

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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3 GUSTAVO GUNERA-PASTRANA,) No. 79861

4 Appellant,)

5 v.)

6 THE STATE OF NEVADA,)

7 Respondent.)

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9 **APPELLANT'S APPENDIX VOLUME IX PAGES 1955-2204**

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1 THE COURT: Okay. So we will be done, I guess.
2 [Recess taken from 4:32 p.m. to 4:41 p.m.]
3 [Outside the presence of the jury]
4 THE COURT: Anything outside the presence?
5 MS. MACHNICH: No, your Honor.
6 MS. SUDANO: Nothing further.
7 THE COURT: How long do you think?
8 MS. SUDANO: That was like my last question.
9 THE COURT: Right. By 5:30?
10 MS. MACHNICH: I would say so. I mean, as long as she
11 doesn't have amnesia when I start talking to her.
12 THE COURT: Okay. Go ahead, bring them in. Thank you.
13 [Pause]
14 THE MARSHAL: Please rise for the jury.
15 [Jury in at 4:43 p.m.]
16 [Inside the presence of the jury]
17 THE COURT: Please be seated. Parties acknowledge
18 presence of the jury?
19 MS. DIGIACOMO: Yes, Your Honor.
20 MR. SPEED: Yes, Your Honor.
21 THE COURT: Thank you. You may proceed.
22 MS. SUDANO: Thank you, Your Honor.
23 THE COURT: You're still under oath.
24 THE WITNESS: Yes.
25 MS. SUDANO: All right.

DIRECT EXAMINATION CONTINUED

BY MS. SUDANO:

Q Ms. Espinoza, right before we took the break, I was asking you some questions about the interview that you did on July 12th of 2016 with Jose Moran. I don't think I asked you regarding his interview. Did that take place in English or in Spanish?

A In Spanish.

Q Okay. And you had mentioned before, Meily's interview started in English and then switched to Spanish. Did his start the same way or was it in Spanish throughout?

A No, it was full Spanish.

Q Okay. And I had asked you before we took the break whether Jose had discussed with you what, if anything, he knew about why the police had been called?

A Yes.

Q Okay. Did he indicate to you why it was that particular day, as far as his understanding of why the police had been called?

A Because his mom had called the police after the sister talked about the abuse from the stepdad.

Q Okay. And was it specific to anything that was supposed to happen on that day, the July 12th --

A Yes.

Q -- 2016?

A It was -- supposedly, they were going to have relationships that day.

1 MS. SUDANO: Thank you, Your Honor. Nothing further.

2 THE COURT: Cross?

3 MS. MACHNICH: Yes, Your Honor.

4 CROSS-EXAMINATION

5 BY MS. MACHNICH:

6 Q Good afternoon, ma'am.

7 A Good afternoon. How are you?

8 Q All right. So referring to what the District attorney just asked
9 you, that line of questioning with Jose --

10 A Uh-huh.

11 Q -- do I have right that you're saying what Jose said, that his
12 mom said, that Meily said, Gustavo said?

13 A Yes.

14 Q Okay. Wanted to make sure I got that right. So let's -- what
15 do we want to talk about first? All right. At the beginning of your
16 examination, you spoke with the State about having done over 2,000
17 interviews?

18 A Yes.

19 Q All right. Do you have independent knowledge of each and
20 every one of them, like personal, independent knowledge of that?

21 A Meaning like do I have information before I start the
22 interview or --

23 Q No. As you sit here today, do you remember everything that
24 happened in this interview?

25 A I can't give you word by word, but I remember the

1 experiences that Meily shared with me and what Jose had stated.

2 Q Okay. So in preparation for this, you didn't review anything?

3 A I reviewed the transcript. I reviewed the video and the audio.

4 Q Okay. So you did do some preparation in --

5 A Yes.

6 Q Yes. And you also spoke with the District attorneys?

7 A Yes.

8 Q All right. Now, you had said that you've done over 2,000 of
9 these interviews?

10 A Yes.

11 Q And that you've done this for, you said, about four years?

12 A Yes.

13 Q But we're talking about something that happened three years
14 ago, correct?

15 A Yes.

16 Q So at the time, you'd been doing it for about one year?

17 A Correct.

18 Q And the training that you had in preparation for this was a 40
19 hour class and an 80 hour class, correct?

20 A It was approximately, at that time, I want to say 120 hours,
21 with my first -- no, my second week having been completed in Alabama
22 at the headquarters.

23 Q Okay. So if your CV says, forensic interviewing training at
24 the National Children's Advocacy Center in Huntsville, Alabama, 40
25 hours --

1 A Yes.

2 Q -- that would be incorrect?

3 A It's 40 hours.

4 Q Okay.

5 A But subsequently, they came out to Las Vegas and offered
6 the training in the same intervals, 40 hours a week. So I believe I had
7 that as a refresher at some point and then prior to Alabama, I had also
8 had the training.

9 Q So you also had the 80 hours through that?

10 A Yes, approximately.

11 Q Okay, so 120 hours of training?

12 A Yes.

13 Q So that's about three weeks, correct?

14 A Correct.

15 Q And you had been working with -- let me see -- various
16 probation departments and family services departments --

17 A Yes.

18 Q -- for a while at that point, right?

19 A Yes.

20 Q And your education was a Bachelor of Arts in social science
21 from San Jose State in May 1999?

22 A Yes.

23 Q Okay. Thank you. All right. So let's talk about the center
24 that you work for. You work for the Southern Nevada Children's
25 Assessment Center; is that correct?

1 A Yes.

2 Q Okay. I was calling it advocacy. I apologize. So this SNCAC,
3 it's an arm of the State, correct?

4 A Rephrase it.

5 Q It works as a partnership with the State of Nevada in
6 prosecuting people?

7 A It works with a multitude of agencies. Law enforcement,
8 CPS, DFS.

9 Q Okay. In prosecuting people, among other things?

10 A The District attorney; yes. He's a part of the multi-
11 disciplinary team.

12 Q Okay. I assume that you've testified for the State of Nevada
13 previously?

14 A Yes.

15 Q About how many times?

16 A I don't recall an exact number, ma'am. If I -- if you asked me
17 to guesstimate, maybe over five, but I can't remember an exact number.

18 Q So you said over five. Would you say over 10 or under 10?

19 A Under 10.

20 Q Okay. And how many times have you been called by the
21 Defense to testify?

22 A I don't recall. There's -- I do remember there's been a couple
23 of subpoenas sent by Defense --

24 Q Right.

25 A -- for different cases, but I couldn't give you a number.

1 Q But how many times have you testified for the Defense?

2 A None.

3 Q Okay. All right. Now, let's see here. When you were talking
4 about acute exams, that's, as you stated, interviews that happened
5 where something has been either just happened or been ongoing up till
6 that point, correct?

7 A Not acute exams. Acute situations. So emergencies, same
8 day events that, you know, the child was just disclosing that day, or the
9 alleged perpetrator was in the home, there was a safety concern per law
10 enforcement or CPS, and that's why they were coming in that specific
11 day.

12 Q Okay. So you don't use acute -- you don't mean the same
13 thing as like a medical professional uses acute?

14 A No.

15 Q Okay. So this is a --

16 A They're --

17 Q -- specialized term for your area of expertise, as well as
18 others?

19 A There's various terms, although use acute, same day,
20 emergency --

21 Q Okay.

22 A -- when they're bringing in the child that specific day.

23 Q Okay. Were you aware if Meily Moran had been taken to the
24 ER for any forensic testing?

25 A When she was brought in, no, not that I remember.

1 Q Okay. And are you part of the decision-making process
2 about whether someone goes and has a sex assault exam that day or at
3 a later period?

4 A No, I don't make any decisions about that.

5 Q Okay. Do you make --

6 A Or any opinions or any input.

7 Q Okay. Just trying to figure out who the decisionmakers are,
8 so I appreciate that. Okay. Now, you also stated to the District attorney
9 that sometimes, children get the date and the order of things wrong?

10 A Correct.

11 Q Okay, but a lot of the time, when they get the dates and
12 orders of things wrong, it's because you're talking about months and
13 years of alleged abuse?

14 A Yes.

15 Q Okay. So you don't expect them to be able to say, three
16 years ago, X happened in January, Y happened in February, Z happened
17 in March?

18 A Correct.

19 Q Because that would not be reasonable, correct?

20 A Correct.

21 Q But you would expect a pre-teenage child to be able to tell
22 you what happened yesterday?

23 A Yes.

24 Q Okay. All right. So you had said with the State of Nevada
25 that there were several steps in a forensic interview, correct?

1 A Yes.

2 Q Okay. And those included the introduction, the rapport
3 building, the instructions, etcetera?

4 A Yes.

5 Q All right. You also said at the beginning, you asked some
6 open-ended questions, correct?

7 A Yes.

8 Q And then the questions get more specific as the interviewee
9 divulges some information?

10 A Yes.

11 Q All right, so that's all accurate. And you want to ask these
12 open-ended questions because children of various ages are very
13 suggestable?

14 A They can be; yes.

15 Q Okay. Now, you had also described Meily Moran's
16 demeanor when she was in your interview center, correct?

17 A Yes.

18 Q All right. You had never met Meily prior to that day?

19 A No.

20 Q So you did not know how she typically acts under any given
21 circumstance, correct?

22 A No.

23 Q Okay. So you don't know if she is a talkative person?

24 A Correct.

25 Q Or quiet person?

1 A Correct.

2 Q Or if she's just someone who cries all the time, she's a crier,
3 you don't know?

4 A No, I don't.

5 Q And you don't know if she's someone who never cries and is
6 very stoic?

7 A Correct.

8 Q And you also don't know if she's very dramatic?

9 A Correct.

10 Q Okay. Because you don't know her?

11 A I don't know her.

12 Q And you're basing what you're telling us about her
13 demeanor based upon the interview you did with her on July 12th, 2016?

14 A Yes.

15 Q Okay, thank you. All right. Now, let's skip to some of the
16 things you discussed with the State with regard to what Meily had said
17 to you, okay?

18 A Okay.

19 Q Actually, time out, again. You obviously were not present for
20 any of the events that are being described in these interviews?

21 A No, I'm not.

22 Q Okay. So largely, when you interviewed Meily, you're
23 getting her statements and her stories of what happened?

24 A Correct.

25 Q And then to some lesser extent, you're getting stories about

1 what Gustavo, the Defendant, had said to her?

2 A Correct.

3 Q Or what she had said to her mom? Or what she had told
4 people?

5 A Correct.

6 Q Okay. And then when you're talking about Jose, you learned
7 that he wasn't present for any of these alleged incidents that were talked
8 about, correct?

9 A There was a time where he or she referenced that -- about
10 the first time, that she was in the living room with Gustavo and then -- or
11 Mr. Gunera, and then the brother came out of her room, and she said,
12 that was the time that something happened when you came into the
13 living room, out of your room.

14 Q Okay. So Meily had said that --

15 A I can't --

16 Q -- Jose was present for something?

17 A I can't remember who -- which one of them said that, but I
18 remember that they made a reference that they had potentially seen
19 something, but you know, I don't remember who.

20 Q Okay. Would it surprise you to learn that Jose testified he
21 had never seen any of the alleged abuse whatsoever?

22 A Correct. He didn't. He didn't see anything.

23 Q Okay. All right. So to a lesser extent, when you were
24 speaking with Jose, you were talking about a situation where he was
25 telling you what Meily had told him?

1 A Right.

2 Q Or what his mom had told him?

3 A Right.

4 Q About what Gustavo had told them?

5 A Yes.

6 Q And their stories of what had occurred?

7 A Yes.

8 Q Okay. Now let's go to things that Meily told you. And you've
9 already covered a lot with the state. So you started with the open-ended
10 question, tell me everything about the abuse, when you got to the
11 substance section of the interview, correct?

12 A Yes, Uh-huh.

13 Q And she told you many things, but among other things, she
14 said that it started last year?

15 A Yes.

16 MS. DIGIACOMO: What page is that?

17 MS. MACHNICH: Five.

18 MS. DIGIACOMO: Thank you.

19 BY MS. MACHNICH:

20 Q And that it happened every single week or month?

21 MS. MACHNICH: Five.

22 THE WITNESS: I can't remember how many times she said it
23 happened, but there was more than once is --

24 MS. MACHNICH: Okay.

25 THE WITNESS: -- what she said.

1 BY MS. MACHNICH:

2 Q So it's your testimony you don't recall her ever stating, in
3 response to the question, tell me everything about the abuse, in relevant
4 part --

5 MS. DIGIACOMO: And Your Honor --

6 MS. MACHNICH: -- it --

7 MS. DIGIACOMO: -- I would object that she needs to read
8 the entire --

9 MS. MACHNICH: No, I don't.

10 MS. DIGIACOMO: -- part.

11 THE COURT: All right. No, she's right. You can read the
12 rest.

13 MS. MACHNICH: I'm not interested in just reading
14 paragraphs into the record. In relevant part, she's testified -- Meily
15 stated it happened every week or month.

16 THE COURT: Wait. Counsel, approach.

17 [Sidebar begins at 4:57 p.m.]

18 THE COURT: Are you saying you're misquoting --

19 MS. MACHNICH: I'm not.

20 THE COURT: -- the actual -- you need to --

21 MS. MACHNICH: I'm not --

22 MS. DIGIACOMO: She's taking part of the sentence and
23 reading that.

24 THE COURT: Well, that she can do.

25 MS. DIGIACOMO: Not the whole --

1 MS. MACHNICH: Yes, I can.

2 THE COURT: Then you get to read -- go back.

3 MS. DIGIACOMO: Okay. She's just taking it out --

4 THE COURT: That's fine.

5 MS. MACHNICH: I'm not --

6 THE COURT: That's fine. You can do what you want.

7 [Sidebar ends at 4:57 p.m.]

8 BY MS. MACHNICH:

9 Q All right. When Meily Moran was speaking with you, in
10 response to your open-ended question, she told you lots of things,
11 correct?

12 A Yes.

13 Q Okay. Among other things that she told you, she told you,
14 "And these keep happening like every single week or month."

15 A And I believe what she was referring to was he would tell her
16 things.

17 Q Okay. And that's your opinion of what she said?

18 A Yes, because she only described three incidences and when
19 she said it happened every day, I understood it to be statements were
20 made or something was said, because she clarified a couple of times that
21 it was just those specific incidences. It started August 2015, and nothing
22 happened again until February when the baby was delivered, and then
23 that's when he made his statement and proceeded after that.

24 Q Okay. So that's from the context of the entire interview,
25 assuming that she wasn't making things up at that point, correct?

1 A Correct.

2 Q Okay, because you assume children are being truthful?

3 A It's not my job, ma'am, to determine if they're being truthful
4 or not. I just gather the information.

5 Q That's fair. All right. So at one point, she said, and you've
6 read context into it, but what she said in relevant part, when she was
7 speaking about things that had happened, is that it happened every
8 single week or month?

9 A Yes, she did say that.

10 Q Okay, thank you. Now, she spoke about two separate
11 occasions of vaginal touching, according to her?

12 A Yes.

13 Q Okay. She said the first was a Sunday last year?

14 A I don't remember what day of the week she said, but she
15 referred to the year prior; yes.

16 Q Okay, and that's what the State referred to as the August
17 incident?

18 A Yes, 2015.

19 Q Okay. Did she ever mention that she told police officers it
20 was actually June?

21 A I don't recall her saying that.

22 Q Okay, that's fair. And then do you remember when she's just
23 open-endedly describing, she said, in reference to the second incident,
24 she said, he touched her in her private parts --

25 MS. DIGIACOMO: Page, counsel?

1 MS. MACHNICH: Five.

2 BY MS. MACHNICH:

3 Q -- and she didn't remember which day; is that fair?

4 A I'm sorry, rephrase that, again.

5 Q Okay. In reference to the second incident of touching, she
6 said that he touched her in her private parts?

7 A Yes.

8 Q Correct?

9 A Yes.

10 Q Okay. And that she didn't remember which day?

11 A I don't recall that part.

12 Q Okay. She also, at that point, had volunteered some details
13 about the argument she had with Gustavo the day before your
14 interview?

15 A Yes.

16 Q Okay. And in part, she said, "He told me that my time was
17 over, and he didn't want me anymore in the house because I didn't
18 work."

19 MS. SUDANO: Counsel, page?

20 MS. MACHNICH: Still five, counsel.

21 BY MS. MACHNICH:

22 Q "He work. He told me that my mom work, that my brother
23 work, but that I didn't do anything."

24 A Correct.

25 Q And then she further explained other things?

1 A Yes.

2 Q Okay. Because by no means am I quoting her entire
3 statement back to you; that would be fair, right?

4 A Correct.

5 Q All right. Fair statement of what's happening. Now, in
6 reference --

7 MS. MACHNICH: Well, strike that.

8 BY MS. MACHNICH:

9 Q At some point, you went back and spoke to her about details
10 about the first incident of touching that she alleges that she said
11 happened to you in -- she said to you happened in August 2015?

12 A Yes.

13 Q Okay. And she told you various things, but what she never
14 mentioned was anything about her sitting on his lap?

15 A Correct.

16 Q Then she also spoke more, and you asked her more
17 questions about that second claim, which was the vaginal touching in, I
18 believe you said, the fourth week of June, correct?

19 A Yes.

20 Q Okay. And there, she said that he touched her private part
21 and inserted his finger.

22 MS. MACHNICH: Eleven.

23 MS. SUDANO: Thank you.

24 BY MS. MACHNICH:

25 Q He touched her private part and inserted his finger?

1 A Yes.

2 Q Okay. Were you aware that police officers prompted her
3 about inserting his finger in her private part?

4 A No, I wasn't aware.

5 Q Okay. Let me see. You asked her where he put his finger
6 and she said she didn't know?

7 A I believe at some point during that incident, she stated that
8 she felt it in the part where the period came out of.

9 Q Okay.

10 A That's how she described it.

11 Q All right. That's fair. She also said that she told you Gustavo
12 grabbed her by the hair?

13 MS. MACHNICH: Page 10.

14 THE WITNESS: There was mention of hair, but --

15 MS. MACHNICH: Okay.

16 THE WITNESS: -- I don't remember which incident.

17 BY MS. MACHNICH:

18 Q So you're saying you don't remember if the pulling of the
19 hair was the August or the vaginal finger insertion --

20 A I believe it was the one in June, but I don't remember in what
21 order it happened during the incident, other than what she described
22 happened.

23 Q That's totally fair. So at some point during the incident, the
24 last week of June involving her alleged insertion of a finger in her
25 vagina, she said he pulled her hair?

1 A Yes.

2 Q Okay, perfect. She also said that he grabbed her by force?

3 A Yes.

4 MS. MACHNICH: Thirteen.

5 BY MS. MACHNICH:

6 Q And that he threw her on the bed?

7 MS. MACHNICH: Fourteen.

8 THE WITNESS: Yes.

9 MS. MACHNICH: Okay.

10 BY MS. MACHNICH:

11 Q And up to that point when she volunteered all of this
12 information in response to your questioning, she had never claimed that
13 Gustavo used his mouth?

14 A She said he kissed me with his lips and he also used his
15 tongue.

16 Q Okay. And in that, she was describing that it wasn't a kiss on
17 her mouth? That was a kiss on her vagina?

18 A Yes, that's what I understood.

19 Q Okay. My question is actually, up to the point where she's
20 describing the finger insertion and the force that we've just discussed,
21 she never said, up to that point, that Gustavo had used his mouth,
22 correct?

23 A I don't remember the order of it, ma'am.

24 Q Okay. So you don't remember specifically asking what part
25 of his body, besides his fingers, touched your body?

1 MS. MACHNICH: Seventeen.

2 BY MS. MACHNICH:

3 Q You don't remember asking her that?

4 A Yes, I do.

5 Q Okay. So at some point, you asked her that?

6 A Yes.

7 Q And prior to that, she had never mentioned anything beyond
8 the force and the finger?

9 A Correct.

10 Q Okay, but after you said that, she answered, oh, his mouth,
11 he began kissing -- I think she said, "my part" and I'm para-phrasing, her
12 part.

13 A Correct.

14 MS. MACHNICH: Okay, seventeen. Court's brief indulgence.

15 BY MS. MACHNICH:

16 Q You spoke also about a February conversation, correct?

17 A Yes.

18 Q And the only February conversation you spoke about took
19 place, according to Meily, within a day or two of the birth of her brother?

20 A Yes, either while mom was in the hospital with the baby or in
21 that timeframe.

22 Q Okay. And that conversation took place in the apartment
23 they were living in?

24 A I don't remember where that conversation started.

25 MS. MACHNICH: Court's brief indulgence.

1 BY MS. MACHNICH:

2 Q Okay. So it's your testimony today that you don't recall
3 where she said that conversation happened, correct?

4 A I don't recall.

5 Q Okay. You recall, obviously, interviewing her on July 12th,
6 2016?

7 A Yes.

8 Q Okay. And you obviously are aware that it was being
9 recorded?

10 A Yes.

11 Q Okay. And at that time, you asked the following questions
12 and were given the following answers. Question, okay --

13 MS. DIGIACOMO: Page, counsel?

14 MS. MACHNICH: Page 27.

15 BY MS. MACHNICH:

16 Q And this is in reference to the February conversation.

17 "Q Okay. And where did this happen?

18 "A In the apartment where we lived before.

19 "Q In the apartment where you lived before?

20 "A Before we moved to this house?

21 And then you go on to talk about how it occurred face to face and
22 her mother coming home?

23 A Yes.

24 Q Correct?

25 A Yes.

1 Q Okay, thank you.

2 MS. MACHNICH: Court's brief indulgence. Thank you,
3 ma'am, I appreciate it.

4 THE WITNESS: Thank you.

5 MS. MACHNICH: Thank you, Your Honor.

6 THE COURT: Thank you. Redirect?

7 MS. SUDANO: Yes, Your Honor. Thank you.

8 REDIRECT EXAMINATION

9 BY MS. SUDANO:

10 Q So ma'am, you were asked a question earlier about whether
11 the purpose of your interviews is to prosecute people; do you recall that?

12 A Yes.

13 Q Okay. What is the purpose of your interviews?

14 A The purpose of my interviews is to gather factual information
15 regarding what may or may have not occurred.

16 Q Okay. So you don't do any investigation or follow-up beyond
17 your interviews?

18 A No. My job is to be the neutral entity.

19 Q Okay. So whatever may happen with a case or a child or
20 party after your interview outside your purview?

21 A Correct.

22 Q Okay. You were also asked some questions about children
23 sometimes getting dates or orders of events wrong; do you recall those
24 questions?

25 A Yes.

1 Q Okay. You were asked a question about that being
2 something that takes place after years of abuse, I think is the way it was
3 phrased to you; do you recall being asked that?

4 A Yes, I think so.

5 Q You were also then asked whether you would expect a pre-
6 teenager to be able to tell you what happened yesterday?

7 A Yes.

8 Q Okay. And you indicated that yeah, you would expect
9 somebody that's a pre-teen to be able to accurately tell you about
10 yesterday?

11 A Yes.

12 Q Okay. But as you kind of get further back in time, do you
13 have that same expectation?

14 A No, I don't.

15 Q Okay. And we're talking about months or years after
16 something has happened. Do you still expect that person to be able to
17 tell you dates and orders correctly?

18 A No.

19 Q Okay. All right. And then you were asked some questions
20 about the recorded interview that you did with Meily Moran on July 12th.
21 And you were asked a question about whether Meily told you that
22 something happened every single week or month; is that right?

23 A Yes.

24 Q Okay. And was that part of a longer answer in response to
25 your open-ended question to kind of tell me everything about the abuse?

1 A Yes.

2 Q Okay. So the entirety of Meily's answer was not actually just
3 that portion, right?

4 A Correct.

5 Q Okay. She actually told you, well it started last year --

6 MS. MACHNICH: At this point, Your Honor, this is leading.

7 MS. SUDANO: And --

8 THE COURT: Overruled.

9 BY MS. SUDANO:

10 Q So she told you,

11 "Well, it started last year and my guess, it was a Sunday and mom
12 went to work that day. He started to touch me, and he asked me if he
13 liked -- if I like him to touch, and I said no, and he told me that if I told my
14 mom, he was going to kill her and me and my brother, so I didn't told
15 her until today, and this keep happening like every single week or month.
16 And when my mom went to have my other baby brother, the next thing,
17 he left my brother home and he told me to buy like the baby seat."

18 A Yes.

19 Q And then was that --

20 A Yes.

21 Q Okay. That was the entirety of that answer. And then you
22 didn't really ask a question. You just sort of said Uh-huh or something
23 along those lines, and she continued --

24 A Yes.

25 Q -- to talk; is that correct?

1 A Yes.

2 Q All right. And then did she say, "And then he told me that if I
3 didn't have relations with him, he was going to take my brothers away,
4 and he was going to kill me and my mom and my brother, and so I don't
5 remember which day, but he left my brother at work because he usually
6 takes him to work. He left him at a person's house and then he came
7 back for my baby brother because he usually doesn't stay at home. He
8 wants to be with him all day, so he came for him, and he touched me in
9 my private parts.

10 And he told me that if I told someone or the police, he was going
11 to kill me and he was going to kill my mom's family, and he told me and
12 he told me so when that happened yesterday at the -- we were going to
13 wash the cars and he grabbed me and told me that my time was over,
14 and that he didn't wanted me anymore in the house because I didn't
15 work. He told me that my mom work. That he -- that my brother
16 worked, but I didn't do anything, so I told him that I couldn't work
17 because I'm not old enough, and then he also wanted to -- he doesn't
18 want me -- to take me to work, so he was going to pull me out of the
19 house, but my brother came in and he grabbed me with force, and he
20 kissed me on my mouth, and I tried to pull back, but he told me, if I
21 didn't, he was going to kill me right there, so I did it.

22 I had to do everything that he wanted me to do because he told
23 that I was more than his woman and I didn't know what that meant. And
24 the thing he told me that he didn't want me near my brother, he told me
25 that if I was near him, he was going to --". And then at that point, she

1 said that she didn't understand, or she didn't know how to say
2 something in English, and she continued on from there; is that correct?

3 A Yes.

4 Q Okay. Or I'm sorry, she didn't know how to say something in
5 Spanish, or nope, that was right the first time.

6 A Uh-huh.

7 Q She didn't know how to say it in English?

8 A Yes.

9 Q Okay. Would it be fair to say that up until that point in the
10 interview, she was still speaking in English?

11 A Yes.

12 Q And then shortly thereafter is when she switched into
13 speaking in Spanish with you?

14 A Yes.

15 Q All right.

16 MS. SUDANO: Thank you, Your Honor. Nothing further.

17 THE COURT: Recross?

18 MS. MACHNICH: Nothing, Your Honor. Thank you.

19 THE COURT: Questions from the jury? Oh, I do have one.
20 We have a couple.

21 [Sidebar begins at 5:13 p.m.]

22 THE COURT: Is it just the one? I thought there was more.
23 Just one? Oh, okay.

24 MS. MACHNICH: No objection from the Defense.

25 THE COURT: State? No objection?

1 MS. SUDANO: No objection.
2 THE COURT: All right. That's all we got.
3 MS. MACHNICH: Okay.
4 THE COURT: I thought there was more.
5 [Sidebar ends at 5:14 p.m.]
6 THE COURT: So once again, I'm just reading it. Did Meily,
7 daughter, Moran say that she was touched underneath her underwear or
8 was she touched above her underwear?
9 THE WITNESS: You want me to answer, Your Honor?
10 THE COURT: Yeah.
11 THE WITNESS: She stated it was under the underwear both
12 instances.
13 THE COURT: Follow-up from the State?
14 MS. SUDANO: Court's indulgence, Your Honor. Never mind.
15 Thank you, Your Honor. I apologize.
16 THE COURT: From the Defense? You said no, right?
17 MS. SUDANO: I did. I'm sorry.
18 THE COURT: Yeah. State? Defense?
19 MS. MACHNICH: Nothing further.
20 THE COURT: Okay, thank you.
21 MS. MACHNICH: Thank you.
22 THE COURT: You may step down.
23 THE WITNESS: Thank you.
24 THE COURT: Thank you.
25 Counsel, approach.

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[Sidebar begins at 5:15 p.m.]

THE COURT: That was your last witness, right?

MS. DIGIACOMO: For today, yes.

THE COURT: Oh. All right. So okay. 9:00?

MS. DIGIACOMO: Okay.

THE COURT: All right.

MS. DIGIACOMO: Thank you.

MS. MACHNICH: Thank you.

MR. SPEED: Thank you.

[Sidebar ends at 5:16 p.m.]

THE COURT: All right. We're going to start at 9 a.m. tomorrow. During this recess, you're admonished. Do not talk or converse amongst yourselves or with anyone else on any subject connected with this trial, or read, watch or listen to any report of or commentary on the trial, or any person connected with this trial by any medium of information, including without limitation, newspapers, television, radio, or internet. Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

We'll see you at 9 a.m.

THE MARSHAL: Please grab all your personal items. Make sure you've got your keys, your purse, your wallet, and leave your notebooks and pens.

[Jury out at 5:16 p.m.]

[Outside the presence of the jury]

THE COURT: All right. We're outside the presence. Is there

1 anything in the morning we need to -- nope? Okay.

2 MS. DIGIACOMO: I don't think so, Your Honor.

3 MS. SUDANO: Not that we anticipate.

4 MS. DIGIACOMO: Not until we get to instructions.

5 THE COURT: Are we going to have time to do that tomorrow
6 afternoon or evening or whatever?

7 MS. MACHNICH: Yes.

8 THE COURT: Are you assuming you're closing Friday?

9 MR. SPEED: Yes.

10 THE COURT: Okay.

11 MR. SPEED: I think we're hopeful.

12 MS. MACHNICH: Friday morning.

13 MR. SPEED: Like I said, yeah.

14 THE COURT: Well, are you -- I don't know what witnesses,
15 whatever. Okay. All right.

16 [Proceedings concluded at 5:18 p.m.]

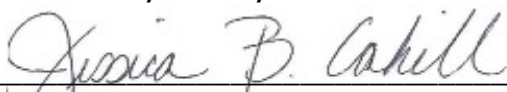
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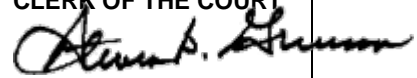
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

23 

24 Maukele Transcribers, LLC

25 Jessica B. Cahill, Transcriber, CER/CET-708



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 STATE OF NEVADA,
9 Plaintiff,

10 vs.

11 GUSTAVO ADONAY GUNERA-
12 PASTRANA,
13 Defendant.

)
) CASE#: C-16-318461-1
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) DEPT. XXVIII
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)

14 BEFORE THE HONORABLE RONALD J. ISRAEL
15 DISTRICT COURT JUDGE
16 THURSDAY, JUNE 13, 2019

17 **RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 8**

18 APPEARANCES:

19 For the Plaintiff:

SANDRA DIGIACOMO, ESQ.
MICHELLE SUDANO, ESQ.

20 For the Defendant:

21 KEVIN SPEED, ESQ.
22 TEGAN MACHNICH, ESQ.

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25 RECORDED BY: JUDY CHAPPELL, COURT RECORDER

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None

<u>FOR THE DEFENDANT</u>	<u>MARKED</u>	<u>RECEIVED</u>
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None

1 Las Vegas, Nevada, June 13, 2019

2
3 [Case called at 9:20 a.m.]

4 THE COURT: Okay.

5 THE CLERK: Case number C-318461, State of Nevada v.
6 Gustavo Gunera-Pastrana.

7 THE COURT: Anything outside the presence?

8 MS. DIGIACOMO: Your Honor, no. Just I provided the Court
9 and Defense counsel with their -- it's the instructions they object to with
10 the cases behind it. There's one that they asked me about and I'm still
11 looking for more on that, but I just -- I gave each side a copy and I tried to
12 highlight the language in the case.

13 MS. MACHNICH: And Your Honor, we can confirm we did
14 receive that, and thank the State.

15 THE COURT: Okay. Is this the agreed upon?

16 MS. DIGIACOMO: No, so I --

17 THE COURT: No, no. I mean, sorry, I got that. Yes, I got
18 that. There's also another packet.

19 MS. DIGIACOMO: that is all of the State's proposed
20 instructions. The ones they object to are also included in there, and then
21 the one that we have in there regarding the general intent, they object to.
22 We have proffered a second one, which you have in the pack or the stack
23 of the ones they object to.

24 THE COURT: All right. We'll deal with this. Has the Defense
25 offered any yet?

1 MS. MACHNICH: We have prepared some, Your Honor, but
2 we have not offered any because the State has still not closed evidence
3 in their case and chief.

4 THE COURT: All right.

5 MS. MACHNICH: But we would be prepared to send those
6 within maybe a 15 minute time period back at our office, give or take.
7 Obviously, we want to reassess --

8 THE COURT: Okay.

9 MS. MACHNICH: -- based on what we see this morning.

10 THE COURT: Right. Okay.

11 MS. SUDANO: And obviously, Your Honor, the State would
12 then need time to look at their instructions and the law that goes along
13 with that.

