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ANTHONY CASTANEDA
Case No. 64515

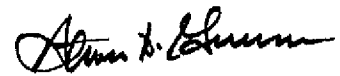
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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

ANTHONY CASTANEDA,

Defendant.

CASE NO. C272657
DEPT NO. V

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 5

FRIDAY, JULY 12, 2013

APPEARANCES:

For the State:

ALEXANDER G. CHEN, ESQ.
Deputy District Attorney
MICHELLE ANTHONY, ESQ.
Deputy District Attorney

For the Defendant:

P. DAVID WESTBROOK, ESQ.
Deputy Public Defender
ERIKA D. BALLOU, ESQ.
Deputy Public Defender

RECORDED BY LARA CORCORAN, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

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001318

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UNCERTIFIED ROUGH DRAFT

001319

1 LAS VEGAS, NEVADA, FRIDAY, JULY 12, 2013, 11:12 A.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: All right. This is a continuation of
5 State of Nevada vs. Anthony Castaneda, Case No. C11272657.
6 Record will reflect presence of the defendant with his
7 counsel, deputies district attorney prosecuting the case, all
8 officers of the court. We are outside the presence of the
9 jury at this time. Are there any matters outside the
10 presence?

11 MR. WESTBROOK: Your Honor, I have some records to
12 make. It can wait till whenever you want to do it. If you
13 don't want to keep the jury waiting, we can do it later.

14 THE COURT: All right. And we'll plan on, apparently
15 there's additional jury instruction that's been submitted.
16 We're going to have to do that at noon. Or --

17 MR. WESTBROOK: That sounds fine.

18 THE COURT: -- not at noon, but at -- at the lunch
19 period.

20 MR. WESTBROOK: Okay.

21 MS. WESTBROOK: Okay. But we're going to do all of
22 the jury instructions at the lunch period, right?

23 THE COURT: Right.

24 MS. WESTBROOK: Okay. Great.

25 THE COURT: All right.

UNCERTIFIED ROUGH DRAFT

1 MS. ANTHONY: And, Your Honor, we did invoke the
2 exclusionary rule. There are three witnesses that -- or three
3 individuals in the courtroom. I'm assuming they're connected
4 with the defendant.

5 MR. WESTBROOK: Your Honor, these are -- if I could,
6 I believe these are all interns from the Special Public
7 Defenders Office.

8 MS. ANTHONY: Oh, all right.

9 MR. WESTBROOK: And then these are interns from my
10 office.

11 THE COURT: All right. Let's bring in our jury.

12 MR. CHEN: Judge, since he is on the stand is it
13 okay, or Your Honor, for her to go to the stand together?

14 THE COURT: Yes.

15 MR. CHEN: Okay. Great.

16 THE CLERK: Has she already sworn herself in?

17 THE COURT: Yes.

18 THE CLERK: Okay.

19 THE COURT: Detective, you're still under oath.

20 THE MARSHAL: All rise for the jury, please.

21 (Jury reconvened at 11:14 a.m.)

22 THE COURT: All right. Please be seated. Good
23 morning, ladies and gentlemen. How are you doing today? So,
24 we have a cozier courtroom. This is one of the civil
25 courtrooms. And we may actually relocate after lunch back

1 down to the regular courtroom we've been in, which has more
2 room.

3 All right. The record will reflect that we have been
4 joined by all 12 members of the jury and the alternate. Will
5 the record so reflect?

6 MS. ANTHONY: Yes, Your Honor.

7 MR. WESTBROOK: Yes, Your Honor.

8 THE COURT: And Detective Tooley was testifying when
9 we left off yesterday. She's still under oath. And you may
10 resume your cross.

11 MR. WESTBROOK: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. WESTBROOK:

14 Q Good morning, Detective.

15 A Good morning.

16 Q Am I coming through loud and clear?

17 A Oh, yes.

18 Q Detective, part of the investigation includes
19 checking registry folders; is that correct?

20 A I don't know anything about registry folders.
21 That's a forensic aspect in this case.

22 Q Okay. Do you direct forensics to go and check
23 registry folders on computers or is that something they do on
24 their own?

25 A That's something they do on their own.

UNCERTIFIED ROUGH DRAFT

1 Q Okay. Is that part of policy?

2 A I do not know that. I know nothing about the
3 forensics side.

4 Q Nothing about it. Okay. But you are the person
5 who orders forensics to investigate certain things, correct?

6 A Yes. I submit a request for forensics.

7 Q Okay. Have you ever seen a registry folder?

8 A I do not know what a registry folder is.

9 Q Okay.

10 MR. WESTBROOK: May I approach?

11 THE WITNESS: Yes.

12 THE COURT: Yes.

13 BY MR. WESTBROOK:

14 Q In case you don't remember what they look like,
15 I'm bringing you something that might refresh your
16 recollection. Please tell me if -- if it does. I've got four
17 pages here to look at.

18 A I -- I don't know exactly what these are.
19 They're obviously from the -- from the file tree [phonetic] on
20 the computer. But I can't tell you.

21 Q Okay.

22 A Other than it says "Registry editor" at the top,
23 that's all I can say.

24 Q All right. So, you wouldn't know how to make
25 head or tails of all these numbers?

1 A No, I would not.

2 Q Okay. Thank you. When we left off, we had
3 talked about your training in interviews and interrogation
4 techniques?

5 A Yes.

6 Q And you said that you have studied several
7 methods, including the Reid technique and the one that I can't
8 pronounce.

9 A Stincelli.

10 Q Stincelli. Thank you very much. You also said
11 that while you know all the techniques, you've, based on your
12 training and experience, come up with your own techniques that
13 you utilize?

14 A Not my own techniques, based on all the training
15 that I've received from those classes. It's just kind of
16 molded together.

17 Q Okay. So you just, you take what you learn and
18 you create your own system, make it your own; is that fair to
19 say?

20 A Somewhat, yes.

21 Q Okay.

22 MR. WESTBROOK: May I approach?

23 THE WITNESS: Yes.

24 THE COURT: Yes.

25 BY MR. WESTBROOK:

1 Q Have you ever seen this book before?

2 A No, I have not.

3 Q Okay. If I open it up, do you recognize
4 anything about the cover page?

5 A I recognize the name, the Reid Technique.

6 Q Okay. And, here we go. Does this look like
7 anything that you've studied before?

8 A I believe so.

9 Q Okay. And how about this page here?

10 A I don't remember the Reid Nine Steps of
11 Interrogation. However, it's similar to other techniques that
12 I've seen.

13 Q Okay. So maybe not steps 1 through 9 as -- as
14 they're written in here, but you do -- these steps themselves
15 look familiar to you?

16 A Yes, they do.

17 Q Okay. And you said you did recognize this as a
18 Reid Technique manual, even though you've not actually seen
19 this particular one before?

20 A That is correct.

21 Q Okay. All right. I want to go back, if I
22 could, to your interview with Mr. Castaneda --

23 A Okay.

24 Q -- okay? This interview took place in the back
25 of a patrol car, correct?

1 A No.

2 Q Was it the back of your personal car?

3 A No. It's a unmarked vehicle and it was in the

4 front seat.

5 Q Oh, it was in the front seat?

6 A Yes, sir.

7 Q It was a police vehicle?

8 A I'm -- I don't remember which car I had. It's

9 either a vehicle owned by our department or the FBI.

10 Q Okay. So it was a law enforcement vehicle?

11 A Yes.

12 Q Okay. And had recording equipment in it?

13 A No.

14 Q Okay. Where was the recording equipment?

15 A It's a recorder, a digital recorder, handheld

16 one.

17 Q Oh, so you always have it with you?

18 A Yes.

19 Q Okay. Was this a one-on-one interview?

20 A Yes.

21 Q So, it was just you and Mr. Castaneda present?

22 A Correct.

23 Q All right. While this interview was going on,

24 police were actually searching the house, correct?

25 A Yes.

UNCERTIFIED ROUGH DRAFT

1 Q And he wasn't told exactly what you were looking
2 for, was he?

3 A He was provided a copy of the search warrant.
4 And yes, during that interview I did explain we're looking for
5 digital items.

6 Q Okay.

7 A And later on, child pornography.

8 Q He wasn't shown any pictures --

9 A No.

10 Q -- of what you were looking for, right?

11 A Correct.

12 Q And you were specifically looking for something
13 that matched what you saw on the thumb drive, weren't you?

14 A Something similar, yes.

15 Q But you didn't share with him that information
16 by showing him the pictures?

17 A I did not show him the pictures, no.

18 Q Okay. He wasn't told where this thumb drive
19 came from, was he?

20 A No. Nor did he ask.

21 Q Okay. You told him it was his, right?

22 A Yes.

23 Q And that you knew it was his?

24 A Yes.

25 Q Okay. But you didn't tell him who gave it to

1 you?

2 A Correct.

3 Q This was all happening in front of his son,
4 wasn't it?

5 A I do now know where his son was. I believe his
6 son was inside the house or right out -- right out front by
7 the front door.

8 Q He was present while police were searching his
9 father's house for child pornography?

10 A Yes.

11 Q And Mr. Castaneda knew that his son was seeing
12 all of this, correct?

13 A I'm assuming, if he knew that his son was home,
14 so.

15 Q Okay. You gave Mr. Castaneda minimal
16 information about why you were there, right?

17 A That is correct.

18 Q Now, you referred to this process as an
19 interview, right?

20 A Yes.

21 Q An interview is designed to gather information?

22 A Yes.

23 Q Because you want to get the -- get the truth
24 when you're interviewing somebody?

25 A That's correct.

1 Q All right. By contrast, an interrogation is an
2 accusatory process, right?

3 A Not necessarily an accusatory process. It can
4 be interpret -- there's different interpretation of
5 interrogation.

6 Q Okay.

7 A The whole purpose of interrogation is to -- is a
8 conversation, a formal conversation between a interrogator and
9 a subject to obtain an admission, an omission, or a
10 confession.

11 Q Okay. Under the Reid Technique, do you recall
12 whether they say an interrogation is an accusatory process?

13 A No, I do not recall anything about the Reid
14 Technique --

15 Q Okay.

16 A -- specifically.

17 Q Specifically. During an interrogation, though,
18 the investigator tells the suspect that there's no doubt about
19 his guilt, correct?

20 A That is a technique, yes.

21 Q Okay. And a technique during interrogation is
22 that the investigator speaks in monologues, correct?

23 A Yes, it is.

24 Q So if you're reading on a page, you see large
25 paragraphs of the interrogator and then maybe one word from a

1 suspect, and then more long paragraphs from an interrogator,
2 correct?

3 A Yes.

4 Q The ideal demeanor during an interrogation is to
5 be understanding, right?

6 A Yes.

7 Q You should also be patient; is that correct?

8 A Yes.

9 Q And never demeaning?

10 A Correct.

11 Q Okay. So saying something like, I know you more
12 than I do, would be a way to accomplish that, the nondemeaning
13 aspect?

14 A Correct.

15 Q All right. Now, your goal is to make the
16 suspect progressively more and more comfortable with you,
17 correct?

18 A The goal is to get to the bottom of the truth.

19 Q All right. And you want him to be comfortable
20 with you so that he will acknowledge what you presume to be
21 the truth about the situation?

22 A No. I want him to be comfortable so he'll
23 acknowledge the truth, not what I presume to be the truth.

24 Q All right. But you still continue the
25 investigation, even after you've gotten a response, correct?

1 A Yes.

2 Q Now, the way you accomplish this, developing
3 comfort and getting a suspect to acknowledge the truth, is by
4 giving them in part -- there's many ways, obviously, correct?

5 A Yes, sir.

6 Q I don't want to be too exclusive. You give them
7 some kind of psychological justifications that hopefully they
8 can grasp onto to describe their behavior or what you perceive
9 to be their behavior, correct?

10 A Yes.

11 Q All right. You use language that contains your
12 own implicit assumptions about what you believe they might
13 have done; is that fair to say?

14 A Yes.

15 Q Sometimes you engage in subterfuge, right?

16 A Yes.

17 Q Subterfuge, a shorter word for that might be
18 tricks, right?

19 A Yes.

20 Q All right. Let me see if you've heard of this
21 one before. You can ask a question such as, Ma'am, have you
22 stopped embezzling from the bank yet? That's a classic trap
23 question, isn't it?

24 A Yeah, I -- yeah, I guess it would be.

25 Q Okay. Do you have a copy of your interview in

1 front of you --

2 A Yes, I do.

3 Q -- by chance? Okay. I'd like to take you
4 through it a little bit so we can sort of examine how your
5 training and experience played into how you conducted the
6 interview, if that's all right.

7 A Okay.

8 Q Okay. If you'd direct your attention to page
9 14. On page 14 --

10 Is everyone there? -- you say, "Okay. Would there
11 be any reason why we would come across anything involving
12 children?" He says, "No." Correct?

13 A I'm sorry, I'm looking for the statement.

14 Q Take your time.

15 A I don't see anything about children --

16 THE COURT: She's not going to find it on that page.

17 THE WITNESS: -- on page 14.

18 BY MR. WESTBROOK:

19 Q Okay. Let me make sure -- it's possible that we
20 have different page numbers. Which I hope not, because that
21 would make this very complicated.

22 MR. WESTBROOK: Court's indulgence.

23 MR. CHEN: Counsel, if I may, I think you're
24 referring to her page 13. She has one of these.

25 MR. WESTBROOK: Okay. So we might be one off on

1 ours? Okay.

2 BY MR. WESTBROOK:

3 Q Could you check page 13 and see if that might be
4 it? I can re-read you the quotation I just gave you.

5 "Would there be any reason why we would come across
6 anything involving children?"

7 And your answer -- or his answer is, "No."

8 A Okay.

9 Q Okay. Is that where it is, page 13 for you?

10 A Yes. It's page 13 at the bottom.

11 Q Okay. Great. And then it goes to page 14, I
12 believe. "Any items in your house, including some drives?"

13 I'm sorry, that part's on 13. And then there'd be
14 answered, "No," on page 14.

15 "CDs?" "No." "External drives?" "No." You
16 following along?

17 A Yes, sir.

18 Q Great. Then you say, "I want you to rethink
19 that. And the reason I'm saying that is there's a reason why
20 we're here." All right. Is that correct?

21 A Yes.

22 Q Now, this is an example of confronting him with
23 the evidence and suggesting to him that you already know he's
24 guilty, isn't it?

25 A Not that -- no. Not that he's already guilty.

1 No.

2 Q Okay.

3 A My job is not to determine [indiscernible] or
4 not, it's to find the truth.

5 Q Well, you're trying to convince him that you
6 have evidence that he committed a crime, correct?

7 A Yes.

8 Q All right. So --

9 A To get to the truth.

10 Q -- regardless of what you're thinking, you want
11 him thinking that you've got the goods?

12 A Correct.

13 Q Correct? All right. If you go to page 15 and
14 16. Start with 15. And this is pretty early in the
15 interview, correct? Page 15? I mean, it's a fairly long
16 interview.

17 A Yeah, I would say it would be earlier in the
18 interview.

19 Q As printed, it's over 100 pages, is it not? All
20 right.

21 "Okay. What will -- what would you say if we already
22 have items of child pornography?"

23 And his question is, "Like what?" And you say, "That
24 are directly related to -- to you." He says, "Like, sure,
25 like what?" And you say, "Storage devices with child

1 pornography on it?" His response is, "You can't find it."
2 Your question, "I already have some of it. That's why I'm
3 here." Okay. Again, you're confronting him with your opinion
4 that he's committed a crime?

5 A Yes.

6 Q Okay. Then on page 17, after he again denies
7 that he has it, or that he knows even what you're talking
8 about, you say, "Well, you have downloaded child pornography,
9 because you saved something. Okay. And that's how I got my
10 search warrant." In fact, you mentioned that you got a search
11 warrant several times, don't you?

12 A I don't know.

13 Q Not in your recollection?

14 A No, it's not. I'm sure I said it. Obviously I
15 said it once, because it's right here.

16 Q Sure.

17 A But I don't know how many times I said it.

18 Q Okay. Well, back on page 14, if you want to
19 turn back to there, you also mentioned the search warrant on
20 that page, too, right?

21 A Okay.

22 Q So at least two?

23 A Correct.

24 Q Maybe more. Mentioning that is a way to let him
25 know that you've got evidence and you want him to perceive it

1 as really excellent evidence of -- of him committing a crime,
2 correct?

3 A Yes.

4 Q You're trying to frighten him and make him
5 nervous, right?

6 A I'm not trying to frighten him, no.

7 Q Okay. Make him nervous?

8 A No.

9 Q You're not trying to put him on edge?

10 A I'm trying to get him to tell me the truth.

11 Q By putting him on edge and directly confronting
12 him with the crime that you believe he committed; that's one
13 of the techniques, isn't it?

14 A I don't know that he's committed the crime yet.
15 My investigation at this point is not done. I'm still trying
16 to elicit the facts.

17 Q Okay. And it's specifically a technique,
18 getting a suspect to talk, of directly confronting him over
19 and over again with accusations of criminal conduct, correct?

20 A Yes.

21 Q Even after he's given you his answer about his
22 conduct?

23 A Correct.

24 Q All right. Now, another technique that you use
25 is you give people an opportunity to be reasonable, right?

1 A Yes.

2 Q So, like, on page 49, I believe it's the bottom,
3 so it goes through to 50, you say, "Okay, so this is basically
4 just your opportunity, just to be like, yeah, a couple of
5 times I went to a site or a couple of times this, or when I
6 was downloading this, this came up. Because, you know, as --
7 I know as well as you do you type in certain search items or
8 search terms and you may come up with things you weren't even
9 remotely looking for." Right?

10 A Yes.

11 Q So that's an example of you giving him an
12 opportunity to be reasonable, right?

13 A Yes, it is.

14 Q It's also an example of you giving him a
15 possible justification, which is another technique, correct?

16 A Yes, it is.

17 Q And it's also a monologue, isn't it?

18 A Yes, I -- I guess it could be.

19 Q Okay. And -- and you would agree during this
20 whole interrogation, you were monologuing quite a bit?

21 A Yes.

22 Q All right. Now, did you notice that I just
23 called it an interrogation and you --

24 A Yes, I did.

25 Q -- agreed and said yes. That's sort of a Reid

1 Technique, isn't it? Where, instead of interview I said
2 interrogation, and you said yes, so it sounds like you agreed
3 it was an interrogation, doesn't it?

4 A Yes, it does.

5 Q But you don't. You believe it was an interview?

6 A I consider it an interview --

7 Q Correct.

8 A -- as we stated yesterday.

9 Q Sure. But --

10 A But I understand what you're saying.

11 Q But you agree that that wouldn't sound good,
12 since I just got you to agree that it was an interrogation?

13 A Yes, I understand that.

14 Q Even though it's not what you really think?

15 MR. CHEN: Objection. Judge, at this point I think
16 he's being argumentative.

17 MR. WESTBROOK: Just talking cross --

18 THE COURT: Overruled.

19 MR. CHEN: Thank you, Your Honor.

20 BY MR. WESTBROOK:

21 Q So, was that a yes?

22 A To what part of the question? I'm sorry.

23 Q I believe -- I believe the question was you can
24 see where that would look bad that you said yes, even though I
25 slipped the word interrogation in there --

1 A Yes, I understand.

2 Q -- and it's not what you really think? Okay.

3 Another thing that you do is you try to create two
4 classifications of criminal activity. One that seems
5 reasonable and one that just seems like the worst possible
6 thing, right?

7 A Yes.

8 Q And, in fact, you did this in this case on page
9 17. Question and answer, you say, "Okay. And we come across
10 child porn all the time. And, unfortunately, sometimes we
11 come across people that are actually hurting children."

12 He goes, "Mm-hmm." "Okay. Which doesn't -- does not
13 seem like that particular case. I don't know. You know, I
14 just -- I just met you just now" -- and it says in
15 parentheses, "laughs" -- "so I can't 100 percent with, you
16 know, confidence."

17 And he tells you, "Go look." Right?

18 A Yes.

19 Q The possibility that he would be accused of
20 hurting children must be very fearful to him, don't you think?

21 A Of being accused of it or being caught? If
22 somebody -- I don't think I understand your question.

23 Q Accused of it?

24 A I think anybody would be fearful of that, yes.

25 Q Okay. And you knew that when you asked the

1 question, which is why you asked the question in the way that
2 you did?

3 A I asked the question to elicit a response.

4 Q All right. And it's one of your interview
5 techniques to set up a smaller crime and a much more
6 horrifying sounding crime in order to allow him to accept
7 responsibility for the lesser thing and shift blame, right?

8 A Yes. These are all techniques.

9 Q Okay. Okay. So, again, page 17, it's very
10 early. And at this point you've never shown the pictures,
11 right?

12 A Correct.

13 Q He doesn't know exactly what you think, right?
14 Correct? He doesn't know exactly what you think or why you're
15 here?

16 A I can't presume to know what he thinks, but --

17 Q Okay. Let me rephrase that. You're right. You
18 haven't told him expressly, because you haven't shown him any
19 of the pictures on the thumb drive?

20 A Correct.

21 Q In fact, you haven't even shown him the physical
22 thumb drive, have you?

23 A No.

24 Q Okay. On page 27, you say -- are you -- are you
25 there?

1 A I've been --

2 Q Oh, you're following along? Okay. Good. Good.

3 "And images I have, it's -- they're criminal child
4 porn. So there's no" -- I think that's probably a typo --
5 "that could be or not be, 'cause some, you know, obviously,
6 some girls you just really can't tell, I mean, you know, face
7 or age."

8 He says, "What?" You say, "But." He says, "Okay.
9 I'll -- you have -- you have to -- you'd have to show it to
10 me." You say, "Okay. Well, I don't -- I'm not going to show
11 you." Correct?

12 A Correct.

13 Q All right. So, what you're talking about is the
14 kind of mistake that might be made by somebody who's looking
15 for a particular genre of Internet pornography, right?
16 Specifically, teen style pornography?

17 A Okay. Yes.

18 Q Okay. The kind of thing that might be
19 classified as teen or young or cheerleaders or college; is
20 that correct?

21 A Anything that I would consider age difficult.

22 Q Right. Schoolgirls, that's another one --

23 A Yes.

24 Q -- that's popular? Okay. At this point, you
25 already know he has tons of that sort of pornography, you

1 know, legal adult pornography, adult pictures on his -- on his
2 computer and -- and actually the thumb drive, correct? You
3 may not know the computer, but you know the thumb drive,
4 right?

5 A I was told that there was -- there was adult
6 porn on the thumb drive, but I never saw it.

7 Q Okay. But you were told about it?

8 A Yes.

9 Q Probably by Detective Ramirez?

10 A That'd be correct.

11 Q All right. And so you suggest the idea that
12 somebody might, in the process of downloading such things,
13 accidentally get somebody who looked like they were old
14 enough, but in reality was under age, correct?

15 A Yes.

16 Q You did that specifically to frighten him and
17 make him examine what he might have downloaded, correct?

18 A No. It's to get him to possibly realize that
19 maybe he downloaded something that he didn't know about.

20 Q Okay. Except that you've seen the pictures,
21 right?

22 A On the thumb drive? Yes.

23 Q Yes. And know that those couldn't possibly be
24 mistaken for, you know, a college coed who is 17 or something
25 like that?

1 A Correct.

2 Q All right. So you're misleading him here,
3 aren't you?

4 A Yes.

5 Q Then he asked you to show him what you're
6 talking about and you said no?

7 A No. Because I didn't have the pictures with me.

8 Q Well, you just said I'm not going to show you,
9 right?

10 A Yes. That's what I said.

11 Q You didn't say I'm not going to show you at this
12 time, but if you want to come down to the station I'd be glad
13 to; just, I'm not going to show you?

