We didn't have

1 a photograph of what the monitor may or may not have looked like but she's always
2 said that in her statement; that he was recording me.

3 So think about that. There's a baby monitor in the room and it's by her
4 futon. Well, what does a four year old think of a baby monitor? She doesn't know.
5 She doesn't know what the purpose of it is. She sees what in her mind is a recorder
6 and she specifically says, he's recording me. Well, number one it's corroboration
7 that the evening happened exactly like she said because we know that the monitor
8 was in there pursuant to even the Defense. So, it puts her in the room with this
9 monitor. But also what does it indicate? That he's touching it? That he's
10 manipulating it in some way because she's somehow has attributed this recorder to
11 the Defendant. He's recording me.

12 She says that he went to the bathroom to wash his hands. Well, what
13 do we know from Megan? That the bathroom is right across the hall. You walk out
14 of the baby's room and walk right in to the bathroom. And it makes sense, right? I
15 mean, if a man sticks his finger into a four year old vagina and then he sticks his
16 finger into her anus, he would probably go to wash his hands before he got back into
17 bed with his wife. It makes perfect sense. She said: Then he went bye-bye. Again,
18 four years old, in the midst of describing this event that happened to her; saying
19 things like it was night -- it was nighttime, it was time to go night-night, and then we
20 went bye-bye.

21 She told you that she told her mommy and that she told Megan and that
22 they were crying. And what do we know from everyone? That the incident at the
23 house included her mom, included her grandma, grandfather was also there, and
24 her uncle, and that Megan came and that they were crying. And with every reason.
25 Corroboration. And she also told you -- and she -- she told you and the detective

1 that she had to go to the doctor; that she had to go to the doctor because she was
2 hurting. And we know that she did go to the doctor. And you heard from Dr. Cetl
3 who is a consultant through Sunrise where she got this examination done at the
4 emergency room.

5 So, her testimony and her statement doesn't [sic] stand alone. It's
6 entirely corroborated by everyone else that was involved in this case. What does
7 Megan say? Megan says that she called the Defendant after she talked to Jocelyn.
8 And she says to him: Well, what happened? And he says: You know what
9 happened. So, how does he know that she's talking about Saturday night? Well,
10 maybe because he made that up clearly, in order to account for the fact that he's in
11 that room. Why does he go into the room and immediately wake up his wife and tell
12 her something as innocuous as oh I accidentally sat on Jocelyn and then continue to
13 say it?

14 He says: I told you what happened. And then she says: Yeah I
15 remember that you woke me up to tell me. So, where does a four year old get this
16 from? And that ladies and gentlemen is the ultimate question. Where on earth
17 would a four year old get this from? There is no motive; there is no basis of
18 knowledge. She would have no idea that this kind of activity is even in the realm of
19 possibility. She is four years old. So, where would she get this from unless that
20 man went into her room and violated her and perpetrated these acts upon her?

21 There's one person who had the opportunity to do this. While
22 everything that Jocelyn says is corroborated in one or another, there's one tiny, tiny
23 minute, one tiny moment, that no one else can testify to but Jocelyn. But the
24 Defendant places himself in that home, he places himself in that bedroom, and he
25 places himself on the futon where this child was. So, she's right on every single

1 thing except that; that isn't reasonable and it certainly isn't reasonable doubt. The
2 Defendant told his wife, Megan, he said: You know what happened. I told you what
3 happened.

4 Ladies and gentlemen after you've the evidence in this case and after
5 you've heard the testimony in this, Ms. Edwards and I on behalf of the state of
6 Nevada would ask that you go back and deliberate and that you come back out here
7 and that you tell the Defendant that you know what happened too; that you know
8 that on July 10th of 2010, he sexually assaulted his niece Jocelyn by sticking his
9 fingers into her vagina and into her anus. And please do that by finding him guilty of
10 both counts and -- counts 1 and 2. Thank you.

11 THE COURT: Defense.

12 MR. BECKER: I'm going to need the exhibits.

13 THE COURT: Okay. Just -- if you'll leave those right there on that.

14 MR. BECKER: I'll just use these ones.

15 THE COURT: All right. You need others?

16 MR. BECKER: No. Thank you.

17 THE COURT: All right.

18 [Colloquy between the Court and the Law Clerk]

19 **CLOSING ARGUMENT BY THE DEFENSE**

20 BY MR. BECKER:

21 Good morning ladies and gentlemen of the jury. At the beginning of this
22 case my associate Mr. Castillo explained to you that this was not such a simple case
23 and he asked you to listen closely and learn a little bit more about the family
24 dynamic here; that it was very relevant. Now Ms. Fleck comes up and tells you from
25 the very beginning that this is a cohesive, loving family. And -- but it's not so simple

1 because what you could see is that there were a lot of indications that show that this
2 family was not so cohesive and loving; at least as came to Dustin. And I think
3 what's really clear if you look at all of the evidence that Dustin was never truly
4 accepted into this family.

5 From the very beginning Dustin was not approved. People -- numerous
6 members of the family did not go to the wedding to show how non-cohesive this
7 family is once this is all done, what is the family doing? They're blaming Megan to
8 the point that Megan still does not have a healthy relationship with her family. And
9 regardless of anything else, anything that might be attributed to conduct of Dustin
10 certainly would not be Meg -- would not be Megan's fault.

11 So, clearly there's some dysfunction going on in this family. It's not
12 such a cohesive and loving family when it comes to the dynamic of Megan and
13 Megan's relationship with her sister Nicole. Clearly, you see a lot of testimony so
14 there's just no way an objective rendering of these facts could suggest that this is a
15 cohesive family. There are problems with the family as manifested and seen in
16 courtroom in relation to this case.

17 Now there are a number of instructions that you're going to consi -- that
18 you're instructed to consider in rendering your verdict in this case. And one of the
19 instructions that the State really wants to seize on is Instruction Number 7. And it's
20 hard to read -- well, you have copies of it. It says: There is no requirement that the
21 testimony of a victim of a sexual offense be corroborated and her testimony alone,
22 standing alone, if believed beyond a reasonable doubt is sufficient to sustain a
23 verdict of guilty. That's key language; if believed beyond a reasonable doubt.