14 THE COURT: Of course. Okay. Other than that, are we ready
15 to go this morning?

16 MS. MACHNICH: Yes, Your Honor.

17 MS. SUDANO: We're ready.

18 THE COURT: Okay.

19 [Pause]

20 THE MARSHAL: Please rise for the jury.

21 [Jury in at 9:24 a.m.]

22 [Inside the presence of the jury]

23 THE MARSHAL: All present, Judge.

24 THE COURT: Please be seated. Good morning, ladies and
25 gentlemen.

1 JURORS: Good morning, Your Honor.

2 THE COURT: So as of this minute, we're going to be starting
3 at 9, right? Unless there's -- we'll notify you as the day goes along.

4 Tomorrow, starting at 9. And as of this minute, we're on track, but you
5 know, these are fluid, as you've seen, and it's part of what trial is about.

6 Okay. The parties acknowledge presence of the jury?

7 MS. SUDANO: Yes, Your Honor.

8 MR. SPEED: Yes, Your Honor.

9 MS. MACHNICH: Yes, Your Honor.

10 THE COURT: Okay. State, call your next witness.

11 MS. DIGIACOMO: Thank you. The State calls Denise Huth.

12 THE MARSHAL: Watch your step. Remain standing. Face
13 the Clerk of the Court.

14 DENISE HUTH, STATE'S WITNESS, SWORN

15 THE CLERK: Please be seated. Please state your name and
16 spell it for the record.

17 THE WITNESS: It's Detective Denise, D-E-N-I-S-E, Huth,
18 H-U-T-H.

19 THE CLERK: Thank you.

20 MS. DIGIACOMO: May I, Your Honor?

21 THE COURT: Go ahead.

22 MS. DIGIACOMO: Thank you. Court's indulgence. I tangled
23 this.

24 DIRECT EXAMINATION

25 BY MS. DIGIACOMO:

1 Q Okay. Ms. Huth, how are you employed?

2 A Employed as a detective with the Las Vegas Metropolitan
3 Police Department.

4 Q And how long have you been with Metro?

5 A Since January 2005.

6 Q So approximately 14 years?

7 A Correct.

8 Q And what is your current assignment?

9 A With the sex abuse juvenile unit.

10 Q So you're a detective?

11 A Yes, I am.

12 Q All right. And how long have you been with that unit?

13 A Since December 2015.

14 Q Can you explain to the jury just your background and your
15 training and your education?

16 A Prior to -- as a detective with the Las Vegas Metropolitan
17 Police Department, I've been a robbery detective, a property crimes
18 detective. Prior to working for Las Vegas Metropolitan Police
19 Department, I was a parole and probation officer for the State of Nevada.
20 For approximately seven years, I worked as a -- with the State Division of
21 Child and Felony Services.

22 For approximately three years, I was a counselor with
23 Intermountain Specialized, which is called now, Abuse Treatment Center.
24 I worked with -- I provided counseling for sex offenders and adults
25 molested as children. Those are some of the previous employments.

1 Q All right. Now, you said you're currently assigned to the
2 sexual assault unit juvenile detail?

3 A That's correct.

4 Q Okay, and what does that mean?

5 A Basically, we -- any calls that come in regarding children who
6 have been sexually abused, at the time in 2016, it was under nine in the
7 home, and nine to 18 outside the home.

8 Q Okay. As you've been on this unit for four years or so, where
9 is your office located?

10 A It's on 701 North Pecos, Las Vegas, Nevada. It's in building
11 K. It's on Pecos and Bonanza.

12 Q Is that where the rest of the detectives for the Las Vegas
13 Metropolitan Police Department are housed?

14 A The sex assault juvenile detectives; yes.

15 Q Okay. So I'm sorry, so where you're located, are all
16 detectives in Metro located there?

17 A No.

18 Q Just your unit?

19 A Correct.

20 Q And what's the purpose of having the juvenile unit located at
21 that location?

22 A It's a treatment center for children, so some of the detectives
23 specifically assigned to that unit are there, as well as forensic
24 interviewers, medical. It's a one-stop, if you will, for children, so they
25 don't have to go to several places.

1 Q All right. So are you housed at this other Nevada Children's
2 Advocacy Center?

3 A Yes.

4 Q Now, on July 12th, 2016, do you recall getting a phone call
5 from a patrol officer regarding a call that they were on?

6 A Yes, I did.

7 Q Was that an Officer Kravetz?

8 A Yes.

9 Q I guess what did you instruct him to do? Like did you go out
10 to the scene or did something else happen?

11 A No. I instructed him to bring the victim and her mother to
12 the SN -- Southern Nevada Children's Assessment Center.

13 Q Did the victim and mom come to the center?

14 A Yes, they did.

15 Q Okay. And what was the victim in this case's name?

16 A Her name is Meily Moran.

17 Q And what is mom's name?

18 A Same spelling of Meily, with I believe it's an I, and her last
19 name is Ortiz, Casillas Ortiz.

20 Q Did -- well, I guess, were interviews conducted that day with
21 Meily and her mother?

22 A Correct.

23 Q Were there any other interviews conducted that day?

24 A Their brother, Meily's brother, Jose Moran, was interviewed,
25 and Gustavo Gunera, was interviewed.

1 Q Okay. Now, when you brought them down there, who
2 conducted the interviews of Meily and Jose?

3 A That would be forensic interview specialist, Elizabeth
4 Espinoza.

5 Q And why didn't you conduct the interview for the kids?

6 A We -- since they're specialists and they're trained specifically
7 for that and they do that, that's one of their jobs that they -- their only
8 job, and we like to have an unbiased person interviewing the child. So
9 that's why we have the specialist interview them.

10 Q All right. Are you present when the interviews are done, or
11 do you listen or watch?

12 A I'm in the same building, and in this case, I was only able to
13 listen to their audio as they were conducting the interview.

14 Q All right. Now, were the interviews conducted in English or
15 Spanish?

16 A Spanish.

17 Q Do you speak Spanish?

18 A Not fluently; no.

19 Q Okay. So did you have somebody interpreting for you?

20 A Yes, I did.

21 Q After the kids were interviewed, did you interview the
22 mother?

23 A Yes.

24 Q Now, why do you interview the adult, whereas forensic
25 examiner, or interviewer, does the kids?

1 A Well, the forensic interview specialist, because we don't want
2 the children -- we don't ask leading questions. It's a structured interview,
3 and again, we want someone who is unbiased. They're not employees
4 of the department, to conduct that interview. As far as adults, they're not
5 easily swayed if they're adults, so we conduct those interviews.

6 Q All right. So it's fair to say this becomes your case?

7 A Right. I was assigned it. I was the case agent; yes.

8 Q All right. Now, the interviews that were done with the kids
9 and mom, those were either video or audio recorded?

10 A Yes.

11 Q What did you do with those recordings?

12 A They were impounded into our evidence vault.

13 Q And with regard to whether or not the child is going to have
14 a physical exam, how is that decided?

15 A The -- it's -- we work together with CPS, so being as I was
16 doing the arrest and the suspect interview, we kind of -- if CPS is
17 involved, sometimes, they will go ahead and fill out the reports and the
18 forms for the medical exam.

19 Q Okay. And was there a CPS worker also participating in this
20 case or watching the interviews?

21 A That's correct. It was CPS specialist, Tiffany Keith.

22 Q Okay. Now, the exam in this case, the medical exam that
23 was done on Meily, was done November 14th, 2016. Do you recall who
24 is the one that made that referral?

25 A That was CPS Specialist Keith.

1 Q Do you ever, I guess, take part in the decision whether or not
2 a medical exam is going to be scheduled right way or versus down the
3 road?

4 A I would do that; yes. If I had thought -- I didn't realize that it
5 hadn't been done for whatever reason, I usually would -- I also have
6 filled out the list forms to request medical; yes.

7 MS. DIGIACOMO: I have nothing further.

8 THE COURT: Cross?

9 CROSS-EXAMINATION

10 BY MR. SPEED:

11 Q Detective, you just testified that you received a call from
12 Officer Kravetz after he responded to space 254 in the Miracle Mile
13 Mobile Home Park in relation to what had been alleged against Mr.
14 Gunera-Pastrana; isn't that right?

15 A That's correct.

16 Q And after receiving that call, you're the, I believe you said,
17 sexual abuse juvenile unit detective, you became the lead detective in
18 that investigation, yes?

19 A That's correct.

20 Q Now, in the course of that call, Officer Kravetz will relay to
21 you basic information about what he's learned after he responds to the
22 scene; isn't that right?

23 A Yes.

24 Q And in this case, Officer Kravetz did that, didn't he?

25 A Yes.

1 Q He informed you that there were four juveniles living in the
2 trailer park, in the mobile home, yes? Two pubescent age, around 12,
3 13, and two infants, yes?

4 A I recall -- I don't recall exactly that, what he said to me, but I
5 recall -- I recall that he was telling me about the Meily and her mother.

6 Q He did tell you that there were a number of children living in
7 the house, yes?

8 A I don't remember that; no.

9 Q You don't remember that. And that the oldest girl is making
10 an allegation of sexual abuse against the stepfather, yes?

11 A Yes, he told me that; yes.

12 Q Okay. Now, in relaying that information to the lead detective
13 on the case, it's Officer Kravetz' duty to make sure that you have as much
14 information as he can gather for you so that you can make the correct
15 decisions moving forward, yes?

16 A That's correct.

17 Q Okay. One of those includes deciding whether to send the
18 alleged victim to the Children's Advocacy Center or to the emergency
19 room for examination, right?

20 A He would call me, and I would make that decision --

21 Q You would make that decision?

22 A -- whether they would go to the emergency or not.

23 Q What goes into that decision-making process?

24 A Well, it would depend, because we have -- at the time, and I
25 don't know if they were there that day, but we have medical on scene at

1 Southern Nevada Children's Health -- Children's Assessment Center. So
2 I would have to look back at the records to make sure they were that day
3 because if they were there that day, they wouldn't go to the emergency
4 center at all. They would come to our office.

5 Q If who was there that day?

6 A Our --

7 Q The medical unit?

8 A Our medical providers; yes.

9 Q I see. Isn't one of the factors that goes into the decision-
10 making process about whether to send an alleged victim child to the
11 advocacy center or to the emergency room, the fact of when the abuse
12 occurred?

13 A That's correct. One of the factors; yes.

14 Q And those factors help you determine whether you're dealing
15 with an acute case or a non-emergency case; isn't that right?

16 A Well, let me clarify, too.

17 Q Well --

18 A Do --

19 Q -- answer the question first for me, Detective.

20 A If it's an acute --

21 Q Those factors go into your decision as to whether a case is
22 an acute case or a non-emergency case; isn't that right?

23 A Yes, that would be correct.

24 Q An acute case is a case where the alleged abuse is set to
25 have occurred within 24 to 48 hours; isn't that right?

1 A At the time, it was three days.

2 Q An acute case is three days. So 72 hours? Within --

3 A Correct.

4 Q -- 72 hours?

5 A Uh-huh.

6 Q And you did receive, in Officer Kravetz' report, information
7 on when he thought the abuse last occurred, right?

8 A Yes.

9 Q Because that's why the decision was to send Meily, her
10 mother, and her brother, to the Children's Advocacy Center instead of
11 the emergency room; isn't that right?

12 A Like I said, I have to clarify that they would come -- we
13 usually have them always come to the Southern Nevada Children's
14 Assessment Center because we don't want them to go to the emergency
15 room because they have the interview.

16 Q Oh, I see.

17 A Because otherwise, they're touched, and we don't want that.

18 Q So otherwise, they're touched, and you don't want that. So --

19 A As a medical procedure.

20 Q I understand. So up until this point, if I understood that the
21 reason a child victim was sent to the emergency room instead of the
22 Children's Advocacy Center was because the abuse was alleged to have
23 occurred within 48 or 72 hours, I'd be mistaken, right?

24 A If the abuse happened within three days, they would see the
25 medical after they had the interview.

1 Q But not go to the emergency room?

2 A If we had the health medical on-site on Southern -- at the
3 Southern Nevada Children's Assessment Center, they would see that
4 person there, at the center.

5 Q And as you testified here today, you don't know whether the
6 medical unit was at the Southern Nevada Children's Assessment Center
7 on July 12th or not, do you?

8 A I don't recall that right now; no.

9 Q You also just testified, Detective, that you didn't realize that a
10 sexual assault nurse examination hadn't been performed in this case;
11 isn't that right?

12 A That's correct.

13 Q Because if you had known that a SANE exam had not been
14 performed, you would've ordered one sooner than November 14th,
15 2016; isn't that correct?

16 A That's correct; yes.

17 Q In getting his report to you -- one other question. Maybe a
18 couple. In getting his report to you, Officer Kravetz is instructed -- well,
19 let me back up a little bit. Do you know Officer Kravetz?

20 A No, just from --

21 Q Professionally?

22 A -- when he called me.

23 Q Professionally, you know him?

24 A Just on that day; yes.

25 Q Did you know in 2016 whether he was still in field training or

1 not, or you don't know that?

2 A No, I do not.

3 Q As part of his report to you, you became the chief detective
4 eventually, yes?

5 A That's correct.

6 Q And part of his report to you, he would have to, at least give
7 you enough information, to help you make the determination about
8 whether to send to the emergency room or to the CAC where there
9 might be medical attention there, but also, isn't one of the things that
10 you expect in his report information about whether evidence can be
11 collected from the scene?

12 A If he's given me that report; yes.

13 Q And you would expect him to include that information?

14 A Yes.

15 Q Who would make the decision to send crime scene analyst to
16 the scene of the alleged incident? That would be you; isn't that right?

17 A That's right. If there was evidence at the scene.

18 Q I'm sorry?

19 A If there was evidence at the scene; yes.

20 Q If there was evidence at the scene, the chief detective would
21 make the decision to have crime scene analysts dispatched there, yes?

22 A Correct.

23 Q And you didn't have crime scene analysts dispatched to that
24 scene, right?

25 A No.

1 MR. SPEED: Nothing further, Your Honor. Thank you.

2 THE COURT: Redirect?

3 MS. DIGIACOMO: Thank you, Your Honor.

4 REDIRECT EXAMINATION

5 BY MS. DIGIACOMO:

6 Q Okay. Counsel was asking you about whether or not you
7 know the officer that called you that day in July of 2106?

8 A That's correct.

9 Q Other than the time he called you on that day, did you ever
10 have any other contact with him?

11 A No.

12 Q And Defense counsel was asking you about how when he
13 turned the case over to you, so you had a report?

14 A Correct.

15 Q Did you have a written report from Officer Kravetz when the
16 kids got to the -- or and mom came to the CAC that day?

17 A No.

18 Q Okay. If he wrote a report in this case, that would've been
19 done and filed independent of what you were doing at the CAC?

20 A Correct.

21 Q So the only information you had was what he verbally
22 reported to you over the phone?

23 A Right, and if he -- and when he came to the SNCAC, if -- we
24 would've had a briefing.

25 Q Okay, so --

1 A If he was the one that transported him; yes.

2 Q Okay. So he came down to the CAC with mom and kids?

3 A Uh-huh.

4 Q And you had a conversation with him before the interviews
5 began?

6 A That's our general procedure, is we take them back in the
7 office and get a briefing.

8 Q Okay. And during that briefing, he's just telling you what he
9 found out?

10 A Correct.

11 Q Okay. And then you hear the interviews of the kids and talk
12 to mom, and then find out some more?

13 A Yes.

14 Q All right. Do you have any information that there was
15 possible evidence at the scene that needed to be collected or CSA's,
16 crime scene analysts, needing to go out to the house?

17 A No, I did not.

18 Q All right. If you had gotten that information, would you have
19 done something about that?

20 A Yes.

21 Q Okay. Now, is it typical in cases involving child victims that
22 you deal with, you -- is it typical that you wouldn't normally go send a CS
23 or go to the house or where the crime occurred?

24 MR. SPEED: Objection, Your Honor. That calls for
25 speculation.

1 MS. DIGIACOMO: Well, it's based upon her training and
2 experience, Your Honor.

3 MR. SPEED: May we approach?

4 THE COURT: Overruled. Okay.

5 [Sidebar begins at 9:45 a.m.]

6 MR. SPEED: She's a police detective and they are allowed to
7 testify about the modus operandi of crime, but they can't render expert
8 opinions in these cases. So for the State to ask her if something is
9 typical, that would call for her to speculate, and as she sits there, she is a
10 lay witness.

11 MS. DIGIACOMO: I can rephrase it, based on your training
12 and experience. He's the one that asked these questions about sending
13 CSA's and doing further investigation.

14 THE COURT: Well, yeah, and this is just based upon her
15 experience. I think the question was, is it standard to send somebody
16 out, which is more or less what you were asking, am I wrong?

17 MS. DIGIACOMO: Right, and then I took the -- I was trying to
18 take it a step further saying, in these types of cases, would that be -- I
19 said typical, but I can rephrase it.

20 THE COURT: All right.

21 MS. DIGIACOMO: Based upon your training and experience,
22 is that normal that you don't go to the scene?

23 THE COURT: I'm going to overrule it.

24 [Sidebar ends at 9:46 a.m.]

25 THE COURT: Overruled.

1 MS. DIGIACOMO: Thank you, Your Honor. Do you
2 remember my question?

3 THE COURT: If you remember it; yeah.

4 THE WITNESS: It would be a case by case basis, basically. If
5 there was evidence there, I mean -- I can't say typically or not. If I'm told
6 there's evidence there, we go do search warrants and retrieve the
7 evidence, but if there's no evidence there, we don't call out CSI.

8 BY MS. DIGIACOMO:

9 Q All right. And in this case, there was no evidence to go to the
10 trailer and to try and collect or photograph?

11 A That's correct.

12 Q Okay. When the victim was interviewed -- well, no, let me
13 back up a little bit. You were talking about acute versus non-emergency
14 cases.

15 A Correct.

16 Q All right. If a case is considered acute, you said that the last
17 act occurs within 72 hours, then -- if I have this correct, if the medical
18 people are not on site at the CAC, after the interviews, they would then
19 be sent to Sunrise?

20 A That's correct.

21 Q Okay. So Sunrise was the backup when medical was not at
22 the CAC?

23 A Yes.

24 Q What would be considered something that was acute that
25 would require a child to go to Sunrise after being interviewed? What

1 type of, I guess, allegations would send a child from the interview to
2 Sunrise or to a medical exam?

3 A Penetration would be one of the criteria on that. Any like
4 fondling, breasts, that type of thing. Anything that you can get a DNA off
5 the body.

6 Q All right. What about if the allegation was a kiss on the lips?

7 A At the time that -- as far as it was a day before that she was
8 alleging that it occurred, you -- at the time, it wasn't -- because of
9 cleaning, bathing, brushing teeth, eating, and things like that, it wasn't
10 deemed that that would be something that we could get DNA off of.

11 Q Okay.

12 MS. DIGIACOMO: Nothing further, Your Honor.

13 THE COURT: Recross?

14 RECROSS-EXAMINATION

15 BY MR. SPEED:

16 Q So you received a verbal report and a briefing, yes?

17 A The typical thing --

18 Q From Officer Kravetz?

19 A The typical thing is for them to come to our office, and then
20 we take them in and do a briefing.

21 Q Okay. How long was your briefing with Officer Kravetz?

22 A I don't recall how long it would've been.

23 Q You don't remember?

24 A Right. I know generally, we bring them in when they arrive,
25 and then I get what happened at the scene.

1 Q Okay. And your expectation is for him to be thorough in his
2 briefing; isn't that right?

3 A I expect him to give me the information that he had there at
4 the scene; yes.

5 Q You expect him to give you the information that he had at
6 the scene, yes?

7 A Correct.

8 Q Okay. If he had given you information about penetration,
9 digital penetration, that occurred within 24 hours, what would your
10 direction have been?

11 A If there was penetration on -- within 24 hours, then we
12 would've done the interview, and then done the medical exam.

13 Q The medical exam?

14 A Correct.

15 Q And what about an allegation of oral sex within 24 hours?

16 A Then it would still be the same thing.

17 Q It would still be the same thing?

18 A Right. We --

19 Q But because the report included only an allegation of kissing,
20 that's why you made the decisions that you made; isn't that right?

21 A That's correct.

22 MR. SPEED: Nothing further, Your Honor. Thank you.

23 THE COURT: Questions from the jury? Just the one. Okay.
24 Sorry, Steve. You've got another.

25 [Sidebar begins at 9:50 a.m.]

1 MR. SPEED: Can't ask that one.

2 MS. DIGIACOMO: Yeah, I saw it.

3 MS. MACHNICH: I'm fine with that question.

4 MR. SPEED: Yeah, you can ask it. Yeah.

5 THE COURT: If she knows? Okay. Defense, okay?

6 MR. SPEED: Yes, sir. That's fine.

7 THE COURT: Okay. State said okay. All right.

8 MR. SPEED: Okay.

9 THE COURT: That's all we have.

10 [Sidebar ends at 9:51 a.m.]

11 THE COURT: Detective, what percentage of cases typically
12 have crime scene investigations?

13 THE WITNESS: I'm not privy to that information, that's all
14 our sergeants, and they do the stats on that. I -- I just -- I'm assigned a
15 specific amount of cases, and other detectives get a large of amount of
16 cases. So as far as the percentage of cases that have crime scenes at
17 them, I'm not -- I don't have that information.

18 THE COURT: Follow-up from the State?

19 FURTHER REDIRECT EXAMINATION

20 BY MS. DIGIACOMO:

21 Q Well, how about with your cases, with the juvenile sex
22 victims? How often have you gone out to the scene, or called out the
23 crime scene analyst?

24 A Like I said, I can't give you a percentage. It just depends on if
25 -- what's going on at the scene, if there's evidence there. I mean, over

1 the last like since 2015 since I've been there, it's -- it's hard to give a
2 specific time. We'll go out there quite a bit to talk with the children or
3 bring the children if there's -- if there's evidence there. Usually if there is
4 we'll freeze the place, freeze the house, the residence and then go out
5 there. But as far as a specific one, it's a case-by-case basis. So --

6 Q Is it -- I guess so it wouldn't -- it's not uncommon that, in
7 these type of cases, that there may not be evidence?

8 A Correct. We've had -- I mean, we've -- you know, it's -- a lot
9 of the -- some of the cases we get are not immediate, some of them are
10 from years ago, so there's no evidence. So we take into account that
11 where some victims come up, and now they're 16, 17, 18 and it occurred
12 when they were 9 or 10. So we don't have evidence at a scene or
13 anything.

14 So we take -- you have to take into consideration those cases,
15 because we get those cases too. So that's quite a number. Some of
16 them happened in other states, so -- or they call us to say it happened
17 years ago. A lot of our cases aren't -- there's -- you know, the immediate
18 ones are, you know, there may or may not be evidence there, but then
19 some of them that are older, there is no evidence, so it's a combination
20 of all the different types of cases like that.

21 THE COURT: Follow-up from the Defense?

22 FURTHER RECROSS-EXAMINATION

23 BY MR. SPEED:

24 Q Detective, in this case if you'd received information that there
25 could have possibly been DNA evidence from both the complainant and

1 the suspect on a t-shirt or a tissue that was still in the place where the
2 alleged abuse occurred, you would have sent a crime scene analyst to
3 the scene, wouldn't you?

4 A That's correct.

5 MR. SPEED: Nothing further.

6 THE COURT: Thank you. You may step down.

7 MS. DIGIACOMO: Your Honor, may I approach, the clerk?

8 THE COURT: Yes.

9 MS. DIGIACOMO: The Court's indulgence.

10 [Pause]

11 MS. DIGIACOMO: Your Honor, at this time, pursuant to
12 51.035, the State has Court's Exhibit 28, which is the preliminary hearing
13 testimony of Meily, who ran from the preliminary hearing in September
14 of 2016. I believe it was September 30th, 2016, that the State will -- now
15 intends to read into the record.

16 THE COURT: Defense?

17 MS. MACHNICH: Your Honor, I believe we've had
18 discussions about this.

19 THE COURT: The discussions, thank you. Go ahead.

20 MS. DIGIACOMO: Thank you, Your Honor. Question by the
21 State.

22 [Whereupon, the transcript of the preliminary hearing held on
23 September 30, 2016 was read into the record:]

24 BY THE STATE:

25 Q Good morning Meily, how old are you?

1 A Thirteen years old.

2 Q When is your birthday?

3 A December 5th, 2002.

4 Q What grade are you in?

5 A Ninth grade.

6 Q Being 13 years old and in the ninth grade do you know

7 the difference between telling the truth and telling a lie?

8 A Yes.

9 Q Do you promise everything you say here in court today is

10 only the truth?

11 A Yes.

12 Q I want to talk to you a little bit about 2015. Who were you

13 living -- who were you living about [sic] in 2015?

14 A My mom, my two brothers and my stepdad.

15 Q What is your stepdad's name?

16 A Gustavo Gunera.

17 Q How hold were you when you met Gustavo?

18 A Eleven years old.

19 Q Was there ever a point in time when Gustavo touched you in

20 any way that made you feel uncomfortable?

21 A Yes. That was in 2015.

22 Q You said that in 2015, do you remember what month?

23 A August.

24 Q August of 2015, where were you when this uncomfortable

25 touching happened?

1 A In the living room that was in the mobile -- the mobile house.
2 Q Were you living with your family in the mobile house at that
3 time?
4 A Yes.
5 Q You said in the living room?
6 A Yes.
7 Q Was this on a specific, in a specific place in the living room?
8 A That was on the couch.
9 Q Who was in the living room?
10 A Gustavo and me.
11 Q Did part of his body touch part of your body?
12 A Yes.
13 Q Which part of his body?
14 A His hands.
15 Q His hands touched which part of your body?
16 A My vagina.
17 Q Did you want him to touch you there?
18 A No.
19 Q Tell me how this stuff started?
20 A He told me he was going to check my surgery, but didn't, he
21 went further down.
22 Q You said he was going to check your surgery; had you just
23 had a medical procedure?
24 A Yes. I surgery on April 9th.
25 Q He kind of told you he was going to check something. Where

1 on your body was that surgery?

2 A Down near my belly button.

3 Q You said that's when he touched your vagina?

4 A Yes.

5 Q When he touched your vagina was that on top of your
6 clothes, or under your clothes?

7 A Under my clothes.

8 Q Was his skin touching your skin?

9 A Yes.

10 Q All right. When his hand touched you there did the hand stay
11 still, or did it move?

12 A It moved.

13 Q Can you describe the motion that it moved in?

14 A Like wiping a table.

15 Q Was his palm in a fist, was it flat, or was it something else?

16 A Flat.

17 Q You mentioned it like a wiping motion?

18 A Yes.

19 Q That mobile home that you said this happened in, was that
20 here in Clark County, Nevada?

21 A Yes.

22 Q Did he tell anything, when that happened?

23 A He told me not to tell my mom, because he was going to go
24 to jail.

25 Q Did you tell your mom this day?

1 A No.

2 Q I want to jump ahead now to June of 2016. Did something
3 happen with your stepdad in June of 2016 that made you feel
4 uncomfortable?

5 A Yes.

6 Q Was this inside your residence or outside?

7 A Inside.

8 Q Was this the same residence you just told us about, or a
9 different one?

10 A A different one.

11 Q Was it also a mobile home, or something different?

12 A Mobile home.

13 Q Mobile home, but a different one than in 2015?

14 A Yes.

15 Q Did this happen in a particular room within that mobile
16 home?

17 A The [sic] was the master room.

18 Q The master bedroom?

19 A Uh-huh.

20 Q Is that a yes?

21 A Yes.

22 Q Whose room was that or who normally slept in that room?

23 A My mom and Gustavo.

24 Q Were you in school at the time, and were --

25 A Yes.

1 Q Did your stepdad do something that made you feel
2 uncomfortable?

3 A Yes.

4 Q Which part of his -- your body touched which part of your
5 body?

6 A His mouth and hands touched my vagina.

7 Q You said his mouth and hands touched your -- your consider
8 vagina?

9 A Yes.

10 Q Where in the bedroom were you?

11 A In the bed.

12 Q At first were you sitting down, laying down, standing, or
13 something else?

14 A Sitting down.

15 Q Did the Defendant come in the room?

16 A Yes.

17 Q What did he do when he came in?

18 A He told me he had come from my little baby brother, it was a
19 lie.

20 Q Did he do anything at that point?

21 A Yes.

22 Q What did he do?

23 A He told me that I have to have relationships with him, and I
24 said, no. He told me if I didn't he was going to take my baby brothers
25 away. He was going to do something bad to my brother.

1 Q Now you told us at first you were sitting on the bed. Did you
2 ever lay on the bed?

3 A Yes.

4 Q How did that happen?

5 A He told me to lay down and I said, no. He told me to let my
6 baby brother in the bed. That's when he told me if I didn't lay down he
7 was going to do something to my brother, I had to obey him.

8 Q You laid down; is that right?

9 A Yes.

10 Q You said his hands touched your vagina?

11 A Yes.

12 Q Did it touch on the inside [sic], or inside?

13 A Inside.

14 Q Which part of his hand touched the inside?

15 A His finger.

16 Q You also said that his mouth touched your private part?

17 A Yes.

18 Q Was that against your skin or over clothes?

19 A Against my skin.

20 Q When you tried to prevent him from touching you, what did
21 you tell him?

22 A I told him I had my period.

23 Q Did you actually have your period?

24 A No.

25 Q Is that what you told him to try and make him not touch

1 you?

2 A Yes.

3 Q You mentioned that during the incident he kind of threatened
4 to take away your little brother?

5 A Yes.

6 Q Did he say anything else regarding telling, or not telling, or
7 threats, or anything of that nature?

8 A Yes.

9 Q What did he say?

10 A He told me if I told my mom he was going to take my baby
11 brothers away, and that he was going to do something bad to my
12 brother and my mom.

13 Q How did you feel when he said that?

14 A I felt scared. I had to -- I could not tell my mom.

15 Q You didn't tell your mom at that time?

16 A No.

17 Q I want to talk to you about a particular incident, after this one
18 you just us about, did something happen again with him after June of
19 2016?

20 A July.

21 Q July. What day do you remember?

22 A 11th.

23 Q This happened at you residence or somewhere else?

24 A My residence.

25 Q Is that in the mobile home you told us previously?

1 A Yes.

2 Q You told us about two mobile homes, was that the first or the
3 second?

4 A Second.

5 Q In a particular room in the mobile home?

6 A Living room.

7 Q And did the Defendant say anything to you in the living room
8 of the mobile home?

9 A He said my time was over, I have to have sex with him.

10 Q Your time was over?

11 A Yes.

12 Q Did he say anything to clarify that?

13 A No. I said that I wouldn't have a relationship with him. He
14 told me if I didn't he was going to kick me out of the house, and I didn't,
15 because I didn't work, or I was no one in the world.

16 Q You were "no one in the world"?

17 A Yes.

18 Q Did you agree with him, or disagree?

19 A I disagreed.

20 Q Then what happened?

21 A I told him I don't work because I was not old enough to work,
22 and that I will start work when I was 15, but he didn't care.

23 Q He didn't care?

24 A Yes.

25 Q Did he say anything else?

1 A I told him that I hadn't chosen this life. He said he had
2 chosen it for me. I told him he was my owner, and I could listen to my
3 mom. He said he didn't care, because I was his woman.

4 Q At any point did he touch you?

5 A He kissed me.

6 Q When you say he kissed you, what part of his body touched
7 which part of your body?

8 A His mouth, and his tongue touched my mouth.

9 Q Was your mouth opened or yours closed?

10 A Closed.

11 Q Was his mouth open or closed?

12 A Open.

13 Q At some point did you tell your mom what was going on?

14 A Yes.

15 Q When?

16 A After he left the house I immediately called my mom and told
17 her everything that had happened.

18 Q Was it that same day, July 11th?

19 A Yes.

20 Q Do you know if your mom ever called the police?

21 A Yes. She called the police the next day.

22 Q July 12th?

23 A Yes.

24 Q Of 2016?

25 A Yes.

1 Q Did you ever want your stepdad to touch you?

2 A No.

3 Q Do you see your stepdad in the courtroom?

4 A Yes.

5 Q Could you point to him and tell us what he is wearing?

6 A He's wearing a dark black shirt.

7 STATE: May the record reflect identification of the
8 Defendant?

9 THE COURT: Let the record reflect the witness has identified
10 the Defendant.

11 STATE: Pass the witness.

12 THE COURT: Cross-examination."

13 MS. DIGIACOMO: I'm sorry, may I just get a sip of water.

14 BY THE DEFENSE:

15 Q Meily, you talked about three incidents that you remember
16 happening with Gustavo. Now when he was living the mobile homes
17 with you did you call him dad, or did you call Gustavo?

