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Respondent.

Docket 74071 Document 2018-13799

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RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,  
vs.  
JOSE AZUCENA,  
Defendant.

CASE NO. C-17-321044-1  
DEPT. NO. II

BEFORE THE HONORABLE RICHARD SCOTTI, DISTRICT COURT JUDGE

**TUESDAY, MAY 2, 2017**

**TRANSCRIPT OF PROCEEDINGS RE:  
JURY TRIAL - DAY 6**

\*\*\*\*\*

**APPEARANCES:**

For the Plaintiff:

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Chief Deputy District Attorney  
CHRISTOPHER S. HAMNER, ESQ.  
Deputy District Attorney

For the Defendant:

P. DAVID WESTBROOK, ESQ.  
Deputy Public Defender  
CARLI L. KIERNY, ESQ.  
Deputy Public Defender

RECORDED BY: DALYNE EASLEY, COURT RECORDER  
TRANSCRIBED BY: SHAWNA ORTEGA, CET-562

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EXHIBITS

DESCRIPTION

ADMITTED

No exhibits offered.

1 **LAS VEGAS, NEVADA, TUESDAY, MAY 2, 2017**

2 [Proceedings commenced at 1:13 p.m.]

3  
4 [Outside the presence of the jury.]

5 THE COURT: All right. Please be seated everybody -- or I guess we'll  
6 stand for the jury.

7 Anything that we need to put on the record before we get  
8 started? Somebody must have something.

9 MR. WESTBROOK: I -- I do have something is.

10 THE COURT: Oh, wait. Oh, by the way, I checked with Judge  
11 Ellsworth.

12 MR. WESTBROOK: Yeah. I appreciate you doing that.

13 THE COURT: And she says she has no idea what you're talking about.  
14 There's -- she doesn't know of anything on calendar.

15 MR. WESTBROOK: Yes, yes. I asked for the 3rd. I -- somehow  
16 someone put it on the 5th.

17 THE COURT: She must have been confused.

18 MR. WESTBROOK: Yeah. Someone put it on the 5th, which was not a  
19 day, apparently, that happens --

20 THE COURT: Oh, okay.

21 MR. WESTBROOK: -- but -- in her courtroom, so now it's been moved  
22 to the 15th, and I'm no longer busy Friday morning.

23 THE COURT: So will that work for you, then?

24 MR. WESTBROOK: Yeah. I'm fine now Friday morning.

25 THE COURT: Perfect. What else do we got? We got all our



1 interpreters here?

2 MR. WESTBROOK: I'm also fine with a later start, if the State wants  
3 one for some reason, either way.

4 THE COURT: The equipment is all working now?

5 MR. WESTBROOK: Should be.

6 THE COURT: The equipment problem we had yesterday? Did the  
7 interpreter --

8 MR. WESTBROOK: Oh, yes. It is. They've replaced the unit. Thanks  
9 for checking on that.

10 And, Your Honor, I do have a -- I have a record to make about  
11 the prior consistent statements.

12 THE COURT: Prior consistent statements, yes.

13 MR. WESTBROOK: Yes. There was -- there was a prior consistent  
14 statement that was admitted yesterday. I --

15 THE COURT: I don't remember the issue. But go ahead and make  
16 your record.

17 MR. WESTBROOK: I wrote -- I wrote up the issue, and if the court  
18 prefers, I can just file it.

19 THE COURT: Whatever you would prefer. If you want to orally make  
20 your record so I -- I hear it now, that -- in case the issue -- you think the issue might  
21 come up again.

22 MR. WESTBROOK: It -- it might come -- come up again, Your Honor.

23 Here's -- here's the issue in -- in brief, and I'm going to give you a  
24 citation.

25 THE COURT: All right. We'll just let him make his record.

1 MR. WESTBROOK: It'll be very brief. The citation is *Patterson v.*  
2 *State*. I will look up the numbers and -- and give it to you in a -- in a few minutes.  
3 We had a piece of paper printed out that's sitting on a desk.

4 THE COURT: Okay.

5 MR. WESTBROOK: But what the standard here is, the State has to  
6 show that the statement they're trying to introduce as a prior consistent statement  
7 was made prior to the motive to fabricate. They made no such showing.

8 Nothing in this case is prior to the motive to fabricate, because  
9 their own witness said that she knew about the U visas prior to October 16th. Since  
10 there are no statements that come out prior to October 16th, there is not a time in  
11 this case that is prior to a motive to fabricate. There is no instance in which they  
12 can get a prior consistent statement in without it being a hearsay and inadmissible.  
13 We say it's prejudicial, it's cumulative, and it's bolstering, and we think that it was  
14 admitted in error, and it's prejudicial.

15 THE COURT: Okay. I -- I appreciate that.

16 MR. WESTBROOK: And then going forward, there'll be no -- no way to  
17 make that showing, because it's a matter of record that the motive to fabricate  
18 existed before any statements in this case were made, because October 16th is the  
19 first day that they were made.

20 THE COURT: All right. Do we need to -- do I anticipate the issue  
21 coming up again? And is it something we need to have any further argument on?

22 MR. HAMNER: For the -- for the record right now, which specific  
23 statement is he talking about?

24 THE COURT: I -- I don't recall --

25 MR. HAMNER: Or is he saying --

1 THE COURT: -- specifically. I'm sorry.

2 MR. HAMNER: I mean, it -- it would help -- in order to answer the  
3 court's question, it would help if the defense would articulate which statement in  
4 particular they're complaining about, or is it every statement uttered by the  
5 children?

6 THE COURT: Well, that might have been the statement about -- to --  
7 well, you -- you -- you tell us. Which statement?

8 MR. WESTBROOK: I can tell you. It was Jatziri talking about what --

9 MS. KIERNY: Yezline.

10 MR. WESTBROOK: -- Yezline told Yusnay.

11 MS. KIERNY: Her.

12 MR. WESTBROOK: No. Told her she told Yusnay. I mean, it was like  
13 triple, possibly quadruple hearsay, I lost count. And we objected to it. It was  
14 brought in as a prior consistent statement, but essentially it was, you know, just  
15 witnesses bolstering each other through hearsay and double hearsay and triple  
16 hearsay, which shouldn't have been admitted.

17 THE COURT: Okay. Okay.

18 MR. HAMNER: I want to -- I would like to address that.

19 THE COURT: Okay. Sure.

20 MR. HAMNER: Because again, Mr. Westbrook is just --

21 THE COURT: Well --

22 MR. HAMNER: I would -- if I could just at least address what actually  
23 happened versus Mr. Westbrook version of it.

24 Mr. Westbrook has failed to articulate the double layer of hearsay  
25 or triple layers. He just baldly threw that out there.

1 The question posed was to the witness -- the witness was  
2 Jatziri -- What did you tell Yusnay about Yezline? Okay. She began to answer  
3 about what Yezline had said to her. There was an objection. I stated I can  
4 rephrase.

5 The witness did not get that answer out. I then repeated the  
6 question. We're not going to focus on any of Yezline's statements to you, Jatziri;  
7 what did you tell Yusnay?

8 The witness then said, I told Yusnay that Yezline had been tied  
9 up and he touched her. That's what she told Yusnay.

10 There then was an objection. The objection was kind of this  
11 bolstering, consistent statement, something along those lines. That's what they  
12 stated. My response to that was they've opened the door, because from the  
13 opening, as well as the opening of the cross, they insinuated that the child was  
14 lying.

15 Now, this -- there -- and that everyone is making all of this up.  
16 They also insinuated on the cross-examination of Yusnay that she also was  
17 potentially making these things up or that they're inconsistent.

18 And so, one, with respect to *Patterson*, they're claiming that you  
19 can't bring out a prior consistent statement unless it's prior to -- prior to there being  
20 a motive to lie.

21 When I argue to you about why that statement needed to come  
22 in.

23 THE COURT: Uh-huh.

24 MR. HAMNER: It was to rebut, in part, a cross-examination of Yusnay  
25 which suggested that there was some level of fabrication. And the information that

1 Yusnay was relating to the jury was being fabricated. Yusnay indicated also on her  
2 cross-examination she never knew what a U visa was. So this whole *Patterson*  
3 argument falls away with respect to her.

4 So it's admissible, one, to show that Yusnay is not fabricating or  
5 making anything up, because if the child relays, I said X and Y to her, and that's  
6 what Yusnay testified to previously, and there's an allegation that Yusnay, as well,  
7 is making things up or is not being consistent or is in part of this big scheme, it  
8 comes in, on that level.

9 Secondly, it comes in and it's admissible because it  
10 demonstrates the allegations that the child herself is making things up -- something  
11 that they have been talking about since the opening statement. And I would submit  
12 to you that there hasn't been any evidence presented that any parent has told their  
13 child to lie or fabricate anything. That didn't come out through the  
14 cross-examination of the mother.

15 The only thing that's come out is that she's applied for a U visa.  
16 And I understand what their argument is, but that's a pretty big leap to say, well,  
17 now, there just has to be kind of coaching all the way across the board.

18 So -- so the bottom line is they have been making insinuations  
19 that every witness that has testified, each one -- the parents, the neighbor, and the  
20 two children -- they are all part of supposedly some big scheme to lie, and that  
21 they're all inconsistent, and this evidence comes in as prior consistent statements  
22 and to rebut the defense's primary argument that these witnesses aren't credible.

23 MR. WESTBROOK: And State made a very --

24 THE COURT: And show Yusnay's state of mind, too, and explain her  
25 subsequent conduct. I think that was another --

1 MR. HAMNER: It does.

2 THE COURT: -- another explanation you offered.

3 MR. HAMNER: It goes to the effect on the listener.

4 THE COURT: Effect on the listener.

5 MR. HAMNER: It goes to the state of mind --

6 THE COURT: I remember you saying that.

7 MR. HAMNER: -- of the declarant, that being the child Jatziri,

8 absolutely.

9 THE COURT: All right. So I -- I understand. I think we -- we discussed

10 all that yesterday, and I wasn't my intent to -- to allow it in just based upon that one

11 ground, prior consistent statement.

12 I mean, I think I accepted Mr. Hamner's view that there are

13 multiple reasons why the evidence should come in, including -- including it was a

14 prior consistent statement, it would reflect the -- the state of mind of the declarant

15 and the effect on the state of mind of declarant and the listener, rebuts the

16 insinuation of untruthfulness, and it -- the probative value exceeded the prejudice.

17 So I -- you know, I mean, all of that, I thought it should come in.

18 You made a good record. But if there's -- is there any final word you want to say on

19 this? You can, if you want to add something.

20 MR. WESTBROOK: Just that --

21 THE COURT: But going forward, I'm going to -- I'm going to stick to

22 that prior ruling.

23 MR. WESTBROOK: Right.

24 THE COURT: I'm -- I'm aware of the *Patterson* case and I'm --

25 MR. WESTBROOK: Sure.

1 THE COURT: And I'm also aware that prior consistent statement can  
2 only come in if the statement was made at a time before there was a motive to  
3 fabricate. That's the whole reason why the rule.

4 MR. WESTBROOK: I understand, Your Honor.

5 Yusnay's motive to fabricate would still have existed at the time.  
6 And the evidence that there's fabrication is the incredible amount of detail that she  
7 has today, six months later, that she did not have October 16th, that shows that  
8 she's been talked to by people like Amanda, who are directly applying for U visas.

9 THE COURT: Well, that -- doesn't that undercut your argument? It  
10 shows that she learned a lot more about the U visa process after September 16th?

11 MR. WESTBROOK: No. She's learned -- she's learned facts that have  
12 been fed to her by the adults in this case after October 16th.

13 THE COURT: Okay. Well, we don't need to -- that's kind of --

14 MR. WESTBROOK: Yeah.

15 THE COURT: -- I mean, you're making a very passionate argument.  
16 We don't have a jury here. So I -- you're not --

17 MR. WESTBROOK: Okay. Well, I'm not -- I'm --

18 THE COURT: You don't need to convince me of anything. You know,  
19 I'm just --

20 MR. WESTBROOK: This has my bland argument, Your Honor.

21 THE COURT: Okay.

22 MR. WESTBROOK: But understanding on *Patterson* --

23 THE COURT: Okay.

24 MR. WESTBROOK: -- my recollection at the bench is that this was  
25 admitted as a prior consistent statement over our objection. I'm just completing the

1 record with the case law.

2 THE COURT: Okay.

3 MR. WESTBROOK: Thank you, Your Honor.

4 THE COURT: No problem.

5 Let's bring in the jury.

6 MR. HAMNER: Your Honor, if I could just approach to start retrieving  
7 some exhibits?

8 THE COURT: Do what to the exhibits?

9 MR. HAMNER: Approach to get some exhibits for my examination.

10 THE COURT: Yes.

11 MR. HAMNER: Thank you very much.

12 I just wanted to grab some core exhibits --

13 THE COURT: Oh.

14 MR. HAMNER: -- for the next direct.

15 THE COURT: Okay. Fine.

16 MR. HAMNER: So thank you very much.

17 [Pause in proceedings.]

18 [Jury reconvened at 1:24 p.m.]

19 THE COURT: All right. Sometimes the chairs get moved around a little  
20 bit. You can -- you guys can, in the front row, spread out and give yourself a little  
21 more room, if you need it. Okay. Nobody wants to move, that's fine. You guys got  
22 enough room? All right.

23 All right. Let's be seated everybody. All right.

24 The State may proceed.

25 MR. HAMNER: The State's going to call Mirabel Moreno to the stand.



1 THE COURT: Mirabel Moreno.

2 [Pause in proceedings.]

3 THE COURT: Hi, Mirabel. How are you today?

4 THE WITNESS: Fine.

5 THE COURT: Great. So do you want to speak Spanish today in court?

6 THE WITNESS: Spanish.

7 THE COURT: Great. No problem. Let me say hi to you. I'm Judge  
8 Scotti. How are -- I want to say hi. We're all going to be friendly here, okay? So  
9 we have to ask you some questions. All right. And Mr. Hamner will have some  
10 questions and then Ms. Kierny, sitting right over here, will have some questions for  
11 you. Okay. We just want to hear the truth. Okay. Thank you.

12 And Mr. Hamner, you can -- you can the proceed.

13 And the people here -- have you ever been in court before?

14 THE WITNESS: No.

15 THE COURT: No? Oh, this is a case to get information. And these  
16 people over here, they're the jurors, and they get all the information and they help  
17 us make a decision. Okay?

18 Okay. Thank you. Mr. Hamner will ask you some questions  
19 now.

20 **MIRABEL MORENO,**

21 [having first been qualified by the judge, testified through the interpreter as follows.]

22 **DIRECT EXAMINATION**

23 BY MR. HAMNER:

24 Q So this is your microphone, so -- so if you speak into that, your voice  
25 will be really loud, okay?

1 A [No audible response.]  
2 Q Okay. Hi Mirabel, how are you?  
3 A Fine.  
4 Q How old are you?  
5 A Eight.  
6 Q Eight years old. And what grade are you in?  
7 A Third grade.  
8 Q Let me ask you a couple questions. Do you see my tie here?  
9 A Yes.  
10 Q What color is it?  
11 A Red.  
12 Q If I told you my tie was yellow, with purple polka dots on it, would I be  
13 telling you the truth or would I be lying?  
14 A You're lying.  
15 Q If -- let me show you the back of this piece of paper here; what color is  
16 it?  
17 A White.  
18 Q If I told you it was black, would that be the truth or would I be lying to  
19 you?  
20 A You're lying.  
21 Q Okay. I want you to take in the room for a second. Can you look at the  
22 ceiling for a second? If I told you right now, it was raining inside the room right  
23 now, would I be telling you the truth or would I be telling you a lie?  
24 A You're lying.  
25 Q Okay. Now, do you promise to tell us what you say here today is going

1 to be the truth?

2 A Yes.

3 Q Okay. Is it a good thing to tell lies?

4 A No.

5 Q Okay.

6 MR. HAMNER: Is the court satisfied at this time?

7 THE COURT: You may proceed.

8 MR. HAMNER: Thank you very much.

9 BY MR. HAMNER:

10 Q Mirabel, do you live in a house or an apartment?

11 A Apartment.

12 Q And who are the people that you live with?

13 A My family.

14 Q Okay. Tell me about who lives in the apartment with you.

15 A My uncle, my sisters, my grandpa and my grandma, my mom and dad.

16 Q Oh, what is your -- what are your sister's names?

17 A Jatziri and Maradel.

18 Q Who is -- who is the oldest sister?

19 A Jatziri.

20 Q Okay. And who is the oldest between you and Maradel?

21 A I am.

22 Q Do you know by how many minutes?

23 A No.

24 Q Okay. So you were the -- you're the old -- you're -- are you twins?

25 A Yes.

1 Q Okay. Now, let me show you -- let me show you -- let me show you  
2 State's 41; what are we looking at there?

3 A My house.

4 Q Is that your house?

5 MR. HAMNER: Publishing 41, State's 41.

6 Q So that's your house?

7 A Yes. The screen's kind of magic. If you touch it with your finger or  
8 something, you can make a mark. Can you take -- can you take that pen and circle  
9 your house?