24 But there are other instructions that give guidance on how to interpret
25 that instruction because what the State wants you to do is they want you to seize on

1 that instruction and they want you to believe that all they have to do is out Jocelyn
2 on the stand and say believe her and that's their only obligation. But their obligation
3 is much greater because their duty in prosecuting a Defendant is to prove their case
4 beyond a reasonable doubt.

5 And you have an instruction on proof beyond a reasonable doubt but
6 Instruction Number 2 also says starting on line 4: You are not to single out any
7 certain sentence or any individual point or instruction and ignore the others but you
8 are to consider all the instructions as a whole and regard each in light of the others.
9 This is really important because the State wants you to just focus on that instruction.
10 And they want you to believe that in order to satisfy their burden that they don't have
11 to do anything more then have someone come up and testify. And I suggest that
12 the -- the burden of proof beyond a reasonable doubt requires more.

13 Ultimately, you as jurors decided what meaning to give to that burden of
14 proof in your rendering of a verdict. And I would suggest that we should demand
15 more from the State in a case such as this and I'm going to go through a number of
16 reasons why I think you should demand more and where I think the State fails to
17 meet its burden.

18 Another important thing I should point is you know, it's -- Instruction
19 Number 18 and in line 8 it says a verdict may never be influenced by sympathy,
20 prejudice, or public opinion. I'm going to hone in on the word sympathy and mind
21 you Dustin Barral is sitting here; he's greatly affected by this verdict. There are
22 other supporters on each side and the purpose of rendering a verdict is not to
23 reward one side or the other or you know, hey, how -- you know, how can we look at
24 one side or the other when we walk out of this courtroom and pass them and justify
25 the verdict. You're not asked to do that and sympathy should not play a role. So

1 you should not get consumed with who is observing and who you owe this, that, or
2 the other to.

3 I'm asking you to render a verdict based on the facts of the case and to
4 adhere to this instruction that says you should not let sympathy influence you. And
5 of course when there's a child witness -- I mean -- you -- I could see the expressions
6 on juror's faces as Jocelyn sat -- sits on the witness stand and she's a cute kid. But
7 you can't just render a verdict for the cute because she's a cute and because you're
8 sympathetic towards her. Your duty is to base your verdict on the evidence in this
9 case and nothing else.

10 I'm going to go back to the instruction -- Instruction Number 7 about the
11 testimony -- about Jocelyn's testimony. And I'm going to suggest to you reasons
12 why, standing alone, it cannot be believed beyond a reasonable doubt. Even Ms.
13 Fleck talked to you in her closing about why there's a time period from July 10th to
14 July 12th how it's not isolated to one incident and she talks about the mind of a child.
15 Because it involves the mind of a child we can't necessarily isolate this. And it is
16 somewhat difficult to interpret what's going on in the mind of a child, especially a
17 four year old as Jocelyn was at the time these allegations came to the surface.
18 Okay. When she testified, she was seven years old.

19 But what do we know about Jocelyn in terms of assessing her
20 credibility. We know that -- the testimony was contradicted. There was testimony
21 from Nicole and Joanna that said for years she was complaining about pain in her
22 vaginal area that felt like a nail; that it really hurt. Her Aunt Kay -- Katelyn -- I'm
23 sorry her Aunt Kathy came in and said that this -- these complaints lasted for two or
24 three months. But we know that she continued for a substantial period of time to
25 complain that she had this pain in her vaginal area and they took her to the daughter

1 and the doctor indicated that there was no medical explanation for it and in fact, it
2 was a psychosomatic issue. Okay. Something that was purely in her imagination;
3 this pain that she was feeling.

4 So in terms of assessing the credibility, when we have somebody who
5 goes on to complain for years and years about this pain that has no medical
6 explanation, that certainly suggests questions about the credibility of this witness.
7 Okay. We don't know -- I mean, you see a small window. You have a small
8 opportunity to observe a witness take the stand; to talk about things. You don't
9 know the whole psychological dynamic and the extent to which this family dynamic,
10 which I'm describing frankly as a dysfunctional family dynamic, we don't know how
11 that could influence a child.

12 And there's certainly reason to believe that children absorb the
13 tensions inside of the family home. And at the point in time where these allegations
14 comes to surface, we have Nicole living with her parents David and Joanna in the
15 house. We know that Dustin is not well-liked and it's reasonable and inferential, and
16 the instructions say that you can make reasonable inferences, that -- that Jocelyn
17 would've absorbed and understood the fact that Dustin was not well-liked.

18 Now, let's talk about Dustin. Let's talk about the night in question. Why
19 did Dustin go into the room? We have very, very clear testimony. The State would
20 probably like you to believe that Dustin had some agenda; that he was looking to do
21 something to Jocelyn. But what does the testimony show you? The testimony
22 shows you that Joshua was sick and that it was Dustin's turn to go into the room.
23 The testimony shows you that Jocelyn had spent the night over at Uncle Dustin and
24 Aunt Megan's many times; once or twice a month without incident.

25 So, again corroborates the notion that Dustin was not looking to have

1 any kind of improper contact or involvement with Jocelyn because nothing like this
2 had ever happened before. And reason dictates that Dustin and Megan were
3 trusted to care for Jocelyn because the kids would spend the night at their house
4 very often. But why does Dustin go into the room? Does he go in for some sinister
5 purpose? No, he does not. He goes into the room because lo and behold there's a
6 baby monitor and this is Defense A for identification. And it's important to note as a
7 footnote -- and I'm going to talk about Detective Hatchett a little bit more later but
8 this is why we expect law enforcement to do an investigation; this is really important
9 stuff

10 Detective Hatchett, what does do? He takes some statements in
11 person a couple -- he calls Joanna on the phone, does a recorded statement. Never
12 goes to either house. Never does any kind of thorough, comprehensive
13 investigation. If he had gone to the Barral home, he would've seen that there was a
14 baby monitor in the room and Megan testifies that she hears noises coming from
15 Joshua's room and as would be expected that a mother with an infant would be very
16 attentive to any sounds coming from a room. It's natural. It's a mother's instinct.