14 A Yes.

15 Q All right. On page 34 you give him two choices
16 again. "Okay. Obviously, on a scale" -- and I'm sorry, this
17 is -- this is your quote. "Okay. Obviously, on a scale of
18 things, you know, monster guy up here and regular Joe guy down
19 here, you know, does that make sense?" Right, you're --
20 you're differentiating people who, you know, are either
21 touching children or collect lots and lots of child porn
22 versus somebody who may have just happened on it. You're
23 setting up two different levels of --

24 A Yes.

25 Q -- of abuse at this [indiscernible], correct?

1 A Yes.

2 Q And your goal here is for him to go, "Gee, I'd
3 rather be regular Joe guy than monster. Regular Joe sounds
4 okay. Monster sounds horrible." Right?

5 A Somewhat, yes.

6 Q All right. Another thing that happens is you
7 want to show him that you're sincere and that you can be
8 trusted, right?

9 A Yes.

10 Q People open up more if they think the person
11 they're talking to is sincere. Is that --

12 A Yes.

13 Q -- part of your training? Okay. So, you talk
14 about how important it is for him to just tell you the truth
15 and come clean and admit what he did. And you say, "Down the
16 road, because, unfortunately' -- and, sorry, this is page, I
17 believe it's 34, as well; 33 continuing to 34. "Down the
18 road, because, unfortunately, a lot of times what we find is
19 people that look at these pictures end up offending. Okay.
20 You know, they don't get help."

21 He says, "Sure." And you say, "Okay. Help, meaning
22 talking to somebody or whatever." Right?

23 A Uh-huh.

24 Q So, you want him to say -- to know that you're
25 not there to trip him up, right? You're there to -- you're

1 there to help.

2 A Yes.

3 Q You're -- you're not there to help him, though,
4 you're doing an investigation, right?

5 A If by preventing somebody from ruining their
6 life and harming a child, yes, I am helping him.

7 Q Okay. Is he your first consideration?

8 A Every party in the -- in an investigation is my
9 first consideration.

10 Q Okay. Another technique you use is discouraging
11 a suspect from denying his guilt, right?

12 A Yes.

13 Q Is that the reason why you ask so many times
14 after he's denied it --

15 A Yes.

16 Q -- to again deny it? Okay. Sorry I'm taking a
17 little bit longer, but the more pages I go through to asking a
18 question, the shorter this is going to be.

19 An example of discouraging from denying guilt
20 immediately is on page 34. You -- he says, "But as far as I
21 know, I haven't even -- I haven't even looked or gone looking
22 for or -- or accidentally clicked onto a -- a child being
23 abused."

24 You say, "Okay. Well, with this item that we have,
25 it is yours." Correct?

1 A Yes.

2 Q And the reason -- wait, I'm sorry. I skipped a
3 line.

4 Oh, and he starts to say, "And -- and I have." And
5 you say, "And the reason I know this is because -- " He says,
6 "Okay." -- "it's not like we're just, like, here -- oh,
7 here's a thumb drive, you know." So, you're suggesting to him
8 that you even have more information that you haven't shared
9 with him, correct?

10 A Yes.

11 Q In reality at that point, what you have is a
12 thumb drive. You know that his personal information is on it
13 and it was given to you by a woman that you know very little
14 about. Correct?

15 A That's correct.

16 Q All right. In fact, it's a woman that you now
17 know misled you in part of your investigation, correct?

18 A The only thing I know is what you have told me
19 or what I've learned in the courtroom.

20 Q Okay. Have you learned in the courtroom that
21 she told you something different in her interview with you
22 than she said in court?

23 A I do not know --

24 MR. CHEN: Objection. Judge --

25 THE WITNESS: -- what she said in court.

1 MR. CHEN: -- I think that's an improper question.
2 And certainly the jury's going to rely upon their own memory
3 of the testimony here.

4 THE COURT: Sustained.

5 MR. WESTBROOK: Okay.

6 THE COURT: The jury will rely on their memory of --

7 MR. WESTBROOK: All right.

8 THE COURT: -- what the testimony is.

9 BY MR. WESTBROOK:

10 Q She told you she found it, right?

11 A Correct.

12 Q She didn't mention anything about a boyfriend?

13 A No.

14 Q She also didn't tell you anything about being
15 evicted, right?

16 A No.

17 Q Or having a grudge against the person she was
18 accusing?

19 A No. Nor did Mr. Castaneda.

20 Q Okay. And she didn't say that they were
21 homeless prior to moving in with him, right?

22 A I do not recall.

23 Q Okay. You talked about using subterfuge and
24 maybe stretching the truth a little bit in an interview and
25 that's also an interview or interrogation technique, right?

1 A Yes, it is.

2 Q All right. On page 39, you stretch the truth a
3 bit when you say -- well, he says, "Sure, I understand. But
4 as far as I know, I mean, I've -- I've even loaded a folder of
5 adult stuff on a USB cards. I don't think I've -- I don't
6 think it's ever been interested for child porn."

7 And you say, "Okay. Well, this has no adult porn on
8 it for sure. Right?"

9 A Yes.

10 Q Okay. Subterfuge?

11 A I don't -- you know what, that sounds like
12 subterfuge, but I think I probably just misspoke there during
13 the interview.

14 Q Okay.

15 A Because it would be better for me to know what
16 he thinks is on the -- on the thumb drive.

17 Q Sure. And I guess eventually you do suggest
18 that there was adult porn on the thumb drive, right?

19 A I may have. If it's in a statement I did.

20 Q Okay. Five days later, on page 44, you say,
21 "But what, you know, also on the thumb drive, maybe this will
22 spark your memory."

23 He says, "Uh-huh." "There's adult pornography." So.
24 Those are two conflicting things that you told him, correct?

25 A Yes.

1 Q All right. On page 92 and 93 -- well, let me
2 ask you this.

3 Was there any point in the interview where you
4 stopped it and spoke to any of the detectives who were
5 searching the house and then, excuse me, resumed?

6 A Not that I'm aware of. I believe somebody came
7 up. Because I remember on the audio yesterday, somebody
8 walked up and asked a question.

9 Q Okay.

10 A I don't remember what they asked. But.

11 Q On page 92 through 93, you tell him, "We found
12 child porn on the computers. Okay." Is that information that
13 you had gotten?

14 A Oh, I'm sorry. You said stop. As I said
15 yesterday, sometimes we exchange text messages or e-mails on
16 what's going on on the inside.

17 Q I see. So you're getting information while
18 you're sitting there?

19 A Yes.

20 Q All right. That makes sense. Now, I've asked
21 you several questions about computers, realizing, of course,
22 that you're not the computer expert in your department?

23 A Correct.

24 Q But you are the person who directs the
25 investigation, right?

1 A Yes.

2 Q It would be helpful for you to have as much
3 computer knowledge as possible so that you can direct people
4 into the correct areas, wouldn't it?

5 A In an ideal world, yes, that would be wonderful.

6 Q You've been doing this for five years, right?

7 A Yes.

8 Q You must have picked up something along the way
9 as far as computer knowledge, right?

10 A My area of -- the way it works is, I -- I know
11 about computers, programs with software programs that we use
12 on a day-to-day basis. It's like a peer-to-peer program or
13 social networking sites.

14 Q What about EnCase?

15 A EnCase, as I stated yesterday, I did take a
16 class several years ago, but did not have an opportunity to
17 practice it.

18 Q Okay.

19 A And it's one of those skills, as I'm sure your
20 client can tell you, that if you don't use it, it's gone.

21 Q I can understand. When you were interviewing my
22 client on page 16, you're talking about people who might be
23 dangerous to children and who download lots and lots of child
24 porn, and you say, "Those are the ones that we're mainly
25 concerned with, clearly."

1 He says, "Yeah." "Okay. Because all I do, this is
2 it. I only deal with children and child pornography. That's
3 it. Children and computers." That's what you said, right?

4 A Yes. Meaning children --

5 Q And that -- and that's accurate?

6 A Meaning child pornography, like children being
7 lured over the computer or the computer being used for the
8 child pornography.

9 Q Okay. Now, also when you're talking to him, you
10 say the following on page 17, "But, you know, I don't think
11 that's the case," I assume referring to him doing anything
12 intentionally, "I think perhaps maybe we're just looking at
13 some child porn mixed in with -- maybe it's just mixed in with
14 your adult porn, you know." You suggest that as an
15 alternative, correct?

16 A Yes.

17 Q And he says, "I can't imagine when I've looked
18 at child porn." Again, another denial, correct?

19 A Yes.

20 Q When you say, "We've been able to 100 percent
21 verify the thumb drive belongs to you" to Mr. Castaneda,
22 you're talking about the fact that his personal identification
23 was on it and someone gave it to you who said it was his,
24 right?

25 A That's what I'm conveying. I do not know for

1 sure that that thumb drive belonged to him at the time.
2 There's no way for me to know that.

3 Q Okay. So he's denying and -- on page 49, and
4 you say, "But, see, now we're sitting here and you're like,
5 No, I don't know, I didn't. I didn't put those -- those on
6 there. I don't know anything like that."

7 He goes, "Uh-huh." And you go, "Whereas, we know
8 that's not true." Now, does this sound like a question posed
9 by someone who has an open mind?

10 A Which question? I'm -- I don't think I followed
11 with that.

12 Q That question -- well, I guess to sounds more
13 like a statement than a question. But your comments or --
14 it's -- it has a Q by it. But that's what you said to him.
15 I'm asking you if that question that you posed sounds like
16 someone who has an open mind to you?

17 A Can you read the question again, please?

18 Q Sure. "But, see, now we're sitting here and
19 you're like, No, I don't know, I didn't. I didn't put those
20 -- those on there. I don't know anything like that."

21 He says, "Mm-hmm." And you says -- and you say,
22 "Whereas, we know that's not true." Does that sound like
23 someone who has an open mind?

24 A Are you referring to me or -- or me?

25 Q You. Because all he says, "Mm-hmm."

1 A That's an -- that's a technique. It's another
2 investigator technique.

3 Q You want to sound like you don't have an open
4 mind?

5 A I don't take that question as whether I have an
6 open mind or not, so I can't really answer the question.

7 Q Okay. On page 105 to 106, you mention that you
8 have all the modified dates, and you say, "Now, modified dates
9 are not that big of an indicator of much." Do you believe
10 that or is that something that you were --

11 A I had no idea. I was just talking.

12 Q Just talking? Okay.

13 A Yeah.

14 Q You don't know whether modified dates are a big
15 indicator of much, right?

16 A I don't -- as we stated yesterday, modified
17 access creation, created dates, I -- I can't explain them.
18 So.

19 Q On page 106 and 107 you say that he has pictures
20 labeled "Adult girls." But in reality there's a folder called
21 "Adult." And within that folder there's a folder called
22 "Girls." Is that more accurate?

23 A Yes.

24 Q Okay. I know that when it comes out and when
25 it's written down it might look different than how you

1 intended it; is that correct?

2 A That -- that's possible, as well.

3 Q All right. When you get trained in these
4 techniques, I assume that you're trained, that there's no such
5 thing as a perfect technique?

6 A Yes.

7 Q Okay. We aren't mind readers?

8 A Correct.

9 Q All right. As with any technique, techniques
10 like the Reid Technique have certain hazards associated with
11 them; is that fair to say?

12 A Hazards meaning what?

13 Q Well, for example, confirmation bias. Have you
14 ever heard of that?

15 A No.

16 Q That would be, it's likely to reinforce an
17 initial, possibly an accurate, inaccurate, or wrong belief or
18 assumption.

19 A Okay.

20 Q Okay. I mean, you've heard of that concept, the
21 idea that --

22 A Yes, I have.

23 Q Okay. And you wouldn't want to have a situation
24 where your own technique is causing you confirmation bias,
25 correct?

1 A Correct. That would be not be ideal.

2 Q Because you don't want the wrong information?

3 A Correct.

4 Q Okay. Also, this technique has been known to

5 cause the premature narrowing of an investigation, correct?

6 A When you're referring to technique, you're

7 referring to what we just talked about or --

8 Q The technique --

9 A -- are you referring to the Reid Technique?

10 Q I'm sorry to interrupt you. You said am I

11 referring to the technique we just talked about or the Reid

12 Technique?

13 A Yeah. Are you referring to the statement about

14 eliciting, you know, a -- a false -- potentially a false

15 admission, or are you referring to the Reid Technique?

16 Q I'm talking about both the Reid Technique that

17 you were trained on and the variation of all the techniques

18 you've studied that you actually use. So let me go ahead and

19 that -- with that second one first.

20 A Okay.

21 Q The variations of the all the techniques that

22 you -- that you use, are you aware of the damage of

23 prematurely narrowing an investigation?

24 A Yes.

25 Q Okay. In this case, the investigation was

1 prematurely narrowed, wasn't it?

2 A It can be interpreted that way, since the thumb
3 drive had his information on it and he was basically the only
4 person that was living at the residence during the time after
5 they had moved out and prior to his son, who obviously just
6 moved in two, three weeks prior to that. So.

7 Q Sure. And then there was no investigation about
8 the people who actually --

9 A Correct.

10 Q -- handed over the thumb drive? Okay. That
11 makes sense. During the interview, Tony gave you several
12 leads that were never followed up on, right? I can be more
13 specific.

14 A Yes, please.

15 Q Page 10 and 11. He says, "So, the girls use
16 file" -- I'm sorry, excuse me. You say, "The girls used
17 fileshare programs, too, when they came over."

18 I think his answer was unintelligible. "Or were --
19 when they were, what computers did they usually use in the
20 house?" He said, "Ah, they usually use the two laptops, but
21 they used my computer and Craig's computer." Craig's computer
22 was never checked. Or, no, I'm sorry. Craig's computer was
23 checked. I -- I apologize. I know the two laptops were
24 checked, but there's no -- there was no specific check of the
25 fileshare programs used by the girls, correct?

1 A You'd have to ask the forensic examiners.

2 Q Okay. Did you ever order the forensic examiner
3 specifically to search that based on what was said in this
4 interview?

5 A Not that I'm aware of.

6 Q Okay. On page 50, and this launches a long
7 conversation, he says, "I do site mirroring and stuff like
8 that, which will download stuff I know about." Then he talks
9 about the types of sites he's gone to, the number of times
10 he's done it, and the software that he uses, which is on the
11 computer, right?

12 A Yes.

13 Q Okay. Did you ever make an investigation
14 request that specifically his site mirroring software be
15 checked, the logs be checked, and that they try to determine
16 whether or not this could have come from site mirroring?

17 A The forensic examiners would find that out while
18 they're doing the investigation. I wouldn't say directly, Can
19 you look into this site mirroring software? No, I would not
20 say that.

21 Q Okay. And you don't know whether specifically
22 they looked into that, you just assumed because of process; is
23 that fair to say?

24 A Correct.

25 Q All right. And you also know that site

1 mirroring, based on your conversation, is a technique where
2 instead of downloading individual files, you have a piece of
3 software grab everything on an entire site and just put it all
4 on the computer, right?

5 A I only know it how he described it. So that
6 sounds like what he described.

7 Q Okay.

8 A Mr. Castaneda.

9 Q You've never heard the term site mirroring
10 before this conversation?

11 A No.

12 Q In five years doing this job, you've not once?

13 A No. Once again, I don't deal with the computer
14 aspect of it, the forensics side.

15 Q He said, on page 54, that he does VPN, virtual
16 private networking, which puts him on foreign networks.
17 Right?

18 A Yes.

19 Q Did you have -- I keep saying have, as if you're
20 the king of this. I apologize.

21 A It's okay.

22 Q Did you do an investigation request to your
23 detectives, your -- your tech detectives, to specifically
24 search the network for any proof of a problem coming from the
25 foreign networks he said he was on?

1 A Okay, again, I stated I did not give any -- any
2 specific direction for the forensic examiners.

3 Q Okay. You reviewed the detectives' reports,
4 correct?

5 A Yes.

6 Q And, Detective -- I'm having a issue -- Errors,
7 Evers?

8 A Ehlers.

9 Q Ehlers. Thank you. Couldn't think of it for a
10 second. You're aware that he didn't even know there was a
11 network, right?

12 A I don't know.

13 Q You don't remember from his report?

14 A No, I don't.

15 Q Okay. Obviously, though, if he didn't know
16 there was a network, he couldn't have checked the network,
17 right?

18 A I don't know. I don't know how that works.

19 Q Okay. You didn't do a specific request for
20 LimeWire -- or, I'm sorry, a specific request that they check
21 the LimeWire accounts that were used by the two girls living
22 there, correct?

23 A The accounts, per se, it's common practice --

24 Q Okay.

25 A -- because a lot of our search warrants are

1 based off a peer-to-peer, fileshare programs, like LimeWire,
2 to check for those. So it wouldn't be something specific I
3 would write down unless I knew that person was using,
4 specifically, like, if I went to a house, unrelated to Mr.
5 Castaneda, obviously.

6 Q Sure.

7 A Let's say John was downloading child porn using
8 Ares.

9 Q Okay.

10 A Well, then, obviously on my request, and after I
11 spoke with John, he said, Yes, I use Ares, then I would put
12 Ares down specifically so they know, because, you know,
13 certain thing to look for on that.

14 Q Okay. And -- and specifically here, LimeWire
15 was mentioned by Mr. Castaneda, but you didn't give a specific
16 request for a LimeWire search, right?

17 A No. Because he said he didn't use it.

18 Q That's true. So you were only investigating him
19 and not other possible sources for the child pornography,
20 then, right?

21 A No. It was requested, I just did not put it
22 down.

23 Q Okay. Well, I said you didn't specifically
24 order a search on LimeWire, and your response was because he
25 said he didn't use it. But he did say someone else used it.

1 A Yeah. I think I'm confused in my ignorance with
2 what to ask for on a forensic request. Because computers or
3 the cassette forensics are not my thing. So I'm not going to
4 specifically put down everything.

5 Q But it -- in other cases, like, for example,
6 fictional John, if Ares, which is a -- is a piece of software
7 like LimeWire, right?

8 A Yes.

9 Q If Ares was specifically mentioned, you would
10 specifically mention Ares; you just testified to that,
11 correct?

12 A Yes. I did.

13 Q Okay. And in this case you didn't search
14 LimeWire, because Mr. Castaneda mentioned it to you, right?

15 A I understand the line of questioning. Yes.
16 You're -- yes.

17 Q Okay. And the same would hold true of
18 Filezilla, the FTP program, correct? Which is referenced on
19 page 80. He mentions --

20 A That's the program he uses, yes.

21 Q Okay. On page 86, he's trying to think of a way
22 that this could get onto his computer, and he says, "The only
23 thing I can think of is file transfers from somewhere. And,
24 you know, other people were using my computer. I mean, Tami
25 and her husband were using my computer." Do you recall that?

1 That's on page 86.

2 A Yes.

3 Q Okay. He mentions Tami specifically was using
4 the computer, right?

5 A He said all the people in the house used it.
6 All the girls. Even his nieces that came over.

7 Q But he also mentions Tami's husband, Mr. Green.

8 A Yes. He mentioned everyone in the house that
9 lived there, including nieces that would come over to visit,
10 would use his computers.

11 Q Okay.

12 MR. CHEN: And, Judge, I just want to object. Just
13 -- I think he misspoke inadvertently. But he said Tami's
14 husband. And I don't think there was any evidence that Tami's
15 husband is Michael Landeau. They were dating at the time, and
16 I believe he said -- I don't know. So.

17 MR. WESTBROOK: If -- if I could, according to the
18 testimony of Tami on the first day, she specifically said that
19 she met Mr. Castaneda when she was living with her husband at
20 the Budget Suites. Mr. Castaneda, I believe, was referring to
21 the husband.

22 THE COURT: I don't know who he was referring to.
23 The -- I don't know if that's what was said.

24 MR. CHEN: He's not speaking about Michael, then, at
25 this point? Am I correct about that?

1 THE COURT: I don't know. Do you want to refer to
2 something he said?

3 MR. WESTBROOK: I am. I did. Page 86, Your Honor.

4 THE COURT: Okay. Okay.

5 MR. CHEN: Thank you.

6 MR. WESTBROOK: The words that were said. And -- and
7 let's all look it up. It's 5 lines from the bottom, it looks
8 like.

9 THE COURT: That's -- okay. So that's what he said.
10 BY MR. WESTBROOK:

11 Q Tami and her husband were using my computer.
12 All right.

13 A Oh, I'm sorry.

14 Q That's all right. I'm sorry. I thought you
15 were still -- you were reading. He said Tami and her husband
16 were using my computer, right?

17 A Yes.

18 MR. WESTBROOK: Michael Hines?

19 UNIDENTIFIED SPEAKER: Richard Hines.

20 MS. BALLOU: Richard Hines.

21 MR. WESTBROOK: Richard Hines.

22 BY MR. WESTBROOK:

23 Q Richard Hines, the husband. And you didn't look
24 into that at all, did you?

25 A No, I didn't.

1 Q In fact, until right now, you probably didn't
2 know that --

3 A No, I didn't.

4 Q -- Tami had a husband named Richard Hines,
5 nothing like that. Right?

6 A Not that I'm aware of. No.

7 Q Okay. Had you asked Tami in your interview, I'm
8 just trying to remember it, if she discussed her first meeting
9 Mr. Castaneda at all?

10 A Yes. I did ask her how she came -- how she
11 first met him.

12 Q Okay. 2007, Budget Suites, does that ring a
13 bell?

14 A She had said -- I don't know if she said Budget
15 Suites. She said that she was --

16 Q Well, she might have said it was a weekly --

17 A It was a weekly, is what she described about the
18 Tropicana --

19 Q There we go.

20 A -- and she said about a year or two years ago.
21 So I don't know if it was 2008 or 2007. She said about two
22 years ago. And this was February 2010, so.

23 Q So, in that area?

24 A Yes.

25 Q I don't recall her mentioning her husband at

1 that time, though, did she?

2 A No.

3 Q Okay.

4 MR. WESTBROOK: Court's indulgence.

5 Q We talked yesterday about how many times Mr.
6 Castaneda denied committing any crime in this case; do you
7 remember that?

8 A Yes.

9 Q And you said several times?

10 A Yes.

11 Q Is the number closer to maybe 50, 52?

12 A I don't know. You said you had counted it,
13 obviously, but I don't remember what you said.

14 Q Okay. So if several is considered a small
15 number, it's -- when you said several, you probably didn't
16 mean 52, right?

17 A I said several because I don't know how many it
18 was. I know it was more than once, more than twice.

19 Q Okay.

20 A So.

21 MR. WESTBROOK: I'll pass the witness. Thanks.

22 THE COURT: Redirect.

23 MR. CHEN: Yeah.

24 REDIRECT EXAMINATION

25 BY MR. CHEN:

1 Q Detective, I'd first like to go and just talk
2 about some of the interaction you had with Tami Hines, if
3 that's okay. Because the number of questions that Mr.
4 Westbrook asked you pertain to that.

5 Your first meeting you mentioned was in -- in a car,
6 correct?

7 A Yes.

8 Q And -- and that was in a parking lot?

9 A Yes.

10 Q And did you record that interview with Ms.
11 Hines?

12 A Yes, I did.

13 Q All right. Now, Mr. Westbrook just asked you
14 questions about her responses to, say, her husband or other
15 things, and when she met Mr. Castaneda; do you remember those
16 questions?

17 A Yes.

18 Q Well, for instance, she said -- do you remember
19 did she tell you when she met Mr. Castaneda, and your response
20 was yes, right?

21 A Yes.

22 Q And I assume that you've worked on hundreds,
23 maybe thousands of cases?

24 A Yeah.

25 Q Just in the course of being a detective?

1 A Yes.

2 Q All right. And I assume that it's hard for you
3 to remember the exact conversations that every person has had,
4 correct?

5 A Yes.

6 Q All right. And that specific statement that you
7 had with Ms. Hines, was that also recorded?

8 A Yes.

9 Q Okay. Now, you responded to Mr. Westbrook that
10 it was your recollection that Ms. Hines had told you when she
11 met the defendant, and you said, Yeah, she said it was two or
12 three years ago. If I were to show you the statement, would
13 it refresh your memory as to whether or not that conversation
14 actually took place --

15 A Yes.

16 Q -- in reality?

17 MR. CHEN: Can I approach the witness?

18 THE COURT: Yes.

19 MR. CHEN: Thank you.

20 BY MR. CHEN:

21 Q And I'm just going to ask you to thumb through
22 this for a sec. Do you -- well, first of all, do you
23 recognize this?