10 Q Okay.

11 MR. HAMNER: Let the record reflect the witness has circled the  
12 first-floor door in the center, as well as the windows to the left of the door in  
13 State's 41.

14 Q Are those the windows to your apartment?

15 A Yes.

16 Q Now, when you lived in this apartment, did you know someone, a little  
17 girl by the name of Yezline?

18 A Yes.

19 Q Does she live there anymore? Or did she move?

20 A She moved.

21 Q Okay. But do you remember where her house was?

22 A Yes.

23 Q If I showed you a picture of her house, do you think you might be able  
24 to find it?

25 A Yes.

1 Q I'm going to publish State's 36; do you see Yezline's house anywhere?  
2 THE COURT INTERPRETER: I'm sorry. Repeat the question, please.

3 BY MR. HAMNER:

4 Q Do you see Yezline's house anywhere?

5 A Yes.

6 Q Why don't you take that pen and circle it again.

7 MR. HAMNER: All right. Let the record reflect the witness has circled  
8 the door on the first floor with the number 5 on it, as well as the windows just to the  
9 right of it, in State's 36.

10 Q When -- when you lived in this apartment -- or you still do -- would your  
11 mom throw parties for some of the other families in the neighborhood?

12 A Yes.

13 Q Did that include Yezline's mom and dad?

14 A Yes.

15 Q Okay. And let me ask you this, did you know someone by the name of  
16 Doña Elena?

17 A Yes.

18 Q Did she used to come to the parties, too?

19 A Yes.

20 Q And what was her husband's name; do you remember?

21 A Don David.

22 Q Okay. Do you remember where Don David's house is?

23 A Yes.

24 Q All right. I'm publishing State's 24.

25 Mirabel, showing you State's 24; do you see Don David's

1 house?

2 A Yes.

3 Q Why don't you take that pen and make a circle around it.

4 MR. HAMNER: Let the record reflect the witness has circled the very  
5 first door in the center of the frame and the two windows to the right of that door in  
6 State's 24.

7 Q Do you remember where -- how close Don David lived to Yezline?

8 A Yes.

9 Q I'm going to publish State's 35.

10 Now, let me ask you, take a good look at that picture; do you see  
11 Yezline's door to her house in this picture?

12 A Yes.

13 Q Why don't you circle it.

14 MR. HAMNER: Let the record reflect the witness has circled what  
15 appears to be the second door all the way to the left in State's 35, just beyond what  
16 appears to be a tan sedan.

17 Q Now, Mirabel, do you see Don David's house in this same picture?

18 A Yes.

19 Q Why don't you make a square around that.

20 MR. HAMNER: Let the record reflect the witness has made a square of  
21 a white door behind -- all the way to the left behind a dodge pickup truck that's dark  
22 in color.

23 THE COURT: All the way to the right.

24 MR. HAMNER: All the way to the right. I misspoke.

25 BY MR. HAMNER:

1 Q Mirabel, are there private places or parts on your body that people are  
2 not supposed to touch?

3 A Yes.

4 Q Mirabel, why don't you tell this jury what names you've given to those  
5 parts?

6 A The tits, the breast, the butt, and the front part.

7 Q And the front part. Let me ask you about the front part.

8 Do you use it to go to the bathroom for anything?

9 A Yes.

10 Q What do you -- what type of -- what do you use it to go to the bathroom  
11 for?

12 A To pee.

13 Q Okay. Let me ask you, you mentioned the front part. Well -- yeah,  
14 you -- you mentioned the front part. Did anyone do something to your front part  
15 that you did not like?

16 A Yes.

17 Q And what was the name of that person?

18 A Don David.

19 Q Okay. Mirabel, I want -- I want to ask you this question.

20 I want you to take a look around the room; do you see Don  
21 David here today?

22 A Yes.

23 Q Could you point where he is in the courtroom and maybe describe  
24 maybe the color of the shirt that he's wearing.

25 A [No audible response.]

1 Q Okay. And what color shirt is he wearing?

2 A [No audible response.]

3 Q Okay. Well, let me ask you this.

4 Is it -- does the shirt have all one color or are there -- are there  
5 lines on the shirt?

6 A It has lines.

7 Q Okay. Is he standing up or sitting down?

8 A Sitting down.

9 Q Is he sitting down at a table or is he sitting somewhere else in the  
10 courtroom?

11 A He is seated at the table.

12 Q Is he in the middle of the table or at the end of the table?

13 A One side of the table.

14 MR. HAMNER: Okay. Let the record reflect the witness has identified  
15 the defendant.

16 THE COURT: It -- it does.

17 BY MR. HAMNER:

18 Q So you mentioned -- let me ask you about Don David for a second.

19 Did you have -- did you and your sisters have a name for him?

20 THE COURT INTERPRETER: Which --

21 BY MR. HAMNER:

22 Q Did you and your sisters have a name for him? What did you call Don  
23 David, other than Don David?

24 A Grandpa.

25 Q Grandpa. Was he your real grandpa?



1 A No.

2 Q You mentioned that he -- he did something to your front part; what did  
3 he do to your front part?

4 A He -- he would touch it.

5 Q Okay. Did this happen one time or more than one time?

6 A More than one time.

7 Q And do you remember where it would happen?

8 A Yes.

9 Q How old -- or I'm sorry.

10 Where were you -- or what places were you at when this  
11 happened?

12 THE COURT INTERPRETER: I'm sorry. Repeat the question.

13 BY MR. HAMNER:

14 Q What places were you at when this happened?

15 A Outside his house.

16 Q Okay. I want to show you -- I'm publishing State's 24; can you show us  
17 where you would be when this would happen?

18 THE COURT INTERPRETER: Please repeat the question again.

19 BY MR. HAMNER:

20 Q Can you show -- you said it happened outside his apartment. Can you  
21 see in this apartment a place or places where it may have happened?

22 A Yes.

23 Q Okay. Take a pen and circle the different places that it happened at.

24 MR. HAMNER: Okay. Let the record reflect that the witness has  
25 circled the power box in the center of State's 24, as well as what appears to be a

1 bush or a tree just to the left of the door.

2 BY MR. HAMNER:

3 Q Okay. When you were there, what part of Don David's body would  
4 touch your front part?

5 A His thing.

6 Q Okay. Were there any other body parts of his that touched your front  
7 part?

8 A Yes.

9 Q And what part was that?

10 A With his hands.

11 Q Okay. How old were you when Don David would touch your front part?

12 A Eight.

13 Q Okay. Do you remember telling anyone previously that you were seven  
14 years old when this happened?

15 MS. KIERNY: I'm going to object as to anyone being not specific.

16 MR. HAMNER: Okay.

17 THE COURT: Overruled.

18 Go ahead.

19 THE WITNESS: Yes.

20 BY MR. HAMNER:

21 Q And do you remember previously stating at a court proceeding where I  
22 was asking you some questions that you were seven years old when that  
23 happened?

24 A Yes.

25 Q When this happened, were you by yourself?

1 A No.

2 Q Who else would be there?

3 A My sisters and Yezline.

4 Q Now, you talked a lot about your private places on your body. I want to

5 talk about a boy's private part. Have you ever seen Don David's private part?

6 A Yes.

7 Q Tell us about that; what happened?

8 A I forgot.

9 Q Okay.

10 THE COURT INTERPRETER: Can you repeat the question, please?

11 BY MR. HAMNER:

12 Q Sure. Well, let me -- I'll rephrase the question.

13 You said that you saw his private area. Where were you when

14 this happened?

15 A Outside his house.

16 Q Okay. And do you see that area here in State's 24, in this picture?

17 A Yes.

18 Q Why don't you circle the areas that happened at?

19 MR. HAMNER: Okay. Let the record reflect the witness has circled

20 again what appears to be the tree just to the left of the door, as well as the ground

21 just -- just in front of it -- walking away from the tree toward the very large tree on

22 the last page of 24.

23 BY MR. HAMNER:

24 Q Who would be there when that happened?

25 A Yezline and my sisters.

1 Q Okay. Where would he take his private part out from?

2 A Outside.

3 Q Okay. But let me ask you this; was he wearing clothes when this  
4 happened?

5 A Yes.

6 Q How would you end up seeing his private part? How would it come into  
7 view?

8 A [No audible response.]

9 Q Well, let me ask you this.

10 Where would Don David be standing when he would do this?

11 A Outside his door.

12 Q Okay. Can you -- can you make a square where that is on State's 24?

13 MR. HAMNER: Okay. And let the record reflect the witness has made  
14 a square right at the location of his door.

15 Q When this happened, how did his thing look? What color was it?

16 A Brown.

17 Q Was it big or small?

18 A Big.

19 Q You mentioned that it happened outside of his house; did it ever  
20 happen inside of his house?

21 A Yes.

22 Q Let me ask you about this; do you remember anything involving Don  
23 David and chocolates?

24 A Yes.

25 Q Tell me, what -- what happened with Don David and the chocolates?

1           A     He put them in front of his thing.

2           Q     Okay. And then what would he do with them when they were in front of

3 his thing?

4           A     He would tell Yezline to touch it.

5           Q     And when you say it, what are you talking about?

6           A     I said I'm not going to touch it.

7           Q     Okay. And let me ask you this, you keep using the word it; are you

8 talking about the chocolates or are you talking about his thing, or are you talking

9 about something different?

10          A     I'm talking about the candies.

11          Q     Okay. What kind of candies would he offer you guys?

12          A     KitKats, Skittles, and Chiclets.

13          Q     Okay. When he would have the KitKats, do you remember seeing the

14 KitKats touch the skin of his part?

15          A     I did not see it.

16          Q     Okay. Where would he start putting the chocolates?

17          A     In front of his thing.

18          Q     Okay. Would his thing be outside his pants or would his thing be inside

19 his pants?

20          A     Outside his pants.

21          Q     Okay. So when you'd walk up and this is happening, his -- his thing is

22 already outside his pants?

23          A     Yes.

24                MR. WESTBROOK: Objection. That misstates her testimony. She

25 never said his thing was outside her -- outside the pants.

1 THE COURT: Well, overruled.

2 The jury will just have to search their own memory for what they  
3 recall her saying.

4 BY MR. HAMNER:

5 Q What would Don David say to you when this was happening?

6 A I don't remember.

7 Q Okay. Did he ever ask you if you wanted any of the chocolates or  
8 candies?

9 A Yes.

10 Q What would he say, do you remember?

11 THE COURT INTERPRETER: What would he say?

12 MR. HAMNER: Yeah.

13 THE WITNESS: Yes. To take some of the candy from front -- from the  
14 front of his thing.

15 BY MR. HAMNER:

16 Q Okay. And when you were there, you mentioned Yezline; was anyone  
17 else there with you?

18 A I did not understand the question.

19 Q Okay. You mentioned Yezline -- Yezline took the chocolates; do you  
20 remember telling us that?

21 MS. KIERNY: Misstates the testimony.

22 BY MR. HAMNER:

23 Q I'm sorry. You mentioned that he asked Yezline --

24 A Yes.

25 Q -- to take the chocolate --

1 THE COURT: Sustained on that one.

2 MR. HAMNER: Let me -- I'll rephrase.

3 MS. KIERNY: Yeah.

4 THE COURT: Thank you.

5 BY MR. HAMNER:

6 Q You mentioned that he asked Yezline to take the chocolates?

7 A Yes.

8 Q Was Yezline there?

9 A No -- yes.

10 Q Okay. Did she take the chocolates when he asked her to?

11 A No.

12 Q Okay. Were -- you were there; was Maradel there?

13 A Yes.

14 Q Did he ask her to take the chocolates?

15 A Yes.

16 Q Did she take any?

17 A No.

18 Q Okay. Was Jatziri there?

19 A Yes.

20 Q Would he ask her to take the chocolates?

21 A Yes.

22 Q And did -- and did he -- did she take any?

23 A No.

24 Q Do you remember if Don David had a phone?

25 A Yes.

1 Q And would he ever show you things on his phone?  
2 A Yes.  
3 Q What sort of things would be on that phone?  
4 A The man and a woman were in bed and the girl had no clothes and the  
5 boy did not have clothes, either.  
6 Q Okay. Did you know what they were doing?  
7 A No, I don't remember.  
8 Q Okay. Who was there with you when that happened?  
9 A My sisters, Yezline, and me.  
10 Q Okay. Let me ask you just about the chocolates. Did the -- the thing  
11 with the chocolates happen one time or more than one time?  
12 A One time.  
13 Q Okay. And the stuff with the stuff on the phone, did that happen one  
14 time or more than one time?  
15 A One time.  
16 Q Okay. Did you ever see -- we talked about how Don David touched  
17 your front part. Did you ever see Don David touch Jatziri's front part?  
18 A No.  
19 Q Okay. Did you ever see Don David touch Maradel's front part?  
20 A Yes.  
21 Q Did you ever see Don David touch Yezline's front part?  
22 A Yes.  
23 Q Do you -- was -- did he touch them over their clothes or under their  
24 clothes or both?  
25 A Both.



1 Q Okay. For those -- your sister Jatziri and Yezline?

2 MS. KIERNY: I'm going to object. That misstates the testimony.

3 BY MR. HAMNER:

4 Q Maradel and Yezline.

5 MS. KIERNY: Yes.

6 THE COURT: Thank you. Sustained.

7 BY MR. HAMNER:

8 Q Do you -- do -- did that apply? Did he touch Yezline over the clothes  
9 and under the clothes?

10 A Yes.

11 Q Did he touch -- was it Maradel -- Maradel over the clothes or under the  
12 clothes?

13 A Both.

14 Q Okay. And do you remember saying at a prior proceeding when I  
15 asked you questions that Don David also touched your sister Maribel -- or  
16 Maradel -- Jatziri?

17 A I did not remember that part.

18 Q Okay. And I may have misspoke. I think you had said previously that  
19 he did not touch Jatziri. Do you remember saying that at a previous proceeding?

20 A I did not hear right.

21 THE COURT INTERPRETER: Can you repeat the question, please.

22 BY MR. HAMNER:

23 Q Do you -- when -- when -- do you remember the last time you came to  
24 court and you spoke to me?

25 A Yes.

1 Q Do you remember talking -- when I was asking questions, do you  
2 remember saying that Don David touched Jatziri, as well, at that -- that time, when  
3 you talked to me?

4 A Yes.

5 Q Okay. Now, as you sit here today, do you remember whether or not  
6 Don David touched Jatziri on her front part?

7 A Yes.

8 Q I didn't ask you this; did Don David touch your front part over the  
9 clothes or under the clothes or both?

10 A On top of the clothes.

11 Q Okay. Now, I want to show you State's 33; do you -- do you recognize  
12 what we're looking at in this picture?

13 A Yes.

14 Q All right. What are we looking at here?

15 A Cars and houses.

16 Q Okay. Is that nearby Don David's house?

17 A Yes.

18 Q Is this -- okay. Is that box at the bottom of the screen, that box you had  
19 circled before, in other pictures?

20 A Yes.

21 Q Now, when you look in this picture, did anything happen with Don David  
22 that you didn't like, in this picture?

23 A Yes.

24 Q What -- can you circle an area where it happened?

25 A [No audible response.]

1 Q Okay. Anywhere else?

2 A No.

3 Q Okay. And what happened there?

4 A Okay. He was touching my sister's front part.

5 Q Okay. I want to talk to you a little bit about Don David and the  
6 conversations you had with him.

7 Did Don David have any nicknames for you guys?

8 A No.

9 Q Do you remember that --

10 MR. WESTBROOK: Your Honor, may we approach briefly?

11 THE COURT: Yeah, sure.

12 One moment.

13 [Bench conference transcribed as follows.]

14 MR. WESTBROOK: I'm sorry --

15 THE COURT: Hold on a second. I just --

16 MR. WESTBROOK: I'm sorry, we need a quick restroom break for my  
17 client. He's having a prostate issue.

18 THE COURT: Oh, yes. Okay. No problem.

19 MR. WESTBROOK: We can take a break.

20 THE COURT: 10 minutes?

21 MR. WESTBROOK: Yeah. That should be fine.

22 THE COURT: Okay. Okay.

23 [End of bench conference.]

24 THE COURT: Okay. We're going to take a 10-minute recess.

25 Okay. 10-minute break.

1 Ladies and gentlemen of the jury, the prior admonishment  
2 applies. Please don't talk to any of the witnesses, parties, or the attorneys about  
3 the case or about any other matter; don't talk among yourselves about -- about the  
4 case or the issues of the case; don't do any research, investigation on your own;  
5 don't form any opinions. All right. Thank you.

6 Please enjoy this 10-minute recess.

7 Thank you, everybody.

8 [Jury recessed at 1:55 p.m.]

9 THE COURT: Okay. We're outside the presence of the jury.

10 And -- and --

11 MR. HAMNER: Mirabel.

12 THE COURT: Mirabel, you may step down and join your  
13 representative.

14 Take a 10-minute break.

15 Then will you come back in 10 minutes? Okay. Thank you.

16 [Court recessed at 1:56 p.m., until 2:13 p.m.]