17 She wakes up Dustin and reminds him that it's his turn to go into the
18 room, which he does. Again, not for some sinister purpose but to look after his son
19 Josh-Josh, who was sick. That's the testimony in this case. Okay. And I'm going to
20 touch on this because you know, it's relevant. We have some description of how
21 these baby monitor's work. And Megan told you that the bottom portion here is the
22 one that it's in the bedroom and it has a volume button but the one on the top is the
23 one that's in Josh-Josh's room, actually on the futon. It does not have a volume
24 switch and if it gets turned off or unplugged it makes a loud noise.

25 MS. FLECK: And I'm just going to -- and I don't mean to object but it -- that

1 assumes facts not in evidence. She said that if it is unplugged in that room it puts a
2 noise off in the other room; never said anything about a volume control. THE

3 COURT: Okay.

4 MS. FLECK: In fact, she said it's in both --

5 MR. BECKER: Well --

6 MS. FLECK: -- rooms.

7 THE COURT: I guess we'll remind the jury, Jury Instruction 15 and Jury
8 Instruction 22: What the attorneys say is not evidence.

9 MS. FLECK: Okay.

10 THE COURT: Because they weren't witnesses. They're just arguing for you.
11 They're the mouth for each of their clients. So, go ahead.

12 BY MR. BECKER:

13 Well, Ms. Fleck acknowledges that Megan testified that this is -- if this is
14 turned off or unplugged, it makes a loud noise in the bedroom. And my as -- my co-
15 counsel, Mr. Castillo actually showed this picture to Megan on the witness stand and
16 he asked her about it. He said you see here this one has a volume button and
17 she -- I believe the testimony will reflect that she acknowledged that the one on the
18 top does not have a volume button. And Ms. Fleck makes an interesting argument
19 to try to address the issue of this monitoring device where she endeavors to --
20 creatively interpret a statement made by Jocelyn about where she says he was
21 recording me.

22 That's Ms. Fleck's interpretation of the evidence and she suggests to
23 you that you know, what would Jocelyn think if she was saying that -- that Dustin
24 Barral was recording her that he must have done something to touch or fidget with
25 the monitor but ladies and gentlemen I'll suggest to you a few things. First of all, no

1 reason to believe that a four year old would even know what this is. Okay. But
2 more importantly -- and you're going have the disks if you want to hear it or play it.

3 The statement that Ms. Fleck makes where she interprets Megan as
4 saying she was recording me, it's not an accurate interpretation of what Megan said.
5 All right. I'm sorry, what Jocelyn said. The statement that she's interpreting is they
6 were -- he was recording me. If you listen to it closely she says -- he says -- she
7 says he was hoiting [sic], hording [sic], hurting me. She doesn't say the word
8 recording. It could sound like it but if you listen closely to the word, the word is
9 hurting, not recording. So, this whole theory of Ms. Fleck that Dustin was fidgeting
10 with the monitor is pure fantasy.

11 And you know, let's talk more about his monitor because I think it's very
12 important. Dustin Barral goes in the room to step on his -- to check on his son Josh-
13 Josh. And he knows -- of course he knows that there's a monitoring device and that
14 his wife is listening to everything that's going on in that room. So, this notion that he
15 would walk into the room with a monitoring device that has no volume, that he can't
16 unplug or turn off without making a buzz, and engage in this type of activity with
17 Jocelyn is objectively absurd and unreasonable.

18 And you know, even with regard to Jocelyn's description of what goes
19 on, interestingly she alternatively says at times that nothing was said and then she
20 says that she told Uncle Dustin stop and Uncle Dustin said, I want to do it again and
21 again; that was he statement attributed to Uncle Dustin. I want to do it again and
22 again. Now does this seem reasonable? Does it seem fathomable that Dustin
23 would go into a room with a baby monitor and would say I want to do it again and
24 again? I mean, could you imagine Megan in her room listening to Uncle Dustin
25 saying I want to do it again and again or if Jocelyn was saying stop. Okay.

1 And we heard that this device was very sensitive and we know that
2 mommy is listening for sounds of baby and if Jocelyn had said stop, it's reasonable
3 to infer that mommy would've heard it and mommy would've come in and said why
4 is Jocelyn saying stop? And it's for this reason that we go back to this instruction
5 about if you believe Jocelyn beyond a reasonable doubt. If you believe her beyond
6 a reasonable doubt then that may be sufficient but you decide that.

7 But in light of these factors, can we believe Jocelyn's testimony beyond
8 a reasonable doubt? And I would suggest that we cannot with reasonable certainty
9 accept her testimony beyond a reasonable doubt; especially when we consider all of
10 the other factors in the family dynamic that we've talked about.

11 But there's more. Okay. Doctor Sandra Cetl testifies about you know,
12 about this issue of grooming and how it's common if somebody is looking to molest
13 a child that they're going to groom them first by developing a unique relationship.
14 And what do we hear? We hear that Dustin was not particularly attentive to Jocelyn.
15 The testimony was well she was alright with Uncle Dustin but she liked her Uncle
16 Michael better. And you know, she even says well sometimes I talk to Uncle Dustin
17 and he wouldn't responds which apparently seems to be a part of his demeanor.
18 Okay. That maybe he's quiet, maybe he's not responsive. But it certainly doesn't
19 seem to suggest that he was grooming Jocelyn for anything.

20 There's a -- it's obvious from the -- you know, the testimony of a -- of
21 the family members that they -- there's a lot of anger, there's a lot of animosity
22 towards Dustin. And the State goes to great lengths to tell you how much harm
23 Dustin has caused and in essence to blame Dustin for this whole family dynamic; it's
24 all Dustin's fault. Okay. I would suggest to you that this dysfunctional family
25 dynamic existed before Dustin came into the life of this family, that is continues to

1 exist today, and that the reason why the State wants to kind of blame this all and put
2 it all on Dustin is because they basically want you to look over here now and just
3 see him as this awful, awful person when the charges here have to do with sexually
4 assaulting a child.

5 But they want you -- you know, they want to blame him for anything and
6 everything they can, to make you look at him in as negative and cynical a way so
7 that it's easier to convict him of these charges. Again, I would suggest to you, in all
8 fairness and objectivity that a reasonable interpretation of the evidence is that a
9 negative family dynamic existed before Dustin came into their lives and still exists
10 today.