18 A I called him dad.

19 Q Gustavo is not your biological father; isn't that right?

20 A He is not my biological father.

21 Q You do not know where your biological father is, or where he
22 lives, do you?

23 MS. DIGIACOMO: The Court's indulgence.

24 [Counsel confer]

25 MS. DIGIACOMO: I apologize, Your Honor.

1 A No.

2 Q You don't know where your biological father lives; isn't that
3 right?

4 A Yes. I don't even know where he lives.

5 Q You have not had contact with your biological father?

6 A No.

7 Q How long, if you know?

8 A Since I was two years, I never saw him again.

9 Q Since you were two years?

10 A Yes.

11 Q While you were talking with the State about being scared in
12 the house you described having a brother, at least two baby brothers
13 and an older brother, yes?

14 A Yes.

15 Q Your older brother is Jose?

16 A Yes.

17 Q How old is Jose?

18 A Twelve years old.

19 Q He is the oldest boy in the house?

20

21 A No, I'm the oldest.

22 Q The oldest boy?

23 A Yes.

24 Q You described two mobile homes, August 2015 incident that
25 you described to the State, how many rooms are in that mobile home;

1 do you remember?

2 A Five rooms.

3 Q Five rooms?

4 A Yes. Two bathrooms, one outside and one inside the master
5 room.

6 Q When you say outside, you don't mean outside the mobile
7 home, you mean outside the master bedroom?

8 A Yes.

9 Q If you know the difference, you're 13 years old and in the
10 ninth grade, is a travel or that first mobile home, a travel trailer, is that
11 still in the community where your family lived?

12 A It's still in the community where we used to live.

13 Q Okay. Do you remember the name of the street or the name
14 of the mobile home community?

15 A No. I know it was Stewart.

16 Q On Stewart?

17 A Yes.

18 Q Your street address was off Stewart?

19 A Yes.

20 Q You had said this August 2015 incident occurred in the living
21 room on the sofa, yes?

22 A Yes.

23 Q Were the four other rooms all bedrooms?

24 A One was the kitchen, one was the living room, three of them
25 were the bedrooms.

1 Q So living, kitchen, three bedrooms?
2 A Yes.
3 Q You had just had surgery about four months prior to this,
4 yes?
5 A Yes.
6 Q Where was your mother?
7 A She was working.
8 Q What time of day was this when the incident occurred; light
9 outside, or dark?
10 A It was in the afternoon.
11 Q It was light outside?
12 A Yes.
13 Q You and your brother Jose were home for summer vacation;
14 isn't that right?
15 A Yes.
16 Q You were not school?
17 A No.
18 Q Where was Jose?
19 A In his room.
20 Q Jose doesn't have a video game system or anything like that
21 in his room, does he?
22 A Yes.
23 Q He does, he has a TV in there?
24 A He used to have one.
25 Q Jose has a TV in this bedroom?

1 A He used to have one, before we moved.

2 Q August 2015 did he have a TV in his bedroom?

3 A Yes.

4 Q Tell me about your other siblings. You said you had a baby

5 brother, yes?

6 A Yes.

7 Q What is his name?

8 A Adoniy Octavio.

9 Q Can you spell that name for the court reporter?

10 A A-D-O-N-I-Y O-C-T-A-V-I-O.

11 Q You have another brother; is that right?

12 A Yes.

13 Q What is his name?

14 A Gustavo Ariel [phonetic].

15 Q In August 2015 how old was Jose, he was 12 then?

16 A Yes.

17 Q How old was Adoniy Octavio?

18 A He was months old, I don't remember.

19 Q A little baby?

20 A Yes.

21 Q What about Gustavo?

22 A He was not born.

23 Q He wasn't born?

24 A No. My mom was pregnant.

25 Q Do you know when Gustavo was born?

1 A It was November.

2 Q November of 2015?

3 A Yes. I don't know when he was born, the baby one.

4 Q Yes.

5 A Oh, he was born February 22, 2016.

6 Q During the early part of your mother's pregnancy she was

7 still working, yes?

8 A Yes.

9 Q Did Gustavo, your stepdad, work at that time?

10 A No.

11 Q He did not work in August 2015?

12 A No.

13 Q During the time Gustavo lived with you, and you said you

14 called him dad, he did keep jobs, didn't he?

15 A I don't understand the question.

16 Q He had jobs during the time he lived with you and your

17 family?

18 A Yes.

19 Q But for some time during August of 2015 your testimony is

20 that he wasn't working?

21 A Yes.

22 Q Was he working before that?

23 A Yes.

24 Q What did he do?

25 A He puts tiles on floors, and decorations in bathrooms.

1 Q After August 2015 do you remember Gustavo returning to
2 work?
3 A No, I don't remember.
4 Q The last time you remember your stepdad working was
5 before August 2015?
6 A Yes.
7 Q If you know, Jose's father is also your father?
8 A Yes.
9 Q Your biological father; I should have specified?
10 A Yes.
11 Q The second incident you described was June of 2016?
12 A Yes.
13 Q Another mobile home?
14 A Yes.
15 Q Do you remember the street address for that one?
16 A No.
17 Q You don't know what street you lived on?
18 A No.
19 Q When did you start school this year?
20 A I started school on August 31st.
21 Q August 31st?
22 A Yes.
23 Q Where are you attending school now?
24 A Desert Pines High School
25 Q Do you live in the same place?

1 A No.

2 Q Correct me if I am wrong, sometime between July 2016 and
3 August 31st you moved to a different house; is that right?

4 A When I was living with Gustavo?

5 Q Between June of 2016 and August 31st your family moved to
6 a different address?

7 A Yes. We moved from the mobile house that we were living
8 in, to somewhere else.

9 Q Okay. Do you remember that mobile home, how many
10 bedrooms or how many rooms? Do you remember how many rooms
11 were in the second mobile home?

12 A Six.

13 Q This one of a -- of the [sic] larger than the first, yes?

14 A Yes. Three bedrooms, one bathroom, and the kitchen and
15 the living room.

16 Q For the second incident was it light or dark outside?

17 A It was in the afternoon.

18 Q Was it light or dark outside?

19 A Lighter.

20 Q Where was your mother?

21 A She was working.

22 Q You said to the State when you were testifying earlier, that
23 you had a conversation with Gustavo, yes?

24 A Yes.

25 Q Before this incident he said something to you about him

1 choosing this life for you?

2 A Yes.

3 Q Is that right?

4 A It was during the day he kissed me.

5 Q He said he choose -- he chose this life for you?

6 A Yes.

7 Q You also talked about having relations with Gustavo?

8 A Yes.

9 Q How do you know what that means?

10 A Because I heard in health class.

11 Q In your health class?

12 A Yes.

13 Q When did you take health class?

14 A Eighth grade.

15 Q Where did you attend middle school?

16 A KO Knudson Middle School.

17 Q Was your health taught by your science teacher or someone

18 else?

19 A Someone else.

20 Q Do you remember that person's name?

21 A We call him Mr. H.

22 Q Mr. H?

23 A Yes.

24 Q Your health class was taught to you by a man?

25 A Yes.

1 Q That's where you learned about having relations?

2 A Yes.

3 Q Did you have this health class in the fall or spring of eighth
4 grade year; was it 2016 or 2015? Was it the fall or spring when you had
5 sex education class or health class?

6 A It was January of 2016.

7 Q For this June incident that happened in the second mobile
8 home where was Jose?

9 A Gustavo took him to work and left him in the work area
10 alone.

11 Q Gustavo took Jose to work?

12 A Yes.

13 Q There was a time after August of 2015 when Gustavo went
14 back to work?

15 A Yes. I don't remember the date.

16 Q Would it have been in June of 2016 when Gustavo took Jose
17 to work with him?

18 A Yes.

19 Q When you're testifying about the things you say happened
20 between you and Gustavo, it's fair to say you don't remember everything
21 clearly; isn't that fair to say?

22 A I remember everything except the day he worked.

23 Q You remember everything except the days Gustavo worked?

24 A I remember everything that happened during the incidents
25 when he abused me.

1 Q Okay. Let's get back to the time that you could not really
2 remember Gustavo working, but you do recall he did take Jose with him
3 for one of those days?

4 A Yes.

5 Q Where did Gustavo take Jose, if you know that?

6 A He never used to tell the address, he just took him.

7 Q He was doing the same kind of work, laying tiles and
8 bathroom decorations?

9 A Yes.

10 Q You said that Gustavo took Jose and left him at the work
11 site?

12 A Yes.

13 Q How do you know that?

14 A Because he went to pick up -- he told my mom he was going
15 to take my brother to work.

16 Q I'm sorry. You testified that Gustavo took Jose to work -- the
17 site with him, yes?

18 A Yes.

19 Q Then left Jose at the work site?

20 A Yes.

21 Q How do you know that?

22 A That he left him alone?

23 Q Yes.

24 A Because my brother told me.

25 Q Your brother told you?

1 A Yes. And also --

2 Q I haven't asked you anything.

3 A Sorry.

4 Q I'm going to jump ahead a little bit to July 11th of this year.

5 You said July 11th is when you called your mom, and told your mom
6 everything about what had been happening?

7 A Yes.

8 Q Isn't it true you also told Jose about everything that you say
9 had been happening, right?

10 A Yes.

11 Q When did tell Jose everything about what had been
12 happening?

13 A I don't remember the month, it was before 2016.

14 Q In addition to not remembering when Gustavo was working,
15 you don't remember disclosed [sic] all this sexual abuse to your brother?

16 A No. I don't remember.

17 Q But it was before you told your mom, yes?

18 A Yes.

19 Q You love your brother a lot?

20 A Yes.

21 Q You believe he loves you?

22 A I don't know anything, his feelings. I can't say anything
23 about --

24 Q It's not fair of me to say that your baby brother loves you?

25 A They didn't talk. How may I know they love me.

1 Q Your brother Jose does talk?

2 A He does talk. I thought you were asking the baby brothers.

3 Q Jose is younger than you?

4 A Yes.

5 Q You consider him your baby brother?

6 A Yes.

7 Q It's fair of me to say that he loves you?

8 A Yes.

9 Q You talked to him about all of this abuse that you say

10 Gustavo did to you?

11 A Yes.

12 Q More than one time?

13 A Yes.

14 Q More than one time before you told your mom, isn't that

15 right?

16 A Yes.

17 Q You and Jose talk about how much Gustavo was supposedly

18 abusing you quite often; isn't that right?

19 A Yes.

20 Q Did Jose go to the same middle school as you?

21 A Yes.

22 Q Can you Knudson, also?

23 A Yes.

24 Q Do you know whether or not Jose had a health class?

25 A No. He was sixth grade.

1 Q He was in the sixth grade?

2 A Yes.

3 Q When you told Jose about what happened between you and

4 Gustavo and you used some of the words you learned in your health

5 class; isn't that right?

6 A Yes.

7 Q You didn't know whether Jose understood those things, did

8 you?

9 A No.

10 Q Because he hadn't had the health class?

11 A Yes.

12 Q You were telling your baby brother all these things that you

13 learned?

14 A Yes.

15 Q You also told him that Gustavo had been doing those things

16 to you?

17 A Yes. He promised to always protect me, no matter what

18 happened.

19 Q Gustavo promised to always protect you, not matter what

20 happened?

21 A No. My brother told me that, Jose told me that.

22 Q You said you called your mom on the telephone at work,

23 right?

24 A Yes.

25 Q Was your mom working then?

1 A With my uncle. My uncle's restaurant, Santa Rosa Taco
2 Shop.

3 Q When you told your mom about what was happening did she
4 come home right away?

5 A No.

6 Q She finished her shift at work?

7 A Yes.

8 Q You called your mom and she finished her shift, yes?

9 A Could you repeat that?

10 Q You called your mom, and she finished her shift?

11 A Yes.

12 Q What time did mom finally get off work?

13 A 10:00.

14 Q 10:00 at night?

15 A It was dark.

16 Q It was 10:00 at night when your mother got off work, yes?

17 A Yes.

18 Q You called her to tell her about what you said Gustavo had
19 been doing during the incident, yes?

20 A Yes.

21 Q Where was Jose for this July 11th incident?

22 A My brother, before I called Gustavo, went to take the car to
23 wash, and that's when I saw the opportunity to call my mother.

24 Q Gustavo and Jose took the car to the car wash?

25 A Yes.

1 Q Did they wash the car?
2 A Yes.
3 Q What time was that?
4 A In the afternoon.
5 Q Still light outside?
6 A Yes.
7 Q They washed the car and came back home?
8 A Yes.
9 Q Was it still light outside when Jose and Gustavo came home?
10 A It was a little dark.
11 Q A little dark?
12 A Yes.
13 Q The sun had just set, yes?
14 A Yes.
15 Q But it wasn't 10:00?
16 A No.
17 Q It wasn't close to 10:00?
18 A No.
19 Q Gustavo and Jose were home for a few hours before your
20 mother's shift ended, yes?
21 A Yes.
22 Q You said your mother works with your uncle?
23 A Yes.
24 Q Did he come home after you talked with your mother?
25 A Who are you talking about, Gustavo?

1 Q Your uncle.

2 A My uncle went to his house and Gustavo went to pick up my
3 mother.

4 Q You didn't see your uncle on July 11th?

5 A Yes.

6 Q That uncle is your mother's brother?

7 A Yes.

8 Q You described to the State three incidents that occurred in
9 2015 and 2016, and two this past summer, yes?

10 A Yes.

11 Q For each of those I know for two you talked about Gustavo
12 would take your brother Jose to work with him, yes?

13 A Yes.

14 Q You never heard your mother object to, or disagree with
15 Gustavo taking Jose to work, did you?

16 A She couldn't do that.

17 Q Question, you never heard her do it?

18 A No.

19 Q In fact, Jose went to work with Gustavo quite a bit during the
20 summer; isn't that right?

21 A Yes.

22 Q Often?

23 A Yes.

24 Q Were you kids expected to get summer jobs?

25 A No.

1 Q But Jose would to work with Gustavo?

2 A Yes.

3 Q Jose would tell you about having money, right, from working
4 with Gustavo?

5 A He told me he was going to give him money, but he never
6 gave him money, he bought him a cell phone.

7 Q He bought him a cell phone?

8 A Yes.

9 Q Jose is 13?

10 A He turns 13 January 2017.

11 Q He's 12 now?

12 A Yes.

13 Q Gustavo bought Jose a cell phone?

14 A He buy the cell phone to my brother and me.

15 Q You got a cell phone too?

16 A Yes.

17 Q You testified with the State that you didn't want to start
18 working until you turned 15; isn't that right?

19 A Yes.

20 Q Why is that Meily?

21 A Because I was going to get a job in my uncle's restaurant, but
22 he told me I had to [sic] 15 years old in order to work with him.

23 Q Isn't it true that some of the disappointment Gustavo in
24 particular had with you, was because you weren't working?

25 A Yes.

1 Q Jose was working, right?

2 A Yes.

3 Q He got a cell phone?

4 A Yes.

5 Q You weren't working, right?

6 A No.

7 Q You got a cell phone also?

8 A Yes.

9 Q That upset Gustavo a little bit, right?

10 A Yes.

11 Q When you decided for yourself at 14 that you we going to
12 start working. Your choice was to work with your uncle and with your
13 mom?

14 A Yes.

15 Q Until then you didn't think you had to work anywhere else,
16 right?

17 A No.

18 MS. DIGIACOMO: That concludes the prior testimony, Your
19 Honor.

20 THE COURT: All right. We're going to take a break.

21 During this recess you're admonished, do not talk or
22 converse amongst yourselves or with anyone else on any subject
23 connected with this trial, or read, watch or listen to any report of, or
24 commentary on the trial, or any person connected with this trial by any
25 medium of information, including, without limitation, newspapers,

1 television, radio or internet.

2 Do not form or express any opinion on any subject
3 connected with the trial until the case is finally submitted to you. We'll
4 take ten minutes.

5 [Jury out at 10:34 a.m.]

6 [Recess taken from 10:34 a.m. to 10:53: a.m.]

7 [Recess taken from 10:34 a.m. to 10:53: a.m.]

8 THE MARSHAL: -- is again in session.

9 [Outside the presence of the jury]

10 THE COURT: Are we ready to go?

11 MS. DIGIACOMO: Yes.

12 MR. SPEED: Yes, Your Honor.

13 THE COURT: Bring them in.

14 Do you have another witness?

15 MS. DIGIACOMO: We have one last witness.

16 THE COURT: Okay.

17 THE MARSHAL: Please rise for the jury.

18 [Jury in at 10:55 a.m.]

19 [Inside the presence of the jury]

20 THE MARSHAL: All present, Judge.

21 THE COURT: Please be seated.

22 Parties acknowledge presence of the jury?

23 MS. DIGIACOMO: Yes, Your Honor.

24 MS. MACHNICH: Yes, Your Honor.

25 THE COURT: Call your next witness.

1 MS. SUDANO: Thank you, Your Honor.

2 The State calls Tiffany Keith.

3 THE MARSHAL: Watch your step. Remain standing, face the
4 clerk of the court.

5 TIFFANY KEITH, STATE'S WITNESS, SWORN

6 THE CLERK: Please state your name and spell it for the
7 record, please.

8 THE WITNESS: Tiffany Keith, T-I-F-F-A-N-Y K-E-I-T-H.

9 THE CLERK: Thank you. Have a seat.

10 THE COURT: Go ahead.

11 MS. SUDANO: Thank you.

12 DIRECT EXAMINATION

13 BY MS. SUDANO:

14 Q I'll let you get situated there. Ma'am, how are you
15 employed?

16 A With the Clark County Department of Family Services.

17 Q In what capacity?

18 A I am an investigator in our child protective services' sexual
19 abuse unit.

20 Q How long have you worked for Child Protective Services,
21 total?

22 A Twelve years.

23 Q How long have you been in the sexual abuse investigations --

24 A Almost --

25 Q -- detail?

1 A -- ten years.

2 Q Now would it be fair to say that you're assigned to a case
3 when a referral comes in from law enforcement, or whatever source, in
4 the community?

5 A Yes.

6 Q What is the purpose of your investigation?

7 A To investigate the allegations of abuse and neglect that are
8 reported through our Child Protective Services' hotline.

9 Q So were you working in that capacity in July of 2016?

10 A Yes.

11 Q Were you assigned to investigate a case involving biological
12 mother, Meili Castillas Ortiz, and then a biological or stepfather of
13 Gustavo Adonay Gunera-Pastrana?

14 A Yes.

15 Q All right. And the allegations had to do with Meily's child,
16 Meily Moran; would that be fair?

17 A Yes.

18 Q Okay. Would it be fair to say that that case came in as a case
19 that needed to be investigated, kind of that day, rather than a case that
20 needed to be followed up on down the road?

21 A I don't recall the priority response, but we do have three
22 responses that we have to go out on, but I don't recall in this case what
23 response time I had to meet.

24 Q Fair enough. Would it be fair to say that you were present
25 during some interviews that were conducted in this particular case?

1 A Yes.

2 Q Okay. Specifically were those interviews that took place with
3 Meily Moran and Jose Moran, on July 12th of 2016?

4 A Yes.

5 Q Okay. Did those interviews -- were those interviews that you
6 yourself conducted?

7 A I did not.

8 Q Okay. Who conducted them, if you remember?

9 A Our forensic interviewer, Elizabeth Espinoza.

10 Q Okay. Were you present in a different room, watching or
11 listening to that interview as it took place?

12 A Yes.

13 Q Okay. Following those interviews did you do a follow-up
14 interview with Meili Castillas Ortiz?

15 A Yes.

16 Q And was an interview that you were present with Detective
17 Huth?

18 A Yes.

19 Q Now once you've conducted the interviews in a case, can you
20 either close a case out or pass it on to somebody else with the CPS
21 agency?

22 A That is correct.

23 Q Okay. This particular case, did it end up going to a family
24 court hearing on February 21st of 2017?

25 A Correct.

1 Q Were you present in court on February 21st, 2017?

2 A Yes.

3 Q And did Meily Moran testify in that family court proceeding
4 on February 21st of 2017?

5 A Yes.

6 MS. SUDANO: Your Honor, at this time, pursuant to NRS
7 51.035 I would be playing Court's Exhibit 29, which is the testimony from
8 that hearing.

9 THE COURT: Defense?

10 MS. MACHNICH: Your Honor, we have nothing beyond what
11 has previously been discussed.

12 THE COURT: Counsel approach.

13 [Sidebar begins at 11:00 a.m.]

14 THE COURT: Are you playing the whole thing?

15 MS. SUDANO: It's edited.

16 MS. DIGIACOMO: Just her testimony, and what they
17 objected to came out.

18 THE COURT: I'm sorry, what? The objected to is not in?

19 MS. MACHNICH: Correct.

20 THE COURT: Okay. And that's the Defense, for the record.

21 MS. MACHNICH: Yeah. We obviously object to the playing
22 of it in general. But we've discussed all of that before, we won't rehash
23 an argument.

24 THE COURT: Okay. But --

25 MS. DIGIACOMO: So it's edited.

1 THE COURT: -- this is the prior -- so it's clear, you playing the
2 prior consistent to rebut the prior alleged inconsistent, correct?

3 MS. DIGIACOMO: Yes. As well as it's also a prior -- it's also
4 a prior inconsistent, as well, with her switching the incidents when she
5 testified on the stand, so it's both.

6 THE COURT: Well, that has to be different [indiscernible].

7 MS. DIGIACOMO: And it also comes in under 51.035,
8 because it is under oath at a prior hearing, and the Defense got a chance
9 to cross-examine her about it in the trial.

10 THE COURT: We already discussed that. All right. Thank
11 you.

12 MS. DIGIACOMO: Thank you.

13 [Sidebar ends at 11:01 a.m.]

14 MS. SUDANO: All right. And, again, just for the record,
15 we're going to be playing Court's Exhibit 29, which is the testimony of
16 Meily Moran on February 21st, 2017.

17 [Video recording, State Exhibit 29, played in open court at 11:02
18 a.m.]

19 BY MS. SUDANO:

20 Q All right. So, Ms. Keith, we mentioned earlier that you were
21 present for that hearing, a representative from CPS; is that correct?

22 A Yes.

23 Q And was there also a District Attorney there that was working
24 with CPS?

25 A Yes.

1 Q Okay. And then Gustavo Adonay Gunera-Pastrana was
2 there?

3 A Yes.

4 Q He had an attorney and an interpreter there?

5 A Yes.

6 MS. SUDANO: Thank you, Your Honor. No further
7 questions.

8 THE COURT: Cross.

9 MR. SPEED: No questions, Your Honor. Thank you.

10 THE COURT: Questions from the jury? No questions. Thank
11 you. You may step down.

12 State, call your next witness.

13 MS. DIGIACOMO: Your Honor, may I approach the clerk?

14 THE COURT: Yes.

15 MS. DIGIACOMO: Your Honor, I just wanted to check to
16 make sure the exhibits that we had offered have been admitted.

17 With this the State will rest.

18 STATE RESTS

19 THE COURT: Counsel, approach.

20 [Sidebar begins at 11:28 a.m.]

21 THE COURT: We need to read them the amended
22 indictment, correct? There's amended --

23 MR. SPEED: Information.

24 THE COURT: -- information.

25 MS. DIGIACOMO: Amended information. We can do that

1 right now.

2 THE COURT: All right. And then what?

3 MS. DIGIACOMO: We need to -- well, I don't know.

4 MR. SPEED: I mean. I'll speak with our client. We'll let the
5 Court know whether he chooses to testify or not --

6 THE COURT: We'll take a break, is really I meant.

7 MS. DIGIACOMO: Should we do lunch?

8 MR. SPEED: Yeah.

9 THE COURT: Yeah. That's what I meant.

10 MR. SPEED: We might as well.

11 THE COURT: Maybe it was a bad question.

12 MS. MACHNICH: Can we also come back and do instructions
13 after lunch?

14 MR. SPEED: Hey, Judge I'm --

15 THE COURT: Okay. So --

16 MS. DIGIACOMO: But we can't finish the instructions until
17 we know what your case is too.

18 THE COURT: Right. So whatever, we'll have to come back
19 after lunch, and you'll tell us whether -- where we're going.

20 MR. SPEED: Okay.

21 THE COURT: Well, yeah. We'll have like an hour.

22 MS. DIGIACOMO: We could --

23 THE COURT: How long is it going to take. Well, just five
24 minutes to read that.

25 MS. DIGIACOMO: Do you want to, when we send the jury

1 out now, send them out until 1:00, and we could at least try and do the
2 instructions they object to in our packet --

3 MS. MACHNICH: Yeah.

4 MS. DIGIACOMO: And get those at least out of the way?
5 Because those are special, so --

6 THE COURT: That's fine.

7 MS. MACHNICH: Okay.

8 MS. DIGIACOMO: And then -- but we'll have to do more
9 later, obviously, when we see their proposed. We haven't gotten any
10 yet.

11 THE COURT: I think we'll have plenty of time this afternoon,
12 no matter what. Even if your client talks, even if you call a witness or
13 two, we have four hours this afternoon, theoretically. And so, yeah, we'll
14 do that after lunch.

15 MS. DIGIACOMO: Okay.

16 THE COURT: All right.

17 MR. SPEED: Fine.

18 MS. DIGIACOMO: Thank you.

19 MR. SPEED: Thank you.

20 [Sidebar ends at 11:30 p.m.]

21 THE COURT: All right. The Clerk will now read the amended
22 information.

23 THE CLERK: The State of Nevada, Plaintiff v. Gustavo
24 Adonay Gunera-Pastrana, Defendant, case number C-318461,
25 Department XXVIII, amended information.

1 Steve Wolfson, District Attorney within and for County of
2 Clark, State of Nevada, in the name and by authority of the State of
3 Nevada, informs the Court the Gustavo Adonay Gunera-Pastrana, the
4 Defendant as named, having committed the crimes of lewdness with a
5 child under the age of 14, and sexual assault with a minor under 14 years
6 of age, on or between August 1st, 2015 and July 11th, 2016, within the
7 County of Clark, State of Nevada, contrary to the form, force in effect, the
8 statute in such cases made and provided and against the peace and
9 dignity of the State of Nevada.

10 Count I, lewdness with a child under the age of 14, did on or
11 between August 1st, 2015 and August 31st, 2015, willfully, lewdly,
12 unlawfully and feloniously commit a lewd and lascivious act upon or
13 with a body, or any part or member thereof a child, to wit M.M., a child
14 under the age of 14 years' old, by touching the said M.M. genital area
15 with the intent of arousing, appealing to or gratifying the lust, passions,
16 or sexual desires of the Defendant or M.M.

17 Count II, sexual assault with a minor under 14 years of age,
18 did on/or between June 1st, 2016 and July 11th, 2016, then and there
19 willfully, unlawfully and feloniously commit a sexual penetration upon
20 M.M., a child under the age of 14 years, to wit cunnilingus, by placing his
21 mouth and/or tongue on or in the genital opening of the said M.M.

22 Count III, sexual assault with a minor under 14 years of age,
23 did on or between June 1st, 2016, and July 11th, 2016, then and there
24 willfully, unlawfully, and feloniously commit a sexual penetration upon
25 M.M., a child under the age of 14 years to wit digital penetration by

1 inserting his fingers into the genital opening of the said M.M.

2 Count IV, lewdness with a child under the age of 14, did on or
3 between June 1st, 2016 and July 11th, 2016, willfully, lewdly, unlawfully
4 and feloniously commit a lewd or lascivious act upon or with a body or
5 any part of a member thereof, a child to wit M.M., a child under the age
6 of 14 years, by kissing the said M.M. with the intent of arousing,
7 appealing to, or gratifying the lust, passions or sexual desires of
8 Defendant or M.M., to which the Defendant had entered pleas of not
9 guilty.

10 THE COURT: Okay. So we're going to take our lunch recess,
11 and we'll give you a little extra time. We'll have you come back at 1:00.

12 During this recess you're admonished, do not talk or
13 converse amongst yourselves or with anyone else on any subject
14 connected with this trial, or read, watch or listen to any report of, or
15 commentary on this trial, or any person connected with this trial by any
16 medium of information, including, without limitation, newspapers,
17 television, radio or internet.

18 Do not form or express any opinion on any subject
19 connected with the trial until the case is finally submitted to you. We'll
20 see you at 1:00, have a good lunch.

21 THE MARSHAL: Please rise for the jury.

22 [Jury out at 11:34 a.m.]

23 THE COURT: Okay. We'll see you after lunch.

24 [Recess taken from 11:35 a.m. to 1:15 p.m.]

25 [Outside the presence of the Jury]

1 THE COURT: Okay. We're on the record outside the
2 presence.

3 MS. MACHNICH: Yes, Your Honor. If I may approach with a
4 set of the Defense proposed instructions and verdict form?

5 THE COURT: Okay.

6 MS. MACHNICH: Thank you.

7 THE COURT: It also attaches the four cases cited on the
8 specials that we had discussed bringing, so that all parties would have
9 them for argument. We acknowledge that we did not send these out
10 until the end of the lunchtime. We just finished them, given the
11 [indiscernible], right before lunch. However, I have now provided them.
12 I also emailed them to the State, although it was before --

13 MS. DIGIACOMO: By 1:00.

14 MS. MACHNICH: -- 1:00, and I provided them copies of them.

15 THE COURT: If at all we will talk about them probably late
16 this afternoon.

17 MS. DIGIACOMO: Yeah. I was going to say, Your Honor, we
18 got ours while we were sitting here. We need time to --

19 THE COURT: I get that.

20 MS. DIGIACOMO: I know that she provided --

21 THE COURT: Okay. What's up next?

22 MS. MACHNICH: Your Honor, it's the Defense case in chief.

23 THE COURT: Okay.

24 MS. MACHNICH: And --

25 THE COURT: Can you tell me now --

1 MS. MACHNICH: I can, Your Honor.

2 THE COURT: -- if you're going to call a witness?

3 MS. MACHNICH: Our client will be declining to testify.

4 THE COURT: Okay.

5 MS. MACHNICH: And the Defense will be resting.

6 THE COURT: Okay. I certainly don't think at this point
7 there's any reason not to. All right. And your client, I, as of yesterday,
8 gave him all his admonitions, does Mr. Gunera-Pastrana, do you
9 remember what I read to you and discussed yesterday, regarding your
10 right to testify or not testify?

11 THE DEFENDANT: Yes.

12 THE COURT: Do you want me to go over that again?

13 THE DEFENDANT: No, it's fine.

14 THE COURT: Okay. You fully understand that, and you've
15 had an opportunity to discuss it with your attorney?

16 THE DEFENDANT: Yes.

17 THE COURT: Okay. Thank you. You can sit down, thank
18 you.

19 Okay. All right. So we will bring them in, and you'll rest, and
20 then I'll let them go for today, because I certainly will give the State an
21 hour or two, so an hour and a half to go over these, and then -- and you
22 have -- you. The Defense, you have the Prosecutor's proposed?

23 MS. DIGIACOMO: We do, Your Honor. And we would be
24 prepared to argue those before the parties leave, depending on what the
25 State wants.

1 MS. SUDANO: Can we just come back and do it all at once?

2 THE COURT: Yeah. It makes sense --

3 MS. MACHNICH: It doesn't matter.

4 MS. DIGIACOMO: Because we might be changing some of
5 ours.

6 THE COURT: -- to do it all at once.

7 MS. MACHNICH: Okay. That's fine.

8 THE COURT: What about, I know the answer, but I just want
9 -- the verdict form. I'm sure without even looking at it, the State's
10 proposed guilty is first. Defense, innocent is first. Is that the only --

11 MS. MACHNICH: Yes.

12 THE COURT: -- difference?

13 MS. DIGIACOMO: Yes.

14 THE COURT: Okay. So I've ruled on this multiple times, and
15 I think this is fairly good law, although I don't think the Supreme Court
16 has made a decision on something this minor, but since the State does
17 have the burden of proof, which we will be telling them again, multiple
18 times, that it certainly is reasonable that the guilty is first.

19 I quite, as a side note, don't think it -- unless there's some
20 statistical or psychological proof that it makes a difference, I personally
21 don't think it does, but since they do have the burden I think that's
22 appropriate. So I will give, assuming that's the only difference, I will give
23 the State's proposed verdict form. Okay.

24 MS. DIGIACOMO: Yes, Your Honor.

25 MS. MACHNICH: Yes, Your Honor, we understand your

1 rulings.

2 THE COURT: All right. So let's get this out of the way. And,
3 1:20, we'll see when we -- it shouldn't take more than five minutes, and
4 then you can have --

5 [Court and clerk confer]

6 THE COURT: I'm not sure I have the proposed jury?

7 MS. MACHNICH: It's at the back of the --

8 THE COURT: Okay. At the back.

9 [Court and clerk confer]

10 THE COURT: So there's a -- this is a little known fact, that for
11 proposed jury instructions that aren't given, the Judge is supposed to
12 sign them; did you guys know that?

13 MS. DIGIACOMO: Yes.

14 MS. SUDANO: We did, yes.

15 MR. SPEED: Yes.

16 MS. SUDANO: Sign and date and then put "rejected."

17 THE COURT: Although it's been quite some time, no one
18 knew it when -- he does appeals?

19 MS. DIGIACOMO: That's how I found out.

20 THE COURT: Polsenberg, Dan Polsenberg pointed that out,
21 and nobody knew, and sure enough there's a rule. Anyway, most people
22 don't know it. You guys are very well informed. Okay, bring them in.