17 [Outside the presence of the jury.]

18 THE COURT: That'll give us an hour and a half.

19 MR. WESTBROOK: So --

20 MS. KIERNY: So --

21 THE COURT: I can go until 5:45. I really can't -- I've got a hair cut  
22 appointment at 6:30. So.

23 MS. KIERNY: We -- we think we can get them both done --

24 MR. WESTBROOK: Yeah, we --

25 MS. KIERNY: -- by 5:00, 5:30.

1 THE COURT: Okay.  
2 MS. KIERNY: Okay?  
3 THE COURT: I'll go to --  
4 MR. WESTBROOK: With any luck by 5:00. I mean --  
5 THE COURT: 5:30. Well, 5:30 is the latest.  
6 MR. WESTBROOK: If they're not going super slow.  
7 THE COURT: You can't stay?  
8 THE CLERK: I can stay till, like, 6:00 at the latest.  
9 THE COURT: I can't.  
10 THE CLERK: 5:45 is perfect.  
11 THE COURT: Okay. We'll be done by 5:30.  
12 MR. WESTBROOK: Okay.  
13 MS. KIERNY: Perfect.  
14 THE COURT: All right. Let's bring the jurors in. Thank you, marshal.  
15 [Pause in proceedings.]  
16 THE COURT: Will you tell the -- her representative --  
17 MR. HAMNER: I'll let them know.  
18 THE COURT: -- the girl that --  
19 MR. HAMNER: I'm going to let the parents -- I'll let the parents know.  
20 [Pause in proceedings.]  
21 [Jury reconvened at 2:15 p.m.]  
22 THE COURT: All right. Thank you. Please be seated, everybody.  
23 Shall we wait for Mr. Hamner?  
24 MS. KOLLINS: It's fine, Your Honor.  
25 THE COURT: Okay.

1 MS. KOLLINS: Thank you.

2 THE COURT: So ladies and gentlemen of the jury, someone has a  
3 medical issue which is going -- which necessitates us to take a prolonged break,  
4 probably to -- probably about an hour and a half. I hate to do this to you, but it's --  
5 it's necessary. Don't concern yourself with who has the medical issue, what is the  
6 medical issue or -- or how or why the medical issue arose. Don't -- just there's a  
7 medical issue involving somebody. All right.

8 So I need to excuse you for an hour and a half, while we figure  
9 some things out. Okay. We thought about whether we should just let you go for  
10 the day or just let you go for -- I know -- so I can see a couple people shaking their  
11 heads.

12 Tell you what, we have -- my marshal has all of your phone  
13 numbers, right?

14 THE MARSHAL: Yes.

15 THE COURT: I think so. All right. And -- and will you all be available  
16 by phone in a short while? No? One person is saying no.

17 UNIDENTIFIED JUROR: I don't have a cell.

18 UNIDENTIFIED JUROR: No. I don't have a phone.

19 THE COURT: Okay. Well, tell you what, I think -- we're going to need  
20 an hour and a half break. It could be that if you want to check back in with the  
21 marshal in about a half an hour, maybe we -- I'll have more information for you.

22 If we decide to change our mind and let you all go, we'll call and  
23 let you all know that. All right. For those of you that don't have a phone, check  
24 back with the marshal in a half an hour. The rest of you just assume you need to  
25 be back here at 1:30, unless you hear otherwise. Okay. I'm sorry. In an hour and

1 a half -- hour and a half. I was thinking hour and a half, 1:30. I don't know what --  
2 one -- one hour and 30 minutes. 2:20, 3:20, 3:50. 3:50. All right. So 3:50, unless  
3 you hear otherwise, we have your contact information.

4 The other two of you, if you could please check back with the  
5 marshal in half an hour. Is that good advice to the jurors, guys?

6 MR. WESTBROOK: That's perfect, Your Honor. Thank you.

7 THE COURT: All right. Then let me go ahead and just read the official  
8 admonishment and make sure you don't forget your instructions.

9 Do not communicate among yourselves or with anybody else  
10 about this trial or the subject matter of this trial; do not communicate at all with any  
11 of the parties, attorneys, or witnesses involved in this trial; do not seek or obtain  
12 any information or comments about this case from any source, including, without  
13 limitation, newspapers, television, radio, Internet, e-mail, cell phones, or any other  
14 electronic device; do not read, watch, or listen to any report or commentary about  
15 the case; do not form or express any opinion on any subject connected with this  
16 trial until the case is finally submitted to you for deliberations; do not perform any  
17 research or investigations.

18 My marshal was a tray of some more -- of the cookies that he'll  
19 bring out there for whoever wants some cookies. He'll bring them out momentarily.

20 I -- look, I -- unexpected things happen during a trial. I know  
21 what an inconvenience this is to all of your lives -- all different parts of this trial.  
22 You've been very attentive. I feel bad that -- that our system results in taking so  
23 much time out of, you know, good citizens to -- to be here, and I totally respect  
24 and -- respect and value your time. And I'm sorry. But we need to take this time.  
25 Okay.

1                   So please come back in an hour and a half, unless you hear  
2 otherwise. All right. Thank you very much.

3                   And marshal, go get them some cookies. Appreciate it.

4                   [Jury recessed at 2:19 p.m.]

5           THE COURT: All right. All right.

6                   Door is closed. Outside the presence of the jury.

7                   So will we hear something when he gets back there about how  
8 much time we're really going to need?

9           MR. WESTBROOK: Yes. There'll be a phone call from our marshal.

10          MS. KIERNY: He was going to call here.

11          THE COURT: They'll call --

12          MS. KIERNY: That phone.

13          THE COURT: -- my marshal here.

14          MS. KIERNY: So if -- as long as your marshal --

15          THE COURT: So, marshal, as soon as they take them back, they  
16 might get some information and call you. And will you be able to man the phone  
17 and go --

18          THE MARSHAL: Yes, sir.

19          THE COURT: All right. So as soon -- if you hear that they're going to  
20 need --

21          MS. KIERNY: Do you need our cell phones? Any -- do you want  
22 those?

23          THE COURT: My clerk can take it. My clerk can --

24          MS. KIERNY: Yes, that's what I meant.

25          THE COURT: So if we find out that it's going to be, you know, more



1 than two hours, I think we should just let the jurors go home. What do you think?

2 MS. KIERNY: I think --

3 MR. HAMNER: That's fine by me.

4 MS. KIERNY: -- probably an hour and a half is --

5 THE COURT: The max.

6 MS. KIERNY: -- the max we can really get anybody --

7 THE COURT: 3:50, if it's going to be past 3:50 --

8 MS. KIERNY: It's going to be 4:00, yeah.

9 THE COURT: -- and we've had -- yeah.

10 MR. HAMNER: And I still feel confident, even if we shut it down today  
11 entirely, we should be on track still to close by Monday.

12 THE COURT: Okay.

13 MR. HAMNER: Because once -- we're almost done with our all of our  
14 Spanish-speaking witnesses, and it's going to go a lot faster after that.

15 We have a lot of very short witnesses coming at once.

16 MS. KIERNY: Yes. We have --

17 THE COURT: Unless you keep trying to bolster the witnesses, and  
18 then I don't know what's going to happen.

19 MR. HAMNER: You know me.

20 MS. KIERNY: There's going to be some bolstering.

21 MS. KOLLINS: Well, wait till he stands up there in closing and tells  
22 them...

23 THE COURT: All right. Then we'll -- we're adjourned until we hear  
24 more information. But we plan to all be back here at 3:50 --

25 MS. KIERNY: Yes.

1 THE COURT: -- unless we hear otherwise.  
2 MS. KIERNY: Of course, thank you.  
3 THE COURT: All right. Thank you.  
4 [Court recessed at 2:21 p.m., until 3:04 p.m.]  
5 [Outside the presence of the jury.]  
6 THE COURT: So are we back on the record?  
7 THE COURT RECORDER: Back on the record, Your Honor.  
8 MR. HAMNER: Yes, Your Honor. I know our interpreters are not here.  
9 I saw our interpreters at --  
10 THE COURT: Oh.  
11 MR. HAMNER: I saw the interpreters at --  
12 THE MARSHAL: They're right here. They're here.  
13 MR. HAMNER: Oh, they're right here.  
14 MR. WESTBROOK: No, they're around.  
15 MR. HAMNER: They're all ready to go.  
16 MR. WESTBROOK: They're here.  
17 MR. HAMNER: I let them know it was 3:00, so cool. We're good to go.  
18 THE COURT: Let's wait for the interpreter.  
19 [Pause in proceedings.]  
20 THE COURT: Who is -- who is interpreting for the defendant right  
21 now?  
22 THE COURT RECORDER: Rose is.  
23 THE COURT: Okay. Well, let's go when you're ready.  
24 THE COURT INTERPRETER: I'm ready.  
25 THE COURT: Oh, we ready?

1 THE COURT RECORDER: Ready.

2 THE COURT: Okay. Great. Couple brief things. The defendant has  
3 objected a couple times to alleged improper bolstering.

4 MR. WESTBROOK: Yes.

5 THE COURT: And the response by Mr. Hamner was that bolstering --  
6 or at least his -- without regard to whether it was bolstering, what -- what he did was  
7 in part precipitated by the defense attacks on the credibility of State's witnesses  
8 during voir dire and opening statement, in addition to the cross-examination.

9 I love the law. I just -- I went back and -- just, I wanted to, you  
10 know, research and help inform myself more of the -- the issues. And it -- it  
11 appears to be the state of the law -- this is for the benefit of anyone who wants to  
12 look at these cases, in case they -- they're concerned -- they're concerned about  
13 the bolstering issue, if it arises on appeal.

14 It appears to be the state of the law that if -- if and when the  
15 defense attacks the credibility of the State's witnesses, whether by  
16 cross-examination or even, as these cases show, in its opening statement or even  
17 voir dire, that that constitutes an attack on the credibility of the witnesses, that  
18 opens the door for the State to then bolster its witnesses in -- in various ways.

19 The cases usually come up in the context of cooperating  
20 agreements. And the context that I've read is where the State has -- has been  
21 permitted to explain that if one of its State's witnesses is lying on the stand, that it's  
22 going to have repercussions, and so -- so he has a motive to tell the truth. So that's  
23 been allowed.

24 And so we have these cases, just cite them for the record, that  
25 kind of support the proposition that -- that bolstering is allowed once the defense

1 has opened the door.

2 MR. HAMNER: And -- and --

3 THE COURT: You probably know these cases.

4 MR. HAMNER: I -- I was just going to just say for the record, we -- we  
5 agree with the rationale. I don't believe that that qualifies as bolstering, that  
6 particular terminology. I think we're allowed --

7 THE COURT: Any terminology -- you don't think it's bolstering. It's --

8 MR. HAMNER: I --

9 THE COURT: -- what it is, is it's rebutting --

10 MR. HAMNER: Correct.

11 THE COURT: -- the -- maybe I used the word inartfully. Thank you. It  
12 is rebutting the defense attack on the credibility --

13 MR. HAMNER: That's --

14 THE COURT: -- of the State's witnesses --

15 MR. HAMNER: -- correct.

16 THE COURT: -- by offering alternative evidence that helps restore the  
17 credibility of the State's witnesses.

18 MR. HAMNER: That's correct. The State's --

19 THE COURT: That may not be technically bolstering.

20 MR. HAMNER: And -- and bolstering might be a series of questions to  
21 suggest, you know, I believe you or I believe -- you know, in the closing arguments,  
22 I believe this witness.

23 THE COURT: Well, that's vouching, which is certainly not permissible.

24 MR. WESTBROOK: Right.

25 MR. HAMNER: Right.

1 THE COURT: All right.

2 MR. HAMNER: And -- and I think that term bolstering can bleed into  
3 vouching for a witness. But I think what you just said, us rebutting an attack on the  
4 witness's credibility, that's precisely what the State was doing.

5 THE COURT: Well, and that's *Rodriguez vs. State*, 385 P 3rd 600,  
6 2016, unpublished case -- I believe it's unpublished, but it says -- it cites to *Evans v.*  
7 *State*, which is 117 Nevada 609, 2001, "The State may counter impeachment of its  
8 witnesses by presenting evidence supporting their credibility."

9 MR. HAMNER: Right.

10 THE COURT: So you have -- and -- and then you have the  
11 Ninth Circuit and the Second Circuit, which both says that that attack on the  
12 credibility by the defense can come through opening statement. And one of these  
13 cases even says voir dire.

14 MR. HAMNER: Okay.

15 THE COURT: Right. So that's the Ninth Circuit, 943 F.2d 1007 --  
16 again, 943 F 2d 1007, a 1991 case.

17 And then we have the Second Circuit, 844 F 2d 30, 1988. I know  
18 there was -- I don't know, I might have -- I didn't print out all the cases. One of the  
19 cases did talk about voir dire, and three or four of them talked about opening  
20 statements.

21 Just wanted you guys to -- to be mindful --

22 MR. HAMNER: Sure.

23 THE COURT: -- of that authority going forward.

24 MR. WESTBROOK: But to be fair, none of those actually says that  
25 bolstering is allowed. Bolstering is a different thing.

1 THE COURT: Well...

2 MR. WESTBROOK: Bolstering is when --

3 THE COURT: How -- how are you using the term bolstering?

4 Because -- because it hasn't been used consistently by the courts.

5 MR. WESTBROOK: I'm using it --

6 THE COURT: So how do you define bolstering?

7 MR. WESTBROOK: Well, I'm using the definition of bolstering that is in  
8 the evidence code and is in the code involving prosecutorial misconduct.

9 Bolstering, vouching, they are two different things.

10 THE COURT: They're two different things, exactly.

11 MR. WESTBROOK: Right. And, you know, if I hear vouching, I will  
12 identify it as such. That's when the -- the State uses -- you know, puts the power of  
13 the State, essentially, behind the credibility of the witness by saying something like,  
14 well, you know, obviously, what the witness said is true, you know, or something  
15 like that.

16 You know, the bolstering that we're talking about -- and these  
17 were very specific evidentiary objections, which I think they've been made and  
18 they've been preserved, you know, what we've identified as bolstering.

19 But my -- my point is these -- these cases say that, obviously, the  
20 State can provide evidence to -- of credibility, especially in response to evidence of  
21 lack of credibility. But they don't allow bolstering, which is in the evidence code and  
22 which is a specific -- a very specific -- specifically defined thing.

23 THE COURT: Well, my -- my point is that what the State did is  
24 consistent with the activity of the prosecutors in each of these cases, which has  
25 been determined by the Ninth Circuit, Second Circuit, and the State of Nevada to

1 be accurate.

2                   So I just -- I wanted to point these cases out. You should read  
3 them so we don't go down the path of frivolous appeals and wasting everybody's  
4 time.

5                   MR. WESTBROOK: Oh, I understand, Your Honor.

6                   THE COURT: All right.

7                   MR. WESTBROOK: And I'm very familiar with the *Evans*. It's just -- we  
8 just happen to disagree, that's all. That's -- that's what objections are for.

9                   THE COURT: All right. Let's bring the juries in.

10                               [Pause in proceedings.]

11                   THE COURT: You have a translation for the bolstering?

12                   MS. KOLLINS: She asked me how to spell bolster, because she's  
13 looking it up.

14                   THE COURT: There won't be a translation. It is -- the closest English  
15 word would be maybe supporting.

16                   THE COURT INTERPRETER: Thank you. Thank you very much.

17                   THE COURT: Supporting, similar.

18                   THE COURT INTERPRETER: Thanks.

19                               [Pause in proceedings.]

20                               [Jury reconvened at 3:13 p.m.]

21                   THE COURT: All right. Let me -- we were able to get everything  
22 resolved and get you guys back here a little bit earlier. All right. Let's be seated.  
23 And the State may proceed.

24                   MR. HAMNER: Thank you very much.

25                   The State is going to call Mirabel Moreno back to the stand.

1 THE COURT: All right. Great. Let's call her back. Mirabel.

2 [Pause in proceedings.]

3 THE COURT: All right. Welcome back.

4 Mr. Hamner, you may proceed.

5 MR. HAMNER: Thank you very much.

6 THE COURT: Mirabel, you still have to tell the truth; do you  
7 understand?

8 THE WITNESS: Yeah.

9 THE COURT: Okay. You -- will you tell the truth?

10 THE WITNESS: Yes.

11 THE COURT: Okay. Thank you.

12 You may proceed.

13 MR. HAMNER: Thank you very much.

14 **DIRECT EXAMINATION (CONT.)**

15 BY MR. HAMNER:

16 Q So Mirabel, when we last left off, I was trying to ask you, did Don David  
17 have any nicknames for you and your sisters and Yezline?