11 Now when I -- when we spoke in voir dire we talked about this burden
12 of proof and we talked about that fact that it was the State's burden to prove their
13 case beyond a reasonable doubt. And so they -- in order to fulfill that burden, they
14 have to prove each and every element of the charge against Dustin Barral. And
15 there are a variety of ways I could get up here and argue this case but I told you
16 during the voir dire selection that it's not -- and the Judge told you as well. He said,
17 you know, the Defendant's not required to do anything. The Defense is not to prove
18 any -- is not required to prove anything. It's only the State that's required to prove
19 their case beyond a reasonable doubt.

20 And I talked to you about the fact that you know, there are two verdicts
21 rendered: One is guilty and the other verdict is not guilty. And that in fact, a not-
22 guilty does not require you to find that Dustin Barral is innocent. As a matter of fact
23 you could go back into that jury room and you could say you know, I'm inclined to
24 think something happened. I'm inclined to think maybe he did it. I'm inclined to
25 think that probably he did it. But that's not the burden of proof in this case. The

1 burden of proof in this case is proof beyond a reasonable doubt.

2 Now I could get up here and I could argue and will argue that Dustin at
3 and near the time of this event provided a very reasonable explanation as to what
4 occurred. And that there's nothing that's been brought forward that would tend to
5 disprove or discredit Dustin Barral's explanation of what happened in the room that
6 night. But I don't have to argue for Dustin Barral's innocence and I -- and to take on
7 the challenge of standing up here and trying to argue for complete innocence is not
8 my burden. Okay. My burden is to argue that the State did not prove the case
9 beyond a reasonable doubt.

10 With regard to the innocence component of this and I'll use my chair a
11 bit as if it's a sofa. But, -- or a futon, excuse me. Reasonable inferences could be
12 drawn from the evidence. We went over the instruction on reasonable inferences
13 and how you can draw reasonable inferences. Dustin has a sick infant, Josh who's
14 in his crib. Josh is making a stir, he's -- his wife says will you go check on Josh?
15 This may have happened more than once throughout the night; that Josh was
16 stirring because he's sick. It would be reasonable for a father to go into the room to
17 check on the child and perhaps at the moment that he gets into the room, the stirring
18 isn't going on.

19 So, it's perfectly reasonable to infer from the evidence that in such a
20 situation, knowing that there's a futon in the room, that he might go to sit down on
21 the futon for a moment or two to see if the baby stirs. Okay. And the evidence that
22 we have clearly is that Dustin came home and he did not know where Jocelyn was
23 sleeping. Ms. Fleck takes a quote of Megan's where she says she -- when Dustin
24 came home she was preparing the kids, plural, to go to bed. But it was very clear
25 from the testimony that the kids that she was preparing to go to bed were at that

1 time Levi and Katelyn who were in her room. And there was, absolutely, testimony
2 that my colleague, Mr. Castillo, read in that Megan said that Jocelyn had already
3 been in the -- placed in the bedroom and -- with Josh. And that there was no reason
4 to know that Dustin knew which room Jocelyn was in because there was a third
5 bedroom which was Levi's bedroom, who was two years old. And it's reasonable to
6 infer that he assumed that Jocelyn was sleeping in Levi's room.

7 So let's look at the dynamic of somebody going up to a futon -- I'm sorry
8 going up to a crib, checking on a kid, going back to sit on a futon in a dark room not
9 knowing that a child is sleeping. A chair has -- you know, two handles. So when
10 you sit back on a chair you might expect you put your hands back and you sit and
11 you go for the rails. But if it's or sofa or something that doesn't have handles, likely
12 you just sit back. But the natural position is for the hands to be back when you sit
13 down. Okay.

14 Dustin talked about an incident where he accidentally sat on Jocelyn.
15 Accidentally sat on Jocelyn. Ladies and gentleman, I would suggest to you that
16 during the course of accidentally sitting on Jocelyn it's perfectly reasonable to infer
17 that something happened with his hands in relation to accidentally to sitting on her;
18 that she is now interpreting as having dug in her privates. It's a reasonable
19 inference that this event relates to whatever description Jocelyn is giving as to what
20 occurred. And it's an innocent explanation for what occurred here.

21 Now again, I -- it's not my duty to convince you that that's what
22 happened. I -- I am suggesting to you that that's what the evidence shows and
23 that -- you have that before you for your consideration as an explanation for why
24 Jocelyn is lodging allegations. Again, it's the State that has the burden of proving
25 this case beyond a reasonable doubt.

1 I'm now going to talk about issues relating to the State's burden of proof
2 that may be -- that do not go directly to my assertion of Mr. Barral's innocence. And
3 I think this was really important because Dr. Cetl said something very, very
4 significant because in order to prove these allegations the State has to prove that --
5 beyond a reasonable doubt that there was insertion -- insertion or penetration of a
6 finger into the vaginal or anal opening of Jocelyn. And they called Sandra Cetl, their
7 expert, and I'm going to talk a little bit more about Dr. Cetl.

8 But Dr. Cetl said something very, very interesting during her
9 examination. She said that pressure on the outside could feel like the inside. Okay.
10 Pressure on the outside could feel like the inside. Okay. So if -- even if you believe
11 that there was something that happened, okay, or that Uncle Dustin was digging his
12 hands inappropriately, that's not -- the question before you isn't just did Uncle
13 Dustin's hand inappropriately go down Jocelyn's pants? The question is did he
14 insert his fingers inside of her vaginal opening or in her anal opening.

15 And in fact, there is a stipulation that there are no physical findings
16 whatsoever to support this allegation. No physical whatsoever to support or
17 corroborate. And the State's own doctor is now telling you that pressure on the
18 outside could feel like the inside; that's their own expert witness. Again, the State
19 has the burden of proving beyond a reasonable doubt that there was insertion into
20 these areas and their own expert tells you that pressure on the outside could feel
21 like the inside. To convict Dustin Barral, you have to have proof beyond a
22 reasonable doubt that there was penetration of the vaginal and anal openings. I'd
23 suggest to you that that does not exist especially in light of the testimony of the
24 State's expert.