23 THE COURT: What time do you want to start tomorrow?

24 MS. MACHNICH: 9:00 is fine.

25 MS. DIGIACOMO: Fine with the State.

1 MR. SPEED: 9:00, Your Honor.
2 THE COURT: Okay.
3 [Counsel and Clerk confer]
4 THE COURT: So the reason I brought that up, I don't think
5 the statute says the verdict form, it says jury instructions.
6 MS. SUDANO: That is correct.
7 THE COURT: But I'm going to sign it anyway.
8 MS. MACHNICH: Okay. Better safe than sorry.
9 MS. DIGIACOMO: Better safe than sorry, Your Honor.
10 MR. SPEED: Abundance of caution, right.
11 THE COURT: Exactly.
12 [Pause]
13 THE COURT: And so I don't forget, before you go, before we
14 take the break, I believe these are the agreed upon. So I'll have both of
15 you look --
16 MS. DIGIACOMO: No. Did you -- okay.
17 THE COURT: I have four piles here --
18 MS. MACHNICH: Yeah, four.
19 THE COURT: -- but this I believe --
20 MS. DIGIACOMO: I think the latest that the State proposed, it
21 includes the one they are objecting to. Because to me it's easier to like
22 pull them out and -- we don't have anything separate.
23 THE COURT: Well, this was from the other day.
24 MS. DIGIACOMO: No. I sent one this morning, or was it last
25 night?

1 MS. MACHNICH: Yes.

2 THE COURT: All right.

3 MS. DIGIACOMO: I sent one with changes. I think it was last
4 night, I don't know. I have that printed.

5 MS. MACHNICH: Well, we'll take a look at this and see if
6 it's --

7 THE COURT: All right. Thank you.

8 MS. MACHNICH: That's fine.

9 MS. DIGIACOMO: But that still has the ones you're objecting
10 to, it's just I just added stuff.

11 MS. MACHNICH: I think he may have the ones I sent.

12 THE COURT: This was from the 13th.

13 MS. DIGIACOMO: What's today?

14 MS. MACHNICH: Today's the 13th.

15 MS. DIGIACOMO: Yes.

16 [Counsel confer]

17 THE MARSHAL: Please rise for the jury.

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

19 [Inside the presence of the jury]

20 THE MARSHAL: All present, Judge.

21 THE COURT: Please be seated. Good afternoon, ladies and
22 gentlemen.

23 GROUP RESPONSE: Good afternoon, Your Honor.

24 THE COURT: The parties acknowledge presence of the jury?

25 MS. DIGIACOMO: Yes, Your Honor.

1 MS. MACHNICH: Yes, Your Honor.

2 THE COURT: Tomorrow we will be starting at 9:00 a.m.,
3 9:00 a.m.

4 Defense?

5 MR. SPEED: Your Honor, Defense rests.

6 DEFENSE RESTS

7 THE COURT: Thank you.

8 Ladies and gentlemen, that means you get the afternoon off.
9 I assume that's a good thing. 9:00 a.m. tomorrow for jury instructions
10 and closing arguments.

11 During this recess you're once again admonished, do not talk
12 or converse amongst yourselves or with anyone else on any subject
13 connected with this trial, or read, watch or listen to any report of, or
14 commentary on the trial, or any person connected with this trial by any
15 medium of information, including, without limitation, newspapers,
16 television, radio or internet.

17 Do not form or express any opinion on any subject
18 connected with the trial until the case is finally submitted to you.

19 We'll see you tomorrow at 9:00 a.m.

20 THE MARSHAL: Please rise for the jury.

21 [Jury out at 1:26 p.m.]

22 [Outside the presence of the jury]

23 THE MARSHAL: Please be seated.

24 THE COURT: All right. As I look at this -- well, this is the only
25 one that potentially --

1 MS. MACHNICH: Would you like us to go through and flag
2 the ones? In that set there's about four or five, it's not a huge number.

3 THE COURT: Yeah.

4 MS. DIGIACOMO: What I did, Your Honor, and if you look at
5 my set that I gave you this morning, it has a copy of the ones from my
6 set that they are objecting to on top, and then cases underneath. So the
7 set I gave you, the five, are the five that they are objecting to in there?

8 May I approach?

9 THE COURT: Yeah, here. These are the four sets. These are
10 the four sets I currently have. I believe there was yet another one --

11 MS. DIGIACOMO: So this one with --

12 THE COURT: -- that might be on my desk.

13 MS. DIGIACOMO: This is the one with --

14 MS. MACHNICH: That's the Defense proposed, not agreed
15 to.

16 THE COURT: Okay. And that is no longer important?

17 MS. DIGIACOMO: Right.

18 THE COURT: Or current, or whatever you --

19 MS. DIGIACOMO: Sandy had printed one, and you brought
20 one.

21 MS. MACHNICH: Oh, okay.

22 MS. DIGIACOMO: So, yes.

23 MS. MACHNICH: They're the same. Other than the actual
24 cases that I included at the rear of that.

25 THE COURT: Right, okay.

1 MS. DIGIACOMO: So these are our proposed. The ones that
2 they object to in this set, they're right here, with the instruction and the
3 case law underneath.

4 THE COURT: All right. So obviously, you know, page 1, and
5 you have to be unanimous and all that, you've agreed to, correct.

6 MS. MACHNICH: I can take --

7 MS. DIGIACOMO: Except for these five?

8 MS. MACHNICH: Yes. I can take that right now and just flag
9 the ones that we've opposed --

10 THE COURT: Please.

11 MS. MACHNICH: -- because it's not very many. Okay. And
12 this is just a bonus set of our proposed.

13 THE COURT: I don't want it, get rid of it.

14 MS. DIGIACOMO: I will take it, because we don't have that.

15 MS. MACHNICH: Yeah. It's just another set. You guys
16 should have two sets too.

17 MS. DIGIACOMO: Okay.

18 THE COURT: All right. Go ahead and do that, and then we'll
19 take a recess. Give it to Steve, he'll bring it back, I'll look at all this, and --

20 MS. DIGIACOMO: So can we have until 3:00?

21 THE COURT: That's fine with me.

22 MS. DIGIACOMO: Okay.

23 MS. MACHNICH: Thank you, Your Honor.

24 THE COURT: Hopefully it shouldn't take more than an hour.

25 MS. DIGIACOMO: To settle, I don't think so.

1 MS. MACHNICH: Probably not, no.

2 THE COURT: You said there's only five, right?

3 MS. MACHNICH: Of the State's and then the Defense,
4 obviously.

5 MS. DIGIACOMO: And the Defense has some that we're
6 probably going to oppose, I don't know. We haven't had a chance to
7 fully look at them.

8 THE COURT: All right. All right. If it goes longer, it goes as
9 long as it takes.

10 THE MARSHAL: Judge?

11 THE COURT: Yeah.

12 THE MARSHAL: For the Defendant, what time would you like
13 the CO to have the Defendant back here?

14 THE COURT: 3:00.

15 THE MARSHAL: Yes, sir.

16 THE COURT: All right. We're in recess.

17 [Recess taken from 1:29 p.m. to 3:11 p.m.]

18 THE COURT: Remain seated.

19 THE MARSHAL: Remain seated and come to order.
20 Department 28 is again in session.

21 THE COURT: Okay. So I think all the stuff from both sides.
22 Although, none of it's really in -- so you're going to have to get together
23 and put it in final order once this is done. No sides, no captions, et
24 cetera, et cetera.

25 Okay. So first of all, I gave you my inclination, but Defense

1 wants to make an argument regarding the jury instruction. I'm certainly
2 willing to listen.

3 MS. MACHNICH: Oh.

4 MS. DIGIACOMO: Which one, the verdict form?

5 MS. MACHNICH: Did you mean the verdict form?

6 THE COURT: Verdict form. What did I say? Jury instruction.
7 Yeah. Verdict form.

8 MS. MACHNICH: Your Honor, I don't know how much more
9 of an argument we need to make on that at all, just to say that because
10 the State -- it was pretty much the same argument Your Honor made,
11 which is the State has the burden. And given that the State has the
12 burden, not guilty should be first. The first it should be they haven't
13 reached it or where the jury started was at not guilty.

14 And then it usually -- it can go from lowest to highest or
15 highest to lowest. We think that there is -- I don't have any studies. I
16 don't think there are any out there with regard to what a person would
17 check first if they were just blindly checking something. Hopefully our
18 jury is not doing that.

19 But if there's any suggestion that the jury should do one
20 thing over another, if anything is to be inferred by order if they can't
21 decide, I mean, obviously they should then hang. But if they can't
22 decide, not guilty is the answer, not guilty, just because the State has the
23 burden.

24 So I don't know have anything further. I just think that it
25 would be appropriate, and we proffered it. And given that we would

1 request that it be given, and we understand Your Honor's ruling, we
2 won't be pushing further.

3 THE COURT: I mean, the same point goes both ways which
4 is why probably the Supreme Court hasn't said anything on it. Gone.
5 State want to put --

6 MS. DIGIACOMO: Well, Your Honor, I would just say it's our
7 burden of proof. They're here to decide whether or not the State proved
8 the facts beyond a reasonable doubt. So that's where they should start.

9 So it's kind of like chronological. You start, did we prove our
10 case? You know, a lot of times there's multiple lesser includeds, but it's
11 like, did we prove it? If not, you go now to the next one. Did we prove
12 that? If not, then it's not guilty.

13 And so to put not guilty first would be almost like counter
14 intuitive, asking them to consider whether we didn't prove the case
15 before we did prove the case when that's what they're here for.

16 THE COURT: You want to respond or anything on the
17 record? You want to respond?

18 MS. MACHNICH: I have nothing further. We're just chatting.
19 Sorry.

20 THE COURT: I don't know that it -- like I said, I think I
21 mentioned, you know, back in before computers literally almost, I did
22 survey research and I don't think there was anything which showed the
23 order of the actual answer was important.

24 But I think because of the burden, because we tell them that,
25 to do it the other way would almost be similar to a double negative.

1 So I'm going to go ahead and put the guilty first and I'll sign
2 this.

3 MS. MACHNICH: Thank, Your Honor.

4 THE COURT: Okay. Who wants to -- I guess State, because
5 you need to start. So there was the packet I had and then Defense went
6 through with just added tabs, which I think made it fairly easy regarding
7 the objections. And those are the only ones you objected -- well, I'll go
8 through them and if there is something else, you can certainly point that
9 out.

10 Then we have to put them together and I have to number
11 them. Is there really -- well, I guess we haven't gotten to a dispute as to
12 the order.

13 The first one that the State proposes, and the Defendant is
14 objecting to, sexual assault is a general intent crime. Therefore, any
15 claim or evidence of drinking alcohol or volunteering intoxication by the
16 Defendant is no excuse for the criminal conduct and is no Defense to a
17 charge of sexual assault.

18 MS. DIGIACOMO: Actually, can I be heard --

19 THE COURT: Sure.

20 MS. DIGIACOMO: -- before we argue? Because I'm going to
21 change it a little bit. I spoke to Ms. Machnich and --

22 THE COURT: You agreed to all of them?

23 MS. DIGIACOMO: No. You're funny. No. When I originally
24 put the sexual assault as a general intent crime in here and we
25 anticipated that some of his drinking might have come into the trial. It

1 has not.

2 So I'm agreeing to take that language out and change to the
3 one behind it that they're also objecting to talking about the difference
4 between specific in general intent, adding that sexual assault is a general
5 intent crime to that one.

6 And so if I may approach with what --

7 THE COURT: Okay.

8 MS. DIGIACOMO: -- the State proposes for the two that
9 they're objecting to.

10 THE COURT: Okay. And they gave you a copy of this?

11 MS. MACHNICH: They just did. Yes.

12 THE COURT: That so it's clear would be instead of the one --

13 MS. DIGIACOMO: It's basically combining sexual assault --

14 THE COURT: Right.

15 MS. DIGIACOMO: -- as a general intent crime with the next
16 one that they're objecting to.

17 THE COURT: I got that. Okay.

18 MS. MACHNICH: And Your Honor, we would like to be heard
19 on that.

20 THE COURT: Okay. But they're withdrawing the intoxication
21 version because there was absolutely no evidence. Okay. So as to the
22 next one in line.

23 MS. MACHNICH: Which is now the State's modified specific
24 intent.

25 THE COURT: You want me to read it? "Specific intent is the

1 intent to accomplish the precise," is that spelled right? "Act, which the
2 law prohibits. General intent is the intent to do that, which the law
3 prohibits. It is not necessary for the Prosecution to prove that Defendant
4 intended the precise harm or the precise result which eventuated if a
5 crime is a general intent crime."

6 Sexual assault is a general intent crime, and so it's clear on
7 the record, I'm throwing out that intoxication because you withdrew it.

8 MS. DIGIACOMO: Thank you.

9 MS. MACHNICH: Okay.

10 THE COURT: So this one that I just read, go ahead.

11 MS. MACHNICH: From Defense objection or State proffer?

12 THE COURT: Well, State wants it in, so yeah.

13 MS. MACHNICH: Sure. Our objection. All right. Our
14 objection, Your Honor, is that it's super confusing and completely
15 unnecessary in this case.

16 Your Honor read it. As you noticed, it is hard to read
17 because it does -- I'm not saying it doesn't make any sense under the
18 law. I'm saying it makes absolutely no sense given the Defense that has
19 been proffered in this case.

20 The *Honeycutt* case which they cite, 111 Nevada 660 which is
21 from 2002, specifically discusses a situation where the defense had
22 something in their defense about mistaken consent.

23 So they were discussing something with regard to the intent
24 and the intent with which the defendant could then act. That is just
25 simply not an issue here whatsoever. At no point are we discussing the

1 intent.

2 Also, I believe that this leaves out that lewdness is a specific
3 intent crime. So it's omitting that, and I think if you're absolutely
4 inclined to give it, that needs to be added under that because lewdness
5 with a child under 14 is a specific intent crime.

6 That being said, I don't think it's necessary at all. We're not
7 challenging the intent with which something is done. No one's saying
8 there was an accidental insertion of something because I mean,
9 obviously, lewdness is a specific intent, so the sexual assault would be
10 the only one that would be the general intent crime.

11 No one's saying that she was penetrated accidentally. I don't
12 think there's been any evidence of that, that is certainly not anything that
13 was opened on by us or presented through any part of our case.

14 So because of that, I think that this is extremely confusing
15 and not relevant at all. I don't know what version of what could possibly
16 be presented by the State in closing, could twist this into something
17 helpful for them. It just seems like it's superfluous and more prejudicial
18 than probative of anything because I think confusing the jury is not
19 helpful and this is super confusing.

20 THE COURT: I agree, but let me ask you. Shouldn't we be
21 defining both? And they are different.

22 MS. MACHNICH: I don't think that that's specifically at issue
23 in this case whatsoever. I mean, again, I think that if it's at issue, I think
24 the only intent that -- let me see here. The only intent that's --

25 THE COURT: The kiss, you need to have more.

1 MS. DIGIACOMO: That's correct. With the lewdness there
2 has to be specific intent.

3 MS. MACHNICH: Yeah.

4 MS. DIGIACOMO: And so the State's purpose in this, Your
5 Honor, we have a jury --

6 THE COURT: We you done, sorry, the Defense?

7 MS. DIGIACOMO: Oh, I'm sorry. I thought she was done.

8 THE COURT: Are you done?

9 MS. MACHNICH: Oh, I was just going to say, the only other
10 instruction that addresses intent, I believe, of the State's is -- I guess it's
11 not really intent. It's one of the future instructions.

12 I guess I think it's not at issue. And because that's not a
13 parsing that's being done at any point in this case, I just don't think it's
14 appropriate and I think it's confusing.

15 That being said, if it absolutely does need to come in, I
16 believe it has to be complete and therefore it would have to specify that
17 lewdness is a specific intent crime.

18 THE COURT: Okay. State?

19 MS. DIGIACOMO: Your Honor, I mean, this is to instruct the
20 jury on the law.

21 THE COURT: Right.

22 MS. DIGIACOMO: As we've seen throughout the trial, they
23 have lots of questions and especially regarding legal matters. Some of
24 their questions weren't questions, it was statements regarding why
25 we're doing certain things.

1 So we have here charged sexual assault, which is a general
2 intent crime and lewdness, which is a specific intent crime. So I think it's
3 very proper to explain to them that there is a difference between the two
4 crimes. And especially since we do have a burden to prove both crimes.
5 So it's just informing them on the difference.

6 If they want to add in lewdness with a minor is a specific
7 intent crime, that's fine with the State. I just think because you have two
8 different crimes that are not similar in how you have to prove them, we
9 need to instruct them on that.

10 MS. MACHNICH: The only last thing is, I think it's pretty
11 illustrative that the lewdness wasn't included in this. So the one that has
12 the higher level of intent wasn't included in the State's instruction. So it
13 was never intended to be that kind of instruction and hold the State to
14 that burden.

15 MS. DIGIACOMO: Well --

16 THE COURT: So would you rather have lewdness --

17 MS. DIGIACOMO: Your Honor --

18 THE COURT: -- is a specific intent crime, sexual assault is a
19 general intent crime?

20 MS. MACHNICH: I don't care what order.

21 MS. DIGIACOMO: That's fine with the State.

22 THE COURT: I think we need to define them.

23 MS. DIGIACOMO: Okay.

24 MS. MACHNICH: Okay. It's fine if the specific intent, put
25 exactly lewdness and the whole -- what is it? Lewdness is a minor --

1 MS. DIGIACOMO: Is a specific intent crime.

2 THE COURT: -- blah, blah, blah, is a specific intent crime.

3 Sexual assault with a --

4 MS. DIGIACOMO: It's actually just sexual assault is what we
5 used.

6 THE COURT: Yeah. All right. Sexual assault is a general
7 intent. All right. That's the one I will give. I want you to modify that.

8 MS. MACHNICH: I'm not arguing further, Your Honor, I just
9 want to make it clear for the record, we are objecting to the giving of this
10 instruction for all of the reasons previously stated.

11 And because Your Honor is inclined to give the instruction
12 over our objection, we did request that we fully define both of them to
13 make it a complete instruction. We appreciate Your Honor doing that
14 and the State agreeing that that's proper and we have no opinion as to
15 the order of the charges with the definitions.

16 THE COURT: All right. Who's going to make the change?

17 MS. DIGIACOMO: I can do it, Your Honor.

18 THE COURT: All right.

19 MS. DIGIACOMO: I had emailed your JEA our set. So I can
20 go in there and make all these changes.

21 THE COURT: Okay.

22 MS. DIGIACOMO: Easy enough.

23 THE COURT: All right. So that one needs to -- I'll make a
24 note, but that's what I'm doing. So giving the instruction I guess as
25 modified, I don't know -- I'm not rejecting it, so I don't know that again,

1 that little use statute says I have to sign it. But it's clearly on the record.

2 Okay. The next one that I have a sticker, to constitute a lewd
3 and lascivious act, it is not necessary that the bare skin be touched. The
4 touching may be through the clothing of the child. State provided that
5 case.

6 MS. DIGIACOMO: And Your Honor, I have two more.

7 THE COURT: Well, is there anything on -- two more? Two
8 more cases or two more --

9 MS. DIGIACOMO: Two more cases, I'm sorry. Ms. Machnich
10 had asked about if there's anything more specific in the case law. So we
11 provided *State versus Catanio* which is 120 Nevada 1030. And in that it
12 talks about that, we conclude that the Nevada statutory language
13 providing that, "A lewd act be done upon or with a child's body clearly
14 requires specific intent."

15 And it goes on to say, "But does not require physical contact
16 between the perpetrator and the victim."

17 Then I also have -- that's the wrong case. Hold on. I also
18 have here *Griego versus State*, G-R-I-E-G-O versus State, which is 111
19 Nevada 444. And in that case, it's talking about the sufficiency of the
20 evidence and the defense was saying that if there was conflicting
21 testimony regarding whether Griego had fondled him through the
22 outside or inside of his clothing.

23 And the Court concluded that the charge did not specify
24 whether the fondling was on the outside or inside of the clothing. And
25 so we're using that again as an inference that for lewdness, there's not a

1 specific requirement.

2 And then lastly, I have *United States versus Castro*, which is
3 607 F.3d. 566. And it says specifically, "Lewd touching for purposes of §
4 288," and they're talking about a lewd or lascivious act, "can occur
5 through a victim's clothing and can involve any part of the victim's body.

6 But a lewd or lascivious may not involve touching at all. Just
7 instructing the minor to disrobe would be enough. So it's just the State's
8 position that you can infer this from the law that there's not a
9 requirement for lewd act that the bare skin be touched.

10 MS. MACHNICH: And Your Honor, we would oppose this.
11 The *Catania* case doesn't say it. I looked through there and was unable
12 to find anything because the *Catania* case discusses the distinction
13 between upon or with.

14 So it was moving a clothing aside in order to take pictures or
15 having the child masturbate him or herself was what *Catania* dealt with.

16 The other cases the State has now read into the record, the
17 sections, those were not provided to us ahead of time. Ms. DiGiacomo
18 did show them to me at about 2:10 today, 2:15 when we all got here.
19 And so I have not had a chance to case cite those and find out what more
20 might be.

21 But with regard to the instruction that's been proffered by the
22 State, I believe that this is amounting to inappropriate witness vouching.
23 It is misleading to the jury. All of these cases that have been cited by the
24 State all talk about sufficiency of the evidence. Could this verdict be
25 sustained by the jury?

1 This is argument for the State. This is their theory of the
2 case and their argument. This is not a piece of law that should be
3 presented to the jury.

4 They certainly can argue this. And if the State -- if the jury
5 finds that a lewd or lascivious act has occurred, then they can find him
6 guilty. And if they find that it has not occurred, they can find him not
7 guilty.

8 However, this is an inappropriate argument in a jury
9 instruction in order to highlight specific testimony. And in this case,
10 specifically that she said different times, different things.

11 So I think this is wholly inappropriate. And beyond that, they
12 didn't show me the cases ahead of time. I know they largely point
13 towards the California statute. And we all, you know, reference
14 California. We have some CALCRIM ones, pattern things proposed in
15 ours as well. And so we do make arguments that they should be applied
16 and allowed here.

17 That being said, I should note that the section, whatever, 228
18 those Ms. DiGiacomo read out of that case, that was citing into a
19 California case, it's the California statute with the Nevada Supreme Court
20 from my very brief perusal saying, we apply about the same. Our
21 statutes are very similar.

22 I just don't think this is proper. It's going to vouch for this
23 witness. It's going to be overly prejudicial. It doesn't provide anything
24 probative to whether something happened or not, because this is
25 arguments that the State can make, and it should not be unduly

1 highlighted.

2 MS. DIGIACOMO: If I can just be heard, Your Honor.

3 THE COURT: Go ahead.

4 MS. DIGIACOMO: The case that I provided her initially, she
5 said that she wanted something more. We just got this break to go over
6 their jury instructions and I looked up something more and brought it
7 back to her. So, you know --

8 THE COURT: I've only looked *Catanio*, so I don't see what --
9 I'm not -- any of that doesn't really matter. *Catanio* does say, and I'll
10 quote from it. "We agree with California court's interpretation of what
11 must be proven to establish the elements of the crime of lewdness.

12 We further conclude that Nevada's statutory language
13 providing that a lewd act be done upon or with a child's body, clearly
14 requires specific intent by the perpetrator to encourage or compel a lewd
15 act in order to gratify the accused sexual desires, but does not require
16 physical contact between the perpetrator and the victim."

17 So I think this is clearly an accurate statement of the law, but
18 I don't necessarily agree with how it's worded because it does talk about
19 the bare skin and being more, if you will, related to this particular case. I
20 think a jury instruction that says --

21 MS. DIGIACOMO: Would it be better to change it to
22 constitute a lewd and lascivious act, it is not necessary that the child be
23 touched?

24 THE COURT: Does not require physical contact between the
25 perpetrator and the victim. That's a quote right out of the case.

1 MS. DIGIACOMO: Okay.

2 MS. MACHNICH: Your Honor, then our objection to this
3 would be that it does not fit this case at all and that it's not relevant to
4 these proceedings. There's been no allegation that something happened
5 where there was -- making the child masturbate themselves, making a
6 child touch themselves, masturbating in the child's presence. None of
7 those are at issue here.

8 And so then the jury instruction just becomes irrelevant and
9 confusing.

10 THE COURT: It's any act as far as I can tell, in order to gratify
11 the accused sexual desires. And I assume that's -- and although I think I
12 saw it in somewhere the definition of that crime. I certainly hope I saw it.

13 MS. SUDANO: You did.

14 MS. DIGIACOMO: You did. It's right before.

15 THE COURT: That's exactly what -- I mean, is it like two
16 before is the --

17 MS. MACHNICH: It's about two before, Your Honor.

18 THE COURT: -- crime?

19 MS. MACHNICH: It's in the definition of the -- upon or with is
20 about two before. It's in the definition of the --

21 THE COURT: Okay.

22 MS. MACHNICH: -- of the charge. And then we put in a
23 definition of lewd or lascivious or definition of lewd further in the
24 Defense instructions.

25 But again, I don't think that we have an issue with -- I mean,

1 if they're trying to criminalize his alleged statements of, you're going to
2 have sex with me tomorrow, that's incorrect. And so it has to be an act.
3 And this is just, again, it's going to confuse the jury.

4 THE COURT: As I said, that's a statement of Nevada law
5 unless it's been overturned since 2004. It explains generally what we
6 have here and yes, the specific case, that case is different than this case.
7 But it applies, and I believe they even gave examples of all kinds of non-
8 contact, which still violates the statute.

9 They talk about another case, *People versus Austin* without --
10 I mean, they go into removed merely, according to that case, which they
11 cite, merely removing her pants and as she necessarily had to touch
12 herself to do so. Then they cite several different examples that, yeah,
13 don't particularly aren't the exact circumstances, but showing that
14 Nevada has taken California's position of applying this broadly.

15 So as long as you change it, does not require physical
16 contact between the perpetrator and the victim, to constitute a lewd or
17 lascivious act, it is not necessary -- does not require physical contact
18 between the perpetrator and the victim.

19 MS. MACHNICH: But it does require a physical act, Your
20 Honor. I think the distinguishing factor here is as charged in this case,
21 there is only physical contact. That there's no evidence nor any charge
22 relating to again, masturbating in a child's presence or having them
23 remove their clothing in order to take untoward photos of them.

24 THE COURT: But I thought there's -- not I thought. There is
25 testimony, he told her and in fact, he did take her clothing off.

1 MS. DIGIACOMO: Right. We do not have --

2 MS. MACHNICH: But that's not charged.

3 MS. DIGIACOMO: We do not have that charged as a
4 lewdness, Your Honor.

5 THE COURT: Okay.

6 MS. DIGIACOMO: The purpose that we were doing this for
7 was for the fact that, you know, we have it charged fondling as in the
8 *Griego* case that I cited to earlier. And in that case, it was not required
9 that the State had to prove it was under or on top of the clothing. And so
10 we just were trying to make that clear to the jury.

11 But if you want to change it to a lewd or lascivious act does
12 not require physical contact between the perpetrator and the victim, I can
13 change that.

14 THE COURT: That's from the case.

15 MS. MACHNICH: Your Honor, it's going to be so confusing
16 in this case. There's nothing charged.

17 THE COURT: That's what I'm giving, counsel. I mean, I gave
18 you ample opportunity. That's what I'm giving.

19 MS. MACHNICH: Ample opportunity, but Your Honor, they
20 provided additional --

21 THE COURT: To argue.

22 MS. MACHNICH: -- cases. Okay.

23 THE COURT: I've only looked at the one case.

24 MS. MACHNICH: But that's the only one they gave.

25 THE COURT: And that's the one case from Nevada that

1 quotes that.

2 MS. MACHNICH: Right.

3 THE COURT: So that's what I'm doing. Thank you, counsel.

4 MS. MACHNICH: May I ask for the exact full wording of that
5 so that we can know what's being said?

6 THE COURT: It's in the case.

7 MS. DIGIACOMO: He just read it.

8 MS. MACHNICH: Okay. I need to know where --

9 MS. DIGIACOMO: It's from the case where I highlighted for
10 you. To constitute a lewd -- are you asking, to constitute a lewd or
11 lascivious act --

12 MS. DIGIACOMO: I highlighted it.

13 THE COURT: -- does not require physical contact between
14 the perpetrator and the victim.

15 MS. MACHNICH: Okay. And the remainder of this will be
16 struck, correct?

17 THE COURT: Yes. There is no requirement that the
18 testimony of a victim of a sexual crime be corroborated and his or her
19 testimony standing alone if believed beyond a reasonable doubt is
20 sufficient to sustain a verdict of guilty.

21 MS. MACHNICH: Your Honor, we're not saying that this is a
22 bad statement of law. We're just saying that especially given this case,
23 this is inappropriate witness vouching. You're objecting to the giving of
24 this instruction as this case has literally only been about this witness
25 going back and forth and changing her testimony.

1 I mean, I'm not trying to hold out to Your Honor an
2 inappropriate statement of the law here. I don't want to make that
3 misrepresentation, but we do believe that this would put inappropriate
4 weight on the fact that they don't need anything else saying, well, you
5 should convict.

6 And it's the Court telling them you should convict even if it's
7 just her. I understand the State's position that it has to be believed
8 beyond reasonable doubt. And we just disagree with the giving of it in
9 this case.

10 And Your Honor, in the alternative to removing it completely,
11 we would incorporate one of our Crawford instructions and suggest that
12 in order to be properly given, we would posit that it should also be given
13 as a Crawford in order to not put undue weight on the State's position.

14 MS. DIGIACOMO: And Your Honor, we did fashion this
15 instruction, which is proper under *Gaxiola versus State*, which is 121
16 Nevada 638. If I may approach. We did the instruction --

17 THE COURT: I think you included that.

18 MS. DIGIACOMO: Well with the Crawford.

19 MS. MACHNICH: And Your Honor, with the new --

20 THE COURT: Okay.

21 MS. MACHNICH: -- proposed instruction, we can leave it as
22 proper.

23 MS. DIGIACOMO: Before you -- okay. I would just like to
24 read it into the record if you don't mind.

25 THE COURT: Go ahead.

1 MS. MACHNICH: That's fine.

2 MS. DIGIACOMO: So what the State is proposing is the
3 instruction we originally had and their negative or inverse language. So
4 it would read, "There is no requirement that the testimony of a victim of
5 a sexual crime be corroborated and his or her testimony standing alone,
6 if believed beyond a reasonable doubt, is sufficient to sustain a verdict of
7 guilty.

8 If you find that the testimony of a victim of sexual crime is
9 not corroborated and you do not believe the witness's testimony beyond
10 a reasonable doubt, then you must find the Defendant not guilty."

11 MS. MACHNICH: And we'll withdraw our objection if that's
12 the current version.

13 THE COURT: Okay. Next, where a child has been the victim
14 of a sexual crime and does not remember the exact date of the act, the
15 State is not required to prove a specific date, but may prove a timeframe
16 within which the act took place.

17 MS. MACHNICH: Yes, Your Honor. Let's see. First, I think
18 there's a typo and maybe I'm reading it wrong. The State is not
19 required, I believe it's to prove.

20 MS. DIGIACOMO: Okay.

21 MS. MACHNICH: I think at the very least --

22 THE COURT: Yeah.

23 MS. MACHNICH: -- we should fix that, if the State's okay
24 with that.

25 MS. DIGIACOMO: Got it. Thank you, counsel.

1 MS. MACHNICH: And let me see here. And we don't, you
2 know, we think given the facts of this case, that this allows the State too
3 lenient of a burden.

4 It's not enough. I mean, the cases in which this is typically
5 given tend to be cases where they say it happened once a month for four
6 years. And they're like, well, tell us about it every single time. And I
7 can't, but this is what happened. I know it happened every Sunday, the
8 first Sunday in the month, because my mom went to church at a new
9 church, and he had more time with me.

10 I mean, that's the sort of thing that we typically hear when
11 you're talking about a date range and not having to prove a specific date.
12 We're certainly not arguing that they have to say it happened August
13 12th.

14 But I think in some respects this is misleading when it says
15 they can just prove a timeframe because of the edit to charges 2 through
16 4 which now have a time range, I believe that that's how it's charged.
17 The jury has already been charged to determine if they have proven with
18 significant particularity whether something occurred during that time
19 period.

20 But I think this improperly allows leeway because obviously
21 the State is going to argue that it doesn't matter if the kiss happened
22 yesterday or four weeks ago and the oral sex happened four weeks ago
23 or yesterday, it's enough that it happened.

24 And we would posit that it is not enough that it happened
25 and the fact that they don't know how to keep their dates straight, the

1 witness couldn't keep her dates straight, kept changing stories, is not
2 enough to prove the case beyond reasonable doubt.

3 Because of that, given the particular circumstances in this
4 case, it does matter. And I'm not looking for a date. I don't care that it's
5 not July 11th and June 24th. But I do care that it's June or July, and I
6 don't think this is a proper instruction for this jury.