24 A Yes.

25 Q Okay. Could you just thumb through it for a sec

1 and just see if you see anything related to that particular
2 conversation or her telling you that?

3 A About two years ago, she said.

4 Q Okay. So -- so, not two to three years ago, but
5 according to her statement, now your memory's refreshed, it
6 was two years ago?

7 A Yes.

8 Q And this interview took place in 2010, correct?

9 A Yes.

10 Q Now, you were also asked questions yesterday
11 about whether you looked into anything about Tami Hines,
12 because you didn't personally know her, right?

13 A Correct.

14 Q And you did say that you checked a couple of
15 different things that would have told you about Tami Hines,
16 right?

17 A Yes. That would have been a normal course -- I
18 can't exactly remember what I did, but just as a normal course
19 of investigation.

20 Q In that normal investigation, did you have any
21 reason to doubt the information that Ms. Hines was giving you?

22 A No.

23 MR. CHEN: Can I approach the clerk, Judge --

24 THE COURT: Yes.

25 MR. CHEN: -- or, Your Honor? May I approach the

1 witness, Your Honor?

2 THE COURT: Yes. Just a minute. We're going to
3 break at 12:30. Anyone who can't hang out till that time?
4 Everybody will be okay till 12:30? Okay.

5 BY MR. CHEN:

6 Q Detective, I'm going to show you what's been
7 marked as State's Proposed 80 and 80A, or at least just marked
8 as State's 80 and 80A. Do you recognize these?

9 A Yes.

10 Q And can you please tell us what 80 is, first of
11 all?

12 A 80 is the evidence envelope for the Imation
13 thumb drive.

14 Q And is -- is this the Imation thumb drive that
15 we've been talking about throughout the course of this trial?

16 A Yes, it is.

17 Q Okay.

18 MR. CHEN: Now, I believe by agreement of the
19 parties, Judge, we're going to publish this, but it's not
20 going to be admitted.

21 MR. WESTBROOK: That's correct, Your Honor.

22 THE COURT: All right.

23 MR. CHEN: If I could have permission to publish,
24 please.

25 THE COURT: You may.

1 BY MR. CHEN:

2 Q I'll just start with 80 briefly. And I think
3 we've seen this envelope before and the picture. But this is
4 the evidence envelope you were talking about --

5 A Yes, sir.

6 Q -- Detective? And, in fact, you brought this
7 with you to court today, correct?

8 A Yes, I did.

9 Q And where did you get it from?

10 A Form our main evidence vault.

11 Q And it was logged out to you?

12 A Yes.

13 Q And then you brought it to court today, correct?

14 A Yes, I did.

15 Q And it was in court where the envelope was
16 unsealed?

17 A Correct.

18 Q All right. And that was in the presence of the
19 court clerk, myself, as well as defense counsel, correct?

20 A Yes.

21 Q All right. Now, at the bottom I see that
22 there's some names here. First we see it says "V. Ramirez."
23 Do you see that?

24 A Yes, sir.

25 Q And chain of custody and it has the names. So,

1 does this mean that these individuals checked out the evidence
2 at some point?

3 A Yes.

4 Q Okay. So, it looks like Detective Ramirez and
5 Pete Ehlers both looked at this evidence, correct?

6 A Yes.

7 Q All right. Now, I'd like to show 80A. And is
8 this the flash drive?

9 A Yes, it is.

10 Q I'm going to zoom in, make it a little lighter.
11 And is there some writing on there, as well? Turn it around.

12 A It's got "8 Gigabyte" on it.

13 Q So, it actually says that on the USB stick?

14 A Yes, it does.

15 Q All right. And now I want to talk about the
16 interview that you had with the defendant on April 7th of
17 2010. One of the things that -- well, actually, let me start
18 off by saying this. When you first met with the defendant,
19 the only thing that you had to go on was the thumb drive that
20 you were investigating, correct?

21 A Yes.

22 Q And there were pictures of child pornography on
23 that thumb drive --

24 A Yes.

25 Q -- correct? And it was that that you wanted to

1 talk -- it was that -- that was the reason that you wanted to
2 talk with the defendant, correct?

3 A Yes.

4 Q When you showed up at the defendant's residence,
5 was he home?

6 A Yes, he was.

7 Q And you had the thumb drive, right?

8 A No, I did not have the thumb drive.

9 Q Well, at least you had seen or had the report of
10 what the thumb drive --

11 A I did not have the report of the thumb drive
12 with me, no.

13 Q You had read it?

14 A I had read it, yeah.

15 Q Okay. So, you had reviewed the report. And do
16 you remember when that report was actually done? Does it --
17 February --

18 A It would have been some time in March.

19 Q Okay. And if I were to say around February
20 18th, would that sound about --

21 A That would be when the report was first started,
22 when they first started acquiring the hard drive.

23 Q Okay.

24 A I mean, the thumb drive.

25 Q And you didn't actually execute this warrant

1 until April, right?

2 A Correct.

3 Q So, some time had also gone by where you were
4 reviewing the reports and everything, correct?

5 A Yes.

6 Q All right. And when you finally did go to the
7 defendant's residence and you had reviewed the report about
8 the USB thumb drive, did you immediately arrest the defendant
9 at that point?

10 A No.

11 Q Okay. What was the reason for not arresting him
12 at that point?

13 A Because the investigation was not complete.

14 Q And so I assume you want to continue your
15 investigation?

16 A Yes.

17 Q And part of that was obtaining a search warrant
18 for his residence?

19 A Correct.

20 Q And at that point did you know if he had any
21 more child pornography in his residence?

22 A No, I did not.

23 Q Okay. So when you actually started the
24 interview with the defendant, was the only thing that you had
25 to talk about in terms of child pornography the things that

1 were on the thumb drive?

2 A Yes.

3 Q Okay. And, in fact, you told the defendant that
4 you had a thumb drive that had -- no, you didn't have it with
5 you at the time, but you -- that you had in your possession a
6 thumb drive with child pornography, right?

7 A Yes.

8 Q Was that true?

9 A Yes.

10 Q And did you, at any point when you were talking
11 about the thumb drive, make up any information about other
12 child pornography or did you tell him that we have other
13 computers that have child pornography on them that we know
14 about at this time; did you say anything like that?

15 A Later in the conversation during the interview,
16 once I learned that there was child pornography on the
17 computers inside.

18 Q But before that did you basically lie or try to
19 mislead him into thinking you had more than you actually had?

20 A Other than the thumb drive --

21 Q Exactly.

22 A -- at that time, no.

23 Q Okay.

24 MR. WESTBROOK: Your Honor, I have an objection. May
25 I approach?

1 THE COURT: Yes.

2 (Off-record bench conference.)

3 THE COURT: All right. Overruled.

4 MR. WESTBROOK: Thank you, Your Honor.

5 BY MR. CHEN:

6 Q And, in fact, would you personally characterize
7 the conversation that you had with the defendant to be very
8 conversational, in fact?

9 A Yes.

10 Q You mentioned that the doors were unlocked,
11 right?

12 A Yes, I did.

13 Q He was free to leave at any time?

14 A Yes.

15 Q Okay. Now, when you interview or talk to a
16 person in the line of your work, do you always accept the
17 first version that's given to you?

18 A No.

19 Q Is it common that you would just simply talk to
20 somebody as I'm talking to you now and get immediate -- an
21 immediate response from the individual?

22 A Sometimes, yes.

23 Q Sometimes yes and other times do you find that
24 they don't?

25 A Correct.

1 Q Okay. So, if you're investigating something and
2 on the very first time you ask a question and they deny it, do
3 you always automatically stop the interview because they
4 basically said no to you?

5 A No, I do not.

6 Q All right. And why is that?

7 A Because people -- people lie. It just -- it
8 happens. People are afraid to tell the truth sometimes.

9 Q And you're not sure when you're conducting an
10 interview, right?

11 A Exactly.

12 Q So you continue asking questions?

13 A Yes.

14 Q And through your training and experience as a
15 detective, do you learn that over time sometimes the answers
16 do change?

17 A Yes, they do.

18 Q Okay. In this particular interview over time
19 did the answers that you were receiving from the defendant
20 change?

21 A Yes, they did.

22 Q And since they were changing, did you feel it
23 was fruitful to continue with the interview?

24 A Yes, I did.

25 Q And you heard a lot about these investigative

1 techniques that Mr. Westbrook was mentioning. And he gave
2 certain examples of them, as well. And were you paying -- or
3 you did hear the examples he was giving, right?

4 A Yes.

5 Q Okay. So I was wondering, for instance, if you
6 -- well, let me ask you this.

7 If you only had or had found just a single image of
8 child pornography, in your capacity as a detective, would you
9 investigate who possessed or knew about that child
10 pornography? If you had a case where child pornography was
11 presented to you --

12 MR. WESTBROOK: Objection, Your Honor.

13 THE COURT: Relevance. Is that your objection?

14 MR. WESTBROOK: That's -- I'm sorry. Relevance.
15 Yes. Thought I said it for some reason.

16 THE COURT: Sustained.

17 BY MR. CHEN:

18 Q Here's what I'm getting at. You mentioned in
19 your interview specifically that he says, You're trying -- do
20 you remember the questions where Mr. Westbrook was asking you,
21 you were trying to minimize the defendant's conduct, where you
22 were trying to show that on the scale of things, you have
23 terrible person here and you have low person down here --

24 A Yes.

25 Q -- do you remember that? And I believe the

1 example you gave in the interview was someone who actually
2 goes out and does things versus someone who might just be
3 looking at that?

4 A Yes.

5 Q And you give that example, correct?

6 A Yes.

7 Q And just from your opinion, since you're the
8 person who said that, do you believe that there is kind of a
9 moral difference between -- between the two? Or is one -- do
10 you find one to be more, I guess --

11 A Obviously, between somebody looking at something
12 and somebody acting on it --

13 Q Yes.

14 A -- that there is -- one is more severe than the
15 other.

16 Q And that's my question --

17 A But looking at it leads to somebody acting on
18 it, though. So.

19 Q So, when you told the defendant that, did you
20 truly believe that, that there is a severity in levels between
21 someone --

22 A I believe there's a difference, yes. There's a
23 severity in levels, yes.

24 Q And that's what you told the defendant, right?

25 A Yes.

1 Q Okay. And so when you -- you've also
2 investigated a number of these child pornography cases, right?

3 A Yes.

4 Q And you've investigated cases with thousands of
5 images, I would assume, correct?

6 A Yes.

7 Q All right. And when you told the defendant
8 that, as Mr. Westbrook asked the question, you only have, say,
9 this many images versus other cases you've seen, were you
10 being truthful about that?

11 A Yes.

12 Q And throughout the interview, were you only
13 confronting the defendant with evidence as you understood it
14 to be present? So, what I mean by that is, at first it was a
15 thumb drive, and then when you later learned that there was
16 other things, then you would talk to the defendant about that?

17 A Yes.

18 Q So, at no point were you making up any type of
19 evidence to try to get the defendant to admit to anything?

20 A No.

21 Q All right. Now, if you recall, one of the
22 specific questions Mr. Westbrook asked you was that you said,
23 We found child porn on the computer; do you remember that?
24 That you said in your interview, you said, We found some child
25 porn?

1 A Yes.

2 Q And you told that to the detective?

3 A Yes.

4 Q Or, no, I'm sorry --

5 A Mr. Castaneda.

6 Q -- to the defendant. Sorry.

7 A Yes.

8 Q Misspoke there. Now, let me ask you this,
9 Detective. You said we. Were you analyzing those computers?

10 A No.

11 Q All right. And you were trying to be truthful
12 with the defendant, right?

13 A Yes.

14 Q But you used the word we. Were you lying
15 because you used the word we when, in reality, Detective, you
16 hadn't actually personally seen the child pornography on the
17 computers at that time?

18 A No. I wasn't lying when I used the word We. It
19 was just a term.

20 Q It was just a term?

21 A Meaning that -- yeah.

22 Q Okay. So when you said, We found porn, you
23 weren't trying to mistake --

24 A No.

25 Q -- mislead him in any way?

1 A No, not at all.

2 Q It's just kind of you or Metro in general --

3 A Exactly.

4 Q -- had found something? Okay. All right.

5 Okay. Now, the next questions I have for you are dealing also
6 with your experience. Now, Mr. Westbrook asked you some
7 questions about your investigating or about what you know
8 about computers; do you remember those questions, as well?

9 A Yes.

10 Q All right. Now, you mentioned you've been on
11 this particular unit for how many years?

12 A Little over five.

13 Q Investigating Internet crimes against children,
14 correct?

15 A Yes.

16 Q And I assume you have a working knowledge of the
17 Internet, correct?

18 A Yes.

19 Q And do you have a working knowledge of basic
20 computer -- computers or using your home PC or laptop?

21 A Yes.

22 Q All right. And he asked you a question, you've
23 never heard of site mirroring; is that right?

24 A Yes.

25 Q Had you ever heard of site mirroring prior to

1 that conversation?

2 A No.

3 Q Okay. So, in the course of you investigating
4 solely for the last five years child pornography cases on the
5 Internet, safe to say then that none of your prior cases had
6 ever dealt with sites being mirrored and that's how child
7 pornography got on the computer?

8 A To the best of my knowledge, correct.

9 Q All right. What about -- okay. Now, one of the
10 other things that Mr. Westbrook asked you about was limiting
11 your investigation; do you remember those questions, as well?

12 A Yes.

13 Q All right. Now, in the course of the interview,
14 you actually talked about the girls that had been living at
15 the residence, as well, correct?

16 A Yes.

17 Q There was Tami's daughters, right?

18 A Yes.

19 Q And, in fact, he even told you the age of those
20 daughters, right?

21 A Yes, he did.

22 Q Around 17 or 12 or -- or give or take, right?

23 A Yes.

24 Q All girls, correct?

25 A Yes.

1 Q All right. And he talked about his nieces, as
2 well, right?

3 A Yes.

4 Q And his nieces were also roughly 12 or so,
5 correct?

6 A Yes.

7 Q So, Detective, in your experience is it likely
8 that -- or have you come across cases where 12-year-old
9 females are downloading child pornography from the Internet?

10 A 12-year-old females? No.

11 Q Okay. And so based upon your experience as a
12 detective, did you find that trying to -- or going down that
13 path would not have been very fruitful?

14 A No.

15 Q And just so --

16 A It would not have been.

17 Q -- in case -- okay. It would not have been.
18 And what was your reason for that, Detective?

19 A Because it's highly -- it's very uncommon for a
20 female child to download child porn.

21 Q And -- and -- withdraw that. Sorry.

22 MR. CHEN: Court's brief indulgence. Judge, I'll
23 pass the witness, thank you.

24 THE COURT: Thank you. All right. We're breaking
25 for lunch.

1 MR. WESTBROOK: Okay. Great.

2 THE COURT: It's 12:30. Ladies and gentlemen, we're
3 going to, let's see, be in recess till --

4 MS. ANTHONY: Your Honor, can we approach just for a
5 moment?

6 THE COURT: Yes. Okay.

7 (Off-record bench conference.)

8 THE COURT: All right. So we're going to -- we're
9 going to take an hour and 15 minutes for lunch, because the
10 lawyers and I have to work on some things outside your
11 presence, and court staff will be still working during that
12 period. That's why it's going to be longer than just an hour.
13 And they need to still have lunch. So we're going to return,
14 then, at 1:45. So.

15 THE CLERK: Back down to the other courtroom?

16 THE COURT: And we're also, yes, going to return back
17 to our larger courtroom so we don't have to have our alternate
18 be over on the side. We have a little more room. So we'll be
19 back in the courtroom you've been used to. All right.

20 So, during this recess it is your duty not to talk or
21 converse among yourselves or with anyone else on any subject
22 connected with the trial or to read, watch, or listen to any
23 report of or commentary on the trial by any person connected
24 with the trial or by any medium of information, including,
25 without limitation, newspapers, television, radio, Internet,

1 and you're not to form or express an opinion on any subject
2 connected with this trial until it is finally submitted to
3 you. All right. We'll be in recess.

4 THE MARSHAL: All rise. Ladies and gentlemen of the
5 jury, please.

6 (Jury recessed at 12:28 p.m.)

7 THE COURT: All right. The record will reflect that
8 we are outside the presence of the jury. May we excuse the
9 witness for lunch?

10 MR. WESTBROOK: Lunch, yes.

11 MS. ANTHONY: Yes, Your Honor.

12 THE COURT: And 1:45.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: All right. It's my understanding that
15 there's a submitted additional jury instruction by defense
16 that State does not agree with. And there is a case citation
17 on that which I haven't read, because it was just given to me.

18 MR. WESTBROOK: And, Your Honor, I can briefly
19 address this.

20 THE COURT: Okay.

21 MR. WESTBROOK: The case citation, you will not find
22 any language from my instruction in that case citation. It's
23 merely for the proposition that we all know already that
24 search warrants only require probable cause. That's all it's
25 saying.

1 MS. BALLOU: [Indiscernible.]

2 MR. WESTBROOK: I'm sorry. Probable cause
3 [indiscernible] evidence, forgive me.

4 The reason -- I'm sorry. I'll let you read it.

5 THE COURT: All right. I -- I would be willing to
6 consider a mere fact that a search warrant was issue in this
7 case should in no way be considered as proof of the
8 defendant's guilt. But beyond that, you know...

9 MR. WESTBROOK: That's acceptable.

10 MS. ANTHONY: And, Your Honor --

11 THE COURT: What?

12 MS. ANTHONY: -- I'd just like to address this jury
13 instruction. One --

14 THE COURT: Yes.

15 MS. ANTHONY: -- search warrants are in every case
16 that we have. And we don't normally give jury instructions
17 regarding search warrants. My second -- so that's my general
18 objection.

19 The second objection, I think that defense counsel
20 can argue it. I also have no objection with saying that a
21 search warrant is based on probable cause. But I have a
22 problem saying that in no way in this case should you consider
23 it as proof of the defendant's guilt.

24 MR. CHEN: She's not reading that.

25 MS. ANTHONY: Oh, I thought she said she was that

1 strong language.

2 THE COURT: Oh.

3 MR. CHEN: I thought she said she --

4 THE COURT: What, that if a search warrant was
5 issued?

6 MS. ANTHONY: I'm sorry. Maybe I misunderstood. I
7 thought you said that the sentence --

8 THE COURT: Right.

9 MS. ANTHONY: -- the mere fact that the search
10 warrant was issued in this case should in no way be considered
11 as proof of his guilt. You are okay with that?

12 THE COURT: Right. That -- that sentence is true.
13 Just the fact that a search warrant was issued isn't -- is
14 not --

15 MS. ANTHONY: But --

16 THE COURT: -- proof of his guilt. And we can phrase
17 that sentence so that the mere -- the mere fact that a search
18 warrant was issued is not sufficient to prove the defendant's
19 guilt, or something like that.

20 MS. ANTHONY: And I don't -- my problem with the --
21 the way that --

22 THE COURT: All right.

23 MS. ANTHONY: -- obviously, we can argue about
24 phrasing of it. Because my problem is that it is a true and
25 accurate statement that search warrants are based on probable

1 cause. And that in order for them to find the defendant
2 guilty, they have to prove beyond a reasonable doubt.

3 THE COURT: Right.

4 MS. ANTHONY: But if we're going to give a jury
5 instruction on this, the fact that it should not be considered
6 is a problem. They can consider, I mean, if we're giving a
7 jury instruction on it, they can consider that it was there
8 for probable cause.

9 THE COURT: No. They can consider the evidence that
10 was found in the search warrant.

11 MS. ANTHONY: Right. But I -- this --

12 THE COURT: Just the fact that search warrant was
13 issued...

14 MS. ANTHONY: But I think that if we're instructing
15 them, a jury isn't going to understand that. If we're
16 instructing them to not consider it, then -- then that gives
17 the wrong impression to the jury.

18 THE COURT: Well, I -- that -- that may be true. I
19 don't want to certainly mislead the jury to think that they
20 can't consider or to think that that means I'm telling them
21 don't consider what was found in the search warrant.

22 MS. BALLOU: And that's not what that says. It says
23 the mere fact that.

24 MR. WESTBROOK: Yeah.

25 MS. BALLOU: So, that -- that's not even the

1 assertion that's in the sentence that you agreed with, Your
2 Honor. So I don't think that that's in any way, shape, or
3 form saying that that cannot be considered.

4 MR. WESTBROOK: And if it could, Your Honor, let me
5 explain why I think this is appropriate and why it's
6 appropriate to this case specifically. Because, again, this
7 is not something that I -- I took from another case. It's
8 because of this case.

9 We heard this statement that was played in court,
10 which I objected to. And in the statement she says numerous
11 times, at least two, that I even read into the record just
12 now, that she got a search warrant and she specifically says,
13 And those aren't easy to get. And my problem is I don't want
14 the jury to think that because some judge awarded the search
15 warrant, that means that some judge has signed off on the
16 evidence in this case to an extent that it should be used to
17 convict my client.

18 And actually when I said that's acceptable regarding
19 the last line just being in, I want the entire thing in. That
20 would be a conciliation. You know, I -- but I'm asking for
21 the entire thing to be in and not just the last line. I think
22 it's very important, because the problem here is in playing
23 that for the jury, they've essentially informed the jury that
24 a judge has reviewed evidence in this case and has determined
25 that the evidence was sufficient, at least to have this trial.

1 They don't know anything about how incredibly low the standard
2 of proof is for probable cause, especially when compared to a
3 trial. And now they need to be told.

4 The same thing happens in cases from time to time,
5 Your Honor. And if I'd had more time to research it I
6 probably would have gone with one of these. When accidentally
7 or through some other issue in court a preliminary hearing
8 bindover is mentioned. Same standard of proof. And in those
9 cases what happens is you get some -- you get the option for
10 some kind of instruction to fix it all. This can be
11 considered like that. I think that the jury right now is
12 thinking that there was a search warrant in this case, some
13 judge signed off on it. That must mean that there is -- this
14 evidence is sufficient in some way. It doesn't mean that at
15 all.

16 And as I state specifically in this, the mere fact
17 that a search warrant was issued in this case should in no way
18 be considered as proof of the defendant's guilt. Okay. I
19 don't think they're going to misinterpret that don't consider
20 the evidence against the defendant that was got -- that was
21 obtained through the search warrant. And if they do, frankly,
22 I don't know how they're going to understand what an access
23 date is. Or a modification date.

24 THE COURT: All right. Well --

25 MR. CHEN: Your Honor, I have a proposal to make --

1 THE COURT: Yes.

2 MR. CHEN: -- and I think it's accurate and I think
3 it's -- I think -- the way he words it is a little bit harsh
4 and would -- could possibly give that implication. What I
5 would say is, in general the probable cause is correct, slight
6 or marginal is correct. But simply saying that the standard
7 beyond a reasonable doubt is more than probable cause, which
8 is what the justice courts always tell the defendants as
9 they're being bound over to district court, is that simply the
10 standard is different. And I think if we have some type of
11 statement along those lines, it accomplishes all purposes.

12 THE COURT: Maybe then you can work over the lunch
13 hour to -- to come up with language you agree on.

14 MR. WESTBROOK: That sounds fine to me, Judge.

15 THE COURT: Okay. Because in this case, you know,
16 probable cause can be based on slight or marginal evidence,
17 that's true. Was there -- was the evidence slight or
18 marginal? I mean, there was -- okay. All they have to have
19 for the search warrant is probable cause to believe that
20 evidence of a -- a crime is present in the place that they're
21 searching. That's all. And so this makes it -- this makes it
22 sound like --

23 MR. WESTBROOK: I'm not going to --

24 THE COURT: -- probable cause to believe that he
25 committed it. And that's not even the standard for a search

1 warrant. It's really only is there probable cause to believe
2 that there is evidence of a crime and that it's in this place
3 that we want to search. That's all.