18 A Yes.

19 Q What would he call you guys?

20 A Princesses.

21 Q Okay. And let me ask you, do you ever remember him calling you his  
22 girlfriends?

23 A Yes.

24 Q How about his queens?

25 A Yes.



1 Q Did Don David ever take you guys to McDonald's?  
2 A Yes.  
3 Q Did he ever give gifts to you and your sisters for your birthdays?  
4 A Yes.  
5 Q Did he ever get you guys presents, like trampolines and things like  
6 that?  
7 A Yes.  
8 Q Take you to the 99 Cents store so you can buy things?  
9 A Yes.  
10 Q You described a number of things in touching your front part and the  
11 stuff with the chocolates. Did he ever say -- talk to you about whether it was okay  
12 for you to talk to your mom and dad about what was happening with him?  
13 A Yes.  
14 Q What would he say to you?  
15 A He said that if I told my mom that he touched us, he would kill my  
16 family.  
17 Q And when you heard that from him, how did that make you feel,  
18 Mirabel?  
19 A Sad.  
20 Q Okay. When -- when -- the first time he touched your front part, did you  
21 tell your mom and dad after the very first time, or did you tell at a later point?  
22 A The first time.  
23 Q Very first time? Okay. Let's talk about that for a minute. Okay.  
24 I want to first ask -- before we get to that, I want to talk to you  
25 about someone by the name of Yusnay. Do you know a Yusnay?

1 A Yusnay?

2 Q Yes, Yusnay; do you know who Yusnay is?

3 A Yes.

4 Q Does she live in the apartment complex with you?

5 A Yes.

6 Q Okay. Did you have a conversation with Yusnay about Don David?

7 A Yes.

8 Q And what did you tell Yusnay?

9 A Well, since we were telling her all those things about Don David, then

10 she told my mom.

11 Q Okay. Did you tell Yusnay before you told your mom?

12 A Yes.

13 Q Can you tell the jury why you told Yusnay before telling your mom?

14 A Because I thought my mom would hit me, so I wanted her to tell my

15 mom.

16 Q Okay. Why did you think your mom might hit you?

17 A Because we didn't tell her first that he was touching us and then we --

18 and that we told Yusnay for her to tell my mom.

19 Q Okay. So you were worried because you hadn't told your mom up to

20 that point?

21 A Uh-huh.

22 Q Now, I want you to think back to when you were talking to Yusnay; how

23 were you feeling when you told her those things -- to Yusnay?

24 A Well, I wasn't the one telling her. I was there, but I was sitting on the

25 floor and I was listening to my sisters when they were telling her and -- Yusnay --

1 that Don David was touching us.

2 Q Okay. Well, then, let me ask you that, when you were sitting there  
3 listening to your sisters tell Yusnay, how were you feeling inside?

4 A Sad.

5 Q And why were you feeling sad?

6 A Because I was afraid that she would tell my mom and then my mom  
7 would hit us, because we didn't tell her -- those things to my mom -- mom earlier.

8 Q Okay. Were you crying at all when this happened?

9 A Yes.

10 Q Let's talk about Jatziri; how did Jatziri look when she was talking to  
11 Yusnay?

12 A Very sad.

13 Q How did Maradel look when she was talking to Yusnay?

14 A Also sad.

15 Q Was Yezline there?

16 A Yes.

17 Q And how did Yezline look when this conversation was happening with  
18 Yusnay?

19 A Also sad.

20 Q Was she crying?

21 A No.

22 Q Okay. Was Maradel crying?

23 A Yes.

24 Q Was Jatziri crying?

25 A No.

1 Q Now, I want to talk a little bit about a day with Chuck E. Cheese; do you  
2 remember that day?

3 A Yes.

4 Q Was that the day after talking to Yusnay?

5 A Yes.

6 Q Why don't you tell the little jury about -- tell the jury about Chuck E.  
7 Cheese, what you remember about what was going on with that.

8 A Well, he said -- Don David said that he would take us to Chuck E.  
9 Cheese, and then he said not to tell my mom, because when he had said that  
10 before, he said he -- after that, he would take us to a place far away.

11 Q And when he told you he was going to take you to a place far away,  
12 how did that make you feel?

13 A Sad.

14 Q Did you want to go away with him to Chuck E. Cheese?

15 A No.

16 Q So -- and when that happened, when he told you those things, who else  
17 was there with you?

18 A My sisters and Yezline.

19 Q When he told you that he wanted to take you far away, what did you  
20 guys do?

21 A We went to tell my mom and Yezline's mom.

22 Q And when you went to go talk to your mom and Yezline's mom, how  
23 were you feeling when you went up and talked to them?

24 A Very sad.

25 Q Were you crying?

1 A Yes.

2 Q What did you tell your mom?

3 A That Don -- Don David said that he was going to take us to a place far

4 away.

5 Q Okay. Did you tell her anything else about Don David?

6 A No.

7 Q Did you tell your mom about him touching your front part?

8 MS. KIERNY: I'm going to object. She said that she didn't tell her mom

9 anything else.

10 MR. HAMNER: Getting some clarification.

11 THE COURT: I'll -- I'll overrule it.

12 Go ahead.

13 BY MR. HAMNER:

14 Q Did -- let me ask the question again.

15 Did you tell your mom that Don David had touched your front

16 part?

17 A Yes.

18 Q Okay. When you were there talking to your mom, how did Jatziri look?

19 A Also sad.

20 Q Was she crying?

21 A Yes.

22 Q What about Maradel; how did she look?

23 A Sad also.

24 Q Was she crying?

25 A Yes.

1 Q How about Yezline; how did she look?

2 A Sad.

3 Q Was she crying when she was talking to either her mom or -- or your  
4 mom?

5 A Yes, also.

6 Q Okay.

7 MR. HAMNER: Court's indulgence.

8 Q Mirabel, I want to talk about Don David, just quickly for a moment.

9 Before he touched your front part, before he did the stuff with the  
10 chocolate and the phones, before all that happened, did you like Don David?

11 A Yes.

12 Q And let's think about that. Before those things happened, the  
13 chocolates, the touching, the phone, before that, and you told us that you liked him,  
14 can you tell the jury why you liked him before that?

15 A I don't remember that part.

16 Q Okay. All right. Thank you.

17 MR. HAMNER: I have no further questions.

18 THE COURT: All right. Now, we're going to hear from Ms. Kierny.  
19 She's the nice lady over here that's going to ask you some questions. Okay?

20 Okay. You may ask questions.

21 **CROSS-EXAMINATION**

22 BY MS. KIERNY:

23 Q How you doing, Mirabel?

24 A Good.

25 Q Got a little fox there; what's his name?

1 A Cheese Pita.

2 Q Nice. I like cheese pizza, too.

3 Chris talked to you about telling the truth in court, right?

4 A Yes.

5 Q And you're only supposed to say true things in court, right?

6 A Yes.

7 Q So if I said I have a black jacket on, that would be a lie?

8 A Yes.

9 Q Because it's white.

10 A White.

11 Q Now, if I told you you have a fox in your hand, that would be the truth?

12 A Yes.

13 Q Okay. If your mom tells you something, that's the truth, right?

14 A Yes.

15 Q And Jatziri, you said, is your older sister, right?

16 A Yes.

17 Q Is Jatziri kind of the leader of you girls?

18 A Yes.

19 Q Does she tell you a lot of stuff -- to do a lot of stuff?

20 A Yes.

21 Q And you listen to her?

22 A A little.

23 Q I understand. Now, you remember when you went and talked to a lady

24 named Elizabeth Espinoza in November, right?

25 A Yes.

1 Q And that was kind of at a police department, right?

2 A Yes.

3 Q Or your -- your -- it was the Children's Assessment Center, not a police  
4 department, correct?

5 A [No audible response.]

6 Q All right. Sorry. That was a bad question.

7 Elizabeth told you you had to tell her what you remembered  
8 about what happened, right?

9 A Yes.

10 Q And you told her about a time that you saw Don David grab Yezline and  
11 pull her into his apartment.

12 A Yes.

13 Q Okay. And you were -- this -- when this happened, you were sitting  
14 outside with Jatziri and Maradel, correct?

15 A Maradel? Yes.

16 Q Okay. And there's also a girl in the neighborhood that you guys play  
17 with, named Litz; isn't that right?

18 A Yes.

19 Q And she lives in the same apartment complex as you do.

20 A Yes.

21 Q She's a little older than you.

22 A Yes.

23 Q But you play with her still.

24 A Yes.

25 Q Okay. You told Elizabeth that Yezline was trying to scream, but



1 couldn't because Don David covered her mouth with tape.

2 A Yes.

3 Q And it -- the tape was gray.

4 A Yes.

5 Q After that, Don David closed his door and Yezline was inside.

6 A Yes.

7 Q So you went and told Yezline's mom that Don David was maybe doing  
8 something to Yezline.

9 A Yes.

10 Q Now, earlier Chris asked you about a lady named Doña Elena?

11 A Yes.

12 Q And you -- and she is Don David's wife, right?

13 A Yes.

14 Q Did you call her Grandmother?

15 A Yes.

16 Q Okay. So you told Elizabeth that when Yezline was in Don David's  
17 house, then Grandmother came home.

18 A Yes.

19 Q And she went in the apartment.

20 A Yes.

21 Q Okay. You testified earlier with Chris that there was a time when --  
22 more times when Don David showed you his thing, right?

23 A Yes.

24 Q And you said Yezline and your sisters were there, right?

25 A Yes.

1 Q There was also a time when some -- or during that time, there were  
2 some boys playing outside, as well.

3 MR. HAMNER: Objection. Lack of foundation.

4 MS. KIERNY: Or that --

5 THE COURT: Well, she's asking her questions. So I mean, what --  
6 Can -- can you be more specific in what the defect is? Sorry, I  
7 can't see.

8 MR. HAMNER: With respect to the -- yeah, the question -- the question  
9 stated that it happened at the same time. There's been no testimony to establish  
10 there were other people there at the same time based off of what she said on  
11 direct, so.

12 THE COURT: Can you ask her --

13 MS. KIERNY: Sure.

14 THE COURT: -- the question? Thank you.

15 MR. HAMNER: Thank you, Your Honor.

16 BY MS. KIERNY:

17 Q Was there a time when Don David pulled out his thing, and Yezline,  
18 your sisters, and some boys were also there?

19 A Yes.

20 Q And one of those boys is named Leo, right?

21 A Yes.

22 Q And you -- do you -- do you play with Leo sometimes?

23 A Yes.

24 Q How do you know him?

25 A What do you mean?

1 Q Does he live in the apartment complex, same apartment complex you  
2 do?

3 A Yes.

4 Q And he's about your age.

5 A Yes.

6 Q You testified when Chris was asking you questions about that Don  
7 David showed you some videos on a phone, right?

8 A Yes.

9 Q And that was Don David's phone, right?

10 A Yes.

11 Q It was not Grandmother's phone, right?

12 A No.

13 Q It was a black phone.

14 A Yes.

15 Q It was not a pink phone.

16 A No.

17 Q All right. And Leo was there when Don David showed you these  
18 videos.

19 A Yes.

20 Q You -- you also told Chris that Don David touched you more than one  
21 time, right?

22 A Yes.

23 Q And Yezline and your two sisters were there.

24 A Yes.

25 Q Do you remember that when you -- or when you spoke with Elizabeth,

1 you told her that he touched -- do you remember telling her you -- he touched you  
2 one time?

3 A Yes.

4 Q Okay. And you told her that he touched your thing with his thing.

5 A Yes.

6 Q And you said that his hands were outside while he was touching your  
7 thing with his thing.

8 A Yes.

9 Q Okay. And when this happened, Grandmother was there?

10 A I don't remember.

11 Q But you do remember giving a statement to Elizabeth, right?

12 A Yes.

13 MS. KIERNY: Court's brief indulgence.

14 Q Sorry, I lost my thought.

15 Do you recall Elizabeth asking you questions -- page 28, I'm  
16 sorry -- okay, who saw what? What was going on?

17 And you answered, My grandmother.

18 THE COURT INTERPRETER: I'm sorry, counsel. Could you repeat  
19 the question, please.

20 MS. KIERNY: Sure.

21 BY MS. KIERNY:

22 Q Elizabeth asked you, Who saw what was going on?

23 And you answered, My grandmother.

24 A Yes.

25 Q Do you remember testifying in front of a grand jury on February 1st? It

1 was a room full of people and Chris was asking you some questions; do you  
2 remember that?

3 A Yes.

4 Q Do you remember that -- and at that time, you told them that Leo was  
5 there when you were outside and touched by the man?

6 A Yes.

7 Q And then one thing you said earlier was that when you went to tell --  
8 when you told Yusnay about Don David, you were listening to your sisters tell --  
9 tell -- sorry. Strike that.

10 Chris asked you earlier about Yusnay, right?

11 A Yes.

12 Q And you told him that you listened to your sisters tell Yusnay about Don  
13 David, right?

14 A Yes.

15 Q You were sitting on the floor?

16 A Yes.

17 Q And you didn't say anything to Yusnay at that time?

18 A No.

19 Q Okay.

20 MS. KIERNY: Court's brief indulgence.

21 No further questions.

22 THE COURT: Redirect?

23 MR. HAMNER: Yes.

24 MS. KOLLINS: One moment, Your Honor, please. Thank you.

25 **REDIRECT EXAMINATION**

1 BY MR. HAMNER:

2 Q Okay. Do you remember when Carli asked you questions about Don  
3 David pulling Yezline into his apartment?

4 A Who is Carli?

5 Q Carli, the lady in the white jacket. That's Carli.

6 Okay. Do you remember when she just asked you about  
7 Mr. David or Don David pulling Yezline into the apartment?

8 A Yes.

9 Q And how you told this to Elizabeth?

10 A Yes.

11 Q Now, you told Ms. Carli that you were standing outside his house; is  
12 that right?

13 A Yes.

14 Q And did you tell Elizabeth that Yezline was inside his apartment sitting  
15 on a couch?

16 A Yes.

17 Q And did you say that you could see him grab her, because he did it and  
18 then closed the door quickly shut; do you remember telling Elizabeth that, as well?

19 A Yes.

20 Q Okay. You were asked some questions about Leo; do you remember  
21 that?

22 A Yes.

23 Q Would Leo be around when he would give you candy?

24 A Yes.

25 Q Would Leo be around when he gave you KitKats?

1 A Yes.

2 Q Would Leo be with you when he gave you candy by the door of his

3 house?

4 A Yes.

5 Q Would Leo be around when he gave you candy by his car?

6 A Yes.

7 Q And you were asked questions about Leo; was Leo ever standing near

8 you when Don David touched your front part?

9 A Yes.

10 Q Was he always there or sometimes there?

11 A Sometimes.

12 Q Okay. Was Leo there when he would show you things on his phone?

13 A No.

14 Q Was Leo there when he would rub the chocolates on his front part?

15 A Yes.

16 Q Was he always there or sometimes there?

17 A Sometimes.

18 Q You were asked some questions about Litzi.

19 A Yes.

20 Q And you were asked some questions about Litzi being around --

21 MR. HAMNER: Court's indulgence.

22 Q Would there be sometimes when Litzi did not go into his house?

23 A Yes.

24 Q Okay. So would there be sometimes you and your sister would go in,

25 but Litzi would not go in?

1 A Yes.

2 Q Okay. Would Litzi be around when he offered candy?

3 A Yes.

4 MR. HAMNER: Court's indulgence.

5 Q How old were you when -- how old were you when Don David was  
6 touching your front part?

7 A Seven.

8 Q And how old were you when Don David would show you things on his  
9 phone?

10 A Eight.

11 Q Okay. And how old were you when Don David would do the thing with  
12 the chocolate in his front part?

13 A Eight.

14 Q Okay.

15 MR. HAMNER: I have no further questions.

16 THE COURT: Okay. Recross.

17 Be careful you don't swallow the ring. Okay. Thanks.

18 **RECROSS-EXAMINATION**

19 BY MS. KIERNY:

20 Q Don David only showed you something on his phone one time, right?

21 A Yes.

22 Q And when he showed you, Leo was there?

23 A Yes.

24 MS. KIERNY: No further questions.

25 THE COURT: Okay. So anything from the jurors? I'll give you a



1 moment to reflect. Okay. I see a couple hands.

2 Marshal, give them a moment to write their questions down.

3 And make sure you and your name and your badge -- and your  
4 juror number. Juror number and name. Oh, yeah, and a full sheet of paper. Looks  
5 good.

6 UNIDENTIFIED JUROR: Oh, a full sheet?

7 THE COURT: Is that a full sheet? Or a piece? Okay.

8 Thank you, Mr. Thomas.

9 [Pause in proceedings.]

10 THE COURT: You guys can come on forward, if you want, and take a  
11 look.

12 [Bench conference transcribed as follows.]