7 That being said, if Your Honor is inclined to give this, we I
8 believe have submitted a reversed worded Crawford instruction on this
9 as well and believe it's very important that that be given to
10 counterbalance its damage.

11 THE COURT: It's possible, but where is it?

12 MS. MACHNICH: If you've taken off the jury verdict form in
13 ours --

14 MS. DIGIACOMO: It's page 18 of their proposed instructions,
15 Your Honor.

16 MS. MACHNICH: It is. Yes.

17 THE COURT: Okay. State --

18 MS. DIGIACOMO: Your Honor --

19 THE COURT: -- I haven't seen this timeframe argument
20 before, I guess because the cases it hasn't come up. So go ahead.

21 MS. DIGIACOMO: Your Honor, we provided *Cunningham*
22 *versus State*, which is 100 Nevada 396. And that case states, "Unless
23 time is an essential element of the offense charge, there is no absolute
24 requirement that the State alleges the exact date and the State may
25 instead give an approximate date on which it believes the crime

1 occurred."

2 And in this case, we do have the timeframe. We have an
3 overall timeframe of August 1st, 2015 to July 11th, 2016. And then we
4 even went further within each count, did a timeframe as to when those
5 counts occurred within that timeframe.

6 This is a normal instruction that we give, and I do feel it is
7 appropriate. With regard to their reverse or inverse Crawford
8 instruction, it's completely inappropriate because the State does not
9 have to prove beyond a reasonable doubt that any act took place within
10 a given timeframe. We have to prove the elements of the crime and we
11 have to do like on or about or in this timeframe, this is when it
12 happened.

13 But we don't have to prove that beyond a reasonable doubt.
14 So in that case, any Crawford inverse instruction would be improper.

15 And this is certainly relevant any time you have a child sex
16 case because they cannot remember specific dates. And it's normally,
17 you know, it goes on over a period of time. So that's why when these
18 cases are done, you can't just charge and say, oh, he did it to me ten
19 times. We have to say, well, what happened on this day or what
20 happened on the first time? And that's what we're required to prove.

21 So I think that our instruction is completely proper and it's
22 necessary in this kind of a case because the child cannot give the exact
23 dates.

24 THE COURT: Defense, tell me why you think they have to
25 prove beyond a reasonable doubt that any act took place within a given

1 timeframe?

2 MS. MACHNICH: Your Honor, it's within --

3 THE COURT: That would sort of that goes to that case and I
4 forget which one, you guys know, where they talked about the timeframe
5 and a juvenile. And especially at this point -- at that point, 12 year old,
6 correct?

7 MS. DIGIACOMO: Yes.

8 MS. MACHNICH: 13.

9 MS. DIGIACOMO: Well, 12 and 13.

10 THE COURT: 12 and 13. Yes. All right. Go ahead.

11 MS. MACHNICH: Your Honor, I think that is absolutely what
12 the State has to prove, that any of these acts took place within the
13 timeframe given not a timeframe. They've given a timeframe. They've
14 specified a timeframe. They've decided to go with the timeframe instead
15 of a particular date, at least in one, if not three instances, with Counts II
16 through IV.

17 Again, our objection to the State's instruction that the
18 problem is that this is meant for cases where I don't know the exact date
19 it happened on, but it happened. But here we did know with much
20 particularity when it happened. And it was the third week of or the
21 fourth week of June and July 11th. And we knew that until the witness
22 came on the stand and changed her story.

23 Everything would be consistent up to that point. So to now --
24 and Your Honor allowed the amendment to the information which we're
25 not going to relitigate at this point, but we don't think that they should be

1 given an extra instruction to highlight the fact that they don't have to do
2 something as part of their burden.

3 A lot of these are sufficiency of the evidence and whether
4 we'd be able to object to something in closing or asked for the version of
5 a directed verdict. And we're not able to do that because it's not
6 appropriate. And we would not be able to say if it's in their argument
7 that we don't have to prove a particular date. We can just prove a
8 timeframe. Okay. That's fine as argument.

9 But the fact that it's being unduly highlighted by the Court,
10 given this specific circumstance in this case, not overall. Again, it could
11 be misleading, it could lower the State's burden and it doesn't fit in this
12 specific circumstance.

13 But we do believe that our inverse worded instruction, I
14 mean, it's hard to craft it inverse worded when things are phrased in this
15 manner. So that's what we did. And what we're saying is -- and maybe
16 it should be amended to, if the State fails to prove beyond a reasonable
17 doubt that any of the charged acts took place within the charged
18 timeframes, you must find the Defendant not guilty.

19 But the point is they have to prove that these acts happen
20 when they say these acts happened and they still have to prove them
21 beyond reasonable doubt. They can't just say, well, it happened
22 sometime in this timeframe. They have to actually tell us with enough
23 particularity and satisfy what the jurors believe that is.

24 And we don't know the jurors believe that is, but it's within
25 their purview.

1 MS. DIGIACOMO: Your Honor, may I be heard?

2 THE COURT: Yeah.

3 MS. DIGIACOMO: On the *Cunningham* --

4 THE COURT: We started with you, right? Yeah.

5 MS. DIGIACOMO: Yes.

6 THE COURT: Okay.

7 MS. DIGIACOMO: The *Cunningham* case goes on further to
8 say, "Time is not an essential element of the crime of committing lewd
9 and lascivious acts upon a minor." And it goes on to even say, "It would
10 be a very weak rule of law that would permit a man to ravish a 15 year
11 old girl and then say, in effect, you cannot convict me of this crime as
12 you did not guess the right date." And they're quoting a case from
13 Idaho.

14 So we do need to inform the jury, because it is the State's
15 burden of proof that we have to show a timeframe, but we do not have
16 to prove a specific date. It is very important in a case, any case with a
17 trial. And in this case, she cannot give specific dates. She can give a
18 good timeframe, but she cannot give a specific date.

19 So I would ask that this proper instruction be given.

20 THE COURT: I think it is the proper version of the law, proper
21 statement of the law given in many cases talking about the child's age
22 and the fact that they don't necessarily come up with the accurate dates.

23 The case that you talked about where they said once a week
24 for years, but I believe that's what you're talking about, where they
25 charge them sort of a generally multiple times. Or maybe that's not

1 what you're referring to. But that's the case you -- one of the cases you
2 gave me.

3 We are talking about a child and I think, as I said, this is an
4 accurate statement of the law. So I'm going to go ahead and give it. I
5 don't think the converse, if you will, that it beyond a reasonable doubt
6 you have to show the time is accurate under the cases dealing with
7 sexual assault of a minor. And there appear to be -- there are too many.

8 In any event, they have a broad interpretation of the time
9 period. So I'm going to give this one.

10 Flight of a person. Don't we have a standard, if you will? I
11 mean --

12 MS. DIGIACOMO: This is --

13 THE COURT: I guess there is no such thing.

14 MS. DIGIACOMO: No. This is our normal instruction that we
15 proffer. Instead of printing all the cases, I just gave you the list of cases
16 that have found it's proper on the bottom of the instruction.

17 THE COURT: And the Defense had an alternate, let me try to
18 find that.

19 MS. DIGIACOMO: Right. And we would object to that as
20 well because they're saying if the State fails to prove beyond reasonable
21 doubt that the alleged flight is related to the instant offense, then it's
22 improper to consider.

23 But flight is not something that the State has to prove
24 beyond reasonable doubt. So this inverse, it misstates the law and it
25 also increases our burden.

1 MS. MACHNICH: Your Honor, I don't believe that that's
2 accurate, but if --

3 THE COURT: Go ahead.

4 MS. MACHNICH: -- they're concerned with -- what? Oh,
5 yeah. Specifically with the State's, we're objecting to the giving of the
6 flight instruction because we don't believe they've proven flight. There
7 was a turn. It may have been a turn. It may have been a gone straight.
8 It may have been turn down a street. It may have been fast. It may have
9 been not that fast.

10 But what we do know definitively is when the police officers
11 turned on their lights and sirens, the truck stopped and had gone no
12 more than a block and a half. Given the evidence that's been introduced
13 in this case, never even left the development. And when officers ask
14 them to get out of the car, they got out of the car.

15 So I don't believe they proven flight. But if Your Honor is
16 inclined and you don't believe that they have to prove flight beyond a
17 reasonable doubt in order to have it considered, which I don't believe is
18 correct, if they're going to have it considered as something, it's still the
19 State's burden.

20 But we're happy to strike, if the State fails to prove that the
21 alleged flight is related to the instant offense, it is improper to consider
22 it. So amending our instruction if Your Honor disagrees with what we
23 believe the standard would be, but we do believe it's otherwise
24 appropriate.

25 THE COURT: Hold on just a second.

1 MS. MACHNICH: Okay.

2 THE COURT: Oh, here it is. Okay. So say that again. You
3 want --

4 MS. MACHNICH: We believe that this reverse flight
5 instruction or this reversely wordy flight instruction --

6 THE COURT: Second paragraph is what you're talking about,
7 right?

8 MS. DIGIACOMO: No. They're talking about page 17 of their
9 proposed instructions, Your Honor.

10 MS. MACHNICH: Correct.

11 THE COURT: Hang on.

12 MS. MACHNICH: Which I'm happy to hold off on until we get
13 there.

14 THE COURT: Okay. If the State fails to prove beyond a
15 reasonable doubt that the alleged flight is related to the instant offense,
16 it is improper to consider it in determining whether the Defendant is
17 guilty or not guilty.

18 And what is it you're saying you wanted to modify?

19 MS. MACHNICH: The State argue that they don't have to
20 prove the alleged flight beyond a reasonable doubt. We disagree with
21 that assessment, but we are more concerned with having a reverse
22 worded instruction than having proof beyond a reasonable doubt be
23 necessary.

24 So we would proffer our instruction on page 17 in its current
25 form. If Your Honor is inclined to give the State's flight instruction,

1 which we object to on other grounds.

2 However, if Your Honor is inclined to give their flight
3 instruction and only inclined to give our reversely worded instruction,
4 and you believe if the beyond a reasonable doubt is removed from it, so
5 we're merely using the language specifically from their instruction
6 saying proved, then we would proffer in the alternative to our current
7 version of 17, which requires proof beyond a reasonable doubt that the
8 alleged flight is related to the incident offense to read, if the State fails to
9 prove that the alleged flight is related to the instant offense.

10 Which still requires proof, and the standard for that proof is
11 then lowered to what the State has said that they believe it to be. We
12 respectfully disagree with that, but I don't have a case to tell you and
13 therefore we offer this alternate edited version if Your Honor is
14 disinclined to agree with us on the proof beyond reasonable doubt being
15 necessary.

16 I think that's all I have to say. I was going to pause, but I
17 don't have anything more.

18 THE COURT: State?

19 MS. DIGIACOMO: Your Honor, first of all, flight is
20 circumstantial evidence in determining whether we prove something
21 beyond reasonable doubt. We do not have to prove flight beyond a
22 reasonable doubt.

23 And also, if they want a reverse, then I would suggest taking
24 the language that's been approved by all of these cases and reversing it
25 versus making it specific and tailoring it in a more narrow fashion.

1 The first part says, "The flight of a person after the
2 commission of a crime is not sufficient in itself to establish guilt.
3 However, if flight is proved, it is circumstantial evidence in determining
4 guilt or innocence."

5 We could add right there, if flight is not proved, then it is not
6 circumstantial evidence in determining guilt or innocence.

7 THE COURT: All right. I'm going to talk about the
8 Defendant's proposed first. I don't think -- I am not seeing any cases
9 where you need to prove flight beyond a reasonable doubt. The crime is
10 not flight. Flight is only a circumstantial, if you will, circumstantial
11 evidence in determining. They say that clearly.

12 It can, I think in some other instructions it can show
13 something. But to say the State fails to prove beyond a reasonable
14 doubt the alleged flight is related to the incident offense, it is improper to
15 consider it in determining whether the Defendant is guilty or not guilty.

16 I understand you're trying to do the inverse and I'm inclined
17 to give the inverse instruction. But this seems to -- it clearly to me seems
18 to say if somebody, the alleged flight, then they're guilty. If you decide
19 they -- forget the evidence of what actually happened, if you think they
20 left the scene, then they're guilty.

21 And I would say this is a very dangerous type instruction.
22 And I don't think it comports with the law. I've done a lot of these now
23 and as I've said, unfortunately, many of them have been this type of
24 case.

25 I think there should be the inverse --

1 MS. DIGIACOMO: So if --

2 THE COURT: Violent person after commission of a crime is
3 not sufficient, shouldn't it be in and of itself? All right.

4 MS. DIGIACOMO: Probably.

5 THE COURT: In itself. It doesn't matter. I think in itself. No.
6 Whatever. In itself to establish guilt, that's -- yeah. It doesn't mean just
7 because.

8 However, if flight is proved, it is circumstantial evidence in
9 determining guilt or innocence. And you're proposing to say --

10 MS. DIGIACOMO: If flight is not proved.

11 THE COURT: -- if flight is not proved --

12 MS. DIGIACOMO: It is not circumstantial evidence in
13 determining guilt or innocence.

14 MS. MACHNICH: Your Honor --

15 THE COURT: I realize you don't want that at all, but as a
16 whatever you call it, inverse. Do you have any other suggestions?

17 MS. MACHNICH: My concern would be that when you go to
18 the second paragraph of the instruction it states, "The essence of flight in
19 body is the idea of deliberately going away with consciousness of guilt
20 and for the purpose of avoiding apprehension or prosecution."

21 If this instruction is given, it's not necessarily our largest
22 concern if Your Honor is inclined to give it whether flight is proven. But
23 it's the purpose with which the flight happened.

24 And we've heard ongoing commentary, obviously, jury
25 selection had a lot of police contact, potential illegal immigration, born in

1 Honduras -- and then in jury testimony we heard born in Honduras type
2 stuff.

3 I don't think that our only concern about this instruction is
4 whether flight is proven or not proven. It also goes to the second
5 paragraph about whether the consciousness of guilt is proven or not
6 proven.

7 THE COURT: That's right from the case though.

8 MS. MACHNICH: I understand it's a correct statement of law,
9 Your Honor. What I'm concerned about is having a reverse worded
10 version of or encompassing the theory that they have to prove that the
11 flight was a consciousness of guilt. You know, the concern is that the
12 deliberate going away with consciousness of guilt for the purpose of
13 avoiding apprehension or prosecution necessarily relates to the
14 apprehension or prosecution in this case.

15 They can't prove that he was scared of police contact
16 because he was an undocumented person. Should be --

17 THE COURT: Isn't that for argument?

18 MS. MACHNICH: And that's why --

19 THE COURT: How do you prove what's in somebody's head?

20 MS. MACHNICH: Right. And that's why I think this entire
21 instruction is inappropriate, because there's been an alternate theory as
22 to why, if you determine flight did occur enough to give this instruction --

23 THE COURT: Again, you can make the argument, but I think
24 you're asking me to ignore established Nevada law. This is right --
25 especially the second paragraph. What's the case so I can quote it or at

1 least refer to it?

2 MS. MACHNICH: Your Honor, we're not stating that this is
3 incorrectly written.

4 THE COURT: Well, the Supreme Court I'm sure knows it.

5 MS. DIGIACOMO: And Your Honor, I don't know if you got
6 this one where I listed all of the cases.

7 THE COURT: Yeah.

8 MS. MACHNICH: And we're not saying this is an incorrect
9 version of the law, Your Honor. We're stating that given the
10 circumstances in this specific case, the instruction shouldn't be given. If
11 it's given, there should be some sort of inverse worded instruction that
12 says that --

13 THE COURT: And I'm asking you what do you want as an
14 inverse?

15 MS. MACHNICH: Court's brief indulgence.

16 THE COURT: If the State fails to -- the State fails to prove
17 flight --

18 MS. DIGIACOMO: Then you may not consider it
19 circumstantial evidence in determining guilt or innocence. Although, I
20 don't like it with if the State fails, Your Honor, because it's not our
21 burden. It's just a flight is proved, or flight is not proved.

22 THE COURT: Well, I think it is.

23 MS. MACHNICH: It's always the burden of the State.

24 THE COURT: If you don't prove flight, then none of this
25 applies. If they say no, he wasn't trying to get away, they're going to

1 argue he could have been trying to get away for lots of reasons.

2 Whatever. I think it's appropriate to put that.

3 MS. MACHNICH: Okay, so the third paragraph should be, if
4 the State does not prove flight, then it may not be considered as
5 circumstantial evidence in determining guilt or innocence or however
6 they want it?

7 MS. MACHNICH: And Your Honor, we would say that that
8 ignores the second paragraph. Again, not saying that's bad law. That is
9 correct statement of Nevada law.

10 THE COURT: Okay. So do --

11 MS. MACHNICH: We would say it needs to incorporate that.

12 THE COURT: -- you have any alternative to what she just
13 said?

14 MS. MACHNICH: Yes. If the State fails to prove the alleged
15 flight was done with the consciousness of guilt and for the purpose of
16 avoiding apprehension or prosecution in this matter, it should not be
17 considered as circumstantial evidence.

18 MS. DIGIACOMO: And Your Honor, I just find that really
19 confusing. The whole point of it is that if flight is proven, they can
20 consider it as circumstantial evidence regarding the guilt of the
21 Defendant on the crimes that the State is trying to prove.

22 All paragraph 2 does is explain why you can use it. That it
23 would be consciousness of guilt. But if we don't prove it, it's not
24 consciousness of guilt.

25 So I think just simply saying if flight's proved, you can use it

1 as circumstantial evidence as pointed out in the second paragraph. If it's
2 not proved, then you may not use it as circumstantial evidence.

3 THE COURT: All right. All right. I'm going to agree. So the
4 first paragraph we'll add the converse, if flight is not proved, then --

5 MR. SPEED: Your Honor, may I be heard on that? It should
6 have no bearing on your determination of guilt or innocence. I think that
7 uses the least amount of words. It's the most economical of thought,
8 and it makes it clear what both sides are trying to accomplish with this
9 instruction.

10 MS. DIGIACOMO: So if --

11 MS. SUDANO: The State wants to have the flight instruction,
12 we want an inverse that doesn't confuse the issues even more. So I
13 think --

14 THE COURT: If flight is not proved --

15 MS. DIGIACOMO: Then it --

16 MR. SPEED: It should have no bearing on your
17 determination of guilt or innocence.

18 THE COURT: Well, you may not consider it.

19 MS. DIGIACOMO: Then it may not be considered as
20 circumstantial evidence.

21 THE COURT: And it may not be considered in determining
22 guilt or innocence.

23 MR. SPEED: That's perfect.

24 THE COURT: Okay.

25 MS. DIGIACOMO: Isn't that what I said initially?

1 THE COURT: No. It's a little different.

2 MR. SPEED: No, you've added the circumstantial evidence
3 part.

4 THE COURT: All right.

5 MS. DIGIACOMO: Okay. So if flight is not proved, then it
6 may not be considered --

7 MR. SPEED: In your determination.

8 MS. DIGIACOMO: -- in determining guilt or innocence.

9 MS. MACHNICH: In determining guilt or innocence.

10 MR. SPEED: Right.

11 MS. MACHNICH: Yes. And just for the record, Your Honor,
12 we're not acquiescing to --

13 THE COURT: Understand. To anything.

14 MS. MACHNICH: To anything. But to this precise wording,
15 although we are certainly in the interest --

16 THE COURT: Yes. All right.

17 MS. MACHNICH: -- of not having it become more
18 convoluted. But we're not withdrawing any of our prior objections.

19 THE COURT: Yes. Okay. That's all I have for the Defenses
20 objections to the State's.

21 MS. DIGIACOMO: Actually, there's one more Your Honor.

22 THE COURT: What's that?

23 MS. DIGIACOMO: It's one I added in. If you go to after the
24 credibility or believability of a witness. Or are you guys not objecting to
25 this one anymore? The when a trial witness fails for whatever reason to

1 remember a previous statement?

2 MS. MACHNICH: I believe we have withdrawn that.

3 MS. DIGIACOMO: Okay. Then never mind.

4 MS. MACHNICH: Yeah.

5 MS. DIGIACOMO: We're good.

6 THE COURT: Okay. So Defendant's proposed.

7 MS. MACHNICH: Yes.

8 MS. DIGIACOMO: And, Your Honor, if I could just kind of cut
9 to the chase with regard to their Crawford. There's two more that I
10 changed that I'm not -- that we're not objecting to.

11 THE COURT: Okay. If you're not objecting --

12 MS. SUDANO: Well, we're objecting in form.

13 MS. DIGIACOMO: We're objecting in form. But what I did
14 was I took the law and turned it into an inverse for lewdness with a
15 minor and sexual assault with a minor. If I may approach.

16 THE COURT: Yeah.

17 MS. DIGIACOMO: May I approach, Your Honor?

18 THE COURT: Now you've lost me as to even what you're
19 talking about.

20 MS. DIGIACOMO: Okay. So what I did was the bottom of
21 each, I added the inverse of what the definition is.

22 THE COURT: But still you're not agreeing -- nobody's
23 agreeing to these?

24 MS. DIGIACOMO: No. No. This is what the -- they want an
25 inverse instruction. The State's not opposing it. What I did was I took

1 the specific wording of the law and then just turned it reverse at the end.

2 MS. MACHNICH: And Your Honor, I'm pulling our instruction
3 right now. I'd just like to compare them because I haven't seen these
4 before and we may agree.

5 THE COURT: All right. I was wrong.

6 MS. DIGIACOMO: And I'm referring --

7 THE COURT: I hoped it would take an hour. We're way past
8 already.

9 MS. DIGIACOMO: Oh, if you thought it was only going to be
10 an hour.

11 THE COURT: Well, I had recalled there was only five. I
12 figured that's --

13 MS. DIGIACOMO: Well, that was before we got the Defense.

14 THE COURT: Yes.

15 MS. DIGIACOMO: And just for the record, it's their proposed
16 20, 15 and 16 that we made the inverse for the lewdness and for sexual
17 assault of a child.

18 THE COURT: And when you say 15, you're talking about
19 page number?

20 MS. DIGIACOMO: Their page numbers. Yes, Your Honor.

21 THE COURT: I'm sorry. 15 and 16?

22 MS. DIGIACOMO: Yeah. 15 and 16 goes to what they were
23 asking for with inverses regarding lewdness.

24 THE COURT: Okay.

25 MS. DIGIACOMO: Which I added at the bottom of our

1 definition.

2 MS. MACHNICH: All right. With regard to the State's
3 proposed edits encompassing our 15 and 16, we will withdraw the 15
4 and 16 in lieu of the State's proffered --

5 THE COURT: Okay.

6 MS. MACHNICH: -- lewd and lascivious instruction. And that
7 would replace one of the State's instructions.

8 MS. DIGIACOMO: That would replace our lewdness
9 definitions, correct.

10 MS. MACHNICH: Yes. Okay. And similarly, we would
11 withdraw 20 as the substance of it is included in the State's new
12 proffered instruction.

13 THE COURT: And just so the record is clear, page 20?

14 MS. MACHNICH: Page 20, yes.

15 THE COURT: Because we haven't numbered any of these.

16 MS. MACHNICH: That's correct. It's page 20. And that
17 would obviously replace the State's sexual --

18 THE COURT: Why don't you read part of it or all of it?

19 MS. MACHNICH: Page 20 of ours is, "If the State fails to
20 prove beyond a reasonable doubt that Gustavo Gunera-Pastrana
21 engaged in an act of sexual penetration, then you must find Gustavo
22 Gunera-Pastrana not guilty of the offense of sexual assault with a minor
23 under 14."

24 We're withdrawing that because the substance of that
25 language is included in the State's new instruction that begins, a person

1 who commits a sexual penetration upon a child.

2 THE COURT: All right. So what's next?

3 MS. MACHNICH: What is next is a good question, Your
4 Honor.

5 THE COURT: All these changes.

6 MS. MACHNICH: So I'd like to at this point, start with the
7 beginning of ours.

8 THE COURT: That's fine.

9 MS. MACHNICH: Fantastic. So the first proposed instruction
10 is a more thorough version of a credibility or believability instruction. It
11 goes into more detail. It is sourced from a CALCRIM pattern instruction.
12 Obviously, California criminal instructions are not law that must be
13 followed in Nevada by any means.

14 However, as we've noted, a lot of the California criminal
15 statutes are similar to those in Nevada. We believe that this is
16 something that would give the jury a more complete view of determining
17 the credibility or believability of the witnesses in this case given how
18 strongly this case relies upon credibility of very few lay witnesses in
19 particular.

20 So we believe it's a correct statement of the CALCRIM
21 instruction 105. The cited version is page 3. What I believe to be
22 formatted in the correct manner to match the State's instructions is
23 number 4, the clean copy. And because of that we would submit it as an
24 appropriate instruction and request that it be given in this case.

25 It is not, and I'm not trying to hold it out as a Nevada pattern

1 anything. We don't have those here. But we do believe it's a correct
2 statement of the law from which it came and would be illustrative and
3 important in this case.

4 THE COURT: Okay. Before they go, let me ask you.
5 Paragraph 2, I'll read it. "If you do not believe the witness's testimony
6 that he or she no longer remembers something, that testimony is
7 inconsistent with the witness's earlier statement on the subject."

8 That doesn't seem to be like something's left out or
9 something.

10 MS. DIGIACOMO: And Your Honor, we never got a copy of
11 their CALCRIM 105. I don't know if they have a copy of it.

12 MS. MACHNICH: We don't have that.

13 THE COURT: Testimony is inconsistent -- if you do not
14 believe a witness's testimony that he or she no longer remembers
15 something, that testimony is inconsistent with the witness's earlier
16 statement on that subject.

17 MS. MACHNICH: I believe that in substance it's saying that,
18 if you say I don't know, that is inconsistent with knowing previously and
19 having an answer to the question previously.

20 So if you're able to answer previously it happened on
21 Sunday and then you say, I don't know, the, I don't know, isn't consistent
22 with saying Sunday. And we are pulling up the CALCRIM right now.

23 MS. DIGIACOMO: Your Honor, if I can approach.

24 THE COURT: Yeah.

25 MS. DIGIACOMO: I do have 105 and it's a bit different from

1 what you have? Do you want to see my copy, Your Honor?

2 MS. MACHNICH: That's fine.

3 THE COURT: Sure.

4 MS. MACHNICH: Okay, so our version, and I will approach
5 with the State's copy of this. Just so you know, this is the basis of
6 credibility believability instruction. So the different part starts here, and
7 it has factors and it's the factors --

8 MS. DIGIACOMO: Where did that come from?

9 MS. MACHNICH: Okay. It's just on the next page, it's down
10 here. Particularly where the optional sections as included in the
11 CALCRIM.

12 MS. DIGIACOMO: Right.

13 MS. MACHNICH: So it is there.

14 MS. DIGIACOMO: Your Honor, may I approach?

15 THE COURT: Yeah.

16 MS. MACHNICH: It's there. And Your Honor, for the record,
17 the top paragraph substantially similar to the Nevada credibility,
18 believability instruction. From there, it goes onto a number of factors.
19 We have those factors in paragraph form instead of individual factors
20 listed bullet pointed, as none of the other or very few of the other
21 instructions, if any, have that form.

22 So we put it in a form to most similarly mirror the rest of the
23 instructions in the packet. And then the final paragraph is on the second
24 page. It's in one of the optional sections. There's brackets and that was
25 included, given the testimony in this case to us that read as California

1 gives it as an option determining -- based upon the testimony of the
2 witnesses. I don't know that for sure. I'm not a California practitioner,
3 but that's what a bracketed subsection would mean to me by which you
4 see one. And so that's why that is included there.

5 MS. DIGIACOMO: Well, let me know when you're ready,
6 Your Honor.

7 THE COURT: I'm ready.

8 MS. DIGIACOMO: All right, so this instruction is not
9 complete with the California instruction. It pulls out some very
10 interesting choice things. For instance, the California instruction starts
11 with, "You alone must judge the credibility or believability of the
12 witnesses. In deciding whether testimony is true accurate, use your
13 common sense and experience. You must judge the testimony of each
14 witness by the same standard, setting aside any bias or prejudice you
15 may have.

16 You may believe all, part or none of any witness's testimony.
17 Consider the testimony of each witness and decide how much to
18 believe."

19 And then there are a couple of or several bullet points that
20 are in the brackets as far as the optional language goes, but there's a
21 paragraph between the two bracketed sections or there's two sections of
22 things that are in brackets that was not included in their proposed
23 instruction.

24 "Do not automatically reject testimony just because of
25 inconsistencies or conflicts. Consider whether the differences are

1 important or not. People sometimes honestly forget things or make
2 mistakes about what they remember.

3 Also, two people may witness the same event, yet see or
4 hear it differently."

5 And then there were a number of things that were not
6 included in their proposed instruction that would give additional context
7 to paragraph 2.

8 THE COURT: So let me ask real quick.

9 MS. DIGIACOMO: Yes.

10 THE COURT: Are you objecting to using this California?

11 MS. MACHNICH: We are.

12 THE COURT: If it was -- and I agree there's, especially the
13 first paragraph is important. So all right. Tell me why.

14 MS. DIGIACOMO: That last paragraph is also incredibly
15 important as well --

16 THE COURT: Well --

17 MS. DIGIACOMO: -- and gives context to --

18 THE COURT: -- I'm saying if we give it as it is totally included
19 in 105 and whatever it is, are you still --

20 MS. DIGIACOMO: So we would still be objecting to it
21 because the one that is typically used in this jurisdiction is concise. It
22 allows for all of those things to be argued and addressed.

23 I think that the California instruction has a number of
24 different things in it that are not relevant to the facts of our particular
25 case. It goes way beyond and includes a bunch of information that's not

1 necessary or pertinent.

2 There is also an unpublished Nevada case. It's *Kassow*, K-A-
3 S-S-O-W versus State. The Nevada Supreme Court Case Number is
4 66510 from 2015 that addresses this exact instruction. It says that it is
5 not improper to use the State's proffered credibility instruction and to
6 not use the CALCRIM proffered instruction.

7 So we would be objecting to it in its entirety. I don't think
8 that it's necessary. But if the Court is inclined to give it, then yes, it
9 would need to be the full version and not the cherry picked version.

10 THE COURT: So where is -- I assume the State has offered
11 the one that I hate to say is commonly used.

12 MS. DIGIACOMO: It is right behind in our packet where it
13 talks about direct and circumstantial evidence. It's towards the end-ish,
14 middle.

15 MS. MACHNICH: It states, the credibility or believability.

16 MS. DIGIACOMO: That's correct.

17 MS. MACHNICH: Yes. And Your Honor, we are aware of that
18 instruction. We're not opposing that instruction in any manner. The first
19 paragraph of the CALCRIM instruction, we believe to be substantially
20 similar to that one, which is why it wasn't included.

21 We are not trying to State that it's reversible error to not give
22 it. We just think that it's helpful to the jury's analysis and determination.
23 So by no point were we trying to state that you have to give it. Certainly
24 a Nevada court never has to give a California criminal instruction ever.

25 So we would submit it and to Your Honor's discretion.

1 THE COURT: Well, where is -- hang on. Well, does
2 somebody have it real quick?

3 MS. DIGIACOMO: Yes.

4 MS. MACHNICH: Yeah. It's right here. It's this one,
5 credibility, Your Honor.

6 THE COURT: So this is, I believe, the exact one used in the
7 civil cases also. I don't where -- do you want -- do you need that copy?

8 MS. MACHNICH: I would, but it is in the packet.

9 THE COURT: Okay.

10 MS. MACHNICH: Yes.

11 THE COURT: So the Defense is asking in addition to that,
12 because you haven't objected to that, correct?

13 MS. MACHNICH: The State's? We are not objecting to the
14 State's.

15 THE COURT: Right. In addition to that, you want --

16 MS. MACHNICH: Yes.

17 THE COURT: -- the 105. All right, so tell me again, and I hate
18 to put it this way, but this is an incredibly long, detailed instruction that
19 is broadly encompassed by the, if you will, traditional instruction.

20 And I think the Supreme Court is clearly -- we want to explain
21 everything to them, but on the other hand going overboard is also an
22 issue.

23 So tell me why, if you will, six or eight paragraphs is better
24 than the two?

25 MS. MACHNICH: Your Honor, generally speaking, we

1 learned that the Supremes think that our juries are under instructed and
2 that have a more direction is better for them. And generally speaking,
3 we think that given the fact that this case relies so heavily on the
4 credibility of believability of very few witnesses, this would be a good
5 instruction given the subject matter and the evidence that's been
6 proffered.

7 But we'll submit to Your Honor's discretion on whether it is
8 appropriate in this case.

9 THE COURT: State?

10 MS. SUDANO: Your Honor, again, I don't think that the
11 instruction as it's been proffered is appropriate because it is
12 misrepresentative of a lot of the language in the California proposed or
13 stock jury instruction that they use.

14 There's information in the Defense proposed instruction
15 that's irrelevant to our case and there's information in the stock
16 instruction from California that would be relevant or helpful to instruct
17 our jury on that is not included.

18 So based on that, the State is still objecting to the giving, but
19 would request if Your Honor's inclined, to give the entire thing.