4 MR. WESTBROOK: I understand that. That's part of my
5 problem with them talking -- with the detective in her
6 interview talking about search warrants in the first place.
7 Because, yeah, they were searching -- they were searching a
8 residence, we all know that, because we work in this business.
9 They were searching his residence and talking to him. He was
10 the only person interviewed.

11 THE COURT: I understand that.

12 MR. WESTBROOK: So --

13 THE COURT: But -- okay. So what --

14 MR. WESTBROOK: May I approach, though? I think I
15 might have a fix.

16 MS. BALLOU: And, Your Honor, do you mind if I take
17 my jacket off while the jury's not present?

18 THE COURT: I don't mind.

19 MS. BALLOU: My -- I don't have sleeves on and I
20 normally wouldn't, but it's really hot in this courtroom.

21 MR. CHEN: Actually, yeah. It doesn't -- mine
22 doesn't work, either.

23 MR. WESTBROOK: We can't figure out how to dress
24 ourselves.

25 MR. CHEN: I just think it should be probable cause

1 and slight or marginal evidence. Done.

2 THE COURT: All right. I'll work on some language
3 that I will propose and -- while we're at lunch.

4 MS. BALLOU: And, Your Honor, are we going to put the
5 main jury instructions other than this one on record right
6 now?

7 THE COURT: Well, we really can't do it and number
8 these --

9 MS. BALLOU: Okay.

10 THE COURT: -- until we get this hashed out. So.

11 MS. BALLOU: Okay. So, we -- well, we can't come
12 back earlier, then, because the --

13 THE COURT: Right.

14 MS. BALLOU: -- they need to take a break. So --

15 MS. ANTHONY: Can -- Your Honor, can I just briefly.

16 THE COURT: Yes.

17 MS. ANTHONY: I know Mr. Westbrook continues to talk
18 about the statement and just, you know, the reason that he's
19 proffered this jury instruction. I know it's been said
20 before, but I do -- I do just want to make sure that there's a
21 clear record. Mr. Westbrook got on this case, according to
22 him, two weeks prior to us driving trial. This case has been
23 ongoing. Ms. Ballou and I are -- appear to be the only two
24 that have been on the case since maybe January of this year.
25 I did do the redacted statement. I did go through all of the

1 redactions. I took out bestiality. I took out reference to
2 him in jail, I think. And I gave that in -- in, I believe,
3 February, we went over it a week before -- after calender
4 call. Ms. Ballou and I went over, made sure that there's a
5 redaction she didn't think had come out in the audio. We went
6 over the audio, that portion again.

7 So, as far as the objection that Mr. Westbrook made
8 at trial, prior to that I believed it had all been worked out.
9 And we had spoken about it, it was done. And so now that he's
10 objecting, prior to that, we had already agreed if we played
11 the statement that this is the statement that were going to
12 play.

13 So I -- I do want to make sure that that record is
14 clear, it's made, that that was an agreement, we had already
15 talked about it. If it was going to be played, that was what
16 was going to be played.

17 MR. WESTBROOK: Your Honor, I agree with that
18 completely. I am the fly in the ointment here. And I was not
19 on this case two years ago. And when I got here, I am making
20 the objections I'm making and asking the things I'm asking
21 for, because I believe that I'm required by the Sixth
22 Amendment to do so. And if I don't do so, it's a PCR issue.
23 If we end up losing on these issues that I'm bringing up,
24 because they weren't timely made, I believe that that is a PCR
25 issue. It's my duty to my client under the ethical rules and

1 under my personal code of ethics that don't change that I have
2 to do it. And I have no choice.

3 THE COURT: I understand.

4 MR. WESTBROOK: But apologies to this returning,
5 they're completely right about that.

6 THE COURT: Okay. All right. So let's see. Can you
7 come to my chambers at 20 minutes after 1:00?

8 MS. BALLOU: Yes.

9 MR. WESTBROOK: Yes, Your Honor.

10 THE COURT: And then we should be able to resolve
11 this last thing, maybe come in and put as -- as soon as, like,
12 at 12:40, or 1:45. Whatever I told them. But, yeah, at 1:45.

13 MS. BALLOU: 1:45 is what you told them.

14 THE COURT: Maybe we can put the jury instructions on
15 then, because we'll have them resolved. And then bring the
16 jury in. Okay.

17 THE MARSHAL: All rise. This court is in recess,
18 ladies and gentlemen.

19 (Court recesses at 12:39 p.m., until 2:07 p.m.)

20 (Outside the presence of the jury.)

21 THE COURT: All right. The State of Nevada vs.
22 Anthony Castaneda, Case No. C11272657. The record will
23 reflect presence of the defendant with his counsel, the
24 deputies district attorney prosecuting the case, all officers
25 of the court, and the fact that we are outside the presence of

1 the jury. Will counsel so stipulate?

2 MS. BALLOU: Yes, Your Honor.

3 MS. ANTHONY: Yes, Your Honor.

4 THE COURT: All right. And counsel have -- are
5 familiar with the jury instructions that we have now numbered
6 1 through 22.

7 MS. BALLOU: Yes, Your Honor.

8 THE COURT: Does the State have any additional
9 instructions proposed?

10 MS. ANTHONY: We did, Your Honor.

11 THE COURT: And I have in my hand a -- State's
12 instruction which reads, "A valid search warrant was obtained
13 in this case. In order for a judge to issue a valid search
14 warrant it must be demonstrated that this officer seeking the
15 search warrant has probable cause to believe that evidence of
16 the crime may be found in the place or thing to be searched.
17 Probable cause to search is not the same as proof of guilt
18 beyond a reasonable doubt. The mere fact that a valid search
19 warrant was issued is insufficient by itself to convict a
20 defendant."

21 MS. ANTHONY: That's correct, Your Honor. We only
22 submitted that instruction in response to a defense
23 instruction as an alternative. So once you get to the
24 defense's proposed instructions, that instruction that you
25 just read into the record is our alternative to their

1 instruction.

2 THE COURT: Okay. And the Court has elected not to
3 give this instruction nor the other -- the alternatives
4 proposed by the defense, and we will put the reasons for that
5 when we get to those others.

6 MR. WESTBROOK: Thank you, Your Honor.

7 THE COURT: Okay. This will be marked as offered by
8 the State and not given.

9 MS. BALLOU: That'll be made a Court's exhibit, Your
10 Honor?

11 THE COURT: Yes.

12 MS. BALLOU: Thank you.

13 THE CLERK: They're actually filed now --

14 MS. BALLOU: Oh.

15 THE CLERK: -- with a cover sheet.

16 MS. BALLOU: Oh, great.

17 MR. WESTBROOK: Even better.

18 MS. BALLOU: I didn't realize that.

19 THE CLERK: Yep. For about two years now.

20 MR. WESTBROOK: Yeah. That's been happening a lot
21 lately.

22 THE CLERK: If they're following procedure, that
23 should have been happening for two years.

24 MR. WESTBROOK: Yes.

25 THE COURT: All right. Then does the State object to

1 giving any of the instructions, 1 through 22?

2 MS. ANTHONY: No, Your Honor.

3 THE COURT: All right. And does the defense object
4 to the giving of any instructions, 1 through 22?

5 MS. BALLOU: Yes, Your Honor. There is an objection
6 to State's -- I'm sorry, to the final No. 12. The law
7 recognizes two kinds of possession, actual possession and
8 constructive possession.

9 THE COURT: All right. And your objection is?

10 MR. WESTBROOK: Your Honor, in this case we believe
11 that the constructive possession is not appropriate. We think
12 it will unduly confuse the jury. I -- I'm afraid that what
13 the State will be arguing in closing will be something to the
14 effect of, Well, it was his computer, ergo, he somehow
15 constructively possessed the child porn that was on it. This
16 obviously would not be legal, because that does not
17 demonstrate knowingly and -- and willfully, and therefore I
18 think a construction -- constructive possession argument in
19 this case is completely wrong, violate due process and my
20 client's Sixth Amendment rights, as well.

21 THE COURT: And the State's response?

22 MR. CHEN: Your Honor, that is the appropriate
23 possession instruction. As you know, possession is a material
24 element of the offense of which we have charged. So, I think
25 it's appropriate that we're able to argue that he possesses

1 it. Obviously, in this case the child pornography was located
2 on a computer. And so in order to have possession of files,
3 for instance, you need to have possession or an ability to use
4 any of the computers to which those images were on.

5 Since the images were in his house, he didn't
6 necessarily carry the images, they weren't necessarily -- the
7 laptops weren't attached to him at the time. They were in his
8 house. Certainly, being in his house, he would be able to
9 exercise dominion of control and therefore view the child
10 pornography. So I do think it's a correct statement of the
11 law.

12 MR. WESTBROOK: And that completely and accurately
13 describes my fear. He had the ability to, but unless he
14 actually did it, he has not violated this particular statute.
15 This differentiates it from different kinds of possession in
16 which constructive possession is enough. Constructive
17 possession is completely inappropriate in this case, because
18 merely having the ability to access it would not be enough for
19 a conviction. You must knowingly and willfully view or -- or
20 possess the child pornography. You cannot just constructively
21 do it and have that result in a conviction. This will confuse
22 the jury, they will make the wrong decision. And they're
23 being misled, I believe, as a strategy. That's going to be
24 what they're trying to do in their closing argument. It's
25 inappropriate and it's completely violative of my client's

1 rights.

2 MR. CHEN: Your Honor, does that sound like what I
3 just described as I closed -- my closing argument that I'm
4 going to argue it that way? That simply had -- that would
5 make it strict liability, which we've never said it is. We're
6 not going to argue that simply because it's on a laptop that
7 he can be found guilty of it. We have to prove material
8 element of knowingly and willfully, as well. Which we intend
9 to do. But...

10 MR. WESTBROOK: Then what's the purpose of
11 constructive?

12 THE COURT: All right. Stop with this back and
13 forth. Just -- just -- you address your comments only to the
14 bench. And don't be talking to each other.

15 MR. WESTBROOK: Apologize, Your Honor. I was
16 addressing it to the bench.

17 THE COURT: All right. Well, but you -- then you're
18 interrupting. I mean, I give you your chance to state your
19 reasons, then it's the State, then I speak. It's not back and
20 forth. I've had enough of that today from -- not in this
21 case, but from other lawyers.

22 MR. WESTBROOK: Thank you, Your Honor. I apologize.

23 THE COURT: All right. So the Court finds this
24 instruction is appropriate under the facts and circumstances
25 of this case, where the defendant did not have actual physical

1 possession of the images at the -- at a particular time where
2 there has been evidence that others had access to these
3 computers upon which images were found and that this was with
4 the permission of the defendant. So -- and perhaps without
5 the permission.

6 But there is a lot -- there was a lot of discussion
7 about who all had access. And so I think it's an accurate
8 statement of the law. I don't think it's going to confuse the
9 jury. And so it will be given.

10 Were there any other instructions to which the
11 defense objected?

12 MS. BALLOU: No objections, Your Honor.

13 THE COURT: Through -- in 1 through 22? All right.

14 MS. BALLOU: In 1 through 22.

15 THE COURT: So then there were additional
16 instructions that the defense proposed, which the Court has
17 indicated it was not going to give, correct?

18 MS. BALLOU: Correct, Your Honor.

19 THE COURT: All right. And the first one, I believe,
20 is --

21 MS. BALLOU: The first one that I have is the
22 reasonable doubt.

23 THE COURT: Exactly. I have that in my hand. And it
24 says --

25 MS. BALLOU: The -- the first part was addressed in

1 the final that we're giving, where I had proposed the
2 defendant is presumed innocent unless the contrary is proved.
3 Your Honor has changed the final to say the defendant is
4 presumed innocent unless and until the contrary is proved.

5 The second part of that is the -- is I added in
6 additional portion to the final sentence on the second
7 paragraph. I -- as I said in chambers, I understand that
8 that's the part where the legislature indicates that nothing
9 can be added to it. I just think that that's a misleading
10 statement of law and I want it to go up on the -- on appeal at
11 some point, so I put it on every one of my cases. I have that
12 last sentence in the second paragraph, "Doubt, to be
13 reasonable, must be actual, not mere possibility or
14 speculation." That is where it normally ends. I added a semi
15 colon, "Neither may a conviction be based upon mere
16 possibility or speculation."

17 THE COURT: Thank you. All right. And the State's
18 position?

19 MS. ANTHONY: Briefly, Your Honor. Our position is
20 that NRS 175.211 is specifically written in the statute that
21 no other definition could be given, and that's our position.
22 And that was already previously in the packet that's going to
23 be given to the jury.

24 THE COURT: And the -- the Court is not giving it,
25 because the correct recitation of the reasonable doubt

1 instruction is found at Jury Instruction No. 6. So this one
2 is also likewise noted by the Court as offered by defendant
3 and not given. And signed by the Court.

4 MS. BALLOU: Thank you, Your Honor. The next I had
5 is a replacement for No. 7, which is in the finals as No. 7,
6 which Your Honor chose not to use my version. It -- my
7 version is, "You are here to determine whether the State has
8 proved the guilt of the defendant beyond a reasonable doubt
9 from the evidence in this case." The one that Your Honor
10 chose to give is, "You are here to determine whether or not
11 the defendant is guilty or not guilty from the evidence in the
12 case." And I just think that that's a wording choice that
13 Your Honor chose the -- the version offered by the State.

14 THE COURT: And the State's position?

15 MS. ANTHONY: I'm sorry, Your Honor. I --

16 MR. CHEN: Which instruction number was it?

17 MS. BALLOU: 7.

18 THE COURT: "You are here to determine whether the
19 State has proved the guilt of the defendant beyond a
20 reasonable doubt from the evidence in the case. You are not
21 called upon to determine the guilt of any other person. So if
22 the evidence in the case convinces you beyond a reasonable
23 doubt of the guilt of the defendant, you should so find, even
24 though you may believe one or more persons are also guilty of
25 a crime." That was the offered instruction which the Court

1 has indicated it's not going to give in lieu of Instruction
2 No. 7, which is basically the same except that -- for the
3 first sentence, which says, "You are here to determine whether
4 or not the defendant is guilty or not guilty from the evidence
5 in the case."

6 MS. ANTHONY: And it's our stock instruction that we
7 generally give and it's covered. And so that's why we
8 submitted it, Your Honor.

9 THE COURT: And the reason I prefer the given
10 Instruction No. 7 over this one is that the offered
11 instruction is repetitive of the reasonable doubt which
12 they've just been instructed in, in Instruction No. 6. And so
13 that one, as well, I will mark as offered by defendant, but
14 not given.

15 MS. BALLOU: The next, Your Honor -- are you ready
16 for me? I'm sorry, you were still writing.

17 THE COURT: Go ahead.

18 MS. BALLOU: The next, Your Honor, is I've offered
19 one in place of Instruction No. 18, which has the same issue.
20 Instead of where it says, "In your deliberation you may not
21 discuss or consider the subject of punishment" -- I'm sorry,
22 the last sentence, "Your duty is confined to the determination
23 of whether the defendant is guilty or not guilty," my proposed
24 says, "Your duty is confined to the determination of whether
25 the State has proved the guilt of the defendant beyond a

1 reasonable doubt."

2 Again, I believe that there are no stock instructions
3 in the state of Nevada and I believe that mine is a correct
4 statement of the law. And I just would -- that's my
5 preference is to give that one.

6 THE COURT: And that instruction the Court's
7 indicated it's inclined to give, Instruction No. 18, which is
8 extremely similar. It says, "In your deliberation, you may
9 not discuss or consider the subject of punishment, as that is
10 a matter which lies solely with the Court. Your duty is
11 confined to the determination of whether the defendant is
12 guilty or not guilty." I believe that's a correct statement
13 and it doesn't, once again, go back to the reasonable doubt
14 instruction, which is already covered. And so that's the one
15 I'm going to give.

16 MS. BALLOU: And, Your Honor, there was one that we
17 had proposed, the crime of possession visual presentation
18 depicting sexual conduct of a child as a specific intent
19 crime. We had argument in chambers about the fact that
20 whether or not this is a specific intent crime, because the
21 knowing and willfully. And our contention is based on the
22 Jerome Ford case that we could only find as a slip opinion, we
23 believe that it is a --

24 MR. WESTBROOK: I have a -- I'm sorry.

25 MS. BALLOU: Oh, you do have --

1 MR. WESTBROOK: I apologize, Your Honor. Actually, I
2 -- I found the citation.

3 THE COURT: Okay.

4 MR. WESTBROOK: It's not a Nevada citation, still,
5 which is weird to me. But it's 262 P.3d, 1123, 2011.

6 THE COURT: And that instruction that you've offered
7 reads, "The crime of possession of visual presentation
8 depicting sexual conduct of a child is a specific intent
9 crime. A specific intent as the term applies means more than
10 the general intent to commit the act, that to establish
11 specific intent the State must prove beyond a reasonable doubt
12 that the defendant knowingly did the act, which the law
13 forbids, purposely intending to violate that law and act as
14 knowingly done if done voluntarily, intentionally, and not
15 because of mistake or accident or other reasons. Specific
16 intent is the intent to accomplish the precise act which the
17 law prohibits. And the" --

18 THE MARSHAL: Ladies and gentlemen, please silence
19 your phones if you have your phones on right now. We're
20 getting a disturbance.

21 THE COURT: Okay. State's position?

22 MS. BALLOU: Sorry, Your Honor.

23 THE COURT: State's position?

24 MS. ANTHONY: Your Honor, there is a -- I'm sorry, I
25 don't know the number, but there is an instruction that we

1 ended up giving regarding this mistake or accident. We also
2 gave a jury instruction regarding knowingly. I believe all
3 the instructions that we've given accurately describe each and
4 every element that the State needs to prove, and as why the
5 State objected to this jury instruction.

6 THE COURT: All right. And the Court determined that
7 -- that this instruction is unnecessary as -- as in many
8 places. It is made absolutely clear that it must be shown
9 that the defendant knowingly and willfully had in his
10 possession the materials that are designated by law as to be
11 illegal and that -- so that is first mentioned in Instruction
12 No. 11 in the first paragraph. Additionally, that's -- in the
13 first paragraph it says that. In the last paragraph it
14 emphasizes that if you did not knowingly and willfully have it
15 in his possession, you must find him not guilty.

16 And then we also have Instruction No. 13, "An act is
17 done knowingly if the defendant realized what he is doing and
18 did not act through ignorance, mistake, or accident. You may
19 consider the evidence the defendant's acts and words,"
20 etcetera. And then the final sentence, "If you find that the
21 defendant committed the act charged under ignorance or mistake
22 of that, you must find him not guilty."

23 And then Instruction No. 14, "Mere presence," as
24 well, instructs them that being merely present, and so all of
25 those things adequately instruct the jury. As well, the Court

1 --- the statute itself defines and uses the term knowingly
2 within it. That's how it's also described in the jury
3 instructions. And that specific intent crime is a specific --
4 generally a specific intent to cause a specific harm, such as
5 obtaining money under false pretenses, requires specific
6 intent to defraud the person for forgery. Many of the types
7 of forgery require specific intent to defraud. Here, all that
8 is required is knowing possession.

9 There is -- this is not a specific intent crime in my
10 mind. It is -- it does require that it be possessed knowingly
11 and -- but it doesn't require that the defendant knows it's a
12 crime. He just has to knowingly possess it.

13 And so I think the -- the instructions that are given
14 adequately cover the law. And so I'm going to mark this one,
15 as well, offered by defendant.

16 MR. WESTBROOK: And, Your Honor, can I just make a
17 very brief record about that.

18 THE COURT: Yes.

19 MR. WESTBROOK: I understand the Court's point of
20 view. All I want to say is that my point of view was that the
21 Ford case was about the pandering statute. I believe the
22 pandering statute in this instance is sufficiently similar to
23 this statute, that it should be deemed specific intent in
24 exactly the same way that the pandering statute was deemed
25 specific intent in the Ford case. That one also is charged

1 pandering, is also charged knowingly, willfully, and
2 feloniously. The same language is used by the State when they
3 charge it. I believe it has the same requirements under both
4 statutes. I believe that makes this a specific intent
5 statute.

6 THE COURT: All right. I think that that case is
7 distinguishable from the facts at hand. For one thing, the
8 Court in that case pointed out that the statute itself did not
9 have the knowingly language in it, so that there -- so,
10 regardless of how the State charged it, there was some
11 confusion there.

12 But at any rate, I feel the instructions adequately
13 cover the concerns of the defendant, which is that he could be
14 found guilty if the State was unable to prove that he
15 knowingly possessed it, and that he did just acquire it
16 through mistake or accident. So that's marked and I'll give
17 that third.

18 And finally, we've got --

19 MS. BALLOU: I actually have two more that were
20 proposed and --

21 THE COURT: Yes. They're -- they're -- they've been
22 stapled together because there's two of kind of the same
23 thing.

24 MS. BALLOU: If evidence is susceptible to?

25 THE COURT: Yes.

1 MS. BALLOU: I didn't -- I only have one version of
2 it. I don't -- I only have the one that we originally
3 submitted, so I didn't know -- I didn't remember.

4 THE COURT: Yes. There was one that you originally
5 submitted, "If evidence is susceptible to two constructions or
6 interpretations, each of which appears to you to be reasonable
7 and one of which points to the guilt of the defendant and the
8 other to his being found not guilty, it is your duty under the
9 law to adopt that interpretation which will admit of -- of the
10 defendant's being found not guilty and reject that which
11 points to his guilt. You will notice that this rule applies
12 only when both of the two possible conclusions appear to you
13 -- you to be reasonable.

14 "If, on the other hand, one of the possible
15 conclusions should appear to you to be reasonable and the
16 other unreasonable, it would be your duty to adhere to the
17 reasonable deduction and reject the unreasonable, bearing in
18 mind, however, that even if the reasonable deduction points to
19 the defendant's guilt and the entire proof must carry the
20 convincing force required by the law to support a verdict of
21 guilt." That's the first one.

22 And then there was a supplementary suggestion that
23 would instead read, "If the evidence supports two reasonable
24 interpretations, one that points to the defendant being found
25 guilty and one that points to the defendant being found not

1 guilty, it is your duty to find the defendant not guilty."
2 And that is a handwritten instruction that appears on the
3 bottom of the one I just read. And that was handwritten by
4 Mr. Westbrook and proposed and he had indicated he wanted to
5 give -- proposed -- proffered both of those.

6 MS. BALLOU: Okay.

7 THE COURT: So, do you have any objection to marking
8 them together, since --

9 MS. BALLOU: No, Your Honor.

10 THE COURT: All right.

11 MS. BALLOU: So --

12 THE COURT: So --

13 MS. BALLOU: -- the -- the first one that I had
14 written up and -- or typed up and proposed was based on Crane
15 [phonetic] vs. State. And it's also the exact Jury
16 Instruction No. 31 that was given by Judge Barker in a case I
17 believe it was either the end of last year or the beginning of
18 this year that went to trial, State vs. Todd, C-12-285772-1.

19 THE COURT: And the State's position?

20 MS. ANTHONY: Your Honor, it's not error to not give
21 this instruction. I believe our reasonable doubt instruction
22 that we've already previously given comports with the statute
23 which is 175.211.

24 THE COURT: And the Court is not giving this
25 instruction, because the -- the jury is being adequately

1 instructed on the reasonable doubt and the standard in
2 existing jury instructions. And this instruction, the way it
3 is -- is written, the first part is extremely misleading.
4 Well, not misleading. I shouldn't say that. It's just kind
5 of unintelligible, because the -- the grammar and the language
6 is just such a mess. And as far as the more -- the
7 better-written version, which Mr. Westbrook proposed, I think
8 that's redundant, the reasonable doubt instruction. That's
9 why that is not being given. And I've marked that. But both
10 of them together as one single exhibit so they'll --

11 MR. WESTBROOK: Your Honor, may I violate your --
12 your rule that you just told me about a second ago? I thought
13 Ms. Ballou was going to bring this up. I just wanted to say
14 that since we had our conversation in chambers regarding that
15 instruction, I've said that I expected that instead of just
16 being proposed in the way this instruction usually is, as sort
17 of a catchall, or a tie-goes-to-the-runner instruction, I was
18 proposing it in this case as a theory-of-the-case instruction
19 pursuant to [indiscernible] such as Davis v. Alaska, etcetera.