25 Now regarding expert testimony, you have at -- this instruction too.

1 Number 17: You are to consider such opinion and wait if any to be given. You are
2 not bound however by such an opinion. Dr. Cetl testifies about a lot of things and I
3 suggest to you, ladies and gentlemen, that Dr. Cetl has a bias towards the
4 prosecution. Dr. Cetl is a witness who basically sat before and the State you know,
5 proffers this theory -- you know, normal is normal. Either we find physical
6 evidence -- and if we find physical evidence then something improper occurred but if
7 we don't find physical evidence, not to worry you can still infer that something
8 improper occurred. Okay.

9 Look, you're not to abandon your common sense and just because Dr.
10 Cetl has a degree, presents herself as a doctor to you, you have the right to
11 examine the quality of her testimony and of course you are not bound by her
12 opinion. I would suggest to you that her assertion about seeing some evidence
13 justifying a physical finding five percent of the time is something that your own
14 common sense should dictate to you is not reasonable. You're talking about -- they
15 have a camera that has -- it's a high-resolution density camera where there's a
16 substantial magnification. I mean, why do you sexual assault examinations? Why
17 would you do sexual assault examinations if you don't ever or rarely expect to find
18 evidence of sexual assault?

19 I would suggest to you that the county wouldn't spend its money to go
20 and do these examinations if the results were irrelevant. And I suggest common
21 sense dictates that you know that that's not the case. You know that if somebody
22 inserts their fingers and is digging inside of a vagina of a child and -- I talked about
23 the nails on the fingers versus a penis and intuitively reasonable inference suggests
24 that there would be physical evidence to substantiate such a finding and there was
25 in this case. There was none in this case.

1 The State has the burden of proving their case beyond a reasonable
2 doubt. They can't turn around and say well, there are no physical findings and that
3 corroborates the charges. No it does not. The fact -- the lack of physical findings
4 corroborates the fact that Dustin Barral did not dig his hand and/or fingers into
5 Jocelyn's vagina or anal opening.

6 I want to talk a little bit about Detective Hatchett. Okay. And I had
7 suggested to you --you know, that had Detective Hatchett done an investigation he
8 would have learned about the monitor, he would've seen the monitor; he would've
9 been able to photograph the layout of the room, the position of the crib, the position
10 of the futon, the relationship between the bathroom and the futon. You know, that's
11 not my job. It's not my job to do the State's work for them. Okay. It's the State's
12 duty, in order to prove their case beyond a reasonable doubt, to do a thorough
13 investigation.

14 And it stands to reason that a thorough investigation would be to visit
15 the home of the alleged occurrence; to get a search warrant to go in so that you
16 could photograph the relevant areas; so that you could actually do an investigation.
17 So that you could obtain any sheets on the bed, any blankets, anything that could
18 possibly be submitted for DNA, even -- Detective Hatchett says yeah well, in
19 retrospect I prob -- maybe I should have or could've done that. I mean, this is a
20 really serious case. This is a really, really serious case and maybe I should've done
21 that doesn't cut it when you are prosecuting a man for serious charges such as this;
22 that doesn't cut it. We have the right to expect and demand more from law
23 enforcement.

24 Detective Hatchett, five, six years on the force. He was a patrol officer
25 and lo and behold he gets this assignment. He makes detective; sexual assault

1 detective. When asked well when did you become a sexual assault detective? He
2 doesn't know. He doesn't know. I find it -- I was admitted to practice law on June
3 15, 1993 and that day is engrained in my mind like a birthday because I take my job
4 as an attorney to be -- very seriously. And it's monumental day for me that I was
5 admitted to practice law.

6 I suggest to you that it says something about Detective Hatchett and
7 how he sees his responsibilities and duties; that he doesn't know when he became a
8 detective and he doesn't know when he went from being a detective back to being
9 on patrol. It shows the kind of aloof character that doesn't really care about the task
10 that he's charged with. And obviously he went back from sexual assault to patrol it
11 wasn't his forte.

12 I suggest he didn't like what he was doing but he certainly didn't do a
13 very good job of it. Not only did he not go to the Barral home but he never goes to
14 the Hammonds' home. He never makes any inquiry and you heard Jocelyn
15 testifying about the clothes she was wearing when she spent the night over at Aunt
16 Megan's and Uncle Dustin's. And again, you don't have to be a criminal justice
17 major, you don't have to go to college, it stands to reason and your common sense
18 would dictate, that it would be really, really important and probative to get a hold of
19 these clothes. Okay.

20 And what do we know? We know that a bag was packed; that clothes
21 were taken to Aunt Megan's and Uncle Dustin's. The clothes were allegedly worn at
22 the time of this incident; that when Megan -- that when Jocelyn returned home she
23 had her clothes in her bags; that on Tuesday night when these allegations are
24 brought forward there's every indication the clothes are still in the bag. On
25 Wednesday when -- or Tuesday night when the call is made to law enforcement, the

1 clothes would still be in the bag. On Wednesday when Jocelyn and Nicole go to
2 meet with Detective Hatchett, the clothes would've still been in the bag and
3 somebody needed to ask the question: Where are these clothes? Okay.

4 It doesn't take -- it shouldn't take much convincing to accept that these
5 clothes should've been recovered, they should've been submitted for DNA testing to
6 see what was on the inside, to see if there was DNA, to see specifically if there was
7 Dustin Barral's DNA on the inside of those clothes, to see if the State could prove
8 these charges against Dustin Barral beyond a reasonable doubt. And mind you this
9 case really is not a case of Jocelyn Hammonds or Jocelyn Coleman, excuse me,
10 against Dustin Barral. This is a case of the State of Nevada versus Dustin Barral.

11 So you're really not here to reconcile the issues between Dustin Barral
12 and Jocelyn Coleman or the Hammonds family. In fact, the very last instruction,
13 Number 22 tells you that -- it ends, and you could read the entire instruction but I'm
14 going to start on the third line up on the right where it says: With this sole-fixed and
15 steadfast purpose of doing equal and exact justice between the Defendant and the
16 State of Nevada. The Defendant and State of Nevada.