13 THE COURT: Oh. Maybe you guys could stipulate to that one.

14 MS. KIERNY: This is good.

15 THE COURT: Why don't you write down an answer you guys can read.

16 MS. KOLLINS: In the -- in the DA's cross.

17 MS. KIERNY: [Indiscernible.]

18 MR. HAMNER: Just say Elizabeth Espinoza, it was a private interview.

19 THE COURT: Okay.

20 MS. KOLLINS: The follow-up, did some of these happen during the  
21 day? [Indiscernible.]

22 We can follow up.

23 MS. KIERNY: Sure. Yeah, it's good.

24 THE COURT: So you guys are okay with me asking Juror No. 3's  
25 question?

1 MS. KOLLINS: The only thing I would ask is that you put in the end of it  
2 or both, because I don't -- because that's --

3 MS. KIERNY: You can follow up, if you guys want.

4 MS. KOLLINS: Okay.

5 MS. KIERNY: All right.

6 THE COURT: Put what at the end of what? Oh.

7 MS. KOLLINS: Well, because it says did they happen in the day or did  
8 they happen at night? But the logical next thing is or both.

9 THE COURT: Or both. I can't -- I can't -- can you follow up with that?

10 MS. KOLLINS: I guess you -- sure. Sure.

11 THE COURT: Because I can't change the -- the question.

12 MS. KIERNY: You can't modify a jury question.

13 MR. HAMNER: I didn't --

14 MS. KIERNY: Oh, sorry.

15 THE COURT: But I give you both a chance to follow up.

16 MS. KIERNY: Sure.

17 MR. HAMNER: That's fine. That's fine.

18 MS. KOLLINS: Okay. Yeah, that's fine.

19 [End of bench conference.]

20 THE MARSHAL: I believe he has another question.

21 THE COURT: Oh, could you go get it?

22 UNIDENTIFIED JUROR: I -- I left a -- I left a word out.

23 THE COURT: Oh, okay. Can you --

24 UNIDENTIFIED JUROR: [Indiscernible.]

25 THE COURT: Okay. Give this back to the juror so he can fix it.

1 UNIDENTIFIED JUROR: I know that one word makes this easier.

2 THE COURT: Okay. Oh, please. And I think you had a word, is. I  
3 think you meant to write it. But why don't you take a look at that again, too. Maybe  
4 I'm wrong.

5 Okay. Thank you. All right. Let's see. All right. All right.

6 And so I have a question from one of the people over here for  
7 you.

8 The question is: When the young ladies state that David is  
9 showing them his parts and touching them, was it during the day or night, outside?

10 THE WITNESS: At night, outside.

11 THE COURT: Okay. Very good. Thank you.

12 And then, this is not a question for you.

13 One of the jurors had a question, in DA's cross, he mentioned  
14 Elizabeth; who is that?

15 And the answer is Elizabeth Espinoza is the forensic interview  
16 specialist and she will testify later in the case. Okay.

17 Mr. Hamner, you may follow up on the juror question to the  
18 witness, if you have any follow up.

19 [Pause in proceedings.]

20 MR. HAMNER: Court's indulgence.

21 [Pause in proceedings.]

22 MR. HAMNER: Okay. No, Your Honor.

23 THE COURT: Ms. Kierny, do you have any follow up?

24 MS. KIERNY: No, thank you, Your Honor.

25 THE COURT: All right. Never -- no -- no more hands from the jurors?

1 All right. Then we're finished. Thank you very much for being  
2 here. We appreciate your time. Okay. You may step down and -- and have a nice  
3 day.

4 All right. The State may call its next witness.

5 MR. HAMNER: The State's going to call Maradel Moreno, please.

6 THE COURT: Maradel.

7 [Pause in proceedings.]

8 MR. HAMNER: All right. I had one request, maybe to help the jury  
9 see. If we could flip-flop the interpreter and the witness, and you have the witness  
10 sit to the inside, the interpreter to the outside. Because I've seen --

11 THE COURT: Better idea.

12 MR. HAMNER: -- the two kids kind of just turn their backs completely.

13 THE COURT: Okay.

14 MR. HAMNER: So maybe we could do this.

15 THE COURT: All right. You can come sit down.

16 MR. HAMNER: Come sit.

17 THE COURT: Maradel, how are you today?

18 THE WITNESS: Good.

19 THE COURT: You're -- you're Maradel? And -- and the interpreter will  
20 speak Spanish for you. Do you want to speak in Spanish or English?

21 MS. MORENO: Spanish.

22 THE COURT: Very good. Not a problem.

23 MR. HAMNER: Let me slide you over here.

24 THE COURT: So my name is -- is Judge Scotti. Can I say hi to you?  
25 Let me say hi. Shake my hand.

1 MR. HAMNER: Can you say hi?

2 THE COURT: Great. Nice to see you today.

3 Madam Interpreter will sit down next to you.

4 MR. HAMNER: Here you go.

5 THE COURT: All right. We're going to have -- I -- I told your sister we  
6 have questions from Mr. Hamner, the gentleman here, and then the lady -- or  
7 Mr. Westbrook -- the -- the lady, Ms. Kierny, she'll have questions for you too.

8 All right. Very good. And Mr. Hamner, you can qualify the  
9 witness first.

10 MR. HAMNER: Thank you very much.

11 Court's indulgence.

12 **MARADEL MORENO,**

13 [having first been qualified by the judge, testified through the interpreter as follows.]

14 **DIRECT EXAMINATION**

15 BY MR. HAMNER:

16 Q Hi. How you doing?

17 A Good.

18 Q Okay. All right. Maradel, how old are you?

19 A Eight.

20 Q What grade are you in?

21 A Third grade.

22 Q Do you like school?

23 A Yes.

24 Q Favorite class?

25 A Yes.

1 Q Which class?

2 A With my teacher.

3 Q Okay. Well, you probably -- you know, you probably only have one  
4 teacher, right?

5 A Yeah.

6 Q That's my bad.

7 Well, let me ask you this. I want you to take a look at my tie.  
8 See it?

9 A Yes.

10 Q What color is this?

11 A Red.

12 Q If I told you that my tie was green and it had black dragons on it, would I  
13 be telling you the truth or would I be lying to you?

14 A Lying.

15 Q Okay. Why don't you take a look at the back of this piece of paper;  
16 what color is it?

17 A White.

18 Q If I told you this paper was blue, with green stripes, would I be telling  
19 you the truth or telling a lie?

20 A A lie.

21 Q All right. Maradel, I want you to look up at the ceiling and look around  
22 the room for a second. If I told you right now that it was pouring rain inside this  
23 courtroom, would I be telling you the truth or would I be lying? Is it raining inside  
24 the courtroom?

25 A No.

1 Q No. All right. Maradel, do you promise that everything you tell us today  
2 is going to be the truth?

3 A Yes.

4 Q Okay.

5 THE COURT: That's -- the court's satisfied. You may proceed.

6 MR. HAMNER: Thank you very much.

7 BY MR. HAMNER:

8 Q So Maradel, did you live in a house or an apartment?

9 A Apartment.

10 Q And who do you live there with?

11 A My mom and my dad and my sisters.

12 Q Anyone else?

13 A [No audible response.]

14 Q Okay. You don't have any -- any dogs?

15 A Yes.

16 Q What are their names?

17 A Princess.

18 Q Okay. I want to show you -- and if you look at that screen over there to  
19 your right, you'll see a picture pop up. Okay.

20 Publishing State's 41.

21 What are we looking at there, Maradel?

22 A My house.

23 Q Okay. I'd like you to take this pen. Would you take that for me? Okay.  
24 I want you -- oh, it's over there? Grab the yellow -- grab that yellow marker. Okay.  
25 If you touch that screen with that marker -- you don't need to take the cap off. Don't

1 take the cap off. Just leave the cap on.

2 If you take the pen and you make a mark, you know, make a  
3 mark on the screen, can you -- can you circle the door to your house?

4 A Okay.

5 Q Very good.

6 MR. HAMNER: So let the record reflect the witness has successfully  
7 circled the white door on State's 51, the dead center of the screen on the first floor.

8 BY MR. HAMNER:

9 Q So that's your house, huh?

10 A Yes.

11 MS. KOLLINS: Mr. Hamner, it's 41, sorry.

12 MR. HAMNER: State's 41, if I misspoke. I apologize.

13 BY MR. HAMNER:

14 Q Maradel, do you know someone by the name of Yezline?

15 A Yes.

16 Q Is she someone that lived in the apartment complex with you and your  
17 sisters?

18 A Yes.

19 Q Did you play with her a lot when she lived there?

20 A Yes.

21 Q Do you remember where her apartment was?

22 A Yes.

23 MR. HAMNER: Publishing State's 36.

24 Q Maradel, take a look at State's 36; do you see Yezline's house?

25 A Yes.



1 Q Go ahead. Take the marker, circle the door.

2 MR. HAMNER: Let the record reflect the witness has identified

3 Apartment No. 5 in the center of the screen, with a white door in the middle, as

4 being Yezline's apartment in State's 36.

5 BY MR. HAMNER:

6 Q When you -- when Yezline lived in the apartments, would her parents  
7 and your parents have parties?

8 A Yes.

9 Q Would they hang out outside of the apartments and cook things and  
10 hang out?

11 A Yes.

12 Q Did the parties ever happen at Maria's house -- Esther's house?  
13 Yezline's mom?

14 A Yes.

15 Q How about at your mom's house?

16 A Yes.

17 Q At some of these -- do you know someone by the name of Doña Elena?

18 A Yes.

19 Q Did she come to the parties, too?

20 A Yes.

21 Q And do you know what her husband's name is?

22 A Yes.

23 Q What is her husband's name?

24 A David.

25 Q David? Do you see David here in the courtroom right now? Take a

1 look around. Take a good look around.

2 A Over there.

3 Q Okay. And I know you're pointing all the way over to the right. Can you  
4 tell me if he is wearing a shirt with a tie or no tie?

5 A No -- no tie.

6 Q And what color is his shirt?

7 A White.

8 Q White? Does it -- is it a solid white shirt or does it have stripes on it?

9 A It has stripes.

10 MR. HAMNER: Let the record reflect the witness has identified the  
11 defendant.

12 THE COURT: It has.

13 BY MR. HAMNER:

14 Q So, Maradel, was -- you mentioned David. What -- what name did you  
15 have for David, you and your sisters?

16 A Grandpa.

17 Q Okay. Was he your real grandpa?

18 A No.

19 Q Did Don David live nearby Yezline?

20 A Yes.

21 Q I want to show you State's 24, Maradel. What are we seeing here? Do  
22 you recognize anyone's home in State's 24?

23 A Yes.

24 Q Whose home is that?

25 A David.

1 Q Okay. Can you take a pen and circle the door of his house?

2 MR. HAMNER: Let the record reflect the witness, in State's 24, has  
3 circled the white door just beyond the black power box in the center of the picture.

4 I'm going to publish State's 35.

5 Q I want you to take a good look at this paragraph. Can you see Yezline's  
6 house from here?

7 A Yes.

8 Q Could you circle it for us?

9 MR. HAMNER: Okay. Let the record reflect the witness has circled the  
10 second door to the left, the white door beyond the tan sedan in State's 35.

11 BY MR. HAMNER:

12 Q I want you to take a look at that picture again. Can you see Don  
13 David's house in that photo?

14 A Yes.

15 Q Why don't you make a square around his house.

16 MR. HAMNER: Let the record reflect the witness has made a square  
17 on a white door on the right, just beyond the dark Dodge Ram pickup truck.

18 BY MR. HAMNER:

19 Q Maradel, are there places on your body that people aren't supposed to  
20 touch?

21 A I don't understand.

22 Q Okay. What is the -- what would you call the part of your body that you  
23 use to go pee-pee?

24 A My part.

25 Q Okay. And what would you call the part of your body that you use to go

1 poo-poo?

2 A My tail.

3 Q Tail. And what would you call this part up here?

4 A Tits.

5 Q Okay. Now, I want to talk to you about Don David; did he ever touch  
6 your front part?

7 A Yes.

8 Q What part of his body did he use to touch your front part?

9 A His hand.

10 Q Was it one time or more than one time?

11 A More than one time.

12 Q Was it over the clothes, under the clothes, or both?

13 A Both.

14 Q Okay. Did it happen inside a place or outside or both?

15 THE COURT INTERPRETER: Can you repeat the question, please.

16 BY MR. HAMNER:

17 Q Okay. Well, let me just rephrase it.

18 Where did it happen?

19 A Outside.

20 Q Okay. It happened outside. Did it ever happen inside of his house?

21 You have to answer yes or no.

22 A No.

23 Q Okay. I want to publish -- republish State's 24; do you see anywhere in  
24 this picture where he touched your front part?

25 A Right here.

1 Q Go ahead, you can make a mark, make a circle.

2 A Okay.

3 MR. HAMNER: So let the record reflect the work -- the witness has  
4 circled on the black power box.

5 BY MR. HAMNER:

6 Q Who was with you when that happened to you, when he touched your  
7 front part? Who was -- who was with you?

8 A My sisters and Yezline.

9 Q So Jatziri and Mirabel and Yezline?

10 A Yes.

11 Q I want to show you State's 33; do you see anywhere here in this picture  
12 where he touched your front part?

13 A Right here.

14 Q Why don't you -- you can make a mark, go ahead and make a circle.

15 MR. HAMNER: Okay. Let the record reflect the witness indicated near  
16 the front bumper of a black BMW sedan in the center of State's 33.

17 BY MR. HAMNER:

18 Q Who was with you in that time?

19 A My sisters and Yezline.

20 Q Okay. Now, did -- did David ever -- Don David ever touch your  
21 breasts?

22 A Yes.

23 Q What part of his body did he use to touch your breasts?

24 A His hands.

25 Q Was it one time or more than one time?

1 A More than once.

2 Q Okay. And do you see anywhere in this picture, in State's 33, where  
3 this happened?

4 A I don't remember.

5 Q Okay. Do you remember where that happened, when he touched your  
6 breasts, where that happened?

7 MS. KIERNY: Objection. Asked and answered. She just said she  
8 doesn't remember.

9 MR. HAMNER: And that's with respect to that particular picture. It's a  
10 different question.

11 THE COURT: We'll let her answer the question. Overruled.

12 BY MR. HAMNER:

13 Q Do you remember where you were when he would touch your breast?

14 A No.

15 Q Okay. Do you remember if you were alone or if other people were  
16 there with you?

17 A Other people.

18 Q Okay. What other people were there?

19 A My sister and -- my sisters and Yezline.

20 Q Did that include both sisters, Jatziri and Mirabel?

21 A Yes.

22 Q Did David ever touch your tail?

23 A Yes.

24 Q Was that one time or more than one time?

25 A More than once.

1 Q Was it over the clothes, under the clothes, or both?

2 A Both.

3 Q Okay. Do you remember if you were outside or inside when this  
4 happened?

5 A No.

6 Q Do you remember -- do you remember when you spoke to me at  
7 another court proceeding? Remember I asked you some questions at another  
8 court proceeding?

9 A Yes.

10 Q Do you remember telling me that day you would be outside the  
11 apartment complex when he would touch your tail?

12 MS. KIERNY: I'm sorry, counsel. Where are you at?

13 MR. HAMNER: Page 99.

14 MS. KIERNY: 99.

15 THE WITNESS: Yes.

16 BY MR. HAMNER:

17 Q Who would be with you when he touched your tail?

18 A My sisters.

19 Q And let me ask you, how old were you when he touched your tail?

20 A Eight.

21 Q Okay. And how old were you when he touched your front part?

22 A Seven to eight.

23 Q Okay. And how old were you when he put his hand on your breast?

24 A Eight.

25 Q Did Don David ever kiss you on your mouth?

1 A Yes.

2 Q Was this one time or more than one time?

3 A Once.

4 Q Do you remember telling me at that last court proceeding that that

5 happened more than one time?

6 A I do not remember that.

7 Q Okay.

8 A Yeah.

9 Q Who was with you when he kissed you on your mouth?

10 A My sister -- one sister.

11 Q Okay. Which sister?

12 A My twin sister.

13 Q Okay. So Mirabel?

14 A Uh-huh.

15 Q Do you remember telling me at that last proceeding that both your

16 sisters were there?

17 A [No audible response.]

18 Q And it's okay if you don't remember.

19 A I can't remember.

20 Q Okay. We talked about parts on your body; did you ever see don

21 David's private part?

22 A Yes.

23 Q And what do you -- what do boys use that private part to do?

24 A To pee.

25 Q Okay. Where were you when Don David showed you his private part?



1 A Outside.

2 Q Did it ever happen inside his house?

3 A Yes.

4 Q Did this happen one time or more than one time?

5 A More than one time.

6 Q Do you remember what color it was?

7 A No.

8 Q Do you remember if it was big or small?

9 A No.

10 Q Do you remember telling me at a previous proceeding that it was big?

11 A Yes.

12 Q Who were you with when that happened?

13 A With my sisters and Yezline.

14 Q Did anything ever happen with Don David and chocolates?

15 A Yes.

16 Q What would he do with the chocolates, Mirabel -- Maradel?

17 A He put them in his thing.

18 Q Okay. And then after he put it on his thing, what would he say to you

19 guys?