20 And the reason is because, in this case, through the
21 State's own witnesses, I feel that we have gotten several
22 different versions of what could have happened with these
23 computers and the downloading of files. In fact, I went to
24 great pains with their experts to specifically have them tell
25 me what theories of possible transmission of these files were

1 reasonable. And I was using that word on purpose throughout
2 the trial, reasonable, because of that instruction. Not
3 getting that instruction, I believe deprives us of a
4 theory-of-the-case instruction, which makes it different than
5 the cases that have said in the past, It's not error to refuse
6 to give the instruction. This is not a catchall in this case,
7 it's specific to what's going on here. That's all.

8 THE COURT: All right. And in response to that, the
9 Court believes you're not precluded, of course, from arguing
10 that the State has not proved beyond a reasonable doubt that
11 the reasonable doubt instruction adequately covers it.

12 All right. Then we have three additional
13 instructions. Again, I think I'll -- I'll staple these all
14 three together, since they're all versions of the same
15 instruction. The first one, Ms. Ballou, reads, "Search
16 warrants do not require 'proof beyond a reasonable doubt.'
17 Search warrants are merely an investigative tool. All that is
18 required to obtain a search warrant is 'probable cause' as
19 determined by a magistrate. 'Probable cause' can be based on
20 slight or marginal evidence. Slight or marginal evidence is
21 not sufficient for a conviction in a criminal trial. The mere
22 fact that a search warrant was issued in this case should in
23 no way be considered as proof of the defendant's guilt."

24 Now, this proposed instruction that I have here
25 actually has a footnote with the citation to it. And you

1 weren't proposing, of course, that the citation and the
2 footnote be there, correct?

3 MS. BALLOU: No.

4 THE COURT: Okay.

5 MS. BALLOU: Correct.

6 THE COURT: I just want to make that clear for the
7 record.

8 MS. BALLOU: Yes.

9 THE COURT: So, I'll actually strike that out on the
10 offered so it's clear that you did not intend for that portion
11 to be given. Okay. Would you like to make a record on that?

12 MS. BALLOU: Mr. Westbrook did.

13 MR. WESTBROOK: I'll -- I'll do that, Your Honor.
14 The reason that we proposed this, as the Court will recall, we
15 objected -- I don't know why I'm leaning over all the sudden.
16 I'm going to -- I'll try it now. I've got a microphone here
17 and I'm leaning over it like I'm -- I'm at an inquisition or a
18 senate hearing. Okay. Sorry.

19 The reason we proposed this instruction is because
20 the interview audio was entered over our objection. Or my
21 objection. And it was entered over my objection for -- I'm
22 sorry. My objection was based on several things. One of the
23 things that I found a problem with in the interview that was
24 played was the fact that the officer says several different
25 times, at least two and I think more than that, that she got a

1 search warrant and search warrants are really hard to get.
2 And if you get a search warrant it means you have really
3 strong evidence.

4 And the problem I have with that I believe that the
5 jury is going to get the impression that that -- the presence
6 of a search warrant in this case and the description of the
7 search warrant given by this officer means that a judge,
8 someone with authority who has reviewed the case, has signed
9 off on it, implicitly endorsing the evidence. And I think
10 that that's incorrect and it's misleading.

11 I proposed the instructions essentially as a way to
12 cure this possibility with the jury. I was willing to accept,
13 obviously, the one that I -- that I initially submitted and
14 then the one that I redline, which is also in the packet. And
15 then a third one that Your Honor wrote, which I felt was fine
16 with the exception of two words. The two words were in the
17 very last part. I'm not looking at this --

18 MS. BALLOU: You don't have all of them.

19 MR. WESTBROOK: Yeah, I don't -- do I not have the
20 third one?

21 MR. CHEN: You mean our proposed, counsel?

22 MR. WESTBROOK: Yeah. That was -- the -- our
23 proposed has been adopted by the State. Obviously, again, the
24 Court did write that one. But the State decided as a strategy
25 measure to adopt it in chambers. And my only concern with it

1 was two words. And the two words that were crossed out. Your
2 Honor, do you have this instruction in front of you?

3 THE COURT: Yes, I do.

4 MR. WESTBROOK: Would you mind reading that sentence
5 into the record for me, since I don't have a present copy.

6 THE COURT: All right. I'll read the whole thing.

7 MR. WESTBROOK: Thank you.

8 THE COURT: Because this -- this would be the third
9 page in this group exhibit. "A valid search warrant was
10 obtained in this case. In order for a judge to issue a valid
11 search warrant, it must be demonstrated that the officer
12 seeking the search warrant has probable cause to believe that
13 evidence of a crime may be found in a place or thing to be
14 searched. Probable cause to search is not the same as proof
15 of guilt beyond a reasonable doubt. Mere fact that a valid
16 search warrant was issued is insufficient by -- by itself to
17 convict a defendant," you had stricken the "by itself," and
18 there's also some handwritten language that should be
19 disregarded, because that wasn't part of your proposed --

20 MR. WESTBROOK: That was placed in error, you're
21 right, Your Honor.

22 The "by itself" thing was important and I think it's
23 very -- very telling about the State's position on this that
24 they wanted to leave it in. I believe that Your Honor agreed
25 with me when I said that that existence of a valid search

1 warrant is not just insufficient to convict a defendant, it is
2 not evidence at all. It merely means that they got a search
3 warrant. Issuance of a search warrant cannot be considered as
4 evidence that a crime was committed. It is only a tool that
5 is used to start an investigation.

6 I believe that the State wants the jury to believe
7 somehow that this -- this -- this warrant is evidence in this
8 case or it's some kind of symbol that the evidence in this
9 case was strong because a judge signed off on it. That's why
10 they adopted it as a strategy measure, this court's complete
11 instruction, and they objected to me crossing out "by itself."
12 And I believe the Court agreed that the existence of a search
13 warrant is not evidence of guilt. So that's -- that's my
14 record on that.

15 THE COURT: Well, of course, it's not. So I -- of
16 course I would have agreed with that statement. However, I
17 guess we should, before we finish, we should note that the
18 second page of this exhibit was your additional revised, your
19 second revised version of the first one, which says, "Search
20 warrants do not require 'proof beyond a reasonable doubt.'
21 Search warrants are merely an investigative tool. All that is
22 required to obtain a search warrant is 'probable cause' as
23 determined by a magistrate. 'Probable cause' is not the
24 standard in this case. Probable cause is not sufficient for a
25 conviction in a criminal trial. The mere fact that a search

1 warrant was issued in this case should in no way be considered
2 as proof of the defendant's guilt."

3 Okay. My concern about all of these instructions was
4 this. First of all, the comment in an interview by police
5 officer where she says we -- we got a search warrant, they're
6 not -- it's not easy to get, they're not easy to get in
7 passing, in -- buried in what was an hour and a half of
8 recorded testimony played for the jury is really
9 insignificant.

10 But what I'm concerned about is going into a lot of
11 detail about trying to define what probable cause is and
12 whether, you know, that it's slight or marginal evidence, now,
13 what does -- what does that mean? And that -- that I don't
14 want the jury to be confused by this type of instruction. And
15 when I was trying to address your concern in -- in coming up
16 with an instruction that would be acceptable to both sides,
17 really no one was happy. I mean, I agreed that I was
18 concerned with reading the "by itself" language in my initial
19 draft could be fraught with issues. And I didn't want that to
20 be the case. It's true that a valid search warrant was
21 obtained in the case, and it's true that in order for a judge
22 to issue a valid search warrant, it must be demonstrated the
23 officer seeking the search warrant has probable cause to
24 believe that evidence of the crime may be found in a place or
25 thing to be searched and that probable cause to search is not

1 the same as proof of guilt beyond a reasonable doubt. And I
2 would have even been willing to give it up to that point.

3 But then you just want more. And -- and the more is
4 what I'm concerned about. It just keeps clouding the issue
5 further and further and makes it -- it blows something up into
6 -- that's not there. The -- the State is not -- has never
7 argued that because they had a search warrant, and certainly
8 if they argue that in closing argument, because we had a
9 search warrant, you have -- you can convict him, would be
10 completely improper and I would sua sponte stop such argument.

11 So, for -- for that reason I've elected to leave it
12 alone, because I think it causes more problems and error than
13 to not give any of those instructions. And for that reason,
14 I'm not giving any of them. So I'm going to mark this as a
15 group exhibit, all three versions offered by defendant, but
16 not given. And, of course, then that explains the reason
17 similarly I elected not to give the proposed one by the State.

18 All right. And I assume both counsel would -- are
19 requesting that the Court instruct the jury before closing
20 arguments?

21 MS. ANTHONY: Yes, Your Honor.

22 MS. BALLOU: Yes, Your Honor.

23 THE COURT: All right. Thank you. Are we ready to
24 bring the jury in?

25 MR. WESTBROOK: Your Honor, I have other things just

1 to read into the record. I don't require any argument on it.
2 If we could do it right now, it would take about two minutes.

3 MS. ANTHONY: And if I could run to the restroom, my
4 co-counsel could handle it.

5 THE COURT: Okay.

6 MR. WESTBROOK: Okay.

7 MS. ANTHONY: Do you mind if I go that way?

8 THE MARSHAL: No.

9 THE COURT: Yes, you may.

10 MS. ANTHONY: Thank you.

11 MR. WESTBROOK: Again, I believe these have all been
12 ruled upon. I just wanted to perfect my record. First of
13 all, in my objection to the playing of the interview,
14 something was said at the bench I don't believe I said on the
15 record. So just in case I didn't, I wanted to bring this out.

16 In addition, during the cross-examination of
17 Detective Ehlers, the State objected that my questioning of
18 him was unfair and that I was misleading and confusing him
19 with my examination. I was required to alter my questioning,
20 which I did. Then prior to the playing of the recording, I
21 objected to its admission in part on the same grounds, because
22 Castaneda was interviewed by a professional, he was placed
23 under duress. The professional was using advance
24 interrogation techniques, which are specifically designed to
25 elicit confessions, that I believe these techniques were

1 inherently unfair and reliable [sic]. I thought it would
2 confuse and mislead the jury to play the interview, although
3 there was no confession. That the State would suggest that
4 Castaneda's words showed a guilty mind.

5 May -- may I go on to the next one or?

6 THE COURT: Oh.

7 MR. WESTBROOK: That -- that was it. That was just
8 completing the -- the objection to the playing of the -- of
9 the interview.

10 THE COURT: All right. And the -- the Court had
11 ruled that it was proper evidence and it was relevant in the
12 case and allowed it. Okay.

13 MR. WESTBROOK: Thank you, Your Honor. Number two, I
14 made an oral motion to call a rebuttal witness specifically to
15 rebut testimony that was given at trial that I was not
16 expecting to Detective Evers. I keep mispronouncing his name.
17 Is it Evers, guys? Ehlers. Gosh. I don't know why I can't
18 get that. Ehlers.

19 I intend to secure an offer of proof to complete my
20 record on this topic. I will file it in writing, however, in
21 the event my client is found guilty, because it costs money.
22 And because I -- I wouldn't have time to obtain it before
23 closing arguments, certainly.

24 THE COURT: All right. And I think you need to say,
25 because I don't think it's -- it's on the record. I don't

1 remember whether this was all argued outside the presence or
2 at the bench. But you don't say why you felt you need a
3 rebuttal witness, at least today, right now you haven't said
4 that. So, in case --

5 MR. WESTBROOK: Okay.

6 THE COURT: -- it's not on the record, why don't you
7 tell me anyway.

8 MR. WESTBROOK: Absolutely. It is my position that
9 we should have had technical experts in this case. When we
10 went through the questioning, there was something that was
11 said -- and also for the record, there was an expert that was
12 consulted in this case. But I don't believe he was asked the
13 right questions, and this was before I got onto the case.
14 That's neither here nor there, but that's just some
15 background.

16 The two experts that I wanted to contact would be an
17 Internet networking expert, specifically, and a Windows
18 expert, and then specifically Windows XP. That sometimes is
19 the same person, sometimes it's not. There were specific
20 things that were said by the detective on the stand, answers
21 that I felt that he wasn't giving a complete account of. For
22 example, his definitions of the word access and his
23 definitions of the word modified. And then a variety of other
24 things, which I will -- I will, if necessary, address in
25 writing along with a complete offer of proof. But those are

1 just two examples. I really wasn't expecting him to go that
2 direction, because I don't believe it was consistent with his
3 report or with reality.

4 And then one in particular, which I thought was
5 really out of left field, I -- I don't think it was anywhere
6 in any report. He said that he felt that some fragment files
7 that were in unallocated spaces of the hard drive provided
8 evidence that they were deleted and, in another leap, that
9 they were deleted by direct human intervention.

10 Eventually, I got him to admit to the possibility
11 that he could -- they could be deleted by a virus program
12 automatically, but then he also fudged that by saying, Well,
13 I'm not sure which virus program was in use and not everyone
14 has it, etcetera.

15 I think that that issue could absolutely and
16 unequivocally be laid to rest by an expert who does not have a
17 bias towards the State. That's my position, I will, if
18 necessary, file an offer of proof to that effect once I get
19 the expert squared away and paid for and they can review
20 exactly what I'm talking about.

21 THE COURT: All right. Well, the State's expert
22 witness was subject to extensive cross-examination. He
23 explained why he came -- he reached the opinion that he did.
24 You may disagree with it. But that doesn't -- doesn't entitle
25 you to a rebuttal -- rebuttal expert. You were certainly --

1 you certainly had the ability to call your expert that -- that
2 was retained by the defense, and in fact went and examined the
3 particular hard drives and had the ability to do a complete
4 analysis. The decision, apparently you used strategic
5 decision not to call that expert as a witness.

6 And you -- you had that opportunity to do that and
7 you could have put -- you could put such a witness on in your
8 case in chief. And you still can. Unless you didn't notice
9 that witness.

10 MR. WESTBROOK: I'm sorry, Judge, Your Honor, he
11 wasn't noticed in this case. And that was before I ever got
12 onto the case.

13 THE COURT: Okay. Well, then, you know, it's -- that
14 was a decision that was made, a strategic decision by counsel.
15 And so Ms. Ballou could have noticed him, she's had the case,
16 I think, since January. So there was adequate time to do so.
17 And so, plus you don't -- you don't have such an expert hired,
18 you don't have such an expert noticed, so I don't know what --
19 what this, you know, offer of proof, it sounds more like
20 you're jumping to post-conviction issues, potentially. Which
21 assumes that there will be a conviction in this case, and
22 there certainly has not been one yet.

23 MR. WESTBROOK: Well, I'm hopefully going to go get
24 one. However, that would, I think, be an appellate issue, the
25 denial of my request to call a -- a rebuttal expert.

1 THE COURT: You don't even have a rebuttal expert.

2 MR. WESTBROOK: Whether or not we should have --

3 THE COURT: You're saying you don't have a rebuttal
4 expert, haven't hired one, and --

5 MR. WESTBROOK: Oh, that's -- that's correct, Your
6 Honor. But I have a list and I would have contacted one
7 yesterday, except the Court told me that I would not be
8 allowed to call one either, I think Tuesday. I think Tuesday.
9 So yesterday or the day before. In fact, I have a list of
10 people that I could have called. But I was told that I
11 wouldn't be able to get a rebuttal expert. And so it became a
12 non issue as far as the appellate issue goes.

13 And then, of course, as far as the potential PCR
14 issue, if that ever happens, unfortunately, and I'm -- I'm
15 sure to the great dismay of many, including myself, I will
16 make a record about that if it ever comes to pass.

17 THE COURT: All right. State's -- have any further
18 response to that?

19 MS. ANTHONY: No, Your Honor.

20 THE COURT: Okay. All right. Was that the last
21 thing?

22 MR. WESTBROOK: Oh, sorry. Oh, yes. Just one last
23 thing about the -- the motion that was already rejected, the
24 Motion to Dismiss and the perjury issue --

25 THE COURT: Yes.

1 MR. WESTBROOK: -- regarding materiality.

2 THE COURT: Yes.

3 MR. WESTBROOK: During her testimony, Detective
4 Tooley specifically said that she altered her investigation
5 because of the information received from Tami, the information
6 that is the subject of our perjury argument and that she now
7 admits on the stand was a lie to Detective Tooley. And then,
8 of course, earlier, she had said that it was truthful on the
9 stand, which -- which makes it a lie under oath here.

10 THE COURT: All right. State's response.

11 MR. CHEN: Your Honor, I would -- I think he just
12 misstated something and when they check the record it's going
13 to be clear. He said, Would you have changed your
14 investigation had you known something? She said yes. There's
15 a difference between telling someone that something happened
16 and changing -- and -- and lying about it. She was never --
17 in the interview, Detective Tooley never says that she asks
18 Tami about being evicted. And certainly Tami wasn't there to
19 talk about being evicted, as Mr. Westbrook puts it. So that's
20 just a complete misstatement of everything. I don't think it
21 changes anything from where we were on this motion from the
22 time that he filed it earlier on to -- to now. It's the same
23 exact thing, Your Honor.

24 MR. WESTBROOK: May I address that, Your Honor, since
25 I was told that I just made a misstatement of what actually

1 happened? Because I -- I don't believe it was a mis -- it's a
2 misstatement. I wasn't as detailed as I could have been. But
3 I can be a little bit more detailed.

4 MR. CHEN: Tami wasn't as detailed --

5 THE COURT: Yeah, I -- I heard the testimony --

6 MR. CHEN: -- in an interview, either, Your Honor.

7 THE COURT: -- and -- and I don't believe that
8 testimony changes my initial ruling on your Motion to Dismiss,
9 which was all about whether at the preliminary hearing the
10 witness, Ms. Hines, had lied at preliminary hearing. Okay.
11 And so that's my ruling on that.

12 All right. That's the last thing, right? And
13 it's --

14 THE MARSHAL: 2:53.

15 THE COURT: -- almost -- yeah. So we need to bring
16 the jury in. They've been here waiting.

17 THE MARSHAL: All rise for the jury, please.

18 (Jury reconvened at 2:54 p.m.)

19 THE COURT: Please be seated. Ladies and gentlemen,
20 I apologize for keeping you waiting.

21 THE MARSHAL: Your Honor, we're missing one juror.

22 MS. ANTHONY: He was on his phone out there.

23 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

24 THE COURT: All right. Again, ladies and gentlemen,
25 I apologize for keeping you waiting. I don't want you to

1 think that we were not here and not working. We were, but we
2 didn't need your presence until just now.

3 The record will reflect the presence of the defendant
4 with his counsel, the deputies district attorney prosecuting
5 the case, all officers of the Court, all 12 members of the
6 jury, and the alternate. Will counsel so stipulate?

7 MS. ANTHONY: Yes, Your Honor.

8 MS. BALLOU: Yes, Your Honor.

9 MR. WESTBROOK: Yes, Your Honor.

10 THE COURT: Thank you. And we are -- where are we?
11 We're on -- still on cross?

12 MR. CHEN: Cross-examination of Detective Tooley.

13 THE COURT: And --

14 MR. CHEN: Recross. She's in the vestibule.

15 THE COURT: She's in the vestibule.

16 THE MARSHAL: Detective, please. Detective, would
17 you please take the stand.

18 Remind you that you're still under oath from earlier
19 today.

20 THE WITNESS: Yes, sir.

21 THE MARSHAL: Thank you.

22 THE COURT: You may continue.

23 RECROSS-EXAMINATION

24 BY MR. WESTBROOK:

25 Q Hello, Detective. Just a few things. All

1 right. Before the break Mr. Chen mentioned that you didn't
2 arrest Mr. Castaneda following your interview because you were
3 continuing your investigation; is that correct?

4 A Yes, sir.

5 Q Okay. Let's talk about how that investigation
6 was continued. You didn't do an in-depth investigation
7 regarding Tami's daughters, because as you said, it's not
8 typical for teenage girls to download child pornography,
9 right?

10 A That, and the girls were not living at the time
11 downloads occurred.

12 Q Okay. As far as you know, correct?

13 A As far as the forensics revealed.

14 Q All right. But you don't know when the
15 downloads occurred, do you?

16 A According to the forensic record on the
17 computer, the dates were 2007.

18 Q I'm sorry, I thought you didn't understand
19 anything about terms like accessed and written and modified?

20 A This is coming from the forensics, from the
21 forensic investigators.

22 Q Okay. So you had no knowledge of this?

23 A They're -- they gave me a report with the
24 information in it.

25 Q Okay. And the record had information like

1 accessed, written by, modified, correct?

2 A Yes, sir.

3 Q Okay. And I asked you questions about that
4 yesterday, and you told me that you didn't know anything.

5 A I said I didn't understand it all.

6 Q Okay. Written by, you don't know what that
7 means, right?

8 A Can I give you a working definition? I'm -- I'm
9 confused on what you're asking.

10 Q I asked you for one yesterday and you told me
11 you couldn't give me one.

12 A I -- because I told you I get them confused
13 between written, modified, accessed.

14 Q Then tell me what you think written is now?

15 A Couldn't tell you.

16 Q Okay. So you can't give me a written
17 definition?

18 A No. I already -- I already clarified this
19 yesterday, and this morning, actually.

20 Q Okay. I'll slow down just a second. You just
21 asked me if you could give me a working definition of what
22 written means, didn't you, just now?

23 THE COURT: No. Okay.

24 THE WITNESS: That's --

25 MR. WESTBROOK: Did I misunderstand?

1 THE COURT: Yes.

2 THE WITNESS: Yes.

3 THE COURT: Yes.

4 MR. WESTBROOK: Okay.

5 THE COURT: She's testified repeatedly that she is
6 confused over those terms and she doesn't know. And she just
7 said, Do you want me to give you a written -- a working
8 definition? That was what she said.

9 MR. WESTBROOK: I understand. Okay.

10 THE COURT: Okay.

11 BY MR. WESTBROOK:

12 Q And your response to that is you can't give me
13 one?

14 A Correct.

15 Q Because you don't understand terms like written,
16 modified, and accessed?

17 A Correct.

18 Q Okay. And yet you just said that these girls
19 weren't living there when the child porn was downloaded
20 because someone else told you that, right?

21 A Based off the forensic report and talking with
22 the forensic -- the persons who did the forensic report, yes.

23 Q Okay.

24 A That was my interpretation.

25 Q Okay. In all fairness, if you don't know what

1 the terms mean, you can't develop an interpretation, can you?

2 A If a person explains something to me, like this
3 was put on this computer, they're saying this -- these items
4 were on the computer at a certain date, and that's explaining
5 it to me.

6 Q So they'd explained to you what the terms mean?

7 A No. Not what the terms mean. They're just
8 telling me, yes, these items were put on this computer around
9 this date.

10 Q So --

11 A They didn't explain the terms. Like I said,
12 we've already covered that.

13 Q So you just accepted what they were saying with
14 no knowledge whatsoever about the terms they were talking
15 about; is that correct?

16 A They're the forensic expert.

17 Q And you're not?

18 A Correct. We've established that.

19 Q So there's somebody who's directing an
20 investigation that involves almost exclusively forensic
21 computer evidence that doesn't know anything about computers;
22 is that what's happening here?

23 A I didn't say I didn't know anything about
24 computers. I said I don't understand the forensic aspect
25 about computers.