17 And Ladies and gentlemen without doing any disrespect to these fine
18 prosecutors who argue zealously on behalf of their cause, I am suggesting to you
19 that the State of Nevada has not done their job and what is necessary to prove a
20 case like this beyond a reasonable doubt. Okay. Because this is not just about
21 advocacy. This is not just about attorneys getting up and trying to persuade you to
22 do something. This is about -- what has the State of Nevada done to prove this
23 case? What facts did they pursue? What investigation did they do? Was it
24 reasonable? Was it reasonable to expect more from the State of Nevada? I
25 suggest to you that it is reasonable and that it's unreasonable to accept the

1 evidence presented in this case as being sufficient to sustain a guilty verdict.

2 There is another significant, significant glaring weakness in the State's
3 case. All right. They bring before you a litany of individuals to testify about events
4 going from Saturday until -- you know, all the way through Wednesday. Okay. And
5 -- but notably there is a -- there was a notable gap in testimony. All right. Because
6 we hear that Michael picks up Jocelyn on Monday and she [sic] brings Jocelyn to
7 the home of her father, Frederick -- Fred Coleman. Okay. And the next testimony
8 we have is that twenty-four hours later that Nicole and Megan pick Jocelyn up from
9 her father's house. Okay. But there's twenty-four hours -- a twenty-four hour gap
10 here for which there is no testimony. Okay.

11 The State for whatever reasons fails to call Fred Goalman [sic] -- I'm
12 sorry, Fred Coleman to the stand. And I would suggest to you that it is a gap; that
13 you need to consider in evaluating the facts and evidence in this case. It's an open
14 twenty-four hour window for which the State provides no explanation. And, you
15 know, there were multiple opportunities for Jocelyn to disclose to individuals that
16 something inappropriate had occurred. Okay. One of those periods of time where
17 you might want or expect Jocelyn to have disclosed that something inappropriate
18 had occurred would have been during the twenty-four hour period which she was --
19 where she was with her father Fred Coleman.

20 Any evidence that Jocelyn was behaving unusually; that her disposition
21 or demeanor was unusual during that period of time, nothing whatsoever. Again,
22 when you consider the State's burden of proof, I would suggest that failing to
23 account for that time period creates a legitimate questioning concern that you should
24 consider in your deliberations. Jocelyn could've disclosed at church on Sunday.
25 She was there with her grandmother. She could've disclosed earlier in the day at

1 the hospital. She could've disclosed to Megan on Sunday night. She could've
2 disclosed to Michael in the car ride when Uncle Michael was bringing her to
3 Frederick's house. She could've disclosed to Fred. She could've disclosed to
4 Nicole or Megan on the way home from Fred's house. And none of this occurred.
5 None of it occurred.

6 And what happens when we have this initial disclosure? We have this
7 comment: Uncle Dustin dug -- dug into me. Okay. The six -- the six words. And
8 then lo and behold everybody freaks out. Nobody asks Jocelyn for any additional
9 detail of information. When did this occur? Where did this occur? What were you
10 wearing? Give me some more detail. Apparently no additional investigation and
11 what do they do? They immediately put her in the bathtub. Not something that you
12 would expect from somebody -- and I don't think again that you have to have had
13 some kind of training to understand that there -- if there's an allegation of sexual
14 abuse you don't want to just put the kid in the bathtub.

15 I mean -- you know -- granted the State may get up here and say you
16 know -- well, it'd been a couple of days. Who knows what Jocelyn had been up to;
17 whether there was a -- something of evidentiary value. But ladies and gentlemen I
18 would suggest that the reasonable response to something like that would not to --
19 not be to bathe the child immediately thereafter.

20 Coaching or practicing. Okay. There's evidence of that in this case.
21 We're not making it up. It's not something the Defense has done. It's not something
22 that we created. We know that Dustin was not well-liked. We know that the family
23 disapproved of the marriage and I think there was some degree of -- that there
24 was -- that there's a reasonable inference that when Megan was called over to the
25 house to come back home; that it was kind of the coup de gras. The family was

1 right. You never should've married the son of a bitch and we're going to call you
2 over and confront you with this. Okay. And now they got the goods on Dustin.

3 And Megan tells you she's upset. She didn't think that Dustin would be
4 capable of doing something like this. As a matter of fact the testimony was that he
5 was a good husband, a great father, a good man; he worked to support his family.
6 And they bring Jocelyn down so that Megan confront -- can confront Jocelyn about
7 this. And Megan starts to ask questions but she was not allowed to question
8 Jocelyn any further. And that Joanna, her mother, immediately took Jocelyn away.
9 And that Megan thought that was very strange -- thought that it was very strange.

10 Not something the Defense is making up. These are the facts. And
11 these are the facts as testified to. And lo and behold we learn that Jocelyn is
12 speaking to a counselor, a Betsy Morgan. And we learn and we questioned Jocelyn
13 about this: Didn't you tell your counselor that you wanted to practice? That you
14 were going to practice prior to coming in? All right. Now this is a girl who couldn't
15 even tell you if she was sleeping on the floor, on a bed, on a futon when she testified
16 in here a few days ago about the events in question. She didn't know where she
17 was sleeping. Okay. Yet, she was able to testify to other things. And she told
18 you -- again, not something that we did or made up, she told you that she practiced
19 in the days leading up to her testifying with her mother, Joanna; that's what she
20 said.

21 Now, you know -- the State can put a spin on it and they can try to tell
22 you what that practice meant; that it wasn't going over her testimony. But how could
23 -- how could she if she doesn't remember whether she was a bed or on the floor? I
24 mean, there's reason to suggest that the seven year old's memory of events that
25 allegedly take place when she's four isn't very good. And this was something,

1 perhaps one component of the testimony that she hadn't practiced or that she
2 wasn't coached on. But I would suggest to you that the evidence suggests that
3 there was some coaching or practicing going on here. And that should be a cause
4 for alarm in a case where you don't have any physical evidence to support the
5 charges. And you just have the testimony of a child who thinks years later that she's
6 feeling pains of nails in her vaginal area.

7 What happens when Jocelyn makes these allegations? Everybody
8 becomes very attentive to Jocelyn. Everybody becomes very attentive. Megan
9 comes home immediately. Michael is called back to the house. You know -- the
10 mind of a child. Can we say definitively what would motivate the mind of a child? A
11 child that, years later is still seeing a counselor and is it just because of this? Who
12 knows? It's the mind of a child. Who knows what kind of problems she had before
13 these allegations came to surface? And who knows what kind of problems develop
14 afterwards?