20 THE COURT: Well, I like the first sentence, you alone must
21 judge the credibility or believability of the witnesses. Even though that's
22 in the pretrial instructions, I haven't seen it here.

23 In other words, explaining they're the judges of the
24 credibility or believability.

25 And then the second sentence, in deciding whether

1 testimony is true and accurate, use your common sense and experience.
2 I think I'm going to go with the traditional and add, you alone must
3 judge, at the very first sentence. You alone must judge the credibility or
4 believability of the witnesses, so they understand that I don't do any of
5 that. In deciding whether their testimony is true and accurate, use your
6 common sense and experience.

7 We tell him that to a certain extent in other places, but I can't
8 tell you how many times they've, you know, sent out questions that
9 would tend to show that, well, maybe the judge still has some input in
10 this.

11 MS. MACHNICH: Just so that I have it correct in our notes.
12 You're inclined to add, "You alone must judge the credibility or
13 believability of a witness to the State's stock" --

14 THE COURT: Of the witnesses.

15 MS. MACHNICH: Of the witnesses. Okay. Did I miss
16 anything else?

17 MS. DIGIACOMO: And that's going to be --

18 THE COURT: In deciding whether testimony is true and
19 accurate, use your common sense and experience. That sort of should
20 be in there on another one that says --

21 MS. DIGIACOMO: We do. We have that in the
22 commonsense instruction.

23 THE COURT: I kind of -- when we're explaining how to
24 determine, I think that it may be redundant. But I think it certainly adds
25 to the standard.

1 MS. MACHNICH: And we have no opposition to Your
2 Honor's proffered language. I just wanted to make sure I had it written
3 correctly.

4 THE COURT: All right. Otherwise, yeah. I think that's --

5 MS. MACHNICH: Yes.

6 THE COURT: The other criteria, it's so -- I mean, you know,
7 we're asking you use your common sense. I think that's the most
8 important thing.

9 MS. DIGIACOMO: Okay. So, Your Honor, if I have this clear,
10 the first two lines I'm adding before --

11 THE COURT: Yes.

12 MS. DIGIACOMO: -- we start the credibility believability?

13 THE COURT: Yes. Exactly.

14 MS. DIGIACOMO: Okay.

15 THE COURT: What's next?

16 MS. DIGIACOMO: Oh, can you just give me one second,
17 Your Honor? Just so I can make sure I have this right when I make the
18 changes.

19 THE COURT: All right.

20 MS. MACHNICH: And just for the record, Your Honor, you
21 are disinclined to give the Defense's proposed instructions, which would
22 be pages 3 and 4, but one instruction, and at that point we would just ask
23 that you sign them and file as part of the record.

24 THE COURT: That's fine, I will do that. Yes. I think it's -- I
25 hate to be so simplistic, but, too much. We're giving them overly

1 detailed in what they need to do and attempting to quantify what they
2 should be doing. Which again, I think the most important is using their
3 common sense.

4 Which one do you want me to sign? The one with the --

5 MS. MACHNICH: Probably the one with the cite.

6 THE COURT: Okay. I noticed that also on page 2, you have
7 this request to use Defendant and not his name.

8 MS. MACHNICH: To use his name, and not the Defendant.
9 We didn't make our instructions necessarily all that way because it's not
10 always done. But we did want to generally oppose that as our request.

11 And then the other part so that we did not have to
12 continuously put additional pages in --

13 THE COURT: Wait. Just so it's clear, you want to use his
14 name, or you want to --

15 MS. MACHNICH: Yes.

16 THE COURT: Here it says, request that the generic phrase,
17 the Defendant -- oh.

18 MS. MACHNICH: Yes.

19 THE COURT: Be replaced with the Defendant's name. Sorry,
20 I totally misread. I thought you were doing the reverse and I was
21 wondering why you were doing that.

22 MS. MACHNICH: Yeah.

23 THE COURT: All right. So you want where it says Defendant
24 in any reference?

25 MS. MACHNICH: I believe so, Your Honor. Obviously, not in

1 the instruction -- not in the charges.

2 MS. DIGIACOMO: Oh, so they want to pick and choose.

3 MS. MACHNICH: Well, I mean, I don't want -- I mean, if you
4 do not like the charging document that's copied from the information,
5 that's the information just put into the jury instructions. So that's
6 different. But other than the actual charges, yes. Or put it in there too.
7 That's fine.

8 MS. DIGIACOMO: May I be heard, Your Honor?

9 THE COURT: Yeah.

10 MS. DIGIACOMO: Okay. So these instructions are on the
11 law. They're supposed to be generic. They're not supposed to be fact-
12 based. By trying to put the Defendant's actual name throughout all the
13 jury instructions, it overemphasizes him. We don't have the victim's
14 name in there. We don't have specific facts. It's supposed to be generic
15 instructions that a jury can use on any case. It's not supposed to be
16 personalized. That's why it's never been done.

17 And they have no case law supporting their request. So we
18 object because it's almost like over and over again, jury, don't forget,
19 you might be convicting our client. Just like they want the not guilty
20 first. And I think it over emphasizes -- excuse me.

21 THE COURT: Defense?

22 MS. DIGIACOMO: And it also -- I'm sorry, Your Honor. I
23 wasn't done.

24 THE COURT: I thought you were done.

25 MS. DIGIACOMO: But it also tries to elicit sympathy from the

1 Defense, which the jury is not supposed to do. There's no reason his
2 name needs to be everywhere in the jury instructions because no one
3 else's is.

4 MS. MACHNICH: And Your Honor, we would only state that
5 the State is absolutely correct that it personalizes them. But it should,
6 because it's the State's burden to convict our client who is a person.
7 And they're asking for the jury to find a person guilty beyond a
8 reasonable doubt and that person is our client.

9 So, yes, and we think that is why it's important and it's the
10 State's burden to prove all the charges and he's sitting here as the
11 person.

12 The State is an entity, but Gustavo Gunera-Pastrana is a
13 person and he will be the one serving years, decades, more of his life in
14 prison if convicted.

15 MS. DIGIACOMO: And that's something the jury can't
16 consider, punishment and or sympathy.

17 THE COURT: Yes.

18 MS. MACHNICH: We're not asking for sympathy or
19 punishment, Your Honor.

20 THE COURT: All right, guys, I've told you before, don't go
21 back and forth. These are instructions to the jury on the law and I've
22 never seen them, nor do I think it's appropriate to tailor them somehow
23 to say that a statement on the law, it applies to the individual who is the
24 Defendant. That's true. Or it doesn't apply. And that's the whole
25 purpose of why we're here.

1 But I don't see any reason to -- there shouldn't be sympathy
2 or prejudice on either side. And so I think it would be improper to just
3 like -- I mean, we're taking jury instructions and yes, they're not, if you
4 will, stock instructions, but they're used quite frequently, and they have
5 to be, and they are applied by the Supreme Court on multiple cases.

6 And they don't seem to tailor it to a specific individual. They
7 are talking about instructions on the law. And the law, and that's what
8 your job is, and I'm pointing to both of you or both sides. That it's your
9 job to apply the facts to the law and that's exactly what you're going to
10 do tomorrow. And so I don't think it's appropriate. So I'm denying that
11 request. Although it's not a specific instruction request.

12 MS. MACHNICH: I don't think -- because it's not a specific
13 instruction, we wouldn't request anything particularly signed. It's just
14 we've now made a record on it.

15 THE COURT: All right. It's all part of the record, yeah.

16 MS. MACHNICH: Yeah.

17 THE COURT: Okay. What's next?

18 MS. MACHNICH: Next is pages 5 and 6. If the evidence is
19 susceptible to reasonable interpretations, one of which points to the
20 Defendant's guilt and the other of which points to the Defendant's
21 innocence, it is your duty to adopt that the interpretation which points to
22 the Defendant's innocence and rejects the other which points to his guilt.

23 With respect to *Bayles* [phonetic], it doesn't say it's improper
24 to give it. We're not saying and I'm not trying to hold out to you that
25 *Bayles* says it's required to give. I'm not trying to say that. I don't want

1 it to be misconstrued that way. That's not our statement.

2 But we do believe that it is appropriate. We do believe,
3 especially given such a case where there's not any -- this isn't the right
4 term for it, but there isn't any hard evidence that if there are two
5 reasonable -- ultimately, if it comes down to there are two reasonable
6 interpretations that this happened or didn't happen, if they get to that
7 point, the correct verdict is not guilty in this case and the presumption of
8 innocence has not been overcome.

9 So we think that it is appropriate. We understand the State's
10 position is that it's not appropriate after the definition of reasonable
11 doubt was adopted and the Supreme Court has said that that is the one
12 definition of reasonable doubt that should be given.

13 And we're not saying that the Supreme Court has not said
14 that. We're saying that this is in addition to that, does not contradict
15 that. And it's not inappropriate to give and we are requesting it in this
16 case, given the facts and circumstances in this case. Thank you.

17 THE COURT: State?

18 MS. DIGIACOMO: Well Your Honor --

19 THE COURT: And I have *Richardson* in front of me.

20 MS. DIGIACOMO: Okay. I was going to say, our first
21 objection would be that in this jurisdiction, it's not -- I know it's a
22 negative, but it's not error not to give this instruction as long as the jury
23 is properly instructed on reasonable doubt, which we have the proper
24 instruction that is required by case law as well as statute in the
25 instructions already.

1 The State's concerned as well with what they're asking for
2 with this reasonable, the two reasonable interpretations. They are not
3 asking for the entire correct instruction. This comes from *Kaljick*
4 [phonetic] in California, their jury instructions, they're not requesting the
5 entire one.

6 And I actually have where the Supreme Court granted the
7 petition in -- it was in the *Supranovich* case where they tried to get this
8 exact instruction. And the Supreme Court ordered the district Court, if
9 you are inclined to give such an instruction, you need to give the full
10 version.

11 And I have that, the full version in this remand if the Court
12 would like to see it. But they're picking and choosing language and not
13 giving the entire instruction.

14 And if the Court's not familiar with the entire instruction, I
15 can approach if you'd like to see it.

16 THE COURT: All right.

17 MS. MACHNICH: Your Honor, it's on page 13 or 14 of our
18 instructions and the case was given as part of our proffered instructions
19 as well.

20 MS. DIGIACOMO: Okay. Wait a minute, 13 and 14?

21 MS. MACHNICH: Yes.

22 MS. DIGIACOMO: Oh, sorry. Hold on.

23 MS. MACHNICH: That's okay.

24 MS. DIGIACOMO: Oh, I'm sorry. I missed that. That is
25 correct. They have the correct language in 13, but I guess they're asking

1 for the incorrect language in 5, page 5 and 6.

2 MS. MACHNICH: So yeah. 5 and 6 is bails and then 13 and
3 14 is the --

4 MS. DIGIACOMO: Right.

5 MS. MACHNICH: -- State versus *Supranovich* case. We're
6 offering them in the alternative.

7 MS. DIGIACOMO: And Your Honor, if I can make another
8 argument if counsel's done.

9 MS. MACHNICH: Oh, go ahead. Yes.

10 MS. DIGIACOMO: You know, in this case, this isn't about
11 circumstantial evidence. It's really a direct testimony case. It's, as the
12 Defense has said, whether or not they believe our victim or not.

13 So I think this would even be confusing. And they've been
14 instructed on reasonable doubt. So I would ask you not to give either.
15 But if you are inclined to give one, I would give the one that the Supreme
16 Court has mandated.

17 THE COURT: Go ahead.

18 MS. MACHNICH: We're fine with 13 and 14 or 14, which is
19 the clean version of 13 being given. We do think that there is
20 circumstantial evidence in this case. Specifically, the State's argued that
21 there's flight. And that in their own in-flight instruction, it specifically
22 states that it can be considered as circumstantial evidence.

23 And so this actually directly goes to that, because if there are
24 two reasonable interpretations or two reasonable conclusions supported
25 by the circumstantial evidence and you can draw two or more

1 reasonable conclusions, you should accept the ones that go towards
2 innocence and not guilt.

3 And so they've actually specifically introduced circumstantial
4 evidence into the case with their flight instruction, and therefore other
5 than this otherwise being appropriate, which I believe it is, and it should
6 be given anyway. As another layer, if we're going to give a flight
7 instruction to introduce that specifically in, then this helps explain that if
8 there's two reasonable interpretations, which is what we're trying to get
9 at with our reverse order for the flight instruction, that there was another
10 reason for him to take flight if there was in fact flight proven. This would
11 be appropriate.

12 And I believe the State made it clear, but the *State versus*
13 *Supranovich*, it is not reversible error not to give this, but it isn't
14 inappropriate to give this. We are proffering it as being especially
15 important in this case, given the flight instruction that's being given in
16 this case. And the entire version out of *Supranovich* to my knowledge
17 and I have read through it. Obviously, if there's a typo, I missed it. But
18 our intention certainly was that it mirrored the *Supranovich* case, which
19 we have also provided to Your Honor as part of the cases we provided.

20 MS. DIGIACOMO: And Your Honor, just lastly. If that's their
21 concern, we have already reworded the flight instruction and you have
22 the reasonable doubt. This is superfluous. We don't need this in
23 addition to what we've already done with the other instructions.

24 THE COURT: Okay. First of all, which I think was cited,
25 *Bayles* is totally a circumstantial case. And we, although you're right, the

1 flight, *Bayles* was -- that's all it was I believe, and they go into that.

2 But in any event and I'm not sure -- *Richardson* is after --

3 MS. MACHNICH: After *Bayles*, before *Supranovich*.

4 THE COURT: Is after *Supranovich*. And my reading, the
5 Supreme Court is very clear that we have the statutory reasonable doubt
6 and that's what we have to give and that's basically it. It doesn't
7 preclude us, you're right on that, from giving the other instruction. But I
8 think it is -- I'm not sure if superfluous is the right word, but in any event,
9 I'm going to give the reasonable doubt.

10 And I don't see justification for potentially confusing them,
11 which is exactly what the Supreme Court really wants us to stay away
12 from. And give the statutory interpretation. And that's already in there,
13 correct?

14 MS. MACHNICH: Yes.

15 MS. DIGIACOMO: Yes.

16 THE COURT: We didn't even talk about it, but I assumed
17 because it is statutory, it's in there. So I'm not going to give the
18 additional, as I look at it, instruction.

19 THE CLERK: So you're not giving 5 and 6 and 13 and 14?

20 MS. MACHNICH: I believe that's the ruling, yes.

21 THE COURT: Yeah.

22 MS. MACHNICH: So if we could have 5 and 13 signed and
23 marked.

24 THE COURT: I'm not sure where the 5 -- let me see if I have --
25 here's 6. Yes. I'll give you -- I marked up on this one.

1 So I'll sign 6, which is the one without the cites. Because I
2 wrote on the other, no, not a circumstantial evidence case because you
3 had *Bayles*, which I of course read.

4 So 5 -- well 6, which is the same thing.

5 THE CLERK: 6 and then 13.

6 THE COURT: And then 13. All right. What else? So there is
7 17, but I think we dealt with that.

8 THE CLERK: 15, 16 we did. 17, 18 is we touched on.

9 THE COURT: Well, I mean, this is the one about flight, which
10 I --

11 MS. MACHNICH: Your Honor, we need to go back and
12 actually continue with 7 and 8. Sorry. We skipped a couple when we
13 went to the *Supranovich* one.

14 THE COURT: Okay.

15 MS. MACHNICH: Your Honor, with regard to 7 and 8, we're
16 going to be withdrawing those. So the next substantive instruction we
17 need to consider is the one on 9.

18 THE COURT: Okay. Go ahead. I've read, what is it, *Shu*
19 *[phonetic]*?

20 MS. DIGIACOMO: Yes.

21 THE COURT: Anything to add?

22 MS. DIGIACOMO: With regard to 9?

23 THE COURT: Well, I was asking them if they have anything
24 to add.

25 MS. DIGIACOMO: Oh.

1 MS. MACHNICH: Oh.

2 THE COURT: But go ahead. I assume that -- all right. State,
3 are you opposing it?

4 MS. DIGIACOMO: Yes, Your Honor. The *Shu* case and the
5 other cases that discuss, it's not a jury instruction and it relates to open
6 and gross lewdness. The *Shu* case as well as the other cases that we
7 found that kind of discuss the -- it's either Black's Law Dictionary or
8 Webster or American Heritage definitions of what lewd is.

9 So I understand that they're presenting it here because we
10 do have lewdness with a minor. However, I think this was used with
11 regard to open and gross lewdness. I'm not sure it applies here.

12 Plus, it would seem somewhat misleading to define what
13 lewd means versus lascivious as well. And the cases that I do have that
14 have cited to it are *Wilson v. State*, 127 Nevada 1186. That's an
15 unpublished decision. And the published decision is *Barry versus State*,
16 125 Nevada 265. And again, it's referring to open and gross lewdness,
17 not lewdness with a child.

18 THE COURT: Okay. Where is the actual statute, if you will, or
19 the jury instruction regarding lewdness with a minor?

20 MS. DIGIACOMO: Lewdness, Your Honor? It would be at the
21 beginning, I think it's about five in.

22 MS. MACHNICH: It's after the intent ones. Willfully or lewdly
23 commits any lewd or lascivious act. And it would be the Defense's
24 position that it's not defined, and this is a correct definition of lewd
25 within Nevada's case law. I don't think the word lewd changes its

1 definitions.

2 THE COURT: Wait. Let me just look at this. So where is this
3 the lewdness with a minor?

4 MS. MACHNICH: It's any person who willfully and lewdly
5 commits any lewd or lascivious act. It's about 11 pages in maybe, to the
6 State's instructions.

7 MS. DIGIACOMO: I was way off. I thought it was five pages
8 in.

9 MS. MACHNICH: It was about five pages after the
10 information was completed.

11 MS. DIGIACOMO: Okay.

12 THE COURT: Oh, I actually -- no. Okay. Okay. So number 9

13 MS. MACHNICH: Yes.

14 THE COURT: You wanted to define lewd?

15 MS. MACHNICH: Yes.

16 THE COURT: All right. And State, you're saying?

17 MS. DIGIACOMO: If you define lewd, we need to define
18 lascivious which I'm on the Lawdictionary.org that features Black's law
19 dictionary. Lascivious is tending to excite lust, lewd, indecent, obscene,
20 relating to sexual impurity, tending to deprave the morals and respect to
21 sexual relations.

22 So if you're going to give one, I'd ask you to define both
23 please.

24 MS. MACHNICH: We'd be fine with that.

25 THE COURT: Very good.

1 MS. DIGIACOMO: Okay.

2 MS. MACHNICH: All right.

3 MS. DIGIACOMO: So I will make this an instruction right
4 after the definition of lewdness.

5 MS. MACHNICH: Okay.

6 THE COURT: Yup.

7 MS. DIGIACOMO: Well, do you need to have, lewd has an
8 ordinary well established definition? That's really just the --

9 THE COURT: Well, that --

10 MS. MACHNICH: It can just --

11 MS. DIGIACOMO: It should be lewd means [indiscernible] to,
12 okay.

13 THE COURT: Right.

14 MS. DIGIACOMO: That's just from the case.

15 THE COURT: Or lewd is defined.

16 MS. MACHNICH: Yeah.

17 MS. DIGIACOMO: Is defined.

18 MS. MACHNICH: Actually, in my clean copy, I just failed to
19 change it in the other one. I have lewd is defined as.

20 MS. DIGIACOMO: Got it.

21 MS. MACHNICH: So if you copy and paste it, the change is
22 there.

23 MS. DIGIACOMO: So lascivious is defined as.

24 THE COURT: Actually, yeah. She's right. Page 10 has lewd
25 is defined as --

1 MS. MACHNICH: Yeah.

2 THE COURT: -- which is fine.

3 MS. DIGIACOMO: Okay.

4 MS. MACHNICH: We're fine with that.

5 THE COURT: Okay. So next you have page 11?

6 MS. MACHNICH: Uh-huh. Yes, Your Honor.

7 MS. DIGIACOMO: Which one's 11?

8 MS. MACHNICH: 11 and 12, it's at issue.

9 MS. DIGIACOMO: Yeah. I have an objection. Do you want
10 to hear from me first or them?

11 MS. MACHNICH: Whatever works.

12 THE COURT: Either way. Go ahead.

13 MS. DIGIACOMO: With regard to this statement, Your
14 Honor, a kiss on the mouth without more does not constitute lewd
15 conduct because it is not lustful or sexually obscene. This statement is
16 not the law. This statement refers to the facts in this case.

17 And the facts in *Shu*, there was a girl who said she was
18 kissed.

19 THE COURT: I read it.

20 MS. DIGIACOMO: Okay. So it doesn't say there was nothing
21 more. She couldn't even say if it was a pack or what it was. So just a
22 kiss by itself, obviously is not a lewd act. It's in our case because it was,
23 you know, with tongue and an open mouth.

24 But I think this is incorrect statement of the law. This is just
25 the specific facts of that case where they found it was insufficient

1 evidence. So we would object.

2 MS. MACHNICH: And --

3 THE COURT: Go ahead.

4 MS. MACHNICH: Your Honor, I think it is a correct statement
5 because it specifically states a kiss on the mouth without more does not
6 constitute lewd conduct because it is not lustful or sexually obscene. It is
7 not default a guilty on something if it has occurred.

8 Now if the State can establish that that kiss was more, if it
9 was a French kiss. Well, I mean, that's the point is that a kiss alone is not
10 but without more. So it allows more to be given, it just makes the State
11 prove more. That's what is given in *Shu*.

12 We have other things in our instructions that have things that
13 pertain to case specifics. Turning back. Specifically, Your Honor's given,
14 to constitute a lewd or lascivious act, it does not require physical
15 touching between the perpetrator and the victim. That goes to the facts
16 of a case.

17 There are lots of different facts and we discussed this ad
18 nauseum and I don't want to revisit them, but it's a statement of law
19 from a case and it goes to the application of what is required under the
20 law.

21 This is the statement from a case. And yes, it's from a case
22 with a fact specific background. All of these are or many of these are.
23 Some of them -- withdraw that. Some of these are statute.

24 But we have lots of specials that go to and come from cases.
25 And *Shu* is a correct statement of the law. A kiss on the mouth without

1 more does not constitute lewd contact because it does not lustful or
2 sexually obscene.

3 That is not to say that the State cannot prove that a certain
4 type of kiss or a kiss with tongue or a kiss with tongue and a requirement
5 that he have sex with her -- she has sex with him is not enough to, you
6 know, establish that that is a lewd and lascivious act under the statute.
7 However, that's argument and this is a correct statement of law.

8 And we think it's appropriate in the case given that one of the
9 charges is specifically a kiss. So it directly does apply here. And if the
10 State can establish that said kiss was done in such a manner that rose to
11 the level of lustful or sexually obscene, then they can still prevail. This
12 certainly is no version of a directed verdict or anything as such.

13 So we believe it's appropriate and should be given,
14 especially given the subject matter that we've addressed in this case.

15 MS. DIGIACOMO: And Your Honor, may I just be heard
16 briefly?

17 THE COURT: Go ahead.

18 MS. DIGIACOMO: When you look at this statement, it shows
19 you this is a conclusion from the case. This says, "A kiss on the mouth
20 without more does not constitute lewd conduct because it is not lustful
21 or sexually obscene." It is drawing the conclusion and making a legal
22 conclusion that the jury has to decide or the factual conclusion.

23 So this clearly is something that is very fact specific and was
24 just the opinion in that case. It is not a statement of the law.

25 THE COURT: I got to tell you, this was the most, one of the

1 most, if you will, troubling. The whole -- I'll put it all on the record and
2 certainly the Supreme Court over me is well aware of what they decided
3 in *Shu*. But this was, they went through the evidence in the case and it
4 was again, maybe I -- this goes back to civil beginnings, a summary
5 judgment. They went through the specific facts and she only testified to
6 maybe a peck or something. And that's in the case. That's in the
7 opinion.

8 And then they say that there just wasn't enough evidence.
9 Oh, here. I can't tell what page. It looks like 340. Anyway, Count XXXIX
10 of the indictment charge Shu with committing open or gross lewdness
11 by inappropriately kissing, said H.I. on the mouth.

12 The trial testimony surrounding the kiss is very limited, but
13 viewing it in the light most favorable to the prosecution, it is as follows;
14 Shu kissed H.I. on the mouth without her permission. 2, Shu's kiss made
15 H.I. feel uncomfortable and scared. 3, H.I. could not recall whether the
16 cause was a peck or a deeper kiss. And 4, Shu later told police that he
17 found H.I. attractive, but that he would never act on that attraction.

18 So it is in conclusion where they dismiss that charge
19 knowing or pointing out that there was thus in light of the evidence we
20 hold a rational fact finder could not conclude beyond a reasonable doubt
21 that Shu's kiss constituted a lewd act. Therefore, they reverse the
22 conviction.

23 But to State that a kiss on the mouth without more does not
24 constitute the lewd act, is but a summary of their findings. And they
25 clearly do not imply that there aren't circumstances where a kiss could

1 not constitute a lewd act.

2 In this case, there was virtually nothing, as I stated, and they
3 stated where they drew that conclusion. And yes, given the facts of *Shu*,
4 a kiss was not a lewd act. But I truly think that the type of kiss, as we
5 have, could be considered a lewd act.

6 And to say more, well, I don't think that's a fair statement of
7 the law because a kiss under different circumstances that aren't just a
8 peck or a deeper kiss, as they point out, could be a lewd act.

9 So I am not giving that because I don't think that is a fair
10 statement of the law. I don't know -- I'm not disagreeing with the
11 Supreme Court. I'm saying that their comment, that comment does not -
12 - when you read the entire case, it doesn't express the Supreme Court's
13 decision. It seems to me to be more dicta.

14 And as I said that a mere kiss or a kiss of a different nature,
15 as is alleged, could be. And that's, if you will, a difficult decision, but
16 that's it. So where was that?

17 THE CLERK: That was 11 and 12.

18 THE COURT: Okay.

19 MS. MACHNICH: And Your Honor, I'm not arguing further. I
20 just want to make sure my record is clear. Obviously, we respect the
21 Court's decision. Are not asking you to reconsider it at this time.

22 However, I would just state, I believe specifically the, without
23 more, does go to the ability to prove that there is more and that there
24 was more. And I would again instruct to turn the Court's attention back
25 to exactly the opposite of what was eventually argued and given in the

1 State's instruction to constitute a lewd or lascivious act, it is not required
2 physical touching to the perpetrator and the victim.

3 That again is also, while that does not go into specific fact
4 scenarios because there were many and none of them were the same as
5 this case. That it exactly equates back to this kiss situation where we're
6 talking about depending on the fact scenario of the case, it either applies
7 or doesn't apply.

8 And actually believe that the kiss on the mouth is actually
9 more fact specific and more applicable here. Again, we respect the
10 Court's decision --

11 THE COURT: It certainly sounds like you're arguing more,
12 but I signed it. Thank you.

13 MS. MACHNICH: We respect the Court's decision. I wanted
14 to make sure that's in the record.

15 THE COURT: You got it -- I'll let you argue ad nauseum and
16 you'll certainly have that right a second time from people that are much
17 smarter than me. What's next?

18 MS. DIGIACOMO: Okay. I'm out. What's 17?

19 MS. SUDANO: It's the flight instruction that they've
20 addressed.

21 MS. DIGIACOMO: Oh, we've already done that.

22 MS. MACHNICH: We've addressed that.

23 THE CLERK: And then 19 and 20 was --

24 THE COURT: Let them tell us. What's next?

25 MS. MACHNICH: I think we're done.

1 THE COURT: Okay. Thank you.

2 MS. DIGIACOMO: Your Honor, I'm not done.

3 THE COURT: I'm tired. What's that?

4 MS. DIGIACOMO: I'm not done. I just need to make a
5 record. In my stock packet, I always put in the instruction about, it's a
6 constitutional right of a defendant in a criminal trial that he may not be
7 compelled to testify.

8 It is the Defense's right to have that or not have that.

9 THE COURT: Correct.

10 MS. DIGIACOMO: So I just want to make sure they want it.

11 THE COURT: Yes.

12 MS. MACHNICH: We do.

13 THE COURT: Okay.

14 MS. DIGIACOMO: And then --

15 THE COURT: And one other thing which I didn't look
16 through, but it needs to be in there, what is it? *Williams*? Do not do any
17 experiments?

18 MS. MACHNICH: It's in there.

19 MS. DIGIACOMO: It's in here. It's in here.

20 THE COURT: Okay. Thank you.

21 MS. DIGIACOMO: And the other thing is I had included not
22 knowing if we were going to get into the DV. I had included, you know,
23 evidence that the Defendant committed offenses other than those he's
24 on trial for. I believe that -- I presume I can pull that out.

25 MS. MACHNICH: We're actually okay with keeping that, Your

1 Honor, because there were alleged threats.

2 MS. DIGIACOMO: Okay. That's fine.

3 THE COURT: All right.

4 MS. MACHNICH: Yeah. They could become [indiscernible].

5 THE COURT: Now --

6 MS. DIGIACOMO: Now we're done.

7 THE COURT: No. Not quite.

8 MS. DIGIACOMO: No. I meant --

9 THE COURT: You need to get those done.

10 MS. DIGIACOMO: Yes. I 'm going to go do them right now.

11 THE COURT: Okay. I hate to say it over -- so you need to do

12 with the numbered -- not numbered. I will number them in the morning.

13 MS. DIGIACOMO: Okay.

14 THE COURT: So get them a copy tonight --

15 MS. DIGIACOMO: Yes, sir.

16 THE COURT: -- of the final packet and be here --

17 MS. DIGIACOMO: 8:30?

18 THE COURT: -- 8:30.

19 MS. DIGIACOMO: Okay.

20 THE COURT: We'll have to number them and make sure we

21 have them right. And then it's going to take -- I'll ask you, do you want

22 every one of them to have a copy? That'll take a half hour.

23 MR. SPEED: Yes.

24 MS. SUDANO: Yes, please.

25 MR. SPEED: Yes, Your Honor.

1 THE COURT: All right.

2 MS. DIGIACOMO: Makes it easier.

3 THE COURT: I agree, but I'm just telling you. So even once
4 we're done, it will take a minimum of a half hour.

5 THE CLERK: We're going to need 17 copies. 15 plus 2 after
6 this one.

7 THE MARSHAL: Judge, the CO's are asking, did you want
8 the Defendant here at 8:30 or 9:00?

9 THE COURT: 8:30. Unless you want to waive.

10 MS. MACHNICH: It's just numbering.

11 MR. SPEED: Your Honor, it's better to have him here.

12 MS. MACHNICH: Yeah.

13 MR. SPEED: He wants to see it. It's our trial.

14 THE COURT: 8:30. Absolutely. It's his trial.

15 MS. MACHNICH: I was going to say, we're done now, but
16 yeah.

17 THE COURT: Yes. Have a good night.

18 [Proceedings concluded at 5:18 p.m.]

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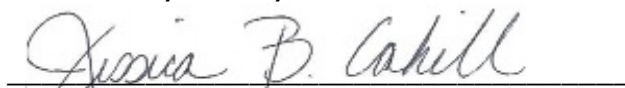
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

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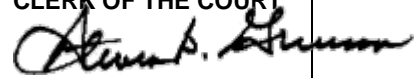
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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 STATE OF NEVADA,
9 Plaintiff,

10 vs.

11 GUSTAVO ADONAY GUNERA-
12 PASTRANA,
Defendant.

)
) CASE#: C-16-318461-1
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) DEPT. XXVIII
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13
14 BEFORE THE HONORABLE RONALD J. ISRAEL
DISTRICT COURT JUDGE
15 FRIDAY, JUNE 14, 2019

16 **RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 9**

17
18 APPEARANCES:

19 For the Plaintiff:

SANDRA DIGIACOMO, ESQ.
MICHELLE SUDANO, ESQ.

20 For the Defendant:

21 KEVIN SPEED, ESQ.
22 TEGAN MACHNICH, ESQ.

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25 RECORDED BY: JUDY CHAPPELL, COURT RECORDER

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1 Las Vegas, Nevada, Friday, June 14, 2019

2

3 [Case called at 8:42 a.m.]

4 [Outside the presence of the jury]

5 THE MARSHAL: 318461, State of Nevada v. Gustavo Adonay

6 Gunera-Pastrana.

7 MS. MACHNICH: Good morning, Your Honor.

8 THE COURT: Good morning. All right. Numbering.

9 MS. MACHNICH: All right.

10 THE COURT: Is there anything else?

11 MS. MACHNICH: No.

12 THE COURT: Have you agreed on the order?

13 MS. MACHNICH: I think so. I think yes, I think we're good.

14 MS. DIGIACOMO: We went through them last night after the

15 Judge left the bench and we agreed.

16 THE COURT: All right. Number one, it is my duty. Number

17 two -- if in these instructions if there's something wrong, tell me right

18 away.