1 Q Okay. Is that not like someone directing a
2 stagecoach who doesn't know anything about horses?

3 MR. CHEN: Objection, Judge. At this point I believe
4 he's being argumentative.

5 THE COURT: Sustained.

6 BY MR. WESTBROOK:

7 Q Let's go back to talking about how your
8 investigation continued. You didn't do an in-depth
9 investigation regarding Tami's daughters. You just explained
10 that. And, specifically, you said because girls, teenage
11 girls, they don't usually download child pornography, right?
12 They don't normally do that. And then you also said because
13 they weren't in the house, but that's the reason that you gave
14 Mr. Chen, correct?

15 A Correct.

16 Q Okay. And I -- I assume that's correct. But
17 they might be able to do it using a fileshare program
18 accidentally, couldn't they?

19 A They'd have to be searching for the key words,
20 search terms for it.

21 Q Unless there was a virus or some other aspect,
22 but that gets into computer knowledge, which you don't have,
23 correct?

24 A I find it very highly unlikely that a virus did
25 it.

1 MR. CHEN: And, Your Honor, if we could approach for
2 a brief moment, please.

3 THE COURT: All right.

4 (Off-record bench conference.)

5 THE COURT: Okay. The objection was sustained.
6 You'll move on.

7 BY MR. WESTBROOK:

8 Q In your continuing investigation, you failed to
9 investigate two middle-aged men who were associated with this
10 case, didn't you?

11 A I didn't know about two middle-aged men until
12 the first preliminary trial.

13 Q Okay. And how long ago was that?

14 A I have no idea. And, as a matter of fact, I
15 don't think I learned about two of them, I just knew about
16 one, that she had a husband.

17 Q Well, you actually learned that she had a
18 husband when Mr. Castaneda told you directly during your
19 interview of him when this case started, right?

20 A I'm sorry, you're correct.

21 Q Okay. So, and you --

22 THE COURT: And let -- before there's any confusion,
23 there has not been a trial until now on this. I think you
24 misspoke. There was a hearing of some kind.

25 THE WITNESS: Yes. I'm sorry. That -- you're

1 absolutely correct. I apologize.

2 THE COURT: Okay. I didn't want there to be any
3 misunderstanding by the jury.

4 MR. WESTBROOK: Thank you. Thank you, Your Honor.
5 Yes, of course. The hearing, of course, is what we're talking
6 about. There's been no other trial in this case.

7 THE WITNESS: Yes.

8 MR. WESTBROOK: Court's indulgence.

9 BY MR. WESTBROOK:

10 Q April 14th, 2011, does that sound about right
11 for the hearing in this case?

12 A I honestly do not remember.

13 MR. WESTBROOK: May I approach the witness?

14 THE COURT: Yes.

15 BY MR. WESTBROOK:

16 Q If this isn't enough, I can get you some more.

17 THE COURT: Court would take judicial notice,
18 however, of that date of the preliminary hearing.

19 MR. WESTBROOK: That -- I'd be fine with that. Thank
20 you.

21 THE COURT: Okay.

22 MR. WESTBROOK: Okay.

23 THE COURT: Because I don't think it's going to
24 refresh her recollection.

25 MR. WESTBROOK: That's a good point. Thank you, Your

1 Honor. And I should have asked if it would refresh her
2 recollection, anyway, so I apologize for that.

3 BY MR. WESTBROOK:

4 Q Okay. So judicial notice being taken, April of
5 2011 is when you heard about the boyfriend, right?

6 A Honestly, I don't recall.

7 Q Well, you heard about it in the hearing, as you
8 just said?

9 A Correct. That's when I believe Michael was
10 brought up.

11 Q Correct.

12 A Is that what you're referring --

13 Q Mr. Landeau.

14 A Okay. I just want to make sure I'm on the same
15 thing. Okay.

16 Q Yeah. The boyfriend, Mr. Landeau, and the
17 husband, Mr. Tami --

18 UNIDENTIFIED SPEAKER: Richard Hines.

19 MS. BALLOU: Hines, Richard Hines.

20 BY MR. WESTBROOK:

21 Q Hines, right. Her maiden name is Green, his
22 name is Hines. So, from almost the outset of the case, you
23 had heard about a husband you just didn't follow up, and since
24 2011 you've known about a boyfriend, and you investigated
25 neither one?

1 A Correct.

2 Q All right. You also heard that they had access
3 with the computers, right?

4 A Yep.

5 Q The computers that had the child pornography on
6 them?

7 A Correct.

8 Q Okay. We just talked about how you can't verify
9 the authenticity of any computer dates, correct?

10 A That I can't?

11 Q That you personally can't.

12 A Correct.

13 Q Right. And you also don't know, and in fact
14 neither of -- none of the forensic reports were able to
15 determine this, the origination of any of the files, right, as
16 far as where they came from out in the Internet, assuming
17 that's where they came from, correct?

18 A Correct.

19 Q Okay. But your reports seem to suggest that
20 most of the files may have been placed on the HP laptop around
21 August of 2007; is that your recollection?

22 A Accord -- yes. That's correct.

23 Q Okay. Now, you interviewed Tami, and I assume
24 that your entire conversation was not recorded, right?

25 A I believe it was all recorded.

1 Q Okay.

2 A Except for me greeting her in the parking lot
3 and telling her we're going to do a recorded interview, I'm
4 going to my vehicle so we have a little bit more privacy.
5 That would be the part that wouldn't be.

6 Q Okay. So there'd be some preliminaries, and was
7 there anything after the recording before the hearing?

8 A I have no idea.

9 Q Okay. Your -- your recollection when you were
10 being questioned by Mr. Chen was that she said she had met Mr.
11 Castaneda when she was living in a weekly, correct?

12 A Yes.

13 Q Maybe the Budget Suites?

14 A It could be. She said Tropicana, the -- you
15 know.

16 Q Sure. In fact, when you interviewed Mr.
17 Castaneda, he also told you that he was living in the Budget
18 Suites behind the old Stardust; do you remember that at all?

19 A Yes. I don't know if he was referring to the
20 same time that Tami was referring to, but...

21 Q I can see that. Now, your recollection was that
22 she said it was about two or three years ago, right?

23 A She said two years ago.

24 Q Correct. After you -- you --

25 A After, yes.

1 Q -- reviewed your report. But your recollection
2 was two to three years ago, correct?

3 A Yes.

4 Q The recording said, actually, about two, right?

5 A Uh-huh.

6 Q So the direct quote was about two. Are you
7 comfortable with that or should I check?

8 A No, it says about two.

9 Q I just want to make sure I wrote it down right.

10 A No, it says about two.

11 Q Okay. The interview happened with her February
12 8th, 2010; is that correct?

13 A Yes, it is.

14 Q All right. Two years earlier would be February
15 8, 2008, right?

16 A Yes.

17 Q Six months before that would be August of 2007,
18 right?

19 A Yes.

20 Q So, that's about two years, isn't it?

21 A It's two and a half years.

22 Q So about two years, could mean two and a half
23 years, could mean one and a half years. But both of those
24 reasonably could be about two years?

25 A Yes.

1 Q And certainly they could be two to three years,
2 if that's -- if your recollection was correct, right?

3 A About two years could be two, two and a half,
4 one and a half.

5 Q Okay. Thank you. You continue the interview
6 through all of Mr. Castaneda's denials because, you told Mr.
7 Chen, people lie, I don't always accept the first version; is
8 that correct?

9 A Yes, it is.

10 Q But that's exactly what you did with Tami Hines,
11 isn't it?

12 A She was reporting a crime. I had no reason to
13 believe that she was making up something.

14 Q Right. You never accused her of lying?

15 A Why would I?

16 Q You never questioned whether or not she had any
17 motive to lie about the person she was accusing, did you?

18 A Why would she have -- no, I did not.

19 Q Okay. You also didn't interview her for an hour
20 and a half, right?

21 A No.

22 Q Okay. And you didn't deliver a monologue to
23 her, did you?

24 A No.

25 Q That was because in the interview with Tami, you

1 were trying to get answers, right?

2 A I was trying to determine if there was enough to
3 report a crime or not.

4 Q Okay. The interview with Mr. Castaneda was
5 different because you were trying to get a confession, right?

6 A No. I was trying to elicit the truth.

7 Q Okay. You weren't trying to elicit the truth
8 from Tami?

9 A Somebody's reporting a -- a crime, and now I'm
10 investigating the crime. They're two separate things.

11 Q You don't investigate an initial report?

12 A Yes. That is the initial report. I obtain
13 initial report from Tami. It's no different than if anonymous
14 person called in and said, I found this thumb drive with child
15 porn on it.

16 Q Okay. So, someone tells you something that
17 launches an entire investigation and ultimately criminal
18 charges, and you don't even question the source?

19 A If there's -- if -- if it leads me to believe me
20 I need to question the source, then yes.

21 Q Okay. Difficult to know whether you need to
22 question the source unless you question the source, though,
23 right?

24 A Not necessarily. If things don't start checking
25 out, then you would go back and re-interview.

1 Q The -- the thumb drive, we actually saw that
2 actual thumb drive in court here, right?

3 A Yes.

4 Q And that thumb drive is what Tami handed to you;
5 is that correct?

6 A Yes.

7 Q All right. You've said you want to find the
8 truth, right?

9 A Of course.

10 Q So, after you interview Mr. Castaneda, you
11 considered -- you continued your investigation, right?

12 A Yes.

13 Q All right. But during the continuation of your
14 investigation, you didn't follow up a single lead that would
15 tend to conflict with your case against Mr. Castaneda, did
16 you?

17 A I had the children interviewed and sure that
18 they weren't sexually abused, which they weren't. Which...

19 Q He was never charged with that or accused of it,
20 was he?

21 A No. But it's potential. So, to ensure that it
22 wasn't and to make sure that people were clear that that did
23 not occur, the children were interviewed.

24 Q All right. I'm talking about the allegations
25 that he knowingly and willfully possessed child pornography.

1 You didn't pursue a single lead in this case that conflict
2 with that, did you?

3 A No, I did not.

4 Q He told you that -- well, he asked you when
5 these pictures were supposedly downloaded on the computer,
6 right?

7 A Yes.

8 Q Okay. You said around 2008, but you weren't
9 quite sure?

10 A That is correct.

11 Q All right. At that point, he said -- he seemed
12 surprised and he said that he'd been traveling a lot during
13 that time period; is that right? Do you remember that?

14 A Yes.

15 Q All right. He specifically said that he was
16 traveling for his company in Iowa, correct?

17 A Yes.

18 Q All right. You could have contacted his
19 company, correct?

20 A Yes.

21 Q And you could have obtained the travel records,
22 right?

23 A Yes.

24 Q You could have matched them to what your
25 forensic people said the download dates were, right?

1 A Yes.

2 Q This is all verifiable information that you
3 could have --

4 A Yes, it is.

5 Q -- followed up on? Okay. And you also knew
6 that other people lived in the house and had access to the
7 computers, right?

8 A Yes.

9 Q But you didn't follow up a single thing
10 regarding his travel and whether or not he was even present
11 when these pornography files were downloaded, did you?

12 A That's correct.

13 MR. WESTBROOK: Nothing further.

14 THE COURT: Redirect.

15 FURTHER REDIRECT EXAMINATION

16 BY MR. CHEN:

17 Q Based upon Mr. Westbrook's question, you just
18 mentioned that you did have a conversation with some children
19 that had lived in the house previously, correct?

20 A I didn't. But another detective did, yes.

21 Q Well, based upon any information you received,
22 did you have reason to believe that those children were
23 involved with downloading any child pornography?

24 A Not that I'm aware of, no.

25 Q Did you have any reason to believe throughout

1 the course of your investigation that Tami Hines had
2 downloaded child pornography?

3 A No.

4 Q Now, Mr. Westbrook brought up that he performed
5 an investigation and part of that was searching the house for
6 child pornography, correct?

7 A Yes.

8 Q And when you were there, did you find additional
9 child pornography?

10 A Yes.

11 Q Okay. At that point, did you arrest the
12 defendant?

13 A No.

14 Q Did you continue to do further investigation?

15 A Yes.

16 Q Is that when you submitted forensic reports so
17 that you could get more information about the images you had
18 just found?

19 A Yes.

20 Q And it was -- was it not until later that you --
21 when you had a full investigation that you decided to
22 effectuate an arrest of the defendant?

23 A I submitted the case to the district attorney's
24 office for a warrant.

25 Q Okay.

1 MR. CHEN: And I'll pass the witness.
2 MR. WESTBROOK: Nothing further, Your Honor.
3 THE COURT: Thank you. May this witness be excused?
4 MR. WESTBROOK: Yes, Your Honor.
5 MR. CHEN: Yes, Your Honor.
6 THE COURT: Thank you very much for your testimony.
7 THE WITNESS: Thank you.
8 THE COURT: State have any additional witnesses?
9 MR. CHEN: Your Honor, I have checked with the clerk.
10 The evidence which we wish to admit has been admitted. And at
11 this time the State would rest.
12 THE COURT: All right.
13 MR. WESTBROOK: Your Honor, may we approach?
14 THE COURT: Yes.
15 (Off-record bench conference.)
16 THE COURT: All right. Ladies and gentlemen, we've
17 got to ask you to step out for about 10 minutes. It won't be
18 any longer than that. So please do not stray very far.
19 Ladies and gentlemen, we're going to take a 10-minute
20 recess. During this recess, it is your duty not to converse
21 among yourselves or with anyone else on any subject connected
22 with the trial, or to read, watch, or listen to any report of
23 or commentary on the trial by any person connected with the
24 trial or by any medium of information, including, without
25 limitation, newspapers, television, radio, or Internet, and

1 you are not to form or express any opinion on any subject
2 connected with the trial or the case until it is finally
3 submitted to you.

4 THE MARSHAL: All rise, ladies and gentlemen of the
5 jury, please.

6 (Jury recessed at 3:15 p.m.)

7 THE COURT: Thank you. Record will reflect we are
8 outside the presence of the jury.

9 Mr. Castaneda, under the Constitution of the United
10 States and under the Constitution of the State of Nevada, you
11 cannot be compelled to testify in this case. Do you
12 understand that?

13 THE DEFENDANT: Yes, I do.

14 THE COURT: All right. Now, you may, at your own
15 request, give up that right and take the witness stand and
16 testify. Now, if you do that, you'll be subject to
17 cross-examination by the district attorney. Anything you may
18 say, be it on direct or cross-examination, would be the
19 subject of fair comment when the district attorney speaks to
20 the jury in their final argument. Do you understand that?

21 THE DEFENDANT: Yes, I do.

22 THE COURT: Okay. Now, if you elect not to testify,
23 the Court will instruct the jury that only if your attorney
24 specifically requests as follows, the law does not compel a
25 defendant in a criminal case to take the stand and testify,

1 and no presumption may be raised and no inference of any kind
2 may be drawn from the failure of a defendant to testify. Do
3 you have any question about these rights?

4 THE DEFENDANT: No.

5 THE COURT: And do you -- have you made an election
6 as to whether you are going to take the stand and testify or
7 not?

8 THE DEFENDANT: My election is that I will go on with
9 my attorneys representatives and not testify.

10 THE COURT: Okay. So you've been advised and you've
11 agreed to accept their advice and not take the stand?

12 THE DEFENDANT: Right.

13 THE COURT: In doing that --

14 THE DEFENDANT: It -- it wasn't my preference, but
15 it's what I'm going to accept as advice.

16 THE COURT: You're doing that freely and voluntarily?

17 THE DEFENDANT: I am.

18 THE COURT: After careful consideration of the
19 strategy you've discussed with your counsel?

20 THE DEFENDANT: Yes.

21 THE COURT: All right. All right. Very well. I
22 guess we'll give them two more minutes and call them back.

23 MR. WESTBROOK: Two more minutes, Your Honor?

24 THE COURT: Well, I told them not to stray far. All
25 right. You can be seated. Thank you.

1 (Court recesses at 3:17 p.m., until 3:22 p.m.)

2 (In the presence of the jury.)

3 THE COURT: Thank you. Please be seated. All right.
4 The record will reflect the presence of all 12 members of the
5 jury as well as the alternate. Defendant is present with his
6 counsel, as the deputies district attorney prosecuting the
7 case, and all officers of the Court. Will counsel so
8 stipulate?

9 MS. BALLOU: Yes, Your Honor.

10 THE COURT: All right. And Mr. Westbrook.

11 MR. WESTBROOK: Yes, Your Honor. The defense rests
12 at this time.

13 THE COURT: All right. The defense has rest [sic].

14 And ladies and gentlemen of the jury, I am about to
15 instruct you upon the law as it applies in this case. And I
16 would like to, of course, just instruct you orally without
17 reading to you. But the instructions have been very carefully
18 drafted and are very important, each word is important, and
19 that is why I have to read them to you.

20 And, now, there are 22 instructions. Some of them
21 are rather long. Don't worry that you need to write them
22 down. You will have these with you at -- in the deliberation
23 room and so don't worry about that. Just listen now, you
24 don't need to take notes, because you'll have these.

25 (Jury instructions read.)

1 THE COURT: State --

2 MR. CHEN: Thank you, Your Honor.

3 THE COURT: -- would you like to make your closing
4 argument?

5 MR. CHEN: May I approach the clerk first, please.

6 STATE'S CLOSING ARGUMENT

7 Good afternoon, ladies and gentlemen. This is why
8 we're here. The images contained in this envelope, the images
9 which the Court has just read to you about, the reason that
10 you heard from all the different people that testified on the
11 stand, all the questions you heard from them all have to do
12 with this envelope. And it all started because of a mistake
13 almost. As you heard, this flash drive was found among Tami
14 and Michael. They had moved out, they found this flash drive.
15 And when they used the flash drive, these images were found on
16 this flash drive.

17 So how did we get there? Well, as you heard, Tami
18 and Michael went through the images. Their main concern
19 wasn't initially that there was child pornography on this USB
20 stick. Their main concern was that they wanted to find out if
21 Tami's daughters were on that USB drive. And that's
22 reasonable, right? She's a parent. What parent would ever
23 want their child to be exposed, to have pictures taken in the
24 manner of -- that was described to you such as these photos?

25 What does Tami do? Well, Tami and Michael contact

1 the one person that they kind of know. An Officer
2 Worthington. Officer Worthington doesn't take the USB drive,
3 though, because it's not her job -- or Officer Worthington's
4 job to investigate it. So what happens? Officer Worthington
5 puts them in touch with the Las Vegas Metropolitan Police
6 Department detective, Detective Tooley. And Detective Tooley
7 immediately goes to their location at the probation office to
8 talk to -- to take possession of that flash stick or USB
9 drive.

10 Once Detective Tooley gets it, what does she do?
11 Well, she submits it for forensic analysis. She gives it to
12 Detective Ramirez, the first computer analyst that you heard
13 from. And what do they find on that flash drive? They find a
14 number of pornographic images, which are adult pornographic
15 images, legal pornographic images. There's nine image of
16 child pornography on the USB drive, some of which are
17 contained in this envelope. And there's also something else
18 on that flash drive. There's information relating to Anthony
19 Castaneda.

20 Now, Detective Tooley knew about the name Anthony
21 Castaneda, because Tami Hines told her about Anthony
22 Castaneda. And so based on that, a crime has been reported.
23 She has no reason to question anything. So what does she do?
24 She wants to investigate further. She investigates the flash
25 drive and they find these images.

1 Detective Tooley takes the next step. She wants to
2 know a little bit about Anthony Castaneda, the defendant. So
3 what does she do? She confirms his address. As I mentioned,
4 they had the flash drive analyzed. And then they obtain a
5 warrant in order to find out if there's additional child
6 pornography at the defendant's home. That's at 2250 Beverly
7 Way. And sure enough, in the execution of that search warrant
8 on April 7th, 2010, they find additional child pornography.
9 They find it on a Shuttle desktop, they find it on a HP
10 laptop.

11 Now, at this point, that's about all the detective
12 knows. She doesn't know much about the defendant. She knows
13 -- or she comes to learn that day that there's additional
14 child pornography. But she talks to the defendant about his
15 living situation, and you learn that the defendant is asked
16 about it. And you've heard the audio. And he says, Mostly, I
17 live solo, but there was a time where people lived with me.
18 And he mentions Tami's daughters and then she -- he says that,
19 Well, they were the daughters of Tami and Michael. And then
20 they talk about Craig, who's the defendant's son, and they --
21 he says, Well, he's only been living there for about two to
22 three weeks. So that's the defendant's living situation.

23 And as you heard from Detective Tooley, she also
24 checked power records, and you have a Cox bill which has been
25 admitted. Those were all found in the defendant's home, all

1 under the defendant's name. Not under anybody else's name.
2 Only the defendant's name. He's the person who lived there.

3 So that's what they testified about, ladies and
4 gentlemen. That's the testimony and essentially what you
5 heard. And so in every single criminal case, the State needs
6 to prove two things beyond a reasonable doubt. It needs to
7 prove, first of all, the crimes charged. And second of all,
8 we need to prove, the State of Nevada need to prove that this
9 defendant, Anthony Castaneda, was responsible for putting the
10 child pornography on that computer or possessing it.

11 So, the crimes charged, we have 15 counts of visual
12 image depicting child and sex acts, essentially. Also known,
13 as you've heard throughout the trial, as child pornography.
14 But, ladies and gentlemen, there is a stipulation in this
15 case. There's a stipulation that these images and these
16 images have been stipulated to. Exhibits 1 through 15, the
17 titles that are listed there, all of that is stipulated to.
18 You don't have to determine that there was child pornography
19 in this case. In other cases we would have to prove that
20 beyond a reasonable doubt. But in this case, you have a
21 stipulation that all of these images, ones in this envelope,
22 depict child pornography.

23 What is also stipulated, the file names that are
24 associated with those counts have also been stipulated to.
25 You don't have to determine from your note to memory whether

1 Count 1, "2 girls.jpg" is, in fact, "2 girls.jpg." You don't
2 have to decide that, ladies and gentlemen. That has also been
3 stipulated and that it's child pornography on these images.
4 So, the only question left, did the defendant knowingly and
5 willfully possess these images? And so then we get to
6 possession.

7 Well, what does possession mean? And I know
8 possession sounds like a word that we use every day, and in
9 part, the definition that we've given you under the law is
10 similar. Possession can be actual or constructive. What does
11 that mean? Actual, you have direct physical control over
12 something. I would say right now I have actual possession of
13 this clicker that is in my hand. I'm obviously holding it,
14 it's with me, I have control over it.

15 Constructive possession is that you have the power
16 and intention to exercise dominion and control over something.
17 So, for instance, this envelope right here, I'm not -- it's
18 not on me. I'm not holding it. It's in front of me. I can
19 certainly reach for it, open it, and look at it. But it's not
20 on me. So that could -- that could be constructively
21 possession. I could grab that. But at the same time my
22 co-counsel could also walk up here, nothing's stopping her
23 from grabbing this envelope. And that's constructive
24 possession.

25 MR. WESTBROOK: Your Honor, I repeat my earlier

1 objection based on this point.

2 MR. CHEN: Your Honor, I haven't made any -- it's
3 proper argument about the law.

4 THE COURT: I don't know what the objection -- you've
5 made many objections through the trial. So you need to state
6 what the objection is.

7 MR. WESTBROOK: Specifically to the inclusion of the
8 constructive possession argument and how it's being
9 characterized by the State.

10 THE COURT: All right. Overruled.

11 MR. CHEN: Thank you, Your Honor. And the reason
12 that I'm describing this to you, ladies and gentlemen, is
13 because there wasn't any evidence in this particular case that
14 there was an actual photograph on the defendant. Defendant
15 wasn't pulled over and there wasn't a wallet involved and
16 there was a picture of child pornography on it. That's not
17 what we showed in this case. That's not the state of evidence
18 in this case.

19 What we have in this case are computers that are
20 found in the defendant's home and on those computers there are
21 files that depict child pornography. So where was this child
22 pornography? Where was it found? Where did it come from? It
23 was on a flash stick that came from the defendant's home. It
24 was on a Shuttle desktop that was found only in the
25 defendant's home. It was found on an HP laptop that was in

1 the defendant's home.

2 Not only do we show that those laptops with the child
3 pornography were in the defendant's home, then we looked at
4 the type of user IDs on it. The user ID, the main ID on the
5 computers is Tony. The defendant's name, Tony. He possessed
6 those computers. He had the ability to use those computers
7 and that's why he possessed them.

8 THE WITNESS: Objection again, Your Honor. The exact
9 same objection. Having the ability to use them is not
10 possession under the law as [indiscernible] instructed,
11 knowingly and willfully possessing it. It has to be proven.

12 THE COURT: The -- the jury has been instructed that
13 the State must prove that he knowingly and willfully possessed
14 them. I assume you're going to address that.

15 MR. CHEN: Thank you, Your Honor. And ladies and
16 gentlemen, my very next slide -- well, not my very next slide,
17 I apologize, I misspoke. But the defendant talks about using
18 these computers and which is the main one that you use. I
19 mainly use the one that's against the wall, the north wall.
20 And that's the picture that we saw here.

21 And, ladies and gentlemen, just so you know, too,
22 throughout my argument it says 602 mark. You will not have
23 the transcripts that you used yesterday to listen to the audio
24 version. You will have the CD, but you won't have the actual
25 transcript. So what I've done to help aid you, if you so

1 choose, is I've put times down around where these statements
2 are made so that you can verify them for yourself and you can
3 go back to the audio and listen to the whole thing or part of
4 it. But at the 602 mark, that's where this happens.

5 And so what do we know about these laptops? We know
6 that defendant did, in fact, possess that, which he also says
7 he has two laptops in his house and that the child pornography
8 is found on the one on the right page.

9 So, we go through the possession of -- of this flash
10 drive next. The flash drive that started it all. We have
11 that Michael and Tami find it in their belongings. What do
12 they do? They give it to Detective Tooley and says it came
13 from -- she tells them it came from Anthony Castaneda. I'm
14 sorry, it's the same one. What is -- Detective Tooley gets it
15 analyzed and on it they find the personal documents on the
16 flash drive. Personal documents, such as the defendant's own
17 diploma.

18 Tami and Mike both also saw the flash drive with the
19 defendant. She said -- Tami, as you heard her on the stand,
20 said that she had seen it with the keys and -- and whatnot.
21 And Mike had also said that he had seen it around the house in
22 various places.

23 Now, certainly, you've heard a lot of questions about
24 Tami, and Tami's been the subject of a lot of questions to
25 other witnesses, as well, such as Detective Tooley. And the

1 credibility of Tami was questioned. And you have an
2 instruction that you judge the credibility of a witness.

3 So, what do we know about Tami? Well, she gave a
4 statement to police, she gave the flash drive to police. She
5 testified at a preliminary hearing, which you heard about, and
6 the Court acknowledged the date of that hearing. And then she
7 testified before you here in court.

8 So, on cross-examination, Mr. Westbrook was asking
9 Tami questions. She was asked if she told a different story
10 before. And it was characterized as a lie. A lie. And when
11 we think of a lie, it's an active reason to try to deceive
12 someone, right? A lie. Not a mistake; a lie. It's --
13 defense characterized it as a lie. And at some point Tami
14 even said, Well, I guess what I said at the preliminary
15 hearing was a lie. That's how she said it and you can recall
16 how she -- how her demeanor was.

17 But forget about what she said there. Think about
18 what was she responding to, what question was she responding
19 to? What had changed that was the subject of this big deal,
20 this big ordeal? Well, as Mr. Westbrook asked her, well, at
21 the preliminary hearing the question was, did you right away
22 know that it belonged to Mr. Castaneda? And she said no.
23 That was her answer at the preliminary hearing. Here, she
24 mentioned that she had seen it before.

25 And I would argue, ladies and gentlemen, that there

1 is something to be said about right away recognizing
2 something. Sometimes is it easy to right away recognize that
3 you knew of somebody, maybe someone you might recognize, you
4 see them on the street and you wonder for a sec, Is that the
5 person that I know? Or am I going to make a -- be really
6 embarrassed when I go say hi to them and they don't know who I
7 am, because it's not the right person? There's a difference
8 between right-away knowing and -- and otherwise.

9 So, here we have her saying that she didn't right
10 away recognize it. In court she testified that she had seen
11 it before, she recognized that flash drive. She had seen it
12 many times.

13 And also at the preliminary hearing, as you heard her
14 say, it was different from what she told Detective Tooley, was
15 that she wasn't personally the person who found the flash
16 drive. She testified that, Oh, I didn't actually find it.
17 Michael was the one who found it. And, ladies and gentlemen,
18 a lot can be said of that. On the day that Tami discovered
19 this and the following day where she reported it to law
20 enforcement, her main concern was to get that flash stick to
21 Detective Tooley. Her main concern -- there's no evidence
22 that her main concern was to tell her entire life story, to
23 talk about her ex-husband, to talk about Michael, to talk
24 about anything other than the child pornography that she had
25 found on that USB drive.

1 And as -- even during my questioning of Detective
2 Tooley, I said, Well, you told the defendant that we had find
3 -- found child pornography. Well, isn't that a
4 mischaracterization? And Detective Tooley said, Well, yeah.
5 I mean, I didn't personally do it, but certainly my colleagues
6 found child pornography in the house.

7 And is Tami's version of events to Detective Tooley
8 that different? She did find child pornography. She viewed
9 that child pornography. Is it that outrageous to think that
10 she didn't put every single detail in her statement to
11 Detective Tooley because she simply wanted to report that she
12 thought a crime had taken place? Is it that farfetched,
13 ladies and gentlemen?

14 I would also note that on redirect examination, when
15 Tami was being questioned, my co-counsel asked her about the
16 preliminary hearing. And she was saying, Well, do you
17 remember being asked a question about how your flash drive got
18 into the tote? And Tami's response had to do with keys and
19 her daughter taking them. Which is absolutely consistent with
20 how she testified here in court, ladies and gentlemen. She
21 said that the flash drive was with the defendant's keys. Back
22 at the preliminary hearing, what does she mention when she's
23 talking -- talks about where this came from? Keys.

24 So, I understand what she said on cross-examination
25 and how she was led to say something about a lie, ladies and

1 gentlemen. But think about what she actually said, and you
2 determine whether or not you think that Tami had lied about
3 anything at all. And I would submit that she didn't.

4 MR. WESTBROOK: Your Honor, I would object to him
5 characterizing it as being led to say that she lied. I think
6 that's an inappropriate argument.

7 THE COURT: Overruled.

8 MR. CHEN: Thank you, Your Honor. And furthermore,
9 ladies and gentlemen, with regards to the possession of that
10 thumb drive, what does the defendant even say about his thumb
11 drives? He's asked the question in the interview, "I have
12 been a source for thumb drives."

13 Question, "A source for thumb drives?" Answer, "For
14 all the teenagers." They do -- "Do they take them or
15 something?" "Oh, yeah." Even the defendant admits that the
16 children are running around with the flash drives, his flash
17 drives. So, does anything Tami say -- her -- her -- what she
18 said is corroborated by the evidence, ladies and gentlemen.

19 Now, the defendant is also asked about possessing
20 that USB drive. And you heard the interview and you've heard
21 the questions. At no point does he ever deny that it's his.
22 In fact, ultimately, he even admits that his information would
23 be on there, certainly adult pornography would be on there.

24 MR. WESTBROOK: Objection. This misstates the
25 evidence.

1 THE COURT: The jury's instructed that they'll rely
2 on what they -- their memories of the evidence are, and as you
3 were instructed, these are arguments of counsel. It's not
4 evidence. You'll rely on your own memory of the evidence.

5 Proceed.

6 MR. CHEN: Thank you. And so is this all a simple
7 mere coincidence that the things that the defendant's talking
8 about happened to be on this flash drive? Or is it evidence
9 that he actually did at one time possess that flash drive
10 before it -- it reached the police?

11 So, based upon the evidence, ladies and gentlemen,
12 the flash drive, the photos that are on it, were possessed
13 also by the defendant, Anthony Castaneda. And that leads me
14 to the next point. The knowledge.

15 Mr. Westbrook is absolutely correct. Possession in
16 this case alone is not enough. Not simply possess something
17 or possess child pornography and be charged with it under the
18 statute, because you have to knowingly and willfully possess
19 the child pornography. He's absolutely right and that's the
20 instruction that the Court has also given you, as well.

21 So, knowledge, though, can be shown in two ways, as
22 with all our evidence. It can be directly shown or it can be
23 circumstantially shown.

24 Now, ladies and gentlemen, as I was preparing this, I
25 was thinking about knowledge. How do you really know what

1 someone's thinking or someone has knowledge of? And kind of
2 think about, say, for instance, reality television. Some of
3 us may watch it, some of us might not. But there's always a
4 camera everywhere. In the show Big Brother there's a camera
5 in every single room. Right? And you can see what every
6 single person is doing at every single minute of the day.

7 And sometimes even when you can see what someone's
8 doing, they have the personal interviews later and they ask a
9 person about what's going on in their head. And they say
10 something that's completely different, right, from anything
11 that was shown on the video.

12 And, ladies and gentlemen, I -- I thought about it,
13 and I said, you know what, this though, this is real life,
14 right. Most of us probably don't have computer -- or videos,
15 cameras following us around at every moment with everything
16 that we're doing, right? And so if that's the case, if we
17 don't all have cameras that follow us at every moment, how do
18 we know that defendant knew what was on that computer? How do
19 we actually know that he possessed and willfully possessed the
20 child pornography?

21 That's where you have to look at the facts and
22 circumstances surrounding everything. You have to look at the
23 evidence that surrounds Mr. Castaneda. Obviously, ladies and
24 gentlemen, the standard of beyond a reasonable doubt has been
25 around for ages, before video cameras, even. This is the

1 standard we've always used. We don't need a reality
2 television crew to tell us that we know that somebody did
3 something.

4 So, what evidence do we have of the defendant's
5 knowledge? Well, we have the file folders, we have their
6 creation, the thumb drive is in the file folder,
7 "Adult-backslash-girl pics." The computers under
8 "Tony/MyDocuments/downloads/Adult" and the "girl pics." What
9 do they have in common? Laptop, "Adult/girl pics." The
10 Shuttle and the USB stick also have the exact same file folder
11 structure. Someone created the folders, named them the same,
12 and put them on different computers. The person in
13 possession, ladies and gentlemen, the defendant, Anthony
14 Castaneda, it's reasonable to believe that, okay, this person
15 was moving folders, moving the files that are in assembly.

16 But also telling, ladies and gentlemen, is what isn't
17 on all three pieces of evidence.

18 If I could approach the clerk. If I could have
19 the...

20 THE COURT: Mr. Westbrook, you'll remain seated
21 during his closing.

22 THE WITNESS: I'm sorry, Your Honor.

23 THE COURT: Thank you.

24 MR. CHEN: Also, it shows that defendant -- that an
25 individual knowingly possessed these files, was State's

1 Exhibit 78. The chart that you saw made contemporaneously as
2 everyone testified. What is it that you noticed about this
3 chart? We have USB files, only nine of them. Then we have
4 the Shuttle files. We have the HP files. And certainly in
5 the "girl pics" folders, some of them have the same file. For
6 instance, Count 1, "2 girls01.jpg," it's on all three
7 computers.

8 But what's also true, certain files didn't make it
9 onto the other pieces of evidence. And what does that mean?
10 So, if it starts on one computer, and let's just assume you
11 have a folder, "Adult," such as in this case, and you copy
12 everything over onto another computer, what do you expect to
13 be on the other computer? All the same files. An exact
14 duplicate should be there, right? And if you take that folder
15 and copy it to another folder, all the same files you would
16 expect to be there.

17 What does this show? Somebody had actually gone
18 through the files. Somebody actually chose that, for
19 instance, "Euro002.jpg" wasn't going onto the USB drive. It
20 shows active knowledge, ladies and gentlemen.

21 All right. Now, I know that there's been a lot of
22 talk about these dates and these things, and I don't want to
23 get too technical. But we do have three dates that, again,
24 they were used as part of the investigation to try to
25 determine whether or not the defendant had knowledge of the

1 child pornography. So we had the last modified written date,
2 and I believe the detectives who were responsible for looking
3 at the computers both said it's a little bit confusing,
4 though. Because on last modified date, it can often -- it's
5 also known as last written date, it stays the same oftentimes.
6 And the example, I think, is if -- I asked Detective Ramirez,
7 I believe, Well, if I downloaded an image today from the
8 Internet, would that be a last modified date? And he said,
9 Yeah, that's -- that's basically what it would be. So, for
10 instance, if a picture were downloaded today, July 12th, 2013,
11 last modified date.

12 Then we got into the created date. And the created
13 dates, the detective said, was the date that it gets
14 introduced onto something. So, in the same example, if I
15 downloaded -- if I download the image today and tomorrow I put
16 that same image onto a flash stick or a USB drive, they said,
17 Well, typically, the last modified date would remain the same,
18 because that's the day you downloaded it. But the file
19 created date on the USB drive would change. Because at that
20 point, the first day it's on a USB drive would be tomorrow,
21 July 13th, 2013. And so they said that's confusing because
22 think -- file creation, you think that should be the earliest
23 date. But that's not necessarily what it is.

24 And then we have the last accessed date. And I think
25 that one, at least, seemed to cause the least confusion during

1 the questioning. And in general it's the last date that the
2 file was accessed and that you opened. But essentially the
3 most recent in time, if the file's been used somewhat.

4 So then we have the child pornography that's found on
5 the HP laptop. And we have information that we get from the
6 forensics throughout the investigation. We have the modified
7 date, so looks like in 2007 in August, that's when these
8 images were first on the laptop. And as you'll see, the
9 created date is actually the same. And Detective Ehlers said
10 that's not uncommon if you're -- if that's where the computer
11 -- or the image first showed up. It would have the same
12 modified and created date.

13 But then we get to the last accessed date. And
14 what's the last accessed date for all the images? March 24th
15 of 2010. So keep that in mind.

16 What about the Shuttle? Well, the modified dates are
17 the same, actually, as the HP laptop. They were downloaded at
18 the same time. But it looks like they weren't actually put
19 onto the Shuttle until December of 2008. And it looks like
20 they were all put on at the same time. Last accessed date,
21 they weren't accessed -- or they were last accessed in April
22 of 2010.

23 Both accessed dates are both the Shuttle, the HP
24 laptop, are well after Tami and Michael had lived with the
25 defendant. They had already moved out by this time. They

1 moved out in February. But both on the Shuttle and the HP,
2 the last time these files were accessed was in April.

3 What about the USB drive? Well, we have the USB
4 drive, same written dates, again, indicating that they're most
5 likely the same files, were put on the USB drive in November
6 of 2008. And the last accessed date, we'll discuss that in a
7 bit.

8 So what did Detective Ehlers say that was significant
9 for? Well, he said it's significant because not only were the
10 digital thumbprints the same, but the dates tend to show that
11 the child pornography originated on the HP laptop, moved to
12 the -- USB drive, from the USB drive, moved to the Shuttle.

13 Again, those dates are important, not just those
14 dates, not just because they're just floating out there. But
15 they show active use of those files. Active movement of the
16 files. Someone who knows what's on those files. And not only
17 that, the testimony further said that that's not just any USB
18 stick, that USB stick had been plugged into the HP laptop that
19 the defendant owned; that USB stick had also been plugged into
20 the Shuttle that the defendant owned.

21 And then we have, of course, knowledge about
22 unallocated space. And there were a lot of questions on this
23 and the carved images or partial images. And according to
24 Detective Ehlers, based upon his training, experience, and
25 expertise, he determined that those images are most likely

1 deleted images. And again, what do you need to do in order to
2 delete something? You have to know about it. You have to
3 know to delete it. And that's what the evidence in this case
4 is, ladies and gentlemen.

5 MR. WESTBROOK: Objection. Also misstates the
6 evidence.

7 THE COURT: Again, the jury will rely on what their
8 recollection of the testimony was.

9 MR. CHEN: So, ladies and gentlemen, based upon all
10 of those things that showed knowledge about these files,
11 movement of these files, and that the defendant was the one
12 who was in possession of those items, what does the evidence
13 show? The evidence shows that the defendant was using these
14 computers, knew about these files. The defendant knew about
15 the child pornography that was on his computer.

16 So I'd like to just take a moment to talk about Tami,
17 as well. And you've heard questions about, well, did Tami set
18 this up? Could it have all been Tami who did this? But I'm
19 asking you, ladies and gentlemen, as the Court noted,
20 questions themselves are not evidence. So I ask you, what
21 evidence have you heard, what evidence have you heard from the
22 witness stand, what evidence do you have in this case to
23 determine that Tami made up anything?

24 MR. WESTBROOK: Objection, Your Honor. That's burden
25 shifting. And I have a motion.

1 MR. CHEN: Your Honor, that's a statement upon the
2 evidence and argument.

3 THE COURT: Overruled. You'll -- you'll have the
4 opportunity to put your motion on the record.

5 Continue.

6 MR. CHEN: Because it's been thrown -- it's been
7 mentioned, right, Well, if you would have known this, would
8 you have done things differently? Well, let's take a look,
9 though, about Tami's timeline. We know that child pornography
10 looks like it was put on the computer in 2007. In November of
11 2008 it was put on a USB stick. In December of 2008, it's
12 finally put on that Shuttle.

13 And when does Tami come in? She admits that the
14 first time she lives with the defendant is about April 2009,
15 she moves in with the defendant.

16 MR. WESTBROOK: Objection. That misstates the
17 evidence.

18 THE COURT: Continuing to rely on your own memory.
19 Go ahead.

20 MR. CHEN: I'm sorry, ladies and gentlemen, but I
21 just like to explain the timeline. You might remember she
22 said she went to go live with her sister for a while. But
23 then things happened, she moved back in with the defendant.
24 Right. So obviously things were going okay. She moves back
25 in November of 2009. And in February of 2010, she moves out.

1 So the child pornography was on the computer before she even
2 lived with the defendant.

3 What else? Well, Tami said that she looked through
4 every file to make sure that her daughter wasn't on that USB
5 drive, or her daughters, I'm sorry. And what do we have as
6 the accessed date? Well, February 7th, 2010, is when the last
7 accessed date, when those files were opened on that USB drive.
8 And is that consistent with Tami's testimony? She said that
9 she looked at them and the very next day she went to go show
10 the detective. The last accessed dates on the USB stick
11 absolutely confirms and shows that what she said actually
12 happened.

13 So then we get to, finally, the defendant's
14 statement, the one that he gave on April 7th of 2010. I want
15 you to think about it for a sec what the evidence showed at
16 that specific time. At that time the defendant didn't know,
17 there's no evidence, at least, that the defendant knew that
18 the police were in possession of a USB stick with his
19 identifying information and with child pornography. Because I
20 asked Detective Tooley, they didn't call him to tell him that
21 they were on their way with a search warrant to execute it
22 that morning.

23 So the first time that the defendant has any contact
24 is on April 7th, when the police show up at his residence.
25 They show him a search warrant, and then they go and Detective

1 Tooley talks to him. He doesn't know what they do or do not
2 know at that time, because there's no reason for him to have
3 that knowledge that the police have this.

4 And it's not three years later when it's at that very
5 time that he gives this statement. And the detective asks
6 him, for instance, "Do you have any idea why we'd be here
7 today?"

8 He says, "Nope." No, I have no clue why you're here.

9 And she later says, "Well, we were looking through
10 this USB drive and are we going to come across any
11 pornography?"

12 And he says, "Well, there's going to be a lot of
13 adult pornography." But all of a sudden, the first time that
14 children pornography is even mentioned in the defendant's
15 statement, the defendant brings it up himself. He says, "But
16 there's going to be a bit of -- there's going to be a good
17 amount of regular porn, but nothing involving children." It's
18 the first time that we even hear about children pornography in
19 his statement.

20 And then, of course, Detective Tooley follows up by
21 talking with all of that. He doesn't dispute a number of
22 things, including the fact that he puts his certificate, his
23 license and Social Security, etcetera, on this USB drive. And
24 there's a saying, ladies and gentlemen, that you admit what
25 you can't deny and you deny what you can't admit. Well, I

1 know that that -- that interview was one and a half hours
2 long. But notice how it changed throughout time, and it
3 changed as Detective Tooley gave just a little more
4 information about what she actually had. She wasn't bluffing.
5 She had a USB drive and it had child pornography on it. And
6 she was trying to figure out where it came from.

7 So, as she gives the defendant more information, his
8 answers begin to change, because he can't deny anymore.
9 There's a USB stick with his information on it. How in the
10 world is he going to deny that that's his certificate, that's
11 his drivers license? He's already said that he puts that on
12 his flash drives, or on his computers.

13 And his statement on April 7th about Tami is also
14 corroborated. Because, what does he say? Oh, Well, she lived
15 here for a period of time. They were never planning on
16 staying long. They were waiting on a disability check. And
17 you heard that from Michael and Tami about the disability
18 check. And after they had their check, they moved out.
19 Absolutely corroborated.

20 The defendant corroborates Tami's version of events
21 and Michael's version of events. And this was back on April
22 7th, 2010, this is what he said.

23 At no point through that interview does he say that,
24 Well, Tami must have set me up. Or Michael must have set me
25 up. When this is fresh, that never is said. At no point does

1 he say that an ex-husband of Tami's has been responsible for
2 putting these images on there. In fact, if you listen to the
3 interview, he doesn't even say who the ex-husband is. He just
4 says, Well, Tami and her husband. But he never mentions him
5 by name. He never says anything about it.

6 And not only does he not say anything about Tami's
7 credibility in his statement, ladies and gentlemen, he doesn't
8 even ask where this USB drive came from. On the day that he
9 is confronted with owning child pornography and possessing
10 child pornography, he doesn't ever even question, Well, how in
11 the world did you come up with a USB device of mine? Doesn't
12 even ask her. That's not even discussed throughout that
13 entire one and a half hour conversation. Never asks even
14 where it came from. Which, reasonably, if someone were being
15 accused of that, you would think that they would have a
16 different reaction to that, ladies and gentlemen. They would
17 want to know where this USB -- what's the credibility of your
18 evidence? Where is it coming from? Question's never asked,
19 ladies and gentlemen.

20 And how he responds to the questions, ladies and
21 gentlemen, you can pay attention to that, because you can pay
22 attention to how any witness or how his interview goes and you
23 can determine the credibility of it. And what you see
24 throughout and what you hear throughout his interview is,
25 Well, as far as I know, it's never been a peccadillo for me.

1 As far as I know, looking at child pornography, I've never
2 accidentally clicked on it or witnessed a child being abused.
3 I don't even download that, as far as I know. As far as I
4 know, as far as I know, he's minimizing. As far as I know
5 throughout his entire statement.

6 There's more, because that's how he answers all the
7 questions throughout. Well, as far as I know. And, ladies
8 and gentlemen, you see the pictures that are depicted in this
9 envelope. There's not a question about it. It's not a
10 question about as far as I know I've never seen these images.
11 These images are not easy to forget. For someone to say as
12 far as I know, ladies and gentlemen, if you see these images,
13 you would know.

14 He says as far as I -- I'm concerned, that's never
15 been a problem with me either in the physical sense or in the
16 logical sense, defendant's responses to questions about where
17 did this child pornography come from. How does he respond
18 when he finally does see it? For -- for the entire interview
19 he's saying, Well, if you can describe when or where, maybe I
20 could give you a better idea. Finally, he walks into the
21 house, he sees a child, his response, simply, Oh, yeah, that's
22 a child and I'm sorry. No explanation. No emotion as he does
23 it.

24 MR. WESTBROOK: Objection. There's nothing in the
25 evidence to indicate his emotion. In fact, that wasn't even

1 recorded.

2 MR. CHEN: The description --

3 THE COURT: The -- I think the comment is fair based
4 upon the testimony. But the jury will, of course, remember
5 what they heard as far as the testimony of the evidence and
6 rely on that.