15 You may choose to listen to the audio and video recorded interview of
16 Jocelyn again in your deliberations. A few things I want to point out to you for your
17 consideration when you listen to it: When she's asked -- and everything leads up to
18 you know -- were -- you know -- you know this area where people aren't supposed
19 to touch. We have the diagram that's drawn where body parts are gone over;
20 State's Exhibit Number 3. So there's a lead-in. This is the body. These are the
21 parts of the body. Are there areas that nobody's supposed to touch? She says: My
22 privates. And she illustrates her privates. Okay. And she says, interestingly that
23 well, mommy and daddy are allowed to touch my privates. Mommy and daddy are
24 allowed to touch my privates. And when asked directly if anybody else had ever
25 touched her privates she says: No.

1 Detective Hatchett told about the importance of not asking leading
2 questions; of asking opening -- ended questions as to not insert ideas in to the mind
3 of the child. Okay. And we are contending that there was some suggestiveness
4 here. We are contending that there's a motive to manufacture allegations against
5 Dustin Barral. And when asked the plain question did someone touch you in your
6 privates? She says: No. And then we got to Detective Hatchett acknowledging in
7 cross-examination well she would disclose so he says he used a prompt -- a prompt
8 word; which was dig. Okay.

9 Now, he's trying to play a psychologist to some degree. I'd suggest to
10 you that a prompt word -- the word prompt -- it's no different than leading. Okay.
11 And it wasn't until asking this leading question that he gets a response where blame
12 is pointed in the direction of Dustin Barral. Regarding her testimony, interestingly,
13 there is a period -- a portion of the -- well -- repeatedly if you listen to the
14 testimony -- repeatedly she used the expression, trying to dig in my butt; trying to
15 dig. It's replete throughout the interview. She says trying to dig. Okay.

16 And at one point Detective Hatchett says: And did that go inside,
17 outside, or something else? And she says: Goes inside. And then he says: And
18 how long have you been -- how long did it go inside for? And she said: It was
19 like -- well, he moved before he was in my privates and he started digging and
20 digging. That's what he -- that's what she said. He moved before he was in my
21 privates and started digging and digging.

22 Again, could this be consistent with a fault, an accident that was
23 described where you're sitting down on your hands? I suggest that it could. I
24 suggest that her language if you listen to it closely is ambiguous as to what digging
25 and digging was. Is ambiguous as to what inside means because she says she has

1 her clothes on. Inside could be interpreted to mean inside the clothing. It's
2 ambiguous with regard to inside the vagina; it really is. If you look at it and if you
3 consider the questions that are being asked to elicit a response, there's a lot of
4 ambiguity.

5 There is also, interestingly, a statement that she makes that's just kind
6 of lingering out there that she had fallen off the futon. Okay. We don't know
7 anything more about it. But apparently there was something hap -- something else
8 that happened that night where she's falling off the futon. Okay. You know, who
9 knows what goes on in the mind of a child? Who knows what fears Jocelyn had?
10 Who knows what -- to what degree the animosity and distaste for Dustin Barral
11 affected Jocelyn at the time she's going to sleep? And who knows how that may
12 have influence and/or other may have influence her to lodge these allegations
13 against Dustin? Who knows what was going on for the twenty-four hour period of
14 time that's not accounted for by the testimony in this case and how they may have
15 influenced Jocelyn's allegations.

16 Well, you've heard it all. You've heard the testimony. You've patiently
17 sat through the arguments of counsel and I appreciate you for taking the time
18 although you don't have a choice, to listen to me and my argument. But what's
19 important is that you take what I have to say back with you in the jury room. And
20 there are twelve of you that are going to go back in the jury room -- the attorneys
21 have made arguments and the State gets to go again; the State gets to go two
22 times. We only get to go once and I won't get to respond to anything that the State
23 says from this point on.

24 But there are twelve of you who've listened to the testimony and I'm
25 sure that there are things that you've noted, things that are going to come up in the

1 deliberation room that the attorneys don't even talk about. We don't deny that
2 Jocelyn was a guest in the home of Megan and Dustin Barral at that time. We don't
3 deny that he went in to the room; that doesn't corroborate these allegations. But we
4 clearly deny and Dustin has denied the notion that he did something improper.
5 When Megan called and confronted him with the allegations he immediately denied
6 it. He had no reason to disclose the accident if he was trying to cover something up
7 because no allegation had been made when he told Megan initially about the
8 accident in the bedroom that night when he went to check on Josh-Josh.

9 I ask you to take your words -- my words back with you in the jury room.
10 And ultimately I'm going to ask you to find that the State has not proven the case
11 against Dustin Barral beyond a reasonable doubt and render a verdict of not-guilty.
12 Thank you.

13 REBUTTAL ARGUMENT BY THE STATE

14 BY MS. EDWARDS:

15 You have been sitting here for awhile -- and my greatest nightmare is
16 tripping over this. And you just heard a whole lot from the Defense; a whole lot. But
17 let's focus on what he actually told you. He -- it's like there's a puzzle. We've been
18 putting this puzzle together with all of the witnesses throughout the course of the
19 week. And we do appreciate your time listening to everybody and taking everything,
20 everything in to consideration. But we've built this picture for you all to look at
21 through the witnesses and through the exhibits.

22 And what Defense is doing is he -- in all of his argument, he zooms in to
23 this teeny, tiny little part of the picture; what's really there? What's not really there?
24 And then he zooms back out and then he goes over here and zooms in to
25 something else; what's here? What's not here? But what did he really say?

1 Speculation. And read your jury instructions about what you have to base your
2 reasonable doubt on. It's Instruction Number 11, I believe. It says: A reasonable
3 doubt is one based on reason. It is not mere possible doubt but it is such a doubt as
4 would govern or control a person in the more weighty affairs of life. If you skip down
5 in the paragraph -- you all can read so I'm not going to read the whole thing to you.
6 Doubt to be reasonable must be actual; not mere possibility or speculation.

7 So he's just throwing out all these things that are speculation. Not
8 putting Fred on the stand. Not having the clothing. Not having -- all of that stuff
9 about the baby monitor. It's all speculation. So what are you supposed to do?
10 You're supposed to listen -- you can consider what we say. You could completely
11 zoom -- tune out to everything I'm about to tell you but look at the evidence. So he
12 came up with a number of theories throughout the course of his argument; so let's
13 talk about them.