19 MS. MACHNICH: Absolutely.

20 THE COURT: Three, an information.

21 UNIDENTIFIED FEMALE SPEAKER: There's no line for four.

22 THE COURT: There's no line what?

23 UNIDENTIFIED FEMALE SPEAKER: Numbers.

24 THE COURT: Oh, yeah. Oh, no that's page --

25 MS. DIGIACOMO: Yeah, it carries on.

1 MS. SUDANO: That's the second page, yeah.

2 THE COURT: Okay. The person who commits a sexual
3 penetration is page 4. Specific intent is page 5. Any person who willfully
4 and lewdly is page 6. Lewd as defined is page 7. The law does not
5 require is page 8. A lewd or lascivious is page 9. There is no
6 requirement is page 10. Where a child has been the victim is 11. The
7 flight of a person after the commission is 12. To constitute the crime
8 charged is 13. The Defendant is presumed innocent is 14. It is a
9 constitutional right is 15. You are here to determine whether the
10 Defendant is 16. Evidence that the Defendant committed offense is 17.

11 MR. SPEED: Yes.

12 THE COURT: Okay. The evidence which you are to consider
13 is 18. You alone must judge the credibility is 19.

14 MS. DIGIACOMO: And, Your Honor, I spelled believability
15 wrong. I don't know if Sandy can correct that in the first line.

16 THE COURT: Go tell her. She may not be at her keyboard,
17 so.

18 MS. DIGIACOMO: Which that is actually the way it was
19 spelled in the following instruction. See, it did not come up auto correct.

20 MS. SUDANO: Yeah, well.

21 THE COURT: Going to be 19. How do you spell it?

22 MS. DIGIACOMO: You know what? In the California
23 instruction it had the "e", but we spell it without the "e".

24 MR. SPEED: There may be a debate.

25 MS. DIGIACOMO: Yeah. So it's just two different ways. The

1 first line I did it the way it was in the other instruction and it didn't come
2 up it was spelled wrong.

3 MS. MACHNICH: Apparently there are two ways to spell it.

4 MS. DIGIACOMO: Yeah, "e" or no "e".

5 THE COURT: Are you okay with this one, then, or would you
6 -- do you want it changed?

7 MS. DIGIACOMO: Well, I just think she should correct the
8 first line --

9 THE COURT: All right.

10 MS. DIGIACOMO: -- to reference the same spelling in 4. It
11 just looks better to spell them both the same way.

12 THE COURT: All right. When a trial witness is 20. A witness
13 who has special knowledge is 21. Kathy's going to lose it if we do this
14 without her.

15 [Pause]

16 THE COURT: Matt, tell Kathy to come back. My law clerk can
17 watch this.

18 MS. MACHNICH: I got it.

19 THE COURT: I didn't say wait for it to be changed. All right.

20 All right, that's 19. And 20 is when a trial witness. 21 is a
21 witness who has special knowledge. During the course of this trial is 22.
22 Although you are to consider all of the evidence is 23. In your
23 deliberations is 24. When you retire to consider your verdict is 25. If
24 during your deliberations is 26. Now you listened to the comments is 27.
25 And the verdict form is what we discussed.

1 All right, I will give her this. It will take her hopefully only 15
2 minutes.

3 THE CLERK: And we need 17 copies.

4 THE COURT: Yes.

5 [Recess taken from 8:49 a.m. to 9:09 a.m.]

6 THE MARSHAL: Remain seated, come to order. Department
7 28 is again in session.

8 THE COURT: Okay. Are we ready to go?

9 MR. SPEED: Yes, Your Honor.

10 MS. DIGIACOMO: Yes, Your Honor.

11 THE COURT: Nothing we need to talk about?

12 MS. DIGIACOMO: Not by the State.

13 THE COURT: Okay. Kathy, I believe I have the original.
14 What?

15 [Parties confer]

16 THE COURT: These were the -- do the parties agree to the
17 order of the instructions as I read?

18 MS. DIGIACOMO: Yes, Your Honor.

19 MS. MACHNICH: As to the order, yes, Your Honor.

20 THE COURT: And we discussed at length the individual
21 instructions, the objections, et cetera. Okay. Bring them in.

22 THE MARSHAL: Please rise for the jury.

23 [Jury in at 9:11 a.m.]

24 [Inside the presence of the jury]

25 THE MARSHAL: All accounted for.

1 THE COURT: Thank you. Please be seated.

2 Good morning, Ladies and Gentlemen.

3 THE JURORS: Good morning, Your Honor.

4 THE COURT: In a minute I'll be reading you jury instructions.

5 As you can see, there is a copy for each of you. If you choose to, you can
6 follow along, but I will be reading the entirety and you will have that
7 packet when you go back to deliberate so you can refer to them.

8 In addition, you'll have the verdict form. You will only have
9 one copy of that. The attorneys may refer to it and discuss it with you.
10 The reason we don't give lots of copies is in the past people will write on
11 them and sometimes they will -- more than one copy will be signed, and
12 which one is the real one and then cross outs. This prevents that.

13 If you spill coffee or whatever on the original, don't worry.
14 Just tell us and we will substitute a fresh copy for the one you have.

15 Okay. It is now my duty as Judge to instruct you on the law
16 that applies to this case. It is your duty as jurors to follow these
17 instructions and to apply the rules of law to the facts as you find them
18 from the evidence.

19 You must not be concerned with the wisdom of any rule of
20 law stated in these instructions. Regardless of any opinion you may
21 have as to what the law ought to be, it would be a violation of your oath
22 to base a verdict upon any other view of the law than that given in the
23 instructions of the Court.

24 If in these instructions any rule, direction, or idea is repeated
25 or stated in different ways, no emphasis thereon is intended by me and

1 none may be inferred by you. For that reason you're not to single out
2 any certain sentence or any individual point or instruction and ignore the
3 others. But you are to consider all the instructions as a whole and regard
4 each in light of all the others. The order in which the instructions are
5 given has no significance as to their relative importance.

6 An information is but a formal method of accusing a person
7 of a crime and is not, of itself, any evidence of his or her guilt. In this
8 case it is charged in the amended information that on or between August
9 1st, 2015, and July 11, 2016, Defendant committed the offenses of
10 lewdness with a child under the age of 14 and sexual assault with a
11 minor under 14 years of age within the County of Clark, State of Nevada,
12 contrary to the form, force, and effect of statutes, in such cases made
13 and provided and against the peace and dignity of the State of Nevada.

14 Count I: Lewdness with a Child under the Age of 14, did on
15 or between August 1st, 2015, and August 31st, 2015, willfully, lewdly,
16 unlawfully, and feloniously commit a lewd or lascivious act upon or with
17 the body or any part or member thereof of a child, to wit, M.M., a child
18 under the age of 14 years, by touching the said M.M.'s genital area with
19 the intent of arousing, appealing to, or gratifying the lust, passions, or
20 sexual desires of Defendant or M.M.

21 Count II: Sexual Assault with a Minor under 14 Years of Age,
22 did on or between June 1st, 2016, and July 11, 2016, then and there,
23 willfully, unlawfully, and feloniously commit a sexual penetration upon
24 M.M., a child under the age of 14 years, to wit, cunnilingus, by placing
25 his mouth and/or tongue on or in the genital opening of the said M.M.

1 Count III: Sexual Assault with a Minor under 14 Years of
2 Age, did on or between June 1st, 2016, and July 11, 2016, then and
3 there, willfully, unlawfully, and feloniously commit a sexual penetration
4 upon M.M., a child under the age of 14 years, to wit, digital penetration
5 by inserting his fingers into the genital opening of the said M.M.

6 Count IV: Lewdness with a Child under the Age of 14, did on
7 or about June 1st, 2016, and July 11, 2016, willfully, lewdly, unlawfully,
8 and feloniously commit a lewd or lascivious act upon or with the body or
9 any part or member thereof of a child, to wit, M.M., a child under the age
10 of 14 years, by kissing the said M.M. with the intent of arousing,
11 appealing to, or gratifying the lust, passions, or sexual desires of
12 Defendant or M.M.

13 It is the duty of the jury to apply the rules of law contained in
14 these instructions to the facts of this case and determine whether or not
15 the Defendant is guilty of one or more of the offenses charged.

16 Each charge and the evidence pertaining to it should be
17 considered separately. The fact that you may find the Defendant guilty
18 or not guilty as to one of the offenses charged should not control your
19 verdict as to any other offenses charged.

20 A person who commits a sexual penetration upon a child
21 under the age of 14 years or causes a child under the age of 14 years to
22 make a sexual penetration on himself or herself or another or on a beast
23 is guilty of sexual assault of a minor under 14 years of age.

24 Consent, in fact, of a minor child under 14 years of age to
25 sexual activity is not a defense to a charge of sexual assault of a minor

1 under 14 years of age.

2 Sexual penetration means cunnilingus, fellatio, or any
3 intrusion, however slight, of any part of a person's body or any object
4 manipulated or inserted by a person into the genital or anal openings of
5 the body of another, including sexual intercourse in its ordinary
6 meaning.

7 Evidence of ejaculation is not necessary. Digital penetration
8 is the placing of one or more fingers of the perpetrator into the genital or
9 anal opening of another person.

10 Cunnilingus is a touching of the female sexual organ by the
11 mouth or tongue of another person. Fellatio is a touching of the penis by
12 the mouth or tongue of another person. Sexual intercourse is the
13 intrusion, however slight, of the penis into the genital opening of another
14 person. Anal intercourse is the intrusion, however slight, of the penis
15 into the anal opening of another person. Physical force is not necessary
16 in the commission of sexual assault.

17 If the State fails to prove beyond a reasonable doubt that the
18 Defendant committed a sexual penetration upon a child under the age of
19 14 years or causes a child under the age of 14 years to make a sexual
20 penetration on himself or herself or another or on a beast, then you must
21 find the Defendant not guilty of sexual assault of a minor under 14 years
22 of age.

23 Specific intent is the intent to accomplish the precise act
24 which the law prohibits. General intent is the intent to do that which the
25 law prohibits. It is not necessary for the Prosecution to prove that the

1 Defendant intended the precise harm or the precise result which
2 eventuated if a crime is a general intent crime. Sexual assault is a
3 general intent crime. Lewdness with a child is a specific intent crime.

4 Any person who willfully and lewdly commits any lewd or
5 lascivious act, other than acts constituting the crime of sexual assault
6 upon or with any part of the body of a child under the age of 14 years
7 with the intent of arousing, appealing to, or gratifying the lust or
8 passions or sexual desires of that person or of that child is guilty of
9 lewdness with a child under the age of 14.

10 Consent, in fact, of a minor child under 14 years of age to
11 sexual activity is not a defense to a charge of lewdness with a child
12 under the age of 14.

13 If the State fails to prove beyond a reasonable doubt that the
14 Defendant willfully and lewdly committed any lewd or lascivious act
15 upon or with any part of the body of a child under the age of 14 years,
16 with the intent of arousing, appealing to, or gratifying the lust or
17 passions or sexual desires of that person or of that child, then you must
18 find the Defendant not guilty of lewdness with a child under the age of
19 14.

20 Lewd is defined as (1) pertaining to sexual conduct that is
21 obscene or indecent tending to moral impurity or wantonness; (2) evil,
22 wicked, or sexually unchaste or licentious; and (3) preoccupied with sex
23 and sexual desire, lustful.

24 Lascivious is defined as (1) tending to excite lust; (2) lewd; (3)
25 indecent; (4) obscene; (5) relating to sexual impurity; and (6) tending to

1 deprave the morals and respect to sexual relations.

2 The law does not require that the lust, passions, or sexual
3 desires of either of such persons actually be aroused, appealed to, or
4 gratified. A lewd or lascivious act does not require physical contact
5 between the perpetrator and the victim.

6 There is no requirement that the testimony of the victim of a
7 sexual crime be corroborated. In his or her testimony, standing alone, if
8 believed beyond a reasonable doubt, is sufficient to sustain a verdict of
9 guilty. If you find that the testimony of a victim of a sexual crime is not
10 corroborated and you do not believe the victim's testimony beyond a
11 reasonable doubt, then you must find the Defendant not guilty.

12 Where a child has been the victim of a sexual crime and does
13 not remember the exact date of the act, the State is not required to prove
14 a specific date, but may prove a timeframe within which the act took
15 place.

16 The flight of a person after the commission of a crime is not
17 sufficient in itself to establish guilt. However, if flight is proved, it is
18 circumstantial evidence in determining guilt or innocence. If flight is not
19 proved, then it may not be considered in determining guilt or innocence.

20 The essence of flight embodies the idea of deliberately going
21 away with consciousness of guilt and for the purpose of avoiding
22 apprehension or prosecution. The weight to which such circumstance is
23 entitled is a matter for the jury to determine.

24 To constitute the crime charged, there must exist a union or
25 joint operation of an act forbidden by law and an intent to do the act.

1 The intent with which an act is done is shown by the facts and
2 circumstances surrounding the case. Do not confuse intent with motive.
3 Motive is what prompts a person to act. Intent refers only to the state of
4 mind with which the act is done.

5 Motive is not an element of the crime charged and the State
6 is not required to prove a motive on the part of the Defendant in order to
7 convict. However, you may consider evidence of motive or lack of
8 motive as a circumstance in the case.

9 The Defendant is presumed innocent until the contrary is
10 proved. This presumption places on the State the burden of proving
11 beyond a reasonable doubt every element of the crime charged and that
12 the Defendant is the person who committed the offense.

13 A reasonable doubt is one based on reason. It is not mere
14 possible doubt, but it is such a doubt as would govern or control a
15 person in the more weighty affairs of life. If the minds of the jurors after
16 the entire comparison and consideration of all the evidence are in such a
17 condition that they can say they feel an abiding conviction of the truth of
18 the charge, there is not a reasonable doubt.

19 Doubt to be reasonable must be actual, not mere possibility
20 or speculation. If you have a reasonable doubt as to the guilt of the
21 Defendant, he is entitled to a verdict of not guilty.

22 It is a constitutional right of a Defendant in a criminal trial
23 that he may not be compelled to testify. Thus, the decision as to
24 whether he should testify is left to the Defendant on the advice and
25 counsel of his attorney. You must not draw any inference of guilt from

1 the fact that he does not testify, nor should this fact be discussed by you
2 or enter into your deliberations in any way.

3 You are here to determine whether the Defendant is guilty or
4 not guilty of the charges from the evidence in the case. You are not
5 called upon to return a verdict as to whether any other person is guilty or
6 not guilty. So if the evidence in the case convinces you beyond a
7 reasonable doubt of the guilt of the Defendant, you should so find even
8 though you believe one or more persons are also guilty.

9 Evidence that the Defendant committed offenses, other than
10 that for which he is on trial, if believed, was not received and may not be
11 considered by you to prove that he is a person of bad character or to
12 prove that he has a disposition to commit crimes. Such evidence was
13 received and may be considered by you only for the limited purpose of
14 proving the Defendant's motive, opportunity, intent, preparation, plan,
15 knowledge, identity, or absence or mistake or accident. You must weigh
16 this evidence in the same manner as you do all other evidence in the
17 case.

18 The evidence which you are to consider in this case consists
19 of the testimony of the witnesses, the exhibits, and any facts admitted or
20 agreed to by counsel.

21 There are two types of evidence: Direct and circumstantial.

22 Direct evidence is the testimony of a person who claims to
23 have personal knowledge of the commission of the crime which has
24 been charged, such as an eyewitness.

25 Circumstantial evidence is the proof of a chain of facts and

1 circumstances which tend to show whether the Defendant is guilty or not
2 guilty.

3 The law makes no distinction between the weight to be given
4 either direct or circumstantial evidence. Therefore, all of the evidence in
5 the case, including the circumstantial evidence, should be considered by
6 you in arriving at your verdict.

7 Statements, arguments, and opinions of counsel are not
8 evidence in the case. However, if the attorneys stipulate to the existence
9 of a fact, you must accept the stipulation as evidence and regard that fact
10 as proved. You must not speculate to be true any insinuations
11 suggested by a question asked a witness. The question is not evidence
12 and may be considered only as it supplies meaning to the answer.

13 You must not speculate to be true any insinuations
14 suggested by a question asked a witness. The question is not evidence
15 and may be considered only as it supplies meaning to the answer.

16 You must disregard any evidence to which an objection was
17 sustained by the Court and any evidence ordered stricken by the Court.

18 Anything you may have seen or heard outside the courtroom
19 is not evidence and must also be disregarded.

20 You alone must judge the credibility or believability of the
21 witness. In deciding whether testimony is true and accurate, use your
22 common sense and experience. The credibility or believability of a
23 witness should be determined by his or her manner upon the stand, his
24 or her relationship to the parties, his or her fears, motives, interests, or
25 feelings, his or her opportunity to have observed the matter to which he

1 or she testified, the reasonableness of his or her statements, and the
2 strengths or weaknesses of his or her recollections.

3 If you believe that a witness has lied about any material fact
4 in the case, you may disregard the entire testimony of that witness or
5 any portion of his or her testimony which is not proved by other
6 evidence.

7 When a trial witness fails for whatever reason to remember a
8 previous statement made by that witness, the failure of recollection
9 constitutes the denial of the prior statement that makes it a prior
10 inconsistent statement. The previous statement is not hearsay and may
11 be considered both substantially and for impeachment.

12 A witness who has special knowledge, skill, experience,
13 training, or education in a particular science, profession, or occupation,
14 is an expert witness. An expert witness may give his or her opinion as to
15 any matter in which he or she is skilled.

16 You should consider such expert opinion and weigh the
17 reasons, if any, given for it. You are not bound, however, by such an
18 opinion. Give it the weight to which you deem it entitled, whether that
19 be great or slight, and you may reject it if in your judgment the reasons
20 given for it are unsound.

21 During the course of this trial and your deliberations you are
22 not to (1) communicate with anyone in any way regarding this case or its
23 merits either by phone, text, internet, or other means; (2), read, watch, or
24 listen to any news or media accounts or commentary about the case; (3)
25 do any research, such as consulting dictionaries, using the internet, or

1 using reference materials; (4) make any investigation, test a theory of the
2 case, recreate any aspect of the case, or any other way investigate or
3 learn about the case on your own.

4 Although you are to consider only the evidence in the case in
5 reaching a verdict, you must bring to the consideration of the evidence
6 your everyday common sense and judgment as reasonable men and
7 women. Thus, you are not limited solely to what you see and hear as the
8 witnesses testify. You may draw reasonable inferences from the
9 evidence which you feel are justified in the light of common experience,
10 keeping in mind that such inferences should not be based on speculation
11 or guess.

12 A verdict may never be influenced by sympathy, prejudice, or
13 public opinion. Your decision should be the product of sincere judgment
14 and sound discretion in accordance with these rules of law.

15 In your deliberations you may not discuss or consider the
16 subject of punishment, as that is a matter which lies solely with the
17 Court. Your duty is confined to the determination of whether the
18 Defendant is guilty or not guilty.

19 When you retire to consider your verdict, you must select
20 one of your number to act as foreperson who will preside over your
21 deliberations and will be your spokesperson here in court.

22 During your deliberations you will have all the exhibits which
23 were admitted into evidence, these written instructions, and forms of
24 verdict which have been prepared for your convenience.

25 Your verdict must be unanimous. As soon as you've agreed

1 upon a verdict, have it signed and dated by your foreperson and then
2 return with it to this room.

3 If, during your deliberations, you should desire to be further
4 informed on any point of law or hear any portions of the testimony, you
5 must reduce your request to writing signed by the foreperson. The
6 officer will then return you to court where the information sought will be
7 given to you in the presence of and after notice to the District Attorney
8 and the Defendant and his counsel.

9 Playbacks of testimony are time consuming and are not
10 encouraged unless you deem it a necessity. Should you require a
11 playback, you must carefully describe the testimony to be played back so
12 the court recorder can arrange her notes. Remember, the Court is not at
13 liberty to supplement the evidence.

14 Now you will listen to the arguments of counsel, who will
15 endeavor to aid you to reach a proper verdict by refreshing in your
16 minds the evidence and by showing the application thereof to the law.
17 But whatever counsel may say, you will bear in mind that it is your duty
18 to be governed in your deliberation by the evidence as you understand it
19 and remember it to be and by the law as given to you in these
20 instructions with the sole, fixed, and steadfast purpose of doing equal
21 and exact justice between the Defendant and the State of Nevada.

22 State.

23 MS. SUDANO: Thank, Your Honor.

24 STATE CLOSING ARGUMENT

25 MS. SUDANO: Good morning, ladies and gentlemen.

1 GROUP RESPONSE: Good morning.

2 BY MS. SUDANO:

3 One second. Bear with me a little bit on the tech issues,
4 ladies and gentlemen.

5 So, ladies and gentlemen, this is why we're here in this case.
6 This is Meily Moran as she appeared on July 12th of 2016 as she was
7 describing four police officers everything that had been going on for the
8 past year with her stepfather, the Defendant in this case, Gustavo
9 Gunera-Pastrana as she's describing the times that he's touched her, that
10 he's threatened her and her family if she says anything, then he's told
11 her he'll take her brothers away from her. That he's told her that this day
12 in just a couple of hours after this photo was taken, that if she didn't do
13 something, that he was going to force her to have sex with him.

14 Now, ladies and gentlemen, in every criminal case, the State
15 of Nevada has to prove two things to you. First, we have to prove the
16 crimes charged were committed and then we have to prove that the
17 Defendant is the person who committed these crimes.

18 So we're going to walk through the crimes that are charged
19 in this case and you'll see that each and every one of those crimes is
20 comprised of different elements. We're going to talk about those
21 elements and we're going to talk together about how the State has
22 proven to you beyond a reasonable doubt that the Defendant committed
23 these crimes and he's guilty as charged.

24 So the first charge that we're going to talk about is the
25 charge of sexual assault with a minor under 14 years of age. And that

1 occurs when a person causes a child under the age of 14 to be subjected
2 to sexual penetration or to make a sexual penetration on himself or
3 herself or another.

4 Consent is not an offense to the offense of sexual assault
5 with a minor under the age of 14. So we have to have all of these
6 different things present.

7 So a child under 14 years of age. So today, as she came in
8 earlier this week to testify, Meily is 16 years old. She's about to be a
9 senior in high school because she's one grade year ahead of kind of
10 normal, if you will.

11 So she was 12 for the first incident. She was 13 for the other
12 incidents that took place in 2016. She was 13 at the time that the abuse
13 was 14, or excuse me, the time the abuse was reported.

14 So we know that the entire time that the Defendant had
15 access to Meily, she was under 14. So that element is very clearly
16 established.

17 What you also have to consider is that Meily is 13 at the time
18 that she's talking to police and investigators about everything that
19 happened. She's 13 and 14 at the time that she's coming in to testify in
20 court. Even in front of all of you, she's still only 16 years old.

21 So a sexual penetration then is any intrusion, however slight,
22 of any part of a person's body into the genital or anal opening of
23 another.

24 So this includes digital penetration. So the insertion of one
25 or more fingers into the genital or anal opening of another person and

1 cunnilingus which is touching of the female sexual organ by the mouth
2 or tongue of another person.

3 So it's any intrusion, however slight, for sexual penetration.
4 So there's no time period on it. There is no requirement that the
5 penetration be anything more than penetration that took place.

6 So Meily told you that the Defendant's tongue and the
7 Defendant's finger both went where her period comes out. This is inside
8 her vaginal opening.

9 We had testimony from Dr. Cetl who was kind of giving us
10 that very brief anatomy lesson. We know that when the Defendant's
11 tongue and the Defendant's finger were inside the area where Meily's
12 period comes out, that is sexual penetration, either a digital penetration
13 for when he inserted his finger or cunnilingus for when he inserted his
14 tongue in his mouth. So that's how we know that we have sexual
15 penetration.

16 So those are the elements for sexual assault with a minor
17 under 14. It's the penetration of a person under 14 years of age. So we
18 know that there were two incidents of penetration. There was the
19 sticking of his finger inside of her vagina and then there was the kissing
20 or the licking with his tongue inside of her vagina. We know that she
21 was under 14 for all of those incidents.

22 So I want to talk very briefly to you about specific intent and
23 general intent, and this will make more sense in just one second. So
24 general intent crimes are crimes where the person just has to have the
25 intent to commit the act in question. Specific intent is the intent to

1 accomplish the precise act which the law prohibits.

2 So it will say in the charging document, so in the sexual
3 assault charges that we were just talking about, there is no specific
4 intent.

5 However, we're going to talk about lewdness with a minor in
6 just one second. And so lewdness with a minor is willfully committing a
7 lewd and lascivious act with the intent of arousing, appealing to or
8 gratifying.

9 So it'll specifically have kind of those words with the intent.
10 So unlike the sexual assault charges, the State actually has to prove
11 beyond a reasonable doubt for the lewdness counts that there's some
12 intent to commit a lewd or lascivious act.

13 So here again, lewdness with a child is a specific intent
14 crime, but sexual assault is a general intent crime. So the State has to
15 prove the sexual intent for the lewdness charges, but when we're looking
16 at the sexual assault charges, the fact that they happened, the fact that
17 they were committed, if believed beyond a reasonable doubt is
18 sufficient. You don't have to get into the intent.

19 So lewdness with a child, as we just saw, occurs when a
20 person willfully commits any lewd or lascivious act upon or with any part
21 of the body of a child under the age of 14, and then here's that intent.
22 With the intent of arousing, appealing to or gratify the lust or sexual
23 passions or sexual -- excuse me. Lust or passions or sexual desires of
24 that person or of that child.

25 So lewd or lascivious basically means lustful, obscene or

1 sexualized. You have the actual definition, but it's a lot of words that
2 kind of refer back to each other. So we're just talking about lustful,
3 sexualized behavior.

4 And again, with lewdness, just like with the sexual assault,
5 consent is not a Defense. So there's also no requirement for the
6 lewdness count that there be any sort of a skin to skin touching. It can
7 be contact over the clothes or through the clothes. Doesn't require that
8 there actually be physical skin to skin contact between the Defendant and
9 Meily.

10 So we've talked about the idea that there has to be some sort
11 of an intent to arouse those sexual desires or the passions, but there's no
12 requirement that either side, either party actually be aroused. So that's
13 not something that the State has to prove to you. It's just that their acts
14 that are done with the sexual intent.

15 And so the intent within which an act is done is shown by the
16 facts and circumstances surrounding the act. So in this case, you heard
17 testimony that for the lewdness counts, which are the time that the
18 Defendant rubbed Meily's vagina in the living room, and the time that he
19 had forcefully grabbed her and kissed her.

20 You heard that during that first incident where he was
21 rubbing her vagina with her hand, he was asking if she liked it. He's
22 kissing Meily with tongue and then he's telling her that she's going to
23 have sex with him the next day. So obviously there's a sexual intent
24 there because he's telling her that that is what's going to happen. He's
25 telling her that that's the next step of this.

1 So we know that these aren't innocent kind of accidental
2 touches. They're touching Meily, physical contact with Meily, with the
3 intention of some sort of sexual gratification.

4 He also threatens her if she tells anyone, he says, I'll go to
5 jail, is one of the things that he says. He also says, I'll take your brothers
6 away. I'll separate you, things along those lines. So he's making it clear
7 to her that everything that he's doing are things that could have
8 consequences, that could get him in trouble. Are things that he's got
9 some intent other than a pure intent for.

10 One second. We're going to see if our clicker works now.
11 Nope. All right. We tried.

12 So you have that entire packet of instructions with you. One
13 of the instructions that you have here is this reasonable doubt
14 instruction. And so the thing to know about this is a reasonable doubt is
15 one based on reason. It's not mere possible doubt, but it's such a doubt
16 as would govern or control a person in the more weighty affairs of life.

17 And then if you skip down, it says, doubt to be reasonable,
18 must be actual, not mere possibility or speculation.

19 So that's what you're looking at in this case, ladies and
20 gentlemen, is did the State prove to you that these things happened, and
21 the Defendant did these things beyond reasonable doubt? The answer is
22 yes, ladies and gentlemen, we did.

23 Because along with that reasonable doubt instruction, you
24 also have this one that goes hand-in-hand. It's your commonsense
25 instruction. It tells you that although you are to consider the evidence in

1 the case, you don't check your common sense of the door. You go back
2 into the jury deliberation room and you maintain everything that brought
3 you here. That common sense as reasonable men and women.

4 And when you look at this, all of it together, using your
5 common sense, you'll see that these things happened. So reasonable
6 doubt, there's no requirement that the testimony of a victim of sexual
7 assault for lewdness be corroborated. That victim's testimony standing
8 alone, if believe beyond a reasonable doubt, is sufficient to sustain a
9 verdict of guilty.

10 So what does that mean for you, ladies and gentlemen? That
11 means that reasonable doubt does not say that there must be video, that
12 there must be DNA, that there must be four eyewitnesses who came in
13 and told you these things happened. That's not what reasonable doubt
14 says. That's not what any of your instructions say.

15 So that commonsense instruction again tells you that you
16 can draw these reasonable inferences from the evidence. So Meily is
17 describing actions that are criminal. Right. She's not describing
18 accidental touching. She's not describing something that happened
19 while the Defendant was sleepwalking or anything like that. She is
20 describing criminal conduct at the hands of her stepfather.

21 And we also know that consent is not an offense to anything
22 that the Defendant is charged with. Therefore, if you believe her beyond
23 a reasonable doubt, that's all that's required in this case. Meily's
24 testimony alone is sufficient for you to find the Defendant guilty beyond
25 reasonable doubt.

1 So we're going to walk through the testimony that Meily
2 provided in this particular case. So she talked about that first incident
3 that happened. She said it was a Sunday in August of 2015. It was in
4 that first mobile home that they all lived in together. She was 12 years
5 old at the time. She was sitting on the couch in the living room watching
6 TV when the Defendant comes in and he tells her that he wants to check
7 those scars from the surgery that she had had.

8 You heard testimony from Meily's mom that they were just
9 teeny tiny little scars and that this is something that had happened
10 several months ago at this point. Right. She says she never asked the
11 Defendant to check Meily's scars. Even she wasn't really checking the
12 scars. She would kind of give them a casual once over and then if there
13 were any issues, she said she was just going to take Meily to the doctor.
14 It's not something that really requires any looking at.

15 So this is just sort of the Defendant's opportunity, if you will,
16 to gain access to Meily. So he has her sitting on his lap so that she can
17 show him these scars and then he starts looking there right beneath her
18 belly button where she said those scars were, and she said his hand
19 starts to move.

20 So he sticks his hand inside her pants, and he starts rubbing
21 on her vagina. She described that he touched her inside her pants, so
22 his hands went underneath her pants, but it was over her underwear.
23 And then she described his hand being open and it was sort of like he
24 was rubbing or wiping a table is how she described his hand on her
25 vagina.

1 Throughout this interaction, he asked if she liked it. When
2 she said, no, and kind of got up and got away from him, he tells her not
3 to say anything. He tells her that if she tells her mom or anybody else,
4 that he's going to go to jail.

5 And then after that, she says that there was this long break in
6 time where he would say things to her, sexual things. She described the
7 incident right after her youngest baby brother was born in February of
8 2016, where he started telling her that, you know, she was going to have
9 relations with him and that things were going to progress. And she
10 described a number of different incidents where that took place.

11 She said the next time that anything physical happened was
12 further on into the year. She says June of 2016 is when it picks back up
13 and it turns sexual again.

14 So she also described this other incident in the master
15 bedroom in that second trailer that they lived in. So we're no longer in
16 the first trailer. We're in the second trailer after the apartment. And she
17 describes the incident in the master bedroom where the Defendant
18 comes in while she's taking care of her brothers and she testified here in
19 court that this one was the day before the police were called. And we'll
20 talk about that in a second. But we know that from what she says in
21 court, this was July of 2016.

22 Again, we're in that second trailer. So the Defendant leaves
23 Jose at work. He takes Jose to work with him that morning, leaves Jose
24 who at this time is 12 years old, kind of alone in some stranger's house
25 where he's doing tile work. And he comes back to the house and he's

1 telling Meily something about needing to check on one of the younger
2 babies or something along those lines.

3 She's sitting on the bed with the baby. Both boys are in the
4 room. And he tells her to put the baby down on the bed. And he tells
5 her to take off her shorts. When she won't take off her shorts, he does it
6 for her. He pulls down her shorts and her underwear, and then his hand
7 touched her vagina. She says first on the outside and then he puts his
8 finger inside in the area where her period comes out.

9 She said his finger moved around and she felt disgusted
10 while that was happening. And then he removes his finger and he puts
11 his tongue inside of a vagina. This is all happening while she's on the
12 bed, laying on her back in the master bedroom with her two baby
13 brothers right there next to her.

14 So, again, she says both his finger and his tongue went
15 inside where her period comes from. So both of those things penetrated
16 her vagina. And then he tells her to turn around. She says that that's
17 when one of the babies cries.

18 When she turned back, she saw his penis. She described it
19 as brown and wrinkly and she said that at that point, you know,
20 obviously his pants are down. He pulls his pants up, wipes his mouth
21 with the tissue, and then she gets dressed and comforts the baby.

22 He gets up, leaves the room and then comes back as if
23 nothing happened and says that he's going to go get Jose who's at that
24 other house.