7 MR. CHEN: And then, finally, there's his
8 explanations. In the interview, when he's first given an
9 opportunity to explain what had happened, why this child
10 pornography would be on there, could it have been a mistaken
11 download? Just keep in mind, he says in his interview, that
12 from a 1 to 10, he's a 10 on computers. You've seen his
13 certificates, in fact. He knows a lot about computers. He is
14 not a novice on them. He uses programs. The defendant is
15 someone who knows computers.

16 And what's his answer? Well, I'm fairly aware of
17 what files I do download. This is from a computer person who
18 knows a lot. He fairly knows. And then he says he doesn't
19 like downloading from peer-to-peer programs. So does it
20 appear that, based upon the type of things that he said, that
21 he mistakenly downloaded these images? It doesn't appear so.
22 That's not what the evidence shows.

23 What -- what about site mirroring? And he talks
24 about site mirroring and it's basically where you download an
25 entire Web site and then you get to look at it offline later.

1 And he talks about site mirroring. And he says one thing
2 that's interesting about his site mirroring. The -- the
3 detective asks him, Well, if you're mirroring sites, is it a
4 possibility that maybe you were at an adult site, but then
5 ended up looking at something that was -- had child
6 pornography and a different Web site? And the defendant's, in
7 fact, the one who said, Oh, that's called going across
8 domains.

9 And again, the expert in computers says he doesn't
10 know if his system goes across domains. So, he says he
11 mirrors. But the expert in computers or someone who knows so
12 much about computers doesn't know if his own system goes
13 across domains.

14 But then when the interview continues, they ask him,
15 Well, have you mirrored a lot of sites? Is it possible that
16 you've mirrored so many sites and maybe there was something
17 you didn't know about? And his answer is he's only mirrored
18 maybe two to three times. And, in fact, one of the times that
19 he says he mirrored was recently, well after this child
20 pornography was put on the computer.

21 So, does it appear that the evidence shows that he
22 had been mirroring sites and that's the reason this child
23 pornography ended there? I would say no to that, as well,
24 ladies and gentlemen.

25 And then so what about the other individuals that

1 you've heard so much about? Michael and Tami, well, they
2 didn't know the defendant in 2007. Michael certainly didn't,
3 because the only reason that he knew the defendant was based
4 upon Tami, when he moved in. You have Tami's four children,
5 Sara and Sonia, who were 17, Bethany and Rebecca, who were
6 around 13 and 6. There's other people mentioned in the
7 interview. The defendant's nieces, 13 and 12. And then
8 there's the son Craig, but the Craig wasn't there, either.

9 So, is it reasonable to believe, based upon the
10 evidence, that Allie or Angie or Bethany or Rebecca, 6, 12,
11 13, had downloaded these images? That doesn't show that it's
12 reasonable, ladies and gentlemen.

13 And when the defendant, if you listen to the audio
14 again, as he's trying to describe why maybe it's possible that
15 one of these children was responsible for downloading the
16 child pornography, he talks about it, and he says, Well, the
17 kids can sometimes be rambunctious. They look at the -- they
18 look at things, or one of them, I think went on a dating Web
19 site and said she was older than she was. Nothing about child
20 pornography, though. But he's already shifting the blame to
21 others. Evidence is showing he's shifting it to these girls.
22 And there's absolutely no evidence, ladies and gentlemen, that
23 they were the ones who downloaded this. It's not reasonable
24 to believe that they were the ones who knew about this
25 pornography.

1 And a virus? Well, you've heard a lot about a
2 possible virus today. When the interview was taking place
3 back on April 7th of 2010, there's never a mention of a
4 possible virus that could have done this. In fact, the
5 defendant talks about how he keeps up on his soft -- virus
6 software. He talks about it in his interview. And again,
7 he's a computer guy.

8 And the detective's simply asking, Would it be
9 reasonable to think that these were downloaded, right? And he
10 says, Yes. That's probably where they'd come from. Or,
11 Uh-huh. Sorry. Don't want to misstate it. So even the
12 defendant, at the time, says that he thinks it was downloaded.
13 It's not reasonable to believe in this case, ladies and
14 gentlemen, that there's a virus that put these files on there.

15 He knows what's on the USB. He talks about also some
16 of the names of his type of files. And that's important,
17 ladies and gentlemen. The names of the files.

18 Question, "What would be some of the names you'd put
19 on them?"

20 Answer, "Just like movie folders, Movie one, Movie
21 two, Pic one, Pic two. I have an adult folder and I might
22 also have a celebrities folder."

23 And you have a piece of evidence, ladies and
24 gentlemen, that shows the file tree. And what are you going
25 to see on that file tree? An adult folder. What's in that

1 adult folder? Celebrities? Celebs. Movies01. Movies 02.
2 Pics01. Pics02. And this is a sub folder, ladies and
3 gentlemen. This is a folder within the broader adult folder.
4 All of this, and the pornography that he says that he would
5 have downloaded also in the "girl pics" category. Is it a
6 coincidence, ladies and gentlemen, that all of this,
7 everything that he said about this file folder, everything --
8 or at least I should say the specific folders that he
9 mentions, happen to be on this USB stick? So if this is all a
10 setup, if this is all a conspiracy, apparently Tami somehow
11 knew which folders to pick to try to frame the defendant.

12 MR. WESTBROOK: Objection, Your Honor. Again, I
13 think this is burden shifting and it's also misstating
14 evidence in the case.

15 THE COURT: Overruled.

16 MR. CHEN: Is there any evidence that you have heard,
17 though, to suggest that, ladies and gentlemen?

18 MR. WESTBROOK: Objection. Burden shifting.

19 THE COURT: Overruled.

20 MR. CHEN: So, what's reasonable in this case, ladies
21 and gentlemen? You have it, it's beyond a reasonable doubt.
22 And what's reasonable? The reasonable explanation, based upon
23 the evidence, is that defendant possessed the child
24 pornography, and the reasonable interpretation of the evidence
25 is that he knew about the child pornography. It's not merely

1 what's possible, ladies and gentlemen.

2 So, based upon that and the evidence that you have
3 before you, the State is going to ask you to find defendant
4 guilty of these counts.

5 Thank you for your time.

6 THE COURT: Thank you. All right. I got word from
7 jury commissioner that if they want their vouchers today, they
8 have to get them, like, right now. So we can send the jury
9 out, recess, pick up your vouchers, and then come right back.

10 MR. WESTBROOK: Fine, Judge. Thank you.

11 THE COURT: All right. So -- and then we'll hear the
12 next argument. It'll be about 15 minutes. All right.

13 Ladies and gentlemen, we're in recess for 15 minutes.
14 During this recess it is your duty not to converse among
15 yourselves or with anyone else on any subject connected with
16 the trial, or to read, watch, or listen to any report of or
17 commentary on the trial by any person connected with the trial
18 or by any medium of information, including, without
19 limitation, newspapers, television, radio, or Internet, and
20 you're not to form or express an opinion on any subject
21 connected with this case until it is finally submitted to you.

22 THE MARSHAL: All rise, ladies and gentlemen of the
23 jury, please.

24 (Jury recessed at 4:38 p.m.)

25 THE COURT: All right. Record will reflect the jury

1 has departed the room.

2 And Mr. Westbrook, you had a motion.

3 MR. WESTBROOK: Yeah. My motion was for a mistrial,
4 Your Honor. I'm trying to remember what I was talking about.
5 My motion was for a mistrial based on the burden shifting in
6 the case. I think that what was happening throughout that
7 closing argument is the State, who is the only presenter of
8 evidence in this case and the only people who have to present
9 evidence in this case, spent an inordinate amount of time
10 talking about the lack of evidence disproving their case.
11 That is classic textbook burden shifting.

12 I think it's necessary for them to get a conviction
13 in this case to burden shift. I don't like it. My client's
14 rights were violated. And I want a mistrial in this case.
15 With prejudice, in fact.

16 THE COURT: And State's response.

17 MR. CHEN: Your Honor, as you heard all the testimony
18 in this case was commenting on the evidence, and I was saying
19 that there wasn't any evidence to show that a virus had been
20 placed on his computer. Not only did I talk about what the
21 State's evidence was, but I also properly -- and properly, so
22 that the record is clear -- talked about why other theories
23 that the detectives were asked were not reasonable. And I
24 always couched it as the evidence in this case. So I didn't
25 expect anyone to show anything, but I did say that the

1 evidence in this case is that there is no evidence of that
2 happening.

3 THE COURT: All right. So there was much
4 cross-examination about could -- could -- isn't it true that a
5 virus could have put it on, isn't it true this, isn't it true
6 that? Much cross-examination of the, you know, all of the
7 witnesses as to how they had, you know, misbehaved or bungled
8 or what have you. And, clearly, you're going to get up in
9 your closing argument and argue those things to the jury that
10 it could have been a virus, it could have been this, they
11 didn't disprove that, and it's, I think, fair comment by the
12 State to say there was some suggestion of virus in
13 cross-examination.

14 Was there any evidence by anyone of virus? Did the
15 defendant say that he felt when he was -- had the opportunity
16 during an hour and a half to say there was a virus? No.
17 That's all in evidence in this case. And this is not a
18 question of the State getting up and saying, Ladies and
19 gentlemen, the defendant hasn't shown that there were -- that
20 this was put on by a virus. This is not burden shifting.
21 This is fair comment upon the evidence that was produced and
22 eliminating the possibilities that were suggested on
23 cross-examination. And cross-examination is part of the
24 evidence.

25 MR. WESTBROOK: I just have one final comment on

1 that, Your Honor. The police are the only people who
2 conducted an investigation in this case. They didn't spend
3 one second of their time looking for viruses, by their own
4 admission. They didn't spend one second of their time
5 following up any leads that my client did give them. He sat
6 there and said during the 90 minutes my client was being
7 completely hamstrung and surprised by this -- the accusations
8 of Detective Tooley, that he didn't come up with enough
9 reasonable explanations to justify his perceived conduct?
10 They're basically saying that he didn't prove that there was a
11 virus during that 90-minute conversation, Your Honor.

12 THE COURT: That's not --

13 MR. WESTBROOK: And -- and they're --

14 THE COURT: Not -- that is -- okay.

15 MR. WESTBROOK: -- crying a lack of evidence that
16 they're responsible for.

17 THE COURT: Okay. Motion's denied. I think I stated
18 my basis. I don't believe there was any burden shifting.
19 There has been -- there was much evidence through
20 cross-examination about viruses, about mirroring, about all of
21 these things. And the State has addressed those in a number
22 of ways of which -- all of which has been in evidence and
23 there's been no burden shifting in this Court's opinion. So
24 the motion's denied.

25 All right. Anything else outside the presence?

1 MR. WESTBROOK: Just one thing, Your Honor. I'd like
2 to take a closer look at the State's exhibits if I could for a
3 second. And if I could have the assistance of my intern. The
4 -- there were two slides that were shown --

5 THE COURT: What intern?

6 MR. WESTBROOK: -- that I believe had conflicting
7 information on them. And one of them I think had a complete
8 list of information that was entirely wrong. I'd just like to
9 take a closer look at them. And we can identify the slides,
10 if I could just have the assistance of my intern for a second.

11 THE COURT: Well, okay. I -- I've heard somebody
12 introduced in this case as a law clerk. And intern, who is
13 this person you're talking about?

14 MR. WESTBROOK: Michael, please stand up and
15 introduce yourself to the crowd.

16 MR. VAN LUVEN: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. VAN LUVEN: My name's Michael Van Luven. I'm a
19 law intern. I'm a student with the William S. Ford School of
20 Law here in Las Vegas, Nevada.

21 THE COURT: All right. Good. Good afternoon. And
22 -- but you're not counsel in this case --

23 MR. VAN LUVEN: Negative, Your Honor.

24 THE COURT: -- correct? You're not -- and you're not
25 Rule 49?

1 MR. VAN LUVEN: Negative, Your Honor.

2 THE COURT: Okay. I just wanted to make sure.

3 MR. VAN LUVEN: My -- to my knowledge, I am not.

4 THE COURT: If the -- if the State wishes to show you
5 -- what is it you want to look at?

6 MR. WESTBROOK: There's -- there's two slides that
7 have a list of times and date stamps on them.

8 THE COURT: It's up to them whether they share that.
9 That's -- that's their --

10 MR. WESTBROOK: Well, Your Honor, I certainly have
11 the right to see it, because I represent the defendant --

12 THE COURT: Yes. And --

13 MR. WESTBROOK: -- and it was just --

14 THE COURT: -- you did see it.

15 MR. WESTBROOK: -- [indiscernible] for the victim.

16 THE COURT: You just saw it. So talk to them. I
17 mean, about what it is you'd like to look at. Maybe they'll
18 be courteous --

19 MR. WESTBROOK: Your Honor, but --

20 THE COURT: -- to you and show you that at this point
21 in time.

22 MR. WESTBROOK: If I may, Your Honor, I have the
23 right to request that the entire exhibit --

24 THE COURT: It will be part of the record, of course.

25 MR. WESTBROOK: If it's part of the record, I

1 certainly have the right to see it now, do I not?

2 THE COURT: We're not -- yes. But I'm not spending
3 20 minutes. As soon as these folks get back from -- we're
4 going to resume. Okay?

5 MR. WESTBROOK: That's fine, Your Honor.

6 THE COURT: All right.

7 MR. WESTBROOK: Thank you.

8 THE COURT: Do you have, in fact, your copy of your
9 Powerpoint so we can attach it as a court exhibit?

10 MR. CHEN: I will provide one, Judge. But because of
11 the USB, I wasn't able to put it on my desktop and make a
12 printout of it. So I don't have one at this time. But
13 obviously there will be one filed with the Court.

14 THE COURT: All right. Thank you. Court's in
15 recess.

16 (Court recessed at 4:45 p.m., until 4:52 p.m.)

17 (In the presence of the jury.)

18 THE MARSHAL: Your Honor.

19 THE COURT: Thank you. Please be seated. All right.
20 The record will reflect that we are back within the presence
21 of the jury. The defendant is present with his counsel, the
22 deputies district attorney prosecuting the case, they're
23 present, as are all officers of the court.

24 Ladies and gentlemen, the next part is the defense
25 closing argument, and then there is a rebuttal closing by the

1 State. And then we would be concluded. I don't intend to
2 have you deliberate tonight. I would like to finish the
3 closing arguments tonight so that all you have to do is come
4 back and deliberate starting on Monday morning. Can you stay
5 to --- to do that? It would be probably about an hour and a
6 half.

7 UNIDENTIFIED JUROR: Yes.

8 UNIDENTIFIED JUROR: I'm good.

9 THE MARSHAL: Thumb's up for who's good and who's
10 not.

11 JUROR NO. 3: I actually have work in about maybe an
12 hour, not even. More like half an hour. I hate to be like
13 this [indiscernible] out of here, but I -- I have -- I have
14 work to go to.

15 THE MARSHAL: Okay. One at a time, folks, please.
16 We have to put this on the record.

17 THE COURT: I'm sorry, I thought we were on the
18 record.

19 THE CLERK: We are. We can't hear him.

20 THE MARSHAL: Yeah. We can't hear, Your Honor.

21 THE COURT: I see.

22 THE MARSHAL: Thank you. Okay. I'm sorry, guys.
23 Because everything's on the record, I have to be able to hear
24 you. Here's the microphone.

25 JUROR NO. 3: Oh.

1 THE MARSHAL: So hold it real close.

2 JUROR NO. 3: That's understandable.

3 THE MARSHAL: There you go.

4 THE COURT: All right. So you're -- your intern --
5 is this internship or your externship or --

6 JUROR NO. 3: No. I also do freelance -- I also do
7 freelancing stagehand on the side. And I have a contract with
8 another company. And I -- pretty much I've been going to work
9 all this week as I've -- like, literally right after trial.
10 And, yeah.

11 THE COURT: Okay. But I can certainly give you a
12 note to let them know that you're going to have to be late.
13 What -- we've got another, what -- what's the other issue?

14 THE MARSHAL: Are you done? Just checking.

15 JUROR NO. 3: Yeah. I'm done. That's --

16 THE COURT: Okay.

17 JUROR NO. 3: -- pretty much it for me.

18 THE COURT: Let me just find out what the other
19 concerns are. Okay.

20 JUROR NO. 9: My only other concern is that I've got
21 a wedding tomorrow in Santa Barbara, California. I was
22 supposed to be there this afternoon. Due to the proceedings,
23 I said no problem, you know. They -- they're okay with that.

24 THE COURT: Okay.

25 JUROR NO. 9: My problem is that I'm going to have to

1 drive some part of it tonight and I'm going to have to drive
2 at least three hours or so. And that's after I get home and
3 take care of things and it -- if it -- if it was relatively
4 short, I have no problem. But if we're going to be in here
5 for an hour and a half or maybe longer, as things have been
6 going, I'm just saying, you know, that's 6:30, that's 7:30 or
7 8:00 before I get home.

8 THE COURT: All right.

9 JUROR NO. 9: And then to get on the road. And I
10 don't want to be a stick in the mud, but...

11 THE COURT: Oh, I understand. Okay.

12 THE MARSHAL: Anyone else, folks?

13 THE COURT: All right. So no one else -- but we've
14 got two kind of major things. So the alternative is to come
15 back on Monday. But we won't even be able to start on Monday
16 -- see, that's the problem. I won't be able to come back to
17 you to hear until Monday at 1:00, because I have a morning
18 calender that lasts all morning. And it goes, you know, I
19 start at 9:00 and it -- it often goes until noon. So we'd
20 have to come back at 1:00, you'd have to hear the closing
21 arguments, and then you begin your deliberations. So that's
22 -- that's the alternative.

23 So the two that are here, you're kind of the
24 deciders. Pick your poison.

25 JUROR NO. 2: No pressure. No pressure here, Matt.

1 JUROR NO. 3: It's like double jury.

2 THE MARSHAL: Keep it close, please. Thank you.

3 JUROR NO. 3: I mean, I could try and give a call and
4 see if somebody could fill in. But I don't know what would
5 happen if no one could really fill my shoes. Because usually
6 I have to be there, like, right then and there. Because it's
7 a -- it's a show gig. I'm working -- I'm working a concert.
8 So if I can't have anybody to, you know, fill in for me, I --
9 I really don't know what I would do. They'd have to go out
10 without me, but my role is kind of important.

11 THE COURT: Okay. All right. And gentleman in the
12 -- here. He doesn't need the --

13 JUROR NO. 9: I'm sorry.

14 THE COURT: That's okay.

15 JUROR NO. 9: I'm just trying to do the math.

16 THE MARSHAL: No, it's just not --

17 THE COURT: I know, how many hours.

18 JUROR NO. 9: Exactly. And... Setback's I already
19 got a hotel room tonight because of that. Because I was
20 thinking about driving tonight. I don't think I can make it
21 if I drive all the way there tomorrow morning. I'm worried
22 about getting to the hotel tonight at a reasonable hour.

23 THE COURT: What -- what time is the wedding
24 tomorrow?

25 JUROR NO. 9: Tomorrow?

1 THE COURT: Did you say it's -- the wedding's
2 tomorrow?

3 JUROR NO. 9: It's not till 5:00, but it's in Santa
4 Barbara, California. And --

5 THE COURT: Oh.

6 JUROR NO. 9: -- I need to be there about 4:00 or
7 4:30.

8 THE COURT: You should drive -- I mean, this is just
9 my personal -- you should drive tomorrow morning, because
10 there'll be less traffic.

11 JUROR NO. 9: Well, I understand that. But that --
12 that's a really long drive. And have you been on the 15 and
13 --

14 THE COURT: Yes.

15 JUROR NO. 9: -- I mean, I've got to be there --

16 THE COURT: That's what I mean.

17 JUROR NO. 9: -- so it's not like I can -- the path
18 that traffic were tomorrow morning and all of a sudden I can't
19 be there. That's why I wanted to drive partially tonight. At
20 least I know I can get so far.

21 THE COURT: Oh, you're planning on just driving part
22 way, you mean, tonight?

23 JUROR NO. 9: Tonight, correct. Oh, yeah. There's
24 no way I could drive six and a half, seven hours tonight. So
25 I've actually got a hotel room in Victorville.

1 THE COURT: Ah, beautiful Victorville.

2 JUROR NO. 9: But, also I'm --- yeah. I don't want to
3 be getting into Victorville at midnight, either, 1:00 in the
4 morning.

5 THE COURT: All right. All right. So it sounds to
6 me like we're going to have to resume at 1:00. I apologize.

7 JUROR NO. 9: I do, too.

8 THE COURT: We thought that -- or I certainly thought
9 that the trial was -- should be concluded and it was very safe
10 to tell you it would be five days. But as you see, it wasn't.

11 So I think what we'll do is we're going to recess,
12 5:00 now. That will get Juror No. 3 to his job. Just for the
13 future, know do not schedule to go to work immediately after,
14 even if --- you know, because things do sometimes run over --
15 even if it's a short while.

16 JUROR NO. 3: Yeah.

17 THE COURT: And you're on a pretty tight schedule.
18 So it probably won't be an issue for you for about three
19 years, till you come back on jury service again.

20 MS. ANTHONY: [Indiscernible] on Monday, though.

21 THE COURT: On Monday, yeah, I could be -- you don't
22 have anything on Monday?

23 JUROR NO. 3: No. I'm free on Monday and I've called
24 to make sure, I have no plans Monday for [indiscernible].

25 THE COURT: Okay.

1 JUROR NO. 3: I have [indiscernible].

2 THE COURT: All right. And you have no problem with
3 getting back here?

4 JUROR NO. 9: No problem whatsoever. Yeah, like he
5 said, I thought we'd be done today at 5:00.

6 THE COURT: Right.

7 JUROR NO. 9: And I'd already, you know, made plans.
8 I called the bride, I -- it's my goddaughter. And I, you
9 know, I said I can't be there on Friday. She -- she's a
10 lawyer. So she understands completely.

11 THE COURT: Okay.

12 JUROR NO. 9: However, I do got to be there tomorrow.

13 THE COURT: Okay. All right. So, we're going to
14 recess until Monday at 1:00. Be back in this courtroom to
15 hear the closing, the final closings.

16 And, ladies and gentlemen, during this weekend
17 recess, during this recess it is your duty not to converse
18 among yourselves or with anyone else on any subject connected
19 with the trial or to read, watch, or listen to any report of
20 or commentary on the trial by any person connected with the
21 trial or by any medium of information, including, without
22 limitation, newspapers, television, radio, or Internet. You
23 are not to form or express any opinion on any subject
24 connected with this case until it's finally submitted to you.

25 Additionally, it's even more important when we're --

1 we have an overnight recess like this and you've heard all the
2 evidence, that you do not do any research at all, whatsoever,
3 concerning this case. Do not start trying to research
4 computer terms, anything like that. Everything you've heard
5 is already in evidence and you may not supplement that
6 evidence by doing research on your own. If you do so, it
7 would contaminate this trial and we would have to start all
8 over. All right.

9 Ladies and gentlemen, we'll be in recess.

10 THE MARSHAL: All rise. This court is in recess
11 until 12:50.

12 (Jury recessed at 5:02 p.m.)

13 MR. WESTBROOK: Your Honor, I just had one brief --

14 THE COURT: We are outside the presence of the jury.

15 MR. WESTBROOK: Actually, we're fine, Your Honor. No
16 record necessary.

17 THE COURT: All right.

18 MR. CHEN: Do you wish to say how nice I'm being
19 about anything, David?

20 MR. WESTBROOK: I think that Alex Chen is a mensch.
21 You know what a mensch is, right?

22 THE COURT: That's a good thing.

23 MR. WESTBROOK: It's a good thing. Please, get with
24 the Yiddish, people.

25 (Court recessed for the evening at 5:03 p.m.)

ACKNOWLEDGMENT:

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

A handwritten signature in cursive script, reading "Kimberly Lawson", is written over a horizontal line.

KIMBERLY LAWSON
TRANSCRIBER

UNCERTIFIED ROUGH DRAFT

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