20 A Do you want some?

21 Q What type of chocolates or candies are we talking about?

22 A KitKats.

23 Q Who were you with when this happened?

24 A With my two sisters and Yezline.

25 Q Would it ever be inside of his house when this happened?

1 A Yes.

2 Q Would it ever be outside?

3 A Yes.

4 MR. HAMNER: I want to publish State's 24.

5 Q Do you see anywhere here where he would do the stuff with the  
6 chocolates?

7 A Yes.

8 Q Why don't you circle where that was?

9 MR. HAMNER: Okay. Let the record reflect the witness has circled the  
10 space between the door of his house and a bush to the left. :

11 Q Would Don David be standing by his door when he did this?

12 A Yes.

13 Q Do you remember Don David having a phone?

14 A Yes.

15 Q And do you remember him, whether he showed you things on his  
16 phone?

17 A No.

18 Q Do you remember what was on the phone?

19 MS. KIERNY: I'm going to object. She said no, she doesn't remember  
20 him showing things on the phone.

21 MR. HAMNER: I'm sorry, I misheard.

22 THE COURT: Well --

23 MR. HAMNER: I apologize if I misheard.

24 THE COURT: I -- I don't recall what she said.

25 MS. KIERNY: She said no.

1 THE COURT: Okay. Well --

2 MR. HAMNER: Well, I can -- I can ask another question.

3 THE COURT: All right.

4 BY MR. HAMNER:

5 Q Do you remember telling me --

6 THE COURT: So sustained.

7 BY MR. HAMNER:

8 Q Do you remember telling me at a -- at the last proceeding that you  
9 looked at David's phone?

10 A I didn't say that.

11 Q Okay. Do you remember saying that you were with your sisters when  
12 you had his phone?

13 MS. KIERNY: I'm going to object. She just said he did not have her --

14 THE COURT: Well, let's -- let's see if she maybe can recall something.

15 MS. KIERNY: Okay.

16 THE COURT: All right.

17 MR. HAMNER: You know what, Your Honor --

18 THE COURT: Sometimes -- well --

19 MR. HAMNER: It's okay. I'm -- I'm just going to --

20 Court's indulgence.

21 I'd prefer I had the translator read page 99 and 100 to refresh her  
22 recollection, or do you just want me to read it into the record as a --

23 MS. KIERNY: She hasn't said she didn't remember. She said no.

24 MR. HAMNER: Okay. Great.

25 At this time I'm going to read from the witness's statement, since

1 she's indicated in the negative that this didn't happen.

2 BY MR. HAMNER:

3 Q Reading, starting on page 99 of the witness's statement, at line 24,  
4 continuing on to page 100. And I will read down to -- down to page -- line 22 of  
5 page 100. Okay?

6 THE COURT: Let's make sure the witness understands what we're  
7 doing.

8 MR. HAMNER: Sure.

9 THE COURT: The -- the lawyer is going to read something that you  
10 said at another time. Okay?

11 THE WITNESS: Okay.

12 THE COURT: All right.

13 BY MR. HAMNER:

14 Q So starting on page 99, line 24.

15 Question: Did you ever look on David's phone?

16 Answer: Yes.

17 Question: When you looked on the phone, were you by yourself  
18 or were there other people there, too?

19 Answer: With my sister --

20 THE COURT INTERPRETER: There were other people?

21 BY MR. HAMNER:

22 Q I'm sorry. I'm going to read first and you don't need to answer. I'm just  
23 going to read it out to the jury here.

24 Answer: With my sisters.

25 Question: When you looked on the -- on his phone, did you like

1           what you saw on the phone?

2                   Answer: No.

3                   Question: What were you seeing, what was on the phone?

4                   Answer: I don't remember.

5                   Question: Do you remember if there were people or things?

6                   Then I stated, I'm sorry, honey, you have to speak up. You lean  
7 into this. You can speak in the same voice.

8                   The Interpreter: He has to talk to me?

9                   The Witness -- meaning Maradel.

10                  Question: People; did the people have clothes on, no clothes  
11 on?

12                  Answer: They had clothes.

13                  Question: Okay. You don't remember what they were doing, but  
14 you remember you didn't like it?

15                  Answer: Yes.

16                  And -- and do you remember speaking to a woman by the name  
17 of Elizabeth?

18           A     Yes.

19           Q     Do you remember when you talked to Elizabeth that there were some  
20 videos on his phone? Do you remember talking to her about that?

21           A     Yes.

22           Q     Let's talk a little bit about Don David; did he ever talk to you about  
23 whether it was okay to tell your parents what was going on with him?

24                   THE COURT INTERPRETER: She doesn't understand the question.

25                   MR. HAMNER: Okay. Well let me -- let me ask it another way.

1 BY MR. HAMNER:

2 Q Did Don David something -- say something might happen to your  
3 parents or your mom if --

4 MS. KIERNY: I'm going to --

5 BY MR. HAMNER:

6 Q -- if you talked to them?

7 MS. KIERNY: Object to leading.

8 MR. HAMNER: And, you know --

9 THE COURT: Well, is there another way you can ask that that would  
10 be less leading?

11 MR. HAMNER: Well, the witness didn't understand a more open-ended  
12 frame of question. So I could make it a little more -- I'll try to rephrase it.

13 THE COURT: Well, let's -- let's try one more time, and if not --

14 MR. HAMNER: Okay.

15 THE COURT: -- we'll see if we can ask in more direct questions.

16 BY MR. HAMNER:

17 Q Did Don David ever talk about whether you should talk to your parents?

18 A Yes.

19 Q What did he say?

20 A If I tell or I talk to my mom or my dad, he will kill my mom and my dad.

21 Q And how did that make you feel when he told you those things might be  
22 done?

23 A Scared.

24 Q And what were you scared of?

25 A That he was going to kill my mom and my dad.

1 Q Did he say that in front of your sisters?  
2 A Yes.  
3 Q Did he say that in front of Yezline?  
4 A Yes.  
5 Q Did you ever see Don David touch Jatziri on her front part?  
6 A Yes.  
7 Q Over her clothing, under her clothing, or both?  
8 A Both.  
9 Q Did you ever see Don David touch Mirabel on her front part?  
10 A Yes.  
11 Q Over the clothes, under the clothes, or both?  
12 A Both.  
13 Q Did you ever see Don David touch Yezline on her front part?  
14 A Yes.  
15 Q Do you know someone by the name of Yusnay?  
16 A Yes.  
17 Q Is she a neighbor that lives in the apartment with you guys?  
18 A Yes.  
19 Q Did you talk to her about Don David?  
20 A Yes.  
21 Q Did you tell her the things that you've told us today?  
22 A Yes.  
23 Q Why did you tell Yusnay?  
24 A Because when I told her, we thought my mom is going to -- she's going  
25 to scold us.

1 Q Okay. But why did you -- okay. So let me just try to clarify.  
2 Why did you think it was better to tell Yusnay before your mom?  
3 A So my mom would not be upset.  
4 Q Okay. Is that because you waited a while to tell anyone about this?  
5 MR. WESTBROOK: Objection. Leading.  
6 MR. HAMNER: Doesn't suggest the answer.  
7 THE COURT: Well, is that because -- I mean, maybe you can rephrase  
8 that.  
9 MR. HAMNER: Okay.  
10 THE COURT: All right. Let's --  
11 MR. HAMNER: All right.  
12 THE COURT: -- try and explore a little bit further before you take that  
13 route. All right. So sustained.  
14 BY MR. HAMNER:  
15 Q Why did you think your mom would scold you?  
16 A Because he was touching us.  
17 Q Okay. But why did you think you'd get in trouble?  
18 A I don't understand.  
19 Q Okay. Well, did Yusnay ever ask you why you were telling her about it  
20 and not your mom?  
21 A Yes.  
22 Q And what did you tell her?  
23 A I told her everything.  
24 Q Okay. Did you explain to Yusnay why you were telling her and not  
25 telling your mom?



1 A Because Yusnay will tell my mother.  
2 Q Okay. Were you worried about your mom's safety?  
3 A I don't understand the question.  
4 Q Okay. Were you worried about your mom being hurt?  
5 A Yes.  
6 Q How did you feel when you were telling Yusnay about what Don David  
7 was doing?  
8 A I don't understand.  
9 Q Okay. How did you feel inside when you were telling Yusnay about all  
10 the things Don David was doing?  
11 A Scared.  
12 Q Were you crying when you told Yusnay about what happened?  
13 A No.  
14 Q Okay. Could you see -- well, disregard.  
15 Let me talk to you about Chuck E. Cheese. Do you remember a  
16 day about Chuck E. Cheese?  
17 A Yes.  
18 Q What happened that day?  
19 A My mom said that we could go to Chuck E. Cheese with him.  
20 Q Okay. And did -- and -- and what happened? Was she going to go with  
21 you?  
22 A No. Because my father was there.  
23 Q And so you were allowed to go or not allowed to go because your dad  
24 was there?  
25 A Not to go.

1 Q Okay. Did Don David want to take you to Chuck E. Cheese?  
2 A Yes.  
3 Q What did he tell you about taking you to Chuck E. Cheese?  
4 A I don't understand the question.  
5 Q Okay. Well, did you go and talk to your mom about not wanting to go to  
6 Chuck E. Cheese?  
7 A Yes.  
8 Q Okay. And why didn't you want to go to Chuck E. Cheese?  
9 A Because he's going to touch us.  
10 Q Were you afraid of going to Chuck E. Cheese with Don David?  
11 A Yes.  
12 Q On that day, did you tell your mom and Yezline's mom about what was  
13 happening with Don David?  
14 THE COURT INTERPRETER: Please repeat the question for the  
15 interpreter.  
16 BY MR. HAMNER:  
17 Q On that day --  
18 THE COURT INTERPRETER: On that day --  
19 BY MR. HAMNER:  
20 Q -- on the Chuck E. Cheese day --  
21 THE COURT INTERPRETER: Yes.  
22 BY MR. HAMNER:  
23 Q -- did you tell your mom what was happening with Don David?  
24 A Yes.  
25 Q I don't know if I asked you this, but did -- did Don David have any

1 nicknames for you girls?

2 A Yes.

3 Q What would he call you?

4 A Princess.

5 Q Did he ever call you his queens?

6 A Yes.

7 Q Did he ever call you his girlfriends?

8 A Yes.

9 Q Now, before this, did Don David ever buy you gifts for your birthday?

10 A Yes.

11 Q Did he ever buy you things like trampolines?

12 A Yes.

13 Q Did he ever take you to McDonald's?

14 A Yes.

15 Q Did he ever take you to the 99 -- 99 Cents store to buy you things?

16 A Yes.

17 Q Maradel, I want you to think about before Don David was touching you  
18 and the stuff with the chocolates. Forget all that. Think about before that point in  
19 time. Before he did any of those things, did you like Don David?

20 A No.

21 Q Okay. Why not?

22 A Because he touched our bodies.

23 Q Okay. But before he ever touched your bodies, before all of that, did  
24 you like Don David?

25 A No.

1 Q Okay. Is that because he touched your body?

2 A I don't understand the question.

3 Q Okay.

4 MR. HAMNER: Court's indulgence.

5 BY MR. HAMNER:

6 Q Okay. Just one more question. What did Don David say was going to  
7 happen when you went to Chuck E. Cheese?

8 MR. WESTBROOK: Objection. Asked and answered.

9 MR. HAMNER: This question has not been asked.

10 THE COURT: Overruled. Go ahead.

11 MR. HAMNER: Let me re-ask the question.

12 THE COURT: You can ask.

13 BY MR. HAMNER:

14 Q Maradel, what did Don David say would happen when you went to  
15 Chuck E. Cheese?

16 A I don't understand.

17 Q Okay.

18 MR. HAMNER: I have no further questions at this time.

19 THE COURT: All right. Now, the lady has some questions for you.

20 Okay?

21 **CROSS-EXAMINATION**

22 BY MS. KIERNY:

23 Q Hi, Maradel. Are you okay?

24 A Yes.

25 Q Do you need a break or water or anything?

1           A     A break.

2           Q     A break. Okay. Let's --

3                 MS. KIERNY: Do you mind if we take 10?

4                 THE COURT: No. That's fine.

5                 MS. KIERNY: Okay.

6                 THE COURT: All right. Let's take a -- let's take a short break, maybe

7 five or six minutes. Okay? So we can...

8                     All right. The jurors are admonished not to do any of the things I

9 told you before not to do on a break. And don't form any --

10                 THE COURT INTERPRETER: She wants to go see her mommy; is

11 that okay?

12                 THE COURT: That's fine. Sure.

13                     Let the -- let the witness be excused first.

14                     Don't form any opinions; don't talk about the case; don't do any

15 research. All right. And don't talk to any of the witnesses, attorneys, or -- or the

16 parties. All right. Thank you.

17                     Let's try to make it short. Thanks. We'll try from our end, too.

18                     [Jury recessed at 4:37 p.m.]

19                 THE COURT: All right. We're outside the presence, and we lost the

20 prosecutors somewhere.

21                 MS. KIERNY: We've got this --

22                 THE COURT: Oh, there they are. There's one. All right.

23                 MS. KIERNY: Sorry to intrude. But she just seemed like she was a

24 little bit --

25                 THE COURT: No. That's great. You were being very observant.

1 That's okay. We'll take a recess.

2 [Court recessed at 4:38 p.m., until 4:46 p.m.]

3 [Outside the presence of the jury.]

4 THE COURT: All right. Well all set, guys?

5 MS. KIERNY: Sure.

6 THE COURT: All right. Let's go -- let's bring the jurors in.

7 [Pause in proceedings.]

8 THE COURT: Is this our last witness for today?

9 MS. KIERNY: Yes.

10 THE COURT: Is that the plan?

11 MR. HAMNER: The last one for the day, yes, sir.

12 THE COURT: All right.

13 [Jury reconvened at 4:47 p.m.]

14 THE COURT: Let's be seated everybody.

15 Let's call the witness back to the stand, marshal. Thank you.

16 Maradel.

17 Welcome back. Did you have a good break?

18 THE WITNESS: Uh-huh.

19 THE COURT: Okay. Very good.

20 Ms. Kierny, you may ask questions.

21 MS. KIERNY: Thank you.

22 **CROSS-EXAMINATION (CONT.)**

23 BY MS. KIERNY:

24 Q All right, Maradel, Chris talked to you about telling the truth, right?

25 A Yes.

1 Q And we only say true things in here, right?  
2 A Yes.  
3 Q Lies are bad.  
4 A Yes.  
5 Q Okay. If I told you that I was wearing a pink jacket, that would be a lie.  
6 A Lie.  
7 Q Okay. If I said your hair is in a pony tail, would that be truth or a lie?  
8 A It's true.  
9 Q Okay. If your mom tells you something, it's the truth, right?  
10 A Yes.  
11 Q Okay. Do you remember giving a statement in November to Elizabeth  
12 Espinoza?  
13 A Yes.  
14 Q And in that statement, you told her that you would go in back to play  
15 with your friend, Litzi?  
16 A Yes.  
17 Q Who is Litzi?  
18 A My friend.  
19 Q Okay. And does she live in the apartment complex with you?  
20 A Yes.  
21 Q Is she older than you, younger than you, or something else?  
22 A Younger than me.  
23 Q Okay. And did she used to live -- did -- does she live near where  
24 Yezline used to live?  
25 A Yes.

1 Q Okay. You told -- do you -- you told -- sorry. Let me rephrase.  
2 You told Elizabeth that Don David would offer you KitKats and  
3 then grab your hands, right?  
4 A Yes.  
5 Q And you told Elizabeth that Litzi saw Don David touch you?  
6 A Yes.  
7 Q And that was over your clothes and outside, right?  
8 A Yes.  
9 Q Okay. You testified earlier that you knew Doña Elena, right?  
10 A Yes.  
11 Q And that's Don David's wife?  
12 A Yes.  
13 Q And you called her grandmother, right?  
14 A Yes.  
15 Q You told Elizabeth that you did not go into Don David's house unless  
16 you were going in to get something with Grandmother.  
17 A Yes.  
18 Q Or sometimes to go to the bathroom with Grandmother.  
19 A Yes.  
20 Q Okay. You told Chris on direct that you told Yusnay about Don David  
21 instead of your mom, so that your mom would not be upset, right?  
22 A Yes.  
23 Q And you didn't want to get in trouble with your mom.  
24 A Uh-huh.  
25 Q You're afraid of telling your mom.



1 A Yes.

2 Q And you were -- because you were afraid your mom would hit you.

3 A Yes.

4 Q Okay. Chris also asked you about telling Elizabeth about the phone; do  
5 you remember that question?

6 THE COURT INTERPRETER: Can you repeat the question.

7 MS. KIERNY: Sure.

8 BY MS. KIERNY:

9 Q Chris also asked you that -- about you telling Elizabeth about Don  
10 David's phone.

11 THE COURT INTERPRETER: I'm sorry. The interpreter lost again the  
12 question.

13 MS. KIERNY: Okay.

14 THE COURT INTERPRETER: Darn. Yes.

15 BY MS. KIERNY:

16 Q Chris asked you about you telling Elizabeth about Don David's phone.

17 A Yes.

18 Q Do you remember telling Elizabeth that you could not see what was on  
19 the phone?

20 A Yes.

21 Q Okay.

22 MS. KIERNY: Court's brief indulgence.

23 No further questions at this time.

24 THE COURT: Mr. Hamner?

25 MR. HAMNER: Court's indulgence for one second, Your Honor.

1 [Pause in proceedings.]