25 So the other incident that Meily described to you all during

1 the course of this trial was again in that same second mobile home when
2 she's in the living room. This is a kissing incident that she talks about.
3 She says she's 13 years old for this one, just like she was for the incident
4 in the master bedroom. And this one, she says, was a couple weeks
5 before the police were called. So sometime in June or July of 2016.

6 So she says that the Defendant grabbed her and kissed her
7 by force. So she's got her mouth closed, he's kissing her with an open
8 mouth and using tongue and she had the little baby in her arms.

9 And during this incident, he tells her that she's lazy for not
10 working. He was threatening to kick her out of the house and he's telling
11 her that she's going to have sex with him.

12 So let's talk about how it is that Meily first let anybody know
13 about these things and why she told people what was going on. So she
14 said she told Jose sometime during the school year in 2016 because she
15 felt like she had to tell someone.

16 And remember, ladies and gentlemen, she said that she's
17 really worried when she told Jose that nobody's going to believe her
18 because the Defendant told her that mom was never going to believe
19 her, that mom was always going to live with him and that nobody's
20 going to believe anything that she has to say. She's a kid.

21 So she has this friend at school, and you heard a little bit of
22 testimony about this that had confided in Meily, that that friend had also
23 been sexually abused. But that's also part of why she's worried to say
24 anything. Right. The friend at school wasn't believed. Mom did
25 everything in support of the stepdad and the kid stopped living with her

1 mom, but it was because mom picked the stepdad. Right. Mom
2 supported the stepdad.

3 So that friend ends up living with her dad. Meily knows that
4 she doesn't have a dad to go to and she's worried that just like in that
5 case, mom's not going to believe her.

6 But she finally tells her mom on July 11th of 2016, and she
7 told you all it was because she was sick of it. She was sick of living in
8 fear. And the Defendant that day, July 11th, gave her something
9 particular to fear. Right. He told her, her time was up. All these
10 conversations about them engaging in this sexual relationship. All of the
11 offers to kind of buy her things or the suggestions that she's no longer a
12 child and she's getting older and that everybody her age is doing it.

13 That all comes to a head on July 11th because he's telling
14 her, tomorrow, July 12th, when I drop your mom off at work, I'm going
15 to leave Jose somewhere. I'm going to come back and there's going to
16 be nobody in this house. Your time is up. You're going to have sex with
17 me tomorrow whether you want to or not.

18 So as scared as she is about everything that's going on and
19 about everything that he's done and he said to her, she finally gets to the
20 point where she doesn't feel like she has a choice. She has to tell her
21 mom and just hope that her mom's going to believe her.

22 Luckily, ladies and gentlemen, Meily's mom called the police,
23 kind of brought us to this point.

24 So I want to talk to you about some of the other things that
25 are going on with Meily. So she told you that Meily had told her brother

1 Jose about everything that was going on at some point, kind of well
2 before, at least a couple of months before she tells her mom.

3 So Jose sort of changes his behavior. Right. He starts
4 making sure that Meily's not alone with the Defendant. He's doing
5 everything that he can to be there and to protect her. You have to
6 remember that he's 11, 12 at this point in time, but he's trying to do what
7 he can to keep his sister safe.

8 So he can't refuse to go to work with the Defendant. Even
9 though you heard testimony from Meili Casillas, the mom, that Jose
10 didn't really want to go to work, but he's doing it because that's what the
11 Defendant is telling him to do.

12 So when he gets taken to work and he doesn't have any
13 choice, he makes sure that he calls Meily ahead of time to warn her the
14 Defendant's coming home because he wants her to be prepared. Wants
15 her to have a heads up, because even if he can't be there physically, he's
16 still trying to protect her and keep her safe.

17 And you also heard testimony that Meily's mom kind of
18 described her behavior changing as this was all starting with the
19 Defendant.

20 Meily's mom says she doesn't know at this point when the
21 abuse had started, but she did say she notices this kind of change in
22 Meily's demeanor. Meily becomes quiet and reserved and anytime mom
23 asks her about what's going on, Meily just sort of won't answer her.

24 The other thing that they noticed around this time is that
25 Meily had called the Defendant dad when he first moved in. Right. She

1 was excited. She was happy that he was there because this was the
2 closest thing to a dad that she'd ever had. Right. Her dad had left when
3 she was 2 or 3 years old. She didn't have any contact with him.

4 So she starts calling the Defendant dad. And then she told
5 you that she stopped as soon as the abuse started. So somewhere
6 around that August of 2015 incident, she stops calling him dad. And
7 mom picks up on this and asks why. And Meily won't tell her at that
8 point. Right. She just says, I don't want to do it anymore. I don't want
9 to call him dad anymore.

10 So that's something that mom's aware of, but she doesn't
11 have the context. She doesn't know the background behind it.

12 So, again, we've got this idea of Defendant separating Meily
13 and Jose by leaving Jose at work. Leaving his 12 year old stepson, for
14 all intents purposes, somewhere else. Right. Separating those two kids
15 because those two have always grown up together. They're always
16 close. And he knows that he's got a better shot of accessing Meily and
17 being able to abuse Meily if Jose is not in the picture.

18 And he knows that every day he's not working, he's taking
19 mom to work. Right. So mom doesn't have a ride. Mom can't come
20 home. So as long as Jose's out of the picture, the only two people that
21 are in the house are his little babies who are too young to know what's
22 going on. Too young to intervene, stop, protect their big sister.

23 So I also want you to consider Meily's demeanor during her
24 initial disclosure to Officer Kravetz. So one thing that we have to
25 consider, ladies and gentlemen, is that Meily's told this story a number

1 of times. Right. She's talked about what's happened to her so many
2 times.

3 But that first time when she was first getting it off her chest
4 and telling somebody outside of her family was June 12th when she was
5 telling Officer Kravetz. Excuse me, July 12th, when she's telling Officer
6 Kravetz what happened.

7 And that same day, she's described by Elizabeth Espinoza as
8 being scared and nervous during that interview because it's all still
9 coming out for the first time. They said that she was -- Elizabeth said she
10 was tugging on the tissue the entire time that she was in there. And that
11 she starts speaking in English, but that she sort of breaks down and
12 when she starts talking about everything that happened, she switches
13 over, starts speaking in Spanish, which is the language she's most
14 comfortable in, and she's crying and just trying to get it all out.

15 You also heard testimony from Officer Kravetz that Meily's
16 terrified that after the police stop the Defendant in the truck that they're
17 release him and then he's going to come back. And we know that when
18 the Defendant sees those police vehicles and the police officers in front
19 of the house, he speeds away in the truck.

20 Remember, he's got Jose in that truck with him. He sees
21 police officers, police vehicles parked near his house. The officers are
22 actually waiting in front of his unit. And who else is in that unit? It's the
23 woman that he's been in a relationship with for three years at that point.
24 It's his two children that are inside of that residence.

25 And instead of going to see what's happening inside that

1 residence and making sure that his family and his children are okay, that
2 nothing's happened to them, he takes off and tries to get out of the
3 complex because he knows based on the conversation that he had with
4 Meily the day before, exactly what's going on, exactly why they're there.

5 So I want to talk to you about this idea of Meily working. So
6 you heard a number of things about Meily not having a job. Right. So
7 you do remember that she's 13 at this point. So she's too young to go
8 and get a work card and go even working at a fast food restaurant or
9 anything like that.

10 So all she can really do is, kind of 13 year old job. She can
11 go babysit. She can do something like that. Sure. But she's babysitting
12 every day for her two younger brothers while mom's gone at work.

13 Jose's going to work with the Defendant when the Defendant
14 does go to work, but it's not like Jose's getting paid for that. It's not like
15 Jose's contributing to the household in any way.

16 It's just that the Defendant really wants Meily to work. So
17 he's threatening to kick Meily out of house for not having a job and then
18 it starts to be, I'm going to kick you out of the house if you don't have
19 sex with me.

20 So Meily's kind of job or her only way to be useful for the
21 Defendant is if she's having sex with him. Right. She's not outside the
22 house making money or doing anything like that. And so he's going to
23 put her to work inside the house and decides that Meily's going to have
24 sex with him and that's the latest threat on July 11th, the latest way to
25 keep Meily compliant in doing what he wants.

1 She doesn't have anywhere to go, and he knows that. So
2 he's starting to threaten her, I'm going to kick you out. I'm going to
3 make sure that things are hard on you if you don't have sex with me.

4 So, Ladies and Gentlemen, I want to talk now about all of the
5 times that Meily has had to relive and explain everything that happened
6 to her. So she tells this story four times after the Defendant's arrest.
7 She tells Officer Kravetz, she tells Elizabeth Espinoza , she testified at the
8 preliminary hearing, and she testified at that CPS hearing. So the first
9 two with Officer Kravetz and Elizabeth Espinoza are both on July 12. The
10 preliminary hearing is a couple months later on September 30th of 2016,
11 and then that CPS proceeding is in February of 2017. So each time kind
12 of the purpose of the conversation is different, right? And Meily is being
13 asked different questions.

14 After those sort of incidents when she's 13 and 14 and she's
15 describing everything that's happening to her and she's sort of being
16 interrupted and asked questions and to redirect it, she doesn't tell the
17 story again for more than two years right in front of you all earlier this
18 week. And so when she's talking about everything that happened to her
19 in front of you all earlier this week, we're now three years after the abuse
20 ended, right, because we're talking about things from August of 2015 or
21 June and July of 2016.

22 So as she sat in front of you all earlier this week she's
23 remembering back to things that she doesn't want to remember that are
24 hard for her to talk about. She's describing things that happened when
25 she was 13, 12, and as a 16 year old trying to process that and explain it

1 all to you.

2 So I'm going to go through the statements that were made to
3 each of these individuals.

4 The first person that she talks to is Officer Kravetz. She tells
5 him in that very brief conversation that the Defendant touched her body
6 in her private part, that she told her mom yesterday, and that he started
7 doing this last year, it was a Sunday, I don't remember the date. He
8 touched her with his hands and then he took off his pants and she
9 pushed him away. And then it happened when my mom goes to work
10 and when my mom and my brother are not here. She indicated to
11 Officer Kravetz that he puts his finger -- or he put his fingers inside of her
12 one time.

13 Now, you saw basically the extent of that conversation with
14 Officer Kravetz. It was very short. He was getting the information so that
15 he could pass the case on to the detective. So she didn't provide all of
16 the details to him. He was just trying to get enough that he knows what
17 to do with the case.

18 She does tell him, yesterday he kissed me. He grabbed my
19 head and kissed me. I couldn't do anything else. He said he was going
20 to kill my mother and my brother.

21 Now, she also tells him, he told me yesterday if I told my
22 mom, he was going to kill her, he was going to kill my brother and me.
23 He said he was going to take my two baby brothers away. He said I have
24 to have relationships with him today. He was going to force me to do
25 that while my mom was at work.

1 And so this is Meily's reaction as she's describing for the first
2 time to anybody outside the family everything that was happening.

3 [Whereupon, an audio recording, State's Exhibit was played in
4 open court at 10:15 a.m.]

5 MS. SUDANO: So that's the first time that she's explaining
6 what the Defendant did to her through all those months. And that same
7 day she goes on and she has a conversation with Elizabeth Espinoza that
8 starts out in English and kind of switches over to Spanish partway
9 through.

10 She tells Elizabeth that the abuse started one Sunday last
11 year in the year 2015 and that she was on the couch in the living room
12 during that first incident. Mom was at work. Jose was back in his
13 bedroom. And that he was asking to check her surgery scars and that he
14 started touching her private or her stomach and then her private part.
15 She described for Elizabeth his hand that was moving like he was
16 cleaning a window as he was touching her vagina and that his hand was
17 inside her clothes. He asked her if she likes it. She says no. And then he
18 said that if she tells mom, he's going to kill her, he's going to kill mom
19 and he's going to kill her brother.

20 So she goes on to talk about the second incident with
21 Elizabeth Espinoza. She talked about the time when the Defendant
22 comes home alone without Jose. That this happened in the fourth week
23 of June in 2016. And that she was in mom's room, that master bedroom,
24 trying to put the baby to sleep. She was wearing her P.E. shorts -- her
25 gym shorts. The same type of shorts that you can see her in that video

1 when she's talking to Officer Kravetz. He grabs her, he pulls down her
2 shorts, he starts to touch her private parts. She tries to push him away.
3 And that he touches her vagina and he inserts his finger and he also
4 kisses her private part. And that he tells her he's going to kill mom if she
5 tells anybody. She says that one of the little boys in the bed next to her
6 starts to cry and that's what saved her from further abuse.

7 She goes on to talk about the third incident, the kissing
8 incident with Elizabeth. She says it happened yesterday when the
9 Defendant and Jose were going to wash one of the cars in the house.
10 She says that he tells her that her time is over and that he's going to kick
11 her out of the house because she doesn't work. He grabs her on the
12 mouth and he forcefully kisses her. She tries to pull back, but he says
13 no, he says he's going to kill her right then.

14 And so she calls her mom right after they leave to go get the
15 cars washed because he said that when he was coming back that next
16 day on July 12 after mom's at work, he's going to force her to have sex
17 with him.

18 So that's what she tells Elizabeth.

19 And then she testified again at the preliminary hearing in
20 September, so now a couple of months after everything. She says she
21 told Jose what was happening in 2016 and he promised to protect her.

22 That first incident was August of 2015 in the living room of
23 the mobile home. Mom's at work, Jose's in his room. He tells her again
24 he's checking her surgery and he uses his hand to touch her vagina
25 under her clothes and he's wiping with his hand like he's wiping a table.

1 He tells her not to tell mom because he's going to jail.

2 And then she describes a second incident in June of 2016 in
3 the master bedroom of that second trailer. Defendant takes Jose to
4 work, leaves him there, comes back, and she's sitting alone in the room
5 with her little brothers. He tells her that they're going to have
6 relationships and if not he was going to take the brothers. His finger
7 touched the inside of her vagina, then his mouth touches her private
8 part. Defendant tells her that if she tells her mom, he's going to take her
9 brothers and something bad is going to happen to her brother and to her
10 mom.

11 So then she describes at the preliminary hearing, as well, the
12 third incident, which she says is July 11 in the living room of the second
13 trailer. So he tells her again time was over and that she's going to have
14 sex with him. He tells her if she doesn't have sex with him, right, if she
15 doesn't do the only useful thing that she can do if she's not working, he's
16 going to kick her out of the house. And then he kisses her on his (sic)
17 lips using his tongue and his mouth. And as soon as Defendant and
18 Jose meet to go the car wash, she calls her mom.

19 And then we've got the CPS hearing, the one in February of
20 2017. So we're now up to the fourth time where she's had to relive this
21 and answer questions about everything that happened.

22 So she says the first incident was August of 2015. The
23 Defendant and Meily are in the living room watching TV. Jose's in his
24 bedroom. He tells Meily to sit on his lap. He starts touching her
25 stomach. And then once he stops touching her stomach, he starts

1 moving his hands down towards her private part. She tries to move
2 away from him once. He starts touching her again. So she gets up and
3 goes to the kitchen.

4 So both of those times during this particular incident when
5 he's touching her, he sticks his hand down her pants. And he asks her
6 whether or not she likes it.

7 So she describes also at that hearing the second incident
8 where she's sitting on the master bedroom with her younger brothers.
9 Older brother is at Defendant's job, so he's not there. And the Defendant
10 started to ask when it was going to be time and telling her that he's
11 going to touch her. Defendant tells her that if she doesn't do it, he's
12 going to take her baby brothers and kill her mom. He pulled down her
13 shorts, he touches his private -- or her private area with his hand and his
14 arm, and he tells her to turn around. And then Adonay woke up, one of
15 the babies that's in the room with her, and he stops.

16 So then she also at that hearing describes the third incident
17 which she says starts when Jose and the Defendant are going to wash
18 the truck. He asks for a kiss. She gives him kind of a father/daughter kiss
19 on the cheek. He kisses her on her mouth and when she tries to pull
20 back, he won't let her. She says that kiss stopped because she's holding
21 the baby, Gustavo and that he started crying.

22 She says that at that period the first person that she told was
23 Jose. Again, we're talking about in 2016 she had testified what was
24 happening. And that she tells mom the day that he kissed her because
25 he said that he was going to leave her brother at work. The following

1 day he's going to come back and have sex with her when there's nobody
2 in the house. So that's what prompts her telling mom.

3 So as soon as they leave to go and wash the car, she called
4 mom and tells mom everything that's happening.

5 So she explains that the touching happened that one time in
6 August of 2015 and then months passed before anything happens again.
7 So in that period in between there are all those incidents of him making
8 the statements to her and talking to her about how the relationship is
9 going to turn sexual, but that there's no physical contact until we get to
10 June.

11 So she describes he didn't touch her a lot, he was just kind of
12 saying things to her verbally about their relationship that they were
13 going to have. And she said that there were a number of different
14 conversations when he's talking to her about it and she gave that one
15 example of February 22nd when he was taking her to buy a car seat for
16 the brand new baby that he's just had with Meily's mom. And he's
17 talking about how she's old enough now, she's no longer a child, and
18 they're going to have this sexual relationship.

19 So I want to talk about all of the things that Meily said and
20 how those things have remained consistent kind of over time, right?
21 We're talking about a 13, 14, 16 year old who's had to relive this over
22 and over and over again. Just to kind of put it in context of the
23 information that she's provided to you all.

24 So for this August of 2015 incident, she told pretty much
25 everybody that it first started a year ago. So she told Officer Kravetz it

1 was last year, it was a Sunday; Elizabeth Espinoza it was a Sunday in
2 August; at the preliminary hearing, again Sunday in August; CPS
3 hearing, August of 2015; and then she testified for all of you a couple
4 days ago that it was in August of 2015. That's never changed.

5 During that first incident she again told everybody that he
6 was touching the outside of her vagina. So not only inside of her vagina
7 like the incident in the master bedroom, in the living room. She told
8 Elizabeth it was on a couch looking at the scars; preliminary hearing, on
9 the couch looking at scars; CPS, on his lap, on the couch; and then here
10 on his lap, looking at the scars. That's never changed.

11 And so for that first incident, as well, she's also talking about
12 being touched under her clothes. So she tells Elizabeth it was under her
13 clothes; preliminary hearing, she said it was under her clothes; CPS she
14 said hands down her pants; here she said it's under her pants, over her
15 underwear.

16 So you can consider she's using different words sometimes,
17 but she's conveying essentially the same information throughout. She's
18 being asked different questions and the information's coming out in
19 different ways, but it's generally the same information that she's telling
20 everyone.

21 And, again, during that first incident being asked whether or
22 not she liked it, she tells that to Elizabeth; she said that at the CPS
23 hearing; she said that at the jury trial. If you go back to November there
24 were certain things that she just wasn't asked about during certain
25 proceedings or things that just didn't get explained during some of the

1 proceedings.

2 You heard the preliminary hearing testimony read to you.
3 You know that that was about maybe 30 minutes. The same with the
4 video that you saw at the CPS hearing, maybe 30 minutes. With Officer
5 Kravetz it was just a couple of moments for him to get enough
6 information to relay to the detective.

7 So when she's not providing the same level of detail all of
8 these times, yeah, there's pieces of the information that don't come out
9 because she's not asked. It's not because the story is changing.

10 So as far as the incident in the master bedroom, she tells
11 Elizabeth, she testifies at the preliminary hearing, she testified at the CPS
12 hearing, and she testified in front of you all that he pulls down her shorts
13 and he makes her get onto the bed and that he touches her vagina with
14 his fingers and his tongue. And, again, she tells Elizabeth that, she
15 testified to that at the three separate hearings in this case. That didn't
16 change.

17 She also tells a number of people that he pulls his pants
18 down and that she saw his private part. So Officer Kravetz in that very
19 brief conversation, she starts to tell him about a time that he took off his
20 pants. She tells Elizabeth that his part was brown and wrinkled and that
21 his pants were down and then he pulled them back up when the baby
22 cried. During trial she testified that his penis was brown and wrinkly and
23 that he had his pants down when she sort of turned around after the
24 baby was crying. So that information was provided all along.

25 She tells Elizabeth and then she testified at all three of those

1 separate hearings that the reason that that incident stopped is because
2 one of the babies in the room cried. She didn't always say which baby it
3 was, she said that the baby cried. So that didn't change, either.

4 So this kissing incident, she tells Elizabeth and she testifies
5 three separate times that in the living room the Defendant grabbed her
6 and kissed her using his tongue. She told Officer Kravetz, as well, that
7 the Defendant kissed her, but she didn't tell him where and how, she just
8 provided the information that there was a kiss.

9 And she tells Elizabeth and she testifies at three separate
10 hearings that the Defendant had threatened to kick her out for being lazy
11 and for not working during that kissing incident.

12 So she tells everybody that she had told her mom the day
13 before the police were called. So July 11 of 2016 she says that's the day
14 that I told my mom. Prior to that mom doesn't know.

15 She also tells everybody that the reason that she tells her
16 mom is because he's made the statement that she's going to have sex
17 with him the next day whether she wants to or not and her time's up. So
18 she tells everybody that specific information, as well. That's never
19 changed.

20 She also told Elizabeth and testified at three separate
21 hearings that she tells Jose before she tells her mom. So she told Jose
22 this year. She didn't specify when at the preliminary hearing, but she did
23 say she told him. At CPS she said she told him in 2016. And then here in
24 front of you all it was 2016 during the school year, but it was close to
25 summer. Throughout she's conveying information that Jose knew and

1 she's asked him not to tell anybody, not to tell mom.

2 She also told everybody that after she told Jose, he was
3 trying to protect her, right? So she tells Elizabeth that Jose's trying not
4 to leave her alone. She testified at the preliminary hearing that he
5 promised to protect her, and she testified in front of you all that he
6 doesn't want to leave her alone and that he would kind of text or call to
7 warn her when the Defendant's coming. So throughout that information
8 never changed, it's just that she wasn't asked at a couple of the other
9 proceedings.

10 So, Ladies and Gentlemen, there was some confusion from
11 Meily about the order of the events. So she always said that the first
12 incident was August of 2015 and it was the touching for her scars and
13 the living room was the first incident or the first trailer.

14 And then she's always described the same other two events.
15 It's just at this point she doesn't remember which one came first;
16 whether it was the incident in the master bedroom, or it was the kissing
17 in the living room. She's always described those three incidents, it's just
18 which one came first.

19 So you have an instruction that when a child has been a
20 victim of a sexual crime, the State does not have to prove a specific date
21 for the incident. We just proved to you kind of the timeframe during
22 which all these things took place. And she's consistent on the
23 timeframe, as well.

24 The first incident is August of 2015, the second incident is the
25 end of June, the third incident is July 11. It's just which incident is

1 which.

2 We'd submit, Ladies and Gentlemen, that the State's proven
3 beyond a reasonable doubt, even if she's now not certain on the order.

4 So I want to talk to you about that because that goes to your
5 common sense, Ladies and Gentlemen. Common sense is absolutely
6 important in every single case, but particularly in a case like this. The
7 reason for that, Ladies and Gentlemen, is that your common sense is
8 going to apply to absolutely everything. It applies to witness testimony,
9 it applies to items of evidence, for instance the videos that you saw in
10 this particular case, and it applies to the arguments of the attorneys, all
11 of the information that you could have.

12 So the information you have in this case, again, Ladies and
13 Gentlemen, is that the events and how the events were described is the
14 same, it's just the order that has changed.

15 And you heard testimony from Elizabeth Espinoza, who said I
16 think it was 2100, I don't remember the exact number that she gave us,
17 she's interviewed 2100 kids. She said kids remember the actions and the
18 experience, they don't always remember the order. She said that she
19 would expect a kid of Meily's age to be able to tell them -- to tell her
20 what has happened the day before.

21 But when you start to talk about things that happened
22 months or years before, they're not always going to get the order right,
23 they're not always going to remember the chronology of what happened
24 first and what happened second. They're just going to remember the
25 experience and how it made them feel, which is exactly what Meily was

1 telling you about.

2 So these are things again that Meily doesn't want to
3 remember, she doesn't want to talk about. They're not happy things.
4 And these are uncomfortable conversations that she's having typically in
5 her second language, right? Her English is good, but there were a
6 couple of times even during this trial where she had to use the
7 interpreter where she wasn't totally clear on the questions that were
8 being asked.

9 You know, it's not consider it, if people tell stories differently
10 over time, use your common sense on that one, right? Our memories
11 change, our memories fade, things aren't going to be as fresh a couple
12 years down the road as they were at the time that it happened. And then
13 we're also just -- we're not robots, Ladies and Gentlemen. Nobody tells
14 the same story exactly the same way time after time after time, using the
15 same words time after time after time, because that's just not how our
16 brains are wired.

17 So, Ladies and Gentlemen, when you use your common
18 sense and you take everything together in this case, the State has proven
19 to you beyond a reasonable doubt that the Defendant did all of these
20 things to Meily Moran. He touched her vagina in August of 2015. He put
21 his tongue inside of her vagina and his finger inside of her vagina and he
22 kissed her and told her that she was going to have to have sex with him
23 at some point.

24 And, ladies and gentlemen, when you apply your common
25 sense and you listen to the things that Meily said time after time after

1 time, we ask you, when you go back to deliberate, to take those things
2 into consideration, to find the Defendant guilty of each and every count
3 with which he's charged.

4 Thank you.

5 THE COURT: Ladies and gentlemen, we're going to take a
6 recess. We're working on -- I noticed you're fanning yourselves, it's hot,
7 working on that too, I sent an email.

8 During this recess you're admonished you're not to talk or
9 converse amongst yourselves or with anyone else on any subject
10 connected with this trial or read, watch, or listen a report of or
11 commentary on this trial or any person connected with this trial by any
12 medium of information, including, without limitation, newspapers,
13 television, radio, internet. Do not form or express any opinion on any
14 subject connected with the trial until the case is finally submitted to you.

15 We'll take ten minutes. You have to leave all your notes, the
16 papers, everything here.

17 COURT OFFICER: Please rise for the jury.

18 [Jury out at 10:36 a.m.]

19 [Recess taken from 10:36 a.m. to 10:45 a.m.]

20 [Outside the presence of the jury]

21 THE COURT: It's now a quarter to 11. Any idea who's giving
22 closing and how long?

23 MR. SPEED: I am, Your Honor. Oh, I would say 11:45 I
24 should be done.

25 THE COURT: All right. So now we're -- I'll probably give

1 them a short break, and we'll finish.

2 MR. SPEED: The State does have rebuttal closing though,
3 Your Honor.

4 THE COURT: That's what I said.

5 MR. SPEED: Oh, okay.

6 MS. DIGIACOMO: That's what he said. A short break, I'll
7 finish.

8 MR. SPEED: I see. I see.

9 MS. DIGIACOMO: And then lunch.

10 THE COURT: That's the finish word. Then we'll get them
11 lunch. How long --

12 MS. DIGIACOMO: Mine?

13 THE COURT: Yeah.

14 MS. DIGIACOMO: It's generally half of what he does. So if
15 he's an hour, I would say I'm 20 to 30 minutes. It just depends on what
16 he says.

17 THE COURT: The only -- well, okay.

18 MS. DIGIACOMO: I don't have mine prepared, obviously.

19 THE COURT: I get that. And I think an hour is generally
20 conservative. The problem we've had, whenever we do it at this time --
21 and I told you about the prior time when the juror passed out because
22 we kept him until 1:15 with no lunch, no nothing.

23 MS. DIGIACOMO: They made it on Wednesday though, Your
24 Honor.

25 THE COURT: Yeah, okay.

1 MR. SPEED: Right. This is a younger --
2 MS. DIGIACOMO: I think --
3 THE COURT: So these are younger.
4 MS. DIGIACOMO: -- I think they've learned.
5 THE COURT: He wasn't that old.
6 MS. DIGIACOMO: They brought snacks.
7 MR. SPEED: Stronger.
8 THE COURT: I think it was -- I think --
9 MS. DIGIACOMO: We went from 8:30 to 1:15 though.
10 THE COURT: Yeah. All right. Bring them in.
11 [Pause]
12 THE MARSHAL: Please rise for the jury.
13 [Jury in at 10:48 a.m.]
14 THE MARSHAL: All present, Judge.
15 THE COURT: Please be seated. The parties acknowledge the
16 presence of the jury?
17 MS. DIGIACOMO: Yes, Your Honor.
18 MR. SPEED: Yes, Your Honor. Thank you.
19 THE COURT: Ladies and gentlemen, we will be getting you
20 lunch. Exactly what time, we'll be working on.
21 Defense, closing.
22 DEFENDANT'S CLOSING ARGUMENT
23 BY MR. SPEED:
24 Ladies and gentlemen, thank you all very much. It's been
25 hard. It's been almost ten days that we've spent with one another, but I

1 want you all to know that both the counsels for the government and
2 myself, Ms. Machnich, the Court, the Court staff, we all appreciate your
3 service very much.

4 Our system trusts you, ladies and gentlemen. That's why we
5 spend so many days in jury selection trying to make sure that we
6 impaneled a group of citizens in our community who would promise,
7 moreover swear to be fair and impartial.

8 MS. DIGIACOMO: Your Honor, objection. May we
9 approach?

10 MR. SPEED: May we approach, Your Honor?

11 THE COURT: Yes.

12 [Sidebar begins at 10:50 a.m.]

13 MS. DIGIACOMO: The third bullet point has a profound
14 impact. That's playing on the sympathies and even touching on jury
15 nullification.

16 MR. SPEED: It's not.

17 MS. DIGIACOMO: I would ask that he take that down.

18 MR. SPEED: I'm sorry.

19 THE COURT: Well --

20 MR. SPEED: I don't think that it's judging on jury
21 nullification. We're not mentioning punishment. The purpose of these
22 proceedings has been to determine whether he is guilty of felony
23 offenses, and their decision will have a profound impact on Mr. Gunera-
24 Pastrana.

25 MS. DIGIACOMO: But they're asking, instead of the facts,

1 consider what this could have consequences later, such as like
2 punishment.

3 MR. SPEED: No one is going to say that.

4 MS. DIGIACOMO: That goes too far.

5 THE COURT: Well, I'm going to allow it. It could be, but stay
6 away from that --

7 MR. SPEED: Absolutely, Your Honor.

8 THE COURT: -- all around.

9 MR. SPEED: Thank you.

10 [Sidebar ends at 10:51 a.m.]

11 BY MR. SPEED:

12 And I will continue. All of you swore to be fair and impartial
13 jurors in these proceedings. We know that the issues that we've
14 grappled with these past nine or ten days have involved things that are
15 uncomfortable to say the least. The most unspeakable kinds of crimes,
16 harming, placing in danger, our most vulnerable members, children.
17 These kinds of cases, the charges that our client has been charged with,
18 can bring about emotions, sympathy, and other feelings, and we know
19 that it's hard. We know that it's difficult.

20 You've been asked to sacrifice time with your families and
21 from your careers, but we want you to understand now and forever
22 forward that the decision you make will have a profound impact on
23 Mr. Gunera-Pastrana. Your task has been hard, but you've been dutiful.
24 Here, ladies and gentlemen, is where the real exertion starts because
25 now both sides are giving their cases to you.

1 I would like you to turn your attention to instruction number
2 23 in your packet. The end of that instruction says that, "A verdict may
3 never be influenced by sympathy, prejudice, or public opinion. Your
4 decision should be the product of sincere judgment and sound discretion
5 in accordance with these rules of law." Again, we know this is an
6 uncomfortable subject. We know these kinds of things are hard to talk
7 about, and we know that there is an instinct, there is a natural feeling,
8 and inclination, in all of us to protect children and to believe the people
9 who cannot fend for themselves, who cannot do things for themselves,
10 who cannot provide for themselves the basic necessities of food and
11 shelter and clothing and education, things that parents provide for young
12 people.

13 But in making your decision about whether our client is
14 innocent of the charges that he's facing, and he is, you cannot bring to
15 your deliberation process those feelings of sympathy, that inclination to
16 protect and believe young people. We asked you questions about your
17 decision-making ability being influenced by displays of emotion and if
18 you see people start to cry, and all of you answered those questions and
19 that's why you're sitting before us this morning.

20 If you would turn to instruction 10, and Ms. Sudano touched
21 on this, there is no requirement that the testimony of a victim of a sexual
22 crime be corroborated and his or her testimony standing alone, if
23 believed beyond a reasonable doubt, and that's the portion to keep in
24 mind, if believed beyond a reasonable doubt is sufficient to sustain a
25 verdict of guilty. However, if you find that the testimony of a victim of a

1 sexual crime is not corroborated and you do not believe the victim's
2 testimony beyond a reasonable doubt, those next few words don't say
3 you might. They don't say eh, you can think about it. They don't say
4 probably you should. They say you must, you must, you must find the
5 Defendant not guilty.

6 Instruction 18 -- 19, I apologize. You and you alone must
7 judge the credibility or believability of the witnesses. In deciding
8 whether testimony is true and accurate, use your common sense and
9 experience.

10 The credibility or believability of a witness should be
11 determined by his or her manner upon the stand, his or her relationships
12 to the parties, his or her fears, motives, interests, or feelings, his or her
13 opportunity to have observed the matter to which he or she testified, the
14 reasonableness