14 Let's go with the CSI first; at least that's the argument I like to call it.
15 CSI. He attacks Detective Hatchett; says Detective Hatchett doesn't remember the
16 day he became a detective. But Mr. Becker remembers the day that he was
17 admitted to the bar. So do I, the day I became a lawyer. Now whether I get
18 promoted, whether I go to the D.A.'s office, whether I'm in civil practice, whether I
19 decide to leave the practice altogether and -- I don't know go teach kids, the day I
20 was admitted to the bar, I remember.

21 He didn't ask Detective Hatchett what day he became a police officer.
22 Nobody did. He's like oh he can't remember what day he became a detective. So
23 what? He also can't remember the day he became a sergeant. And a sergeant is a
24 higher-ranking officer than a detective and he had to go back to patrol to go the
25 sergeant route; to become higher than a detective.

1 So, CSI. Lack of evidence is his argument. We have evidence. We
2 have testimony. We have the video. I apologize. My allergies are killing me today.
3 We have testimony, we have the evidence, we have the video, we have the diagram
4 that she drew. And they even brought for us the monitor from the baby room. So
5 we have those pieces of evidence. He's saying we don't have evidence because
6 there are no findings from the exam. And we all stipulate there are no physical
7 findings but the incident occurred on Saturday evening or Saturday night and she
8 goes to the hospital Wednesday afternoon.

9 Dr. Cetl told you it could be -- if, and that's a big if, there were any cuts,
10 scrapes, or injuries, if, it could've been healed within twenty-four hours. She hadn't
11 even disclosed within twenty-four hours. In fact, she waited until the first opportunity
12 she had to get her mother alone, to disclose what that man had done to her one
13 Saturday night. She -- it was actually three days until she disclosed. So all the
14 physical evidence that may or may not have been there; we'll never know.

15 And what physical evidence does he want from the SCAN exam?
16 There's no allegations that he stuck his penis in her. There are no allegations that
17 he got semen anywhere. There are no allegations that his blood, semen, saliva was
18 anywhere on that child. The allegation is digital penetration. Fingers that he put his
19 fingers in her vagina and that he dug with his fingers. So you wouldn't expect there
20 to be any DNA evidence in her or on her four days later. I wouldn't expect any DNA
21 evidence the day after from a finger. Dr. Cetl said probably wouldn't have any
22 evidence from a finger, from that exam.

23 So then he goes in to the clothing. So we get the clothing. So what?
24 What's that going to prove? That her DNA's on it? Sure. She had the pajamas on.
25 What about him sticking his hand underneath her pants, underneath her panties,

1 and into her vagina is going to leave some amount of DNA that the Defendant -- that
2 we're going to find on her clothing? No one even insinuated that he would've left
3 anything that would prove that he did this act to her on her clothing.

4 And let's think about it. He was in the house. She was at his home for
5 two days. Megan testified that he helped out with the kids; helped to get everybody
6 ready for church. Maybe he grabbed her clothing and picked it up and put it in the
7 bag. Would his DNA be on there? Maybe. Maybe not. Just as likely as shoving his
8 hand underneath her pants, underneath her panties, and into her vagina. Same
9 amount of potential DNA or not.

10 The other issue that came up during trial regarding the CSI is the futon
11 and the covering on the futon and the blankets. Again so we find his DNA on the
12 futon. Big deal. It's his house. He lives there. He's probably gone in to the room
13 multiple times; probably sat on the futon multiple times. But again, there was no
14 disclosure of semen, saliva, blood, or anything else coming off the Defendant during
15 this encounter. So we find his DNA. Big deal. So we find Jocelyn's DNA on the
16 futon and the blanket. Big deal. She slept there. She could've drooled. She
17 could've sweat while she sleeping. Finding DNA on something won't prove or
18 disprove that this specific act we're talking happened.

19 It was digital penetration. So what are we left with? All we have is
20 testimony. That's it. Because -- like I just said, DNA is not going to prove one or
21 another whether it happened or not. So all we have is testimony. And we didn't just
22 put Jocelyn on the stand and say hey look at her. Isn't she so cute? Believe her.
23 No. We have taken your time this week and put a multitude of witnesses that you've
24 all had to sit here and listen to; not just Jocelyn. And it's the context of everyone's
25 testimony that we are asking you to look at.

1 Now, Ms. Fleck went through the corroboration and all those kinds of
2 things so I won't waste your time anymore but let's look at a couple of other things
3 that matter. Let's look at the theory of coaching or some sort of conspiracy. For
4 coaching, who has to be involved? Let's think about the facts. Who has to be
5 involved in coaching Jocelyn? I submit to you that it would have to be -- obviously
6 Nicole would have to be in on the coaching. But who else would have to be in on it?
7 Jocelyn. Because she would have to sit there, she would have to retain the
8 information that's being told her, and then she's going to have to turn around and
9 spit it out to Detective Hatchett, to her grandmother. Or maybe her grandma's in on
10 the coaching. Her grandma was the second person she disclosed to. So maybe it
11 was Nicole, Joanna, and Jocelyn in this great coaching conspiracy.

12 Why? Why would they be coaching? And again, she's sitting there,
13 she's -- if she's being coached, she's listening to her mom and now to her grandma,
14 telling her everything she needs to know. Well, it can't be just them. And here's
15 why it can't be just them. There are details that Jocelyn disclosed to Detective
16 Hatchett in that video that only Megan can corroborate; that only Megan was aware
17 of. And in the course of all the testimony you've heard, all Nicole knew from her
18 child -- all she's ever known is that she was pulled aside on a Tuesday night; the
19 first time she'd seem her by herself since she'd gone in to the hospital that Friday.
20 And her child says to her that Uncle Dustin dug in her privates.

21 Nicole, clearly upset, goes downstairs so she doesn't show all her
22 emotion to this child. The grandmother comes upstairs. What'd you tell mommy?
23 Told her Uncle Dustin dug in my privates. Joanna, upset. They call Megan back to
24 the house. What about a conspiracy, what about a coaching would elicit the tension
25 that was described as being in the house that night when Megan got back? What