2 **REDIRECT EXAMINATION**

3 BY MR. HAMNER:

4 Q Do you remember when Carli, that woman there, asked you questions  
5 about going in the house and not going in the house; do you remember that?

6 A Yes.

7 Q Were -- were you told by your mom not to go in that house after these  
8 things happened with Don David?

9 MR. WESTBROOK: Objection. Hearsay.

10 MR. HAMNER: Not being offered for the truth, but the effect on the  
11 witness.

12 THE COURT: Yeah. Not being offered for the truth. Overruled.

13 MS. KIERNY: And I'm sorry. I didn't catch the last part of that.

14 BY MR. HAMNER:

15 Q I said, were you told by your mom not to go into Don David's house  
16 after you told her about the things that happened with Don David?

17 MS. KIERNY: Okay. Thank you.

18 THE WITNESS: Yes.

19 BY MR. HAMNER:

20 Q Is that what -- is that what you were telling Elizabeth when you were  
21 talking about not going in the house?

22 A Yes.

23 Q You -- you also were asked some questions about saying you -- you  
24 told Elizabeth you couldn't see what was on the phone.

25 A Yes.

1 Q Do you also remember telling Elizabeth your sister -- one of your sisters  
2 was telling you about the things that were on the phone?

3 A Yes.

4 Q Do you remember standing there when Don David was showing your  
5 sisters the phone?

6 A Yes.

7 Q Okay.

8 MR. HAMNER: No further questions at this time.

9 THE COURT: All right. Ms. Kierny?

10 MS. KIERNY: Yes. Court's brief indulgence.

11 THE COURT: Take your time.

12 [Pause in proceedings.]

13 **RECROSS-EXAMINATION**

14 BY MS. KIERNY:

15 Q When you were talking with Elizabeth, do you recall being asked this  
16 question and giving this answer:

17 Okay. And how come you guys -- because --

18 MR. HAMNER: Page -- page number, counsel?

19 MS. KIERNY: Pardon?

20 MR. HAMNER: Page number, counsel.

21 MS. KIERNY: Oh, I'm so sorry.

22 MR. HAMNER: That's okay.

23 MS. KIERNY: 33, I'm on 33.

24 MR. HAMNER: That's fine. Thank you.

25 BY MS. KIERNY:

1 Q Oh -- I'll -- should I start over? I'm sorry.

2 Do you -- do you remember being asked this question and giving  
3 this answer:

4 Question: Okay. And how come you guys -- because I  
5 understood something about inside of his house, how come you guys go  
6 inside of his house?

7 Answer --

8 THE COURT INTERPRETER: I'm sorry. You're going too fast.

9 MS. KIERNY: Oh, I'm so sorry. I'm a fast speaker.

10 THE COURT INTERPRETER: And I need you to increase your voice a  
11 volume, please.

12 MS. KIERNY: So start from the beginning?

13 THE COURT INTERPRETER: Thank you. Yes.

14 MS. KIERNY: Okay.

15 BY MS. KIERNY:

16 Q Do you recall being asked this question and giving this answer:

17 Okay -- question: How come you guys -- because I understood  
18 something about inside his house -- how come you guys go inside of his  
19 house?

20 Answer: We don't go inside of his house.

21 Do you remember being asked that question and giving that  
22 answer?

23 A Yes.

24 MS. KIERNY: Okay. No further questions.

25 Oh, does she --

1 THE COURT INTERPRETER: She just answered -- I -- I said do you  
2 remember that Elizabeth asked you that? She said yes. But was something after  
3 the question, wasn't it?

4 BY MS. KIERNY:

5 Q Okay. Do you remember being asked the -- do you -- do you also  
6 remember answering, We don't go inside of his house?

7 A Yes.

8 MS. KIERNY: Okay. Thank you.

9 THE COURT: Do the jurors have any questions at this time?

10 Okay. Thank you. I'll give you a few seconds. All right. Very  
11 good. No questions.

12 Then, Maradel, thank you.

13 Right. Thank you very much for your time. And you can go  
14 home now. Thank you. Have a nice day.

15 Okay. You may -- you may leave. You may -- watch your step.

16 That's all we had planned for today, folks.

17 Is that right, counsel?

18 MR. HAMNER: That's correct.

19 THE COURT: Oh, that was --

20 MS. KOLLINS: Yes, Your Honor. I apologize.

21 THE COURT: So -- all right. Can I -- I can go ahead and excuse the  
22 jurors now?

23 MS. KOLLINS: Yes, sir.

24 THE COURT: All right. And what time -- tomorrow is Wednesday.  
25 Can we -- I thought about starting at 11:00, right, and you were going to check your

1 schedules.

2 MS. KOLLINS: I've -- I've --

3 THE COURT: What did we find out?

4 MS. KOLLINS: I have shifted everyone so that we can start at 11:00  
5 tomorrow.

6 THE COURT: Excellent. All right. So we will start at 11:00. So we'll a  
7 make a little -- make up a little bit of time tomorrow. All right. All right.

8 So ladies and gentlemen, you are admonished during this  
9 overnight recess do not communicate among yourselves or with anybody else  
10 about this trial or the subject matter of this trial; do not communicate at all with any  
11 of the parties, attorneys, or witnesses involved in this trial; do not seek or obtain  
12 any information or comments about the case from any source, including without  
13 limitation, newspapers, television, radio, Internet, e-mail, cell phones, or any other  
14 electronic device; do not read, watch, or listen to any report of or commentary about  
15 the case; do not form or express any opinion on any subject connected with this  
16 trial until the case is finally submitted to you for deliberations; and do not perform  
17 any research or investigation.

18 You are directed to return to the hallway outside this courtroom  
19 for further proceedings tomorrow at 11:00 a.m. and we're probably going to need to  
20 go until 5:00 p.m. tomorrow.

21 Thank you very much for your time. Please leave your notes.  
22 Have a safe evening.

23 [Jury recessed at 5:02 p.m.]

24 THE COURT: Thank you, interpreters.

25 We are outside the presence of the jury.

1 Mr. Hamner, would you mind giving us a little heads up on what's  
2 the plan for tomorrow?

3 MR. HAMNER: Sure, Your Honor. We are going to start at 11:00 a.m.  
4 with Yezline.

5 THE COURT: Yezline, okay.

6 MR. HAMNER: Yes. So that'll be the last of the kids.

7 THE COURT: Okay.

8 MR. HAMNER: Then the plan is to call the following witnesses. It's an  
9 ambitious list, but we -- we're -- they are a lot of short witnesses.

10 Dr. Sandra Cetl of the --

11 THE COURT: Tell us if we need the interpreters. That's what they  
12 probably need to know.

13 MR. HAMNER: After Yezline, guess what? No interpreters.

14 THE COURT: Oh, okay. Other than the one for the defendant.

15 MR. HAMNER: Well -- well, two -- right. Or you need two -- maybe  
16 two -- two for them to switch on and off.

17 THE COURT: Just -- we only need interpreters for the defendant.

18 MR. HAMNER: No witness -- no witness -- oh, well, in the morning,  
19 at 11:00 --

20 THE COURT: Yes.

21 MR. HAMNER: -- we will need two for Yezline.

22 THE COURT: Yes.

23 MR. HAMNER: Yezline will speak Spanish. But after Yezline, it should  
24 be after our lunch break, we'll be done --

25 THE COURT: No. Yezline might take -- that might take a little longer

1 than Maradel and Mirabel, right?

2 MR. HAMNER: It -- maybe.

3 THE COURT: So that might take about 45 minutes to an hour?

4 MR. HAMNER: I -- I think it's going to be about the same amount as  
5 probably Mirabel. I -- I can't imagine it being that -- maybe Jatziri, but, I mean, I --  
6 ballpark, maybe an hour.

7 THE COURT: I think the court interpreters should plan on being here  
8 at 11:00 and staying until about 12:00 noon for the first witness. Okay. Then we'll  
9 need just a couple interpreters for --

10 MR. HAMNER: Well --

11 MR. WESTBROOK: Yezline and Jatziri are probably similar time-wise,  
12 I would guess.

13 MR. HAMNER: And maybe -- maybe an hour and a half, just if you  
14 incorporate cross, I always think -- if it's maybe 45 minutes for each side or an hour  
15 and 30 minutes -- hour and a half.

16 THE COURT: So plan -- plan for an hour and a half there.

17 THE COURT INTERPRETER: Okay. Thank you very much. I have a  
18 question, what about Thursday? Do you only have -- this is --

19 MR. HAMNER: No interpreters for witnesses.

20 THE COURT INTERPRETER: So that's -- that's the end for us?

21 MR. HAMNER: Thank you very much.

22 THE INTERPRETER: Great. Thank you.

23 THE COURT: Well, thank you, so much.

24 MR. WESTBROOK: Thanks.

25 THE COURT: All right. So Yezline and then you said Dr. Cetl --



1 MR. HAMNER: Dr. Cetl, Detective Garris, Officer Schmidt, Officer  
2 Tschirgi, Officer Narvaez, Lieutenant Price --

3 THE COURT: Yeah. Yeah. We won't get that far.

4 MR. HAMNER: Yeah. They're pretty --

5 MS. KIERNY: Your Honor.

6 MR. HAMNER: They're quick.

7 THE COURT: What? Okay.

8 MS. KIERNY: Oh, sorry.

9 THE COURT: No. What?

10 MS. KIERNY: All right. They are -- there's one thing I needed to bring  
11 up regarding discovery. I think there's a Wendy Losada; is that tomorrow? Or do  
12 you want to bring that up -- or is that a different day?

13 MR. HAMNER: What's the discovery issue with Wendy Losada?

14 THE COURT: Are you going to try to move to exclude somebody?

15 MS. KIERNY: Well, here's the thing, we had asked in our discovery  
16 motion under No. 18 for any rape crisis or counseling records, and you said granted  
17 them pursuant to an in camera review. We have not received anything. I didn't  
18 know if you had received anything.

19 THE COURT: I don't remember getting anything.

20 MS. KIERNY: The testimony from Amanda was that the girls had  
21 undergone counseling at the Rape Crisis Center. So I don't know where we're at  
22 with that. And --

23 MR. WESTBROOK: Which we -- we didn't even know until --

24 MS. KIERNY: I didn't realize this until she testified, and then I didn't put  
25 two and two together, until she explained who Wendy Losada was.

1 MS. KOLLINS: First of all, the counseling records are not done through  
2 Rape Crisis. And this witness is being called for a very limited purpose. This is the  
3 inception of where these people learned about Hermandad Mexicana and the  
4 U visa. So she gave these individuals a card and said, if you're interested in a  
5 U visa, go here. So there is no discovery. There's nothing discoverable.

6 In terms of counseling records, those are privileged. And we had  
7 an extensive conversation about that. There is no counseling records coming in.  
8 There's no counselor to come in here and say these kids have been affected in a  
9 certain way. There's no counseling records.

10 All this is is Wendy Losada, who is a Spanish speaking, basically,  
11 victim's assistant at Rape Crisis, who gave them the referral for the U visa.  
12 Because the whole issue, even in voir dire and on cross-examination, is that  
13 somehow that this was created in an effort to obtain a U visa and stay in this  
14 country under the protection --

15 THE COURT: Yeah. So she's only being offered to testify about the  
16 U visa process and what she said about U visa?

17 MR. HAMNER: Right.

18 THE COURT: She's not going to talk about what anybody said to her?  
19 You're not -- she's not going to offer any testimony about what other people said or  
20 any hearsay?

21 MR. HAMNER: Nothing -- it'll be nothing about counseling or anything  
22 of that nature. If anything, it would be about --

23 THE COURT: So that's a separate --

24 MR. HAMNER: Just -- the focus of her testimony will solely be on a  
25 discussion about the U visas, who brought the topic up, and whether or not these

1 people walked in asking for U visas or it was someone like Wendy Losada who was  
2 bringing up -- we proffer she's going to say I'm the one who told them about it.  
3 They didn't ask me. I told them and then gave them the card for Hermandad  
4 Mexico.

5 THE COURT: She's not going to offer any documents that you didn't  
6 produce in discovery?

7 MR. HAMNER: No. She's going to offer no documents at all. She's  
8 just going to talk about when they walked in and how she offered --

9 THE COURT: Let me hear from Ms. Kierny. Is he --

10 MS. KIERNY: She --

11 THE COURT: -- she still has a concern of what it is.

12 MS. KIERNY: She does -- I mean, obviously, she does work at the  
13 Rape Crisis Center. Amanda did testify that she was taking her girls there for  
14 counseling.

15 THE COURT: Right.

16 MS. KIERNY: And you did order that we get the -- that when you get  
17 those records for in camera review, what I'm concerned about is that --

18 THE COURT: So that's a separate issue. It sounds like there's -- one  
19 issue is can she be allowed to testify? The other issue is was there a violation of a  
20 discovery order? That's a separate issue.

21 MS. KIERNY: I think you can say, yeah, separated.

22 THE COURT: Then I -- then I -- you're -- since she's testifying to a very  
23 limited topic, the U visas, even if there was a violation of the discovery order, that  
24 doesn't affect her ability to testify. All right.

25 But what it sounds like this is an issue of whether you're

1 prejudiced -- it's actually prejudiced by not having these counseling records.

2 MS. KIERNY: Without those records, obviously, I don't know the  
3 context in what -- which, you know, this -- this conversation came up. I don't know  
4 how it came up with Ms. Losada. I don't know if it was in the context of --  
5 counseling --

6 THE COURT: But what does that all that matter? The issue is  
7 whether -- you know, who came up -- who -- do what --

8 MS. KIERNY: Context is everything in this case, because depending  
9 on who is there, there's different disclosures.

10 THE COURT: No. But this -- they're offering this person just to rebut  
11 that -- your theory that -- that -- well, that they're motivated to lie based on the  
12 U visas, basically. Right?

13 MS. KIERNY: I -- I understand that, Your Honor.

14 THE COURT: And they didn't know about U visas or what did they  
15 know about U visas, until they were referred to Hermandad Mexicana --

16 MS. KIERNY: I mean, Amanda --

17 THE COURT: -- what they told them and --

18 MS. KIERNY: Amanda did testify that she knew about it before this  
19 case -- before October 16th, before the disclosure in this case. So I don't know that  
20 that's necessary to rebut what Amanda's said, because she said something --

21 THE COURT: Well, then I don't understand --

22 MS. KIERNY: -- different than what they even opened to.

23 THE COURT: They're allowed to put on whatever evidence is relevant.

24 I --

25 MS. KIERNY: Right.

1 THE COURT: You might disagree with the evidence, but argue it in a  
2 different way. I'm -- I'm not understanding --

3 MS. KIERNY: May be I'm not -- okay.

4 THE COURT: I'm not understanding why you're saying they can't put  
5 the witness on. That's -- I'm having trouble with that.

6 MS. KIERNY: Without knowing more about why that family was there, I  
7 have no way of crossing.

8 THE COURT: What difference does it make why they were there,  
9 when we only need one -- when only we need to hear what was said about the  
10 U visas then?

11 MS. KIERNY: Well, how it came up? In what context it came up?

12 THE COURT: Why --

13 MS. KIERNY: I feel like I'm --

14 THE COURT: Why is that relevant?

15 MS. KIERNY: That's the only way that I ever get cross-examination  
16 material on certain -- certain experts. I mean, that's how I -- I get into -- you know,  
17 otherwise, if this is a lay witness, I have some sort of statement from her. They're  
18 just going to be able to put her on for this very small issue, I can't cross about how  
19 it came up or whether it was Amanda asking or whether somebody said it before in  
20 the counseling session.

21 MR. HAMNER: Your Honor, here's -- here's -- and --

22 THE COURT: Well, I -- I think I kind of understand.

23 MS. KIERNY: Okay. Thank you.

24 THE COURT: No. I mean, you want to -- you want to say --

25 MR. HAMNER: Well --

1 MS. KIERNY: I want to know how it came up --

2 THE COURT: You want to know --

3 MS. KIERNY: -- before I can establish how I cross.

4 THE COURT: -- what's in the counseling records to see if there's  
5 anything that might be helpful to you in impeaching her testimony about how the  
6 topic of U visa came up? That's one thing.

7 MS. KIERNY: I think that's an appropriate way to say what I said.

8 THE COURT: What else -- what's your response?

9 MR. HAMNER: And -- and my response is -- is twofold. Number one,  
10 is I don't think there's anything impermissible for us to bring in a witness for a  
11 limited purpose to address the defense that they've said from the very beginning. I  
12 don't think there's anything wrong with that.

13 There are no counseling papers that go in association with the  
14 fact that she handed them a business card.

15 Number three, Wendy Losada has been noticed as a witness for  
16 quite some time.

17 THE COURT: Yeah.

18 MR. HAMNER: If they wanted to speak to Wendy Losada or get a  
19 sense, they could have sent an investigator down and say, Did you ever speak to  
20 any of these people?

21 And as I can see for -- at this point, they haven't done that. And  
22 the idea that the onus is on us to hand them over every single thing, if they're --  
23 when -- when the only purpose to call this witness is just to say, I'm the one that  
24 handed them the business card about Hermandad and told them about the U visa,  
25 there's nothing more to it.

1                   If -- if they wanted something more, they should have sent their  
2 investigator to talk about it. And it's -- I mean --

3                   THE COURT: Is there going to be anything in the counseling records  
4 about U visas?

5                   MR. HAMNER: I don't have any counseling records. I'm in no  
6 possession of any counseling records.

7                   THE COURT: Well, isn't that -- I think Ms. Kierny is saying that -- you  
8 know, I don't know if I did, but she's saying I had ordered the State to produce  
9 those. And -- and she didn't get them, and somehow she's prejudiced now in not  
10 being able to cross this witness based upon the counseling records.

11                  MR. HAMNER: And -- and Ms. -- Ms. --

12                  THE COURT: So you've got to help me.

13                  MR. HAMNER: Sure.

14                  THE COURT: Did I order that they be produced? And --

15                  MR. HAMNER: My understanding, from speaking with Ms. Kollins, was  
16 we had a lengthy discussion about counseling records. And you made a  
17 determination that those records were privileged and they were not ordered to be  
18 turned over.

19                  MS. KIERNY: My -- my belief is that you -- we had discussed --

20                  THE COURT: I guess we've got to look at the minutes, right?

21                  MS. KIERNY: We discussed this in conjunction with the CPS records,  
22 and that then they were ultimately ordered to be turned over in camera. So you  
23 would go through them and see if there's anything useful -- -

24                  THE COURT: I went through the CPS --

25                  MS. KIERNY: -- like you did with the CPS records --

1 THE COURT: Records.

2 MS. KIERNY: -- and found useful stuff for us.

3 MR. WESTBROOK: It was the same order.

4 MS. KIERNY: It was same order.

5 THE COURT: Well, I've got to see an order, guys. You can't -- you  
6 guys -- you guys got to give me either the minutes or an order so I can -- you know,  
7 I can't remember what I said that day. And I'm not -- I'm not going to take the time  
8 to go through JAVS. I mean, that's why we need written orders and that's why we  
9 have minutes, right?

10 MS. KOLLINS: And if I could just address that very briefly.

11 THE COURT: Yeah. Sure. Yeah.

12 MS. KOLLINS: There is no witness on behalf of the State that is  
13 coming in here to testify to the mental status of any of these five victims that are  
14 verbal.

15 So Wendy Losada is for a very limited purpose.

16 THE COURT: That's not the issue, Ms. Kollins.

17 The -- the issue that they're bringing up now is -- is whether  
18 they've been prejudiced by not having discovery.

19 MS. KOLLINS: Well --

20 THE COURT: It's not -- it's a separate -- a separate issue from --

21 MS. KOLLINS: I -- I understand. But in what regard are they  
22 prejudiced? They haven't --

23 THE COURT: I don't know.

24 MS. KOLLINS: -- wanted to cross-examine --

25 THE COURT: I'm trying to find out.



1 MS. KOLLINS: -- these kids about their mental status. They haven't  
2 cross-examined the parents about mental status. Now, all of a sudden, five days  
3 into trial, now they want counseling records that are privileged -- no. You can order  
4 those records and the parent still has to sign off for them.

5 THE COURT: Yeah. Okay.

6 MS. KOLLINS: So -- and we had this discussion during discovery. So I  
7 don't know what Ms. Kierny is saying that she needs them for right now, other than  
8 to throw hands up at the air and say we don't have them.

9 THE COURT: No. I -- and Ms. Kollins, I agree with you that she has  
10 not demonstrated relevance. But I -- I actually haven't asked her that question yet.

11 She's only raised the point that she remembered me ordering  
12 them, and I don't remember that. But she says I ordered them. She didn't get  
13 them. And so she's raising a concern. I -- I don't think it's wrong for her to raise the  
14 issue, right, that she wants to know if a -- if a -- if you're -- if she was supposed to  
15 get something that she didn't get, isn't it fair that she at least ask where are they?  
16 I -- I don't see anything wrong in her asking that if -- if I did order it. I don't  
17 remember if I ordered it.

18 MS. KOLLINS: And I guess we have a -- and I'm not being glib and I'm  
19 not being presumptuous. I just -- I think we're all on a different page about --

20 THE COURT: Okay.

21 MS. KOLLINS: -- what these -- what the purpose of these are at this  
22 juncture in the trial when we're almost through all the victims and we're almost  
23 through all the parents, wherein if you were going to glean relevant information from  
24 counseling records, that those would have been the people to ask the questions to.  
25 Not Wendy Losada. She's nothing but a victim advocate.

1                   So it seems to me there's a little bit of bootstrapping our objection  
2 to Wendy Losada with this --

3                   THE COURT: Well, let's --

4                   MS. KOLLINS: -- records issue.

5                   THE COURT: -- let's forget about Wendy Losada for a second. Let's  
6 forget she's been called. Let's just pretend that her name doesn't exist. Okay.  
7 Can -- can we do that?

8                   MS. KOLLINS: Sure.

9                   THE COURT: Will you just humor me for a second, please?

10                  MS. KOLLINS: Sure. I -- I'm not --

11                  THE COURT: Let's forget the name exists. All right. Completely  
12 separate issue.

13                  The defense is saying, Hey, Judge, you ordered that I'm  
14 supposed to get these counseling records, and I never got them. You know, what  
15 can we do about it?

16                  Well, what I need to find out is, number one, did I order them?  
17 Number two, did the State not produce them? Then number three, are they  
18 material? Because if -- if I ordered them, they weren't produced, there's no excuse  
19 for not producing them, and they are material, that's a relevant issue, right, on  
20 whether they get a fair trial.

21                  MS. KOLLINS: Well, I --

22                  THE COURT: And it has nothing to do with the --

23                  MS. KOLLINS: I -- I --

24                  THE COURT: Okay.

25                  MS. KOLLINS: I understand the chronology you went through, but I

1 disagree with the ultimate analysis.

2 THE COURT: Okay.

3 MS. KOLLINS: So I don't think it prejudices them. I don't think that  
4 they've stated a relevant purpose.

5 THE COURT: No, but see, you're jumping ahead to the merits.

6 MS. KOLLINS: All right.

7 THE COURT: And I'm just saying what is the protocol to resolve the  
8 issue? Would you agree with me that if there was document --

9 MS. KOLLINS: Well --

10 THE COURT: Can I finish my question?

11 MS. KOLLINS: Sure.

12 THE COURT: Okay. Would you agree with me that if I ordered the  
13 State to produce the records, all right, and they weren't produced, then the next  
14 step is to find out if they're relevant and material? Is that important to know if  
15 they're relevant and material? Will you at least concede that?

16 MS. KOLLINS: I will, but --

17 THE COURT: No?

18 MS. KOLLINS: Yes.

19 THE COURT: I don't understand why you wouldn't concede that. That  
20 bothers me.

21 MS. KOLLINS: Well, I guess my problem is at the very beginning of  
22 your statement where can you order me to retrieve something from a third party  
23 that is privileged, that's where we'd the whole discussion at the -- at the discovery  
24 hearing. So that I -- I -- if they're -- if there's something in there that is relevant and  
25 you believe they --

1 THE COURT: But if I ordered them and you choose just to -- to ignore  
2 the order, that would -- without saying, Judge, I'm going to take it up on appeal, that  
3 would be concerning to me, too.

4 MR. HAMNER: No, and -- and I --

5 THE COURT: I -- I'm really getting frustrated here.

6 MR. HAMNER: Well, and I -- and I get that. And I -- and I think the  
7 State would agree that if you had ordered something and if it's relevant, that  
8 that's -- that's -- that analysis is correct.

9 I think what the State's position is, is there was an extensive  
10 discussion about whether or not a court can order the State to compel a third party  
11 to turn over confidential records.

12 THE COURT: Okay.

13 MR. HAMNER: And that there was an extensive discussion at our first  
14 very thorough discovery argument about, logistically, why that is problematic, that,  
15 from our perspective, the State can't -- the court can't compel the State to ask a  
16 third party to turn over something privileged. That it's got to be waivers done by  
17 other parties and --

18 THE COURT: And I understand that. That's why I was agreeing with  
19 Ms. Kollins --

20 MR. HAMNER: And I know you were.

21 THE COURT: -- that the first step is to determine if I ordered it. And  
22 I -- I don't remember if I ordered it.

23 MR. HAMNER: And our impression was that you did not order us to  
24 turn those over. If there's something to the contrary, we would have acted -- you  
25 know, that we'd know about, we'd act differently. But it's very clear that we had a

1 pretty thorough discussion about it. But I'm not saying that maybe -- I know there  
2 was a second -- a second time where you guys met and -- and there was another  
3 order issued and maybe something potentially got changed --

4 THE COURT: My protocol is generally not to order third parties to turn  
5 over documents in discovery. That -- that -- you know, with CPS records the  
6 standard protocol is usually there's an order from the court that they turn them over  
7 for in camera review.

8 MR. HAMNER: Right.

9 THE COURT: All right. And then the court makes a determination if  
10 they should be produced.

11 When it comes to third party records other than CPS, or records  
12 that the State doesn't have the ability to obtain without a subpoena, then I -- then I  
13 require the defense to -- to have a subpoena issued.

14 MR. HAMNER: Right.

15 THE COURT: That's just what I generally do.

16 MR. HAMNER: And -- and I think --

17 THE COURT: And -- and I -- so I -- I just don't recall ordering the Rape  
18 Crisis records to be produced. It doesn't -- because the only way I would have  
19 ordered them to be produced is if they're records held by the State -- held by the  
20 prosecutor or law enforcement that was involved in an investigation of the matter.

21 MR. HAMNER: All right. And -- and I --

22 THE COURT: All right. Counseling records by a private organization,  
23 all right, are generally not the sorts of records that I order to be produced.

24 MR. HAMNER: And -- and I would say -- and I agree with all of that.  
25 And I would also note --

1 THE COURT: Okay.

2 MR. HAMNER: -- factually for the record, this is not a case where the  
3 defense had issued a subpoena for any Rape Crisis -- from the Rape Crisis Center  
4 to get records related to these people.

5 THE COURT: Okay.

6 MR. HAMNER: That did not happen. And they didn't file in their Motion  
7 to Compel, listen, we've made an attempt on our own to issue a subpoena and it's  
8 not being ordered. They didn't seek out an ex parte order from the court ordering  
9 those.

10 THE COURT: So I -- I hear that.

11 So let me go back to Ms. Kierny.

12 So I think --

13 MS. KIERNY: He just told me --

14 THE COURT: I think we're a little bit off on --

15 MS. KIERNY: -- that I can't get those records --

16 THE COURT: I think we were on the wrong page a little bit.

17 MS. KIERNY: -- without having the mother sign.

18 THE COURT: What Ms. Kollins is saying is that let's don't get to the  
19 issue of -- well, first of all, she said they're not relevant. But she's saying, let's don't  
20 get to that issue. You never ordered these to be produced.

21 MS. KIERNY: Right.

22 THE COURT: Because you -- because you can't, because they're  
23 privileged and we don't have them. I think that's what she's saying.

24 So you need to prove to me, all right, Ms. Kierny, that -- that I did  
25 order them. And --

1 MS. KIERNY: Okay.

2 THE COURT: -- because I -- I don't think I did.

3 MS. KIERNY: Okay.

4 THE COURT: But you've got to prove to me that I did.

5 MS. KIERNY: Is it possible to ask for the JAVS of April 4th? All I

6 have -- I -- I do have that I had --

7 THE COURT: Yeah.

8 MS. KIERNY: Obviously, I went through -- the first hearing we didn't

9 get to that issue. It was further along in the requests and we were arguing about

10 something else.

11 THE COURT: Yeah.

12 MS. KIERNY: And then we ended up coming back --

13 THE COURT: Right.

14 MS. KIERNY: -- and that's when it was addressed.

15 THE COURT: Well, we had two hearings.

16 MS. KIERNY: And Ms. Kollins was here and Mr. Hamner was not here.

17 And that was when -- that happened in -- I wrote it in with the CPS records in

18 camera, in camera. So I wrote those notes --

19 THE COURT: Can we just rely on the minutes? Yeah. Let -- do you

20 know how extensive the minutes are?

21 MS. KIERNY: Let's see what the minutes --

22 MR. WESTBROOK: We went by -- point by point. So if the minutes

23 are point by point, that should be fine.

24 THE COURT: Tell you -- I'll tell you what, I -- I see this issue as

25 completely disconnected from -- from whether Wendy Losada testifies. So I'm

1 allowing her to testify.

2 MS. KIERNY: Okay.

3 THE COURT: So we don't need to resolve this by tomorrow. All right.  
4 She's -- she is going to be able to testify, because her testimony has nothing to do  
5 with these counseling records. All right. That's -- that's how I see it. It's a  
6 completely separate issue, you know, if they failed to produce something that they  
7 should have produced and you're prejudiced by that. Completely separate issue.

8 MS. KIERNY: Okay.

9 THE COURT: All right.

10 MS. KIERNY: Okay.

11 MR. WESTBROOK: I'd -- I'd be happy, too, just to -- to wait around for  
12 a disc and do all the work and do timestamps, as well.

13 THE COURT: All right. I -- I can't wait around. I've got to leave.

14 MR. WESTBROOK: That's fine. That's fine. I'll -- I'll do the waiting.

15 THE COURT: Well, and I don't know if my staff --

16 Can you -- do you have time to burn a CD of that hearing?

17 MR. WESTBROOK: Or, if not, I can come tomorrow morning. That's  
18 fine, too.

19 THE COURT RECORDER: What's the date again?

20 MR. WESTBROOK: April 4th, 9:00 a.m.

21 THE COURT RECORDER: Okay.

22 MS. KIERNY: We were called probably about 20 minutes into the  
23 calendar.

24 THE COURT: Were -- Ms. Kollins, were you the one here at the  
25 second discovery hearing?



1 MR. WESTBROOK: Yeah.

2 MS. KOLLINS: I was.

3 MR. HAMNER: And I would think for completeness purposes, if you're  
4 going to burn from April 4th, you should also have burned the other hearing where  
5 there was a -- which we know there was an extensive discussion about the privilege  
6 issue with -- with ordering counseling records from a third party. If there were two  
7 discussions on discovery, I think for the record to complete -- be complete, both of  
8 those JAVS should be pulled.

9 THE COURT: You guys are giving me a headache.

10 MR. HAMNER: I'm sorry.

11 THE COURT: I'll look at both of them.

12 MR. HAMNER: Thank you, Your Honor.

13 MS. KOLLINS: And I'm -- I'm sorry to --

14 MR. WESTBROOK: Your Honor, I'll go through and timestamp them  
15 with anything relevant, just to -- just as an -- to help. I have no problem with that.

16 MS. KOLLINS: And -- and I just want to let the court know that this is  
17 a -- you know, just for the record, obviously, 60-day invoked setting. We have not  
18 inquired on whether these kids are attending specific counseling. We don't even  
19 know that right now. So we don't have the names of any treating anything right  
20 now.

21 THE COURT: Okay.

22 MS. KOLLINS: Okay.

23 THE COURT: Well, I -- if -- if I ordered anything, it probably would have  
24 been limited to just produce whatever you have in your possession or you plan --  
25 you plan on using. I can't imagine I would have ordered them to go get them. It

1 just doesn't seem like something other --

2 Ms. Kierny.

3 MS. KIERNY: What does it say in the minutes?

4 THE COURT RECORDER: Which --

5 MS. KIERNY: For No. 18.

6 THE COURT RECORDER: Number 18?

7 THE COURT: All right. I think we're done. All right. We done?

8 MR. WESTBROOK: Yeah, we're done.

9 THE COURT: All right. I'll -- I'll review both -- I'll review both days. All  
10 right.

11 MR. HAMNER: Thank you, Your Honor.

12 [Court recessed at 5:24 p.m., until the following day,  
13 May 3, 2017, at 11:16 a.m.]

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18  
19 ATTEST: I do hereby certify that the foregoing is a true and correct transcript, to the  
20 best of my ability, from the audio/visual recording of the proceedings in the above-  
21 entitled case.

22 

23 \_\_\_\_\_  
24 Shawna Ortega, CET\*562

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JOSE AZUCENA ) No. 74071  
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 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF NEVADA, )  
 )  
 Respondent. )  
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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10 day of April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY /s/ Carrie M. Connolly  
Employee, Clark County Public Defender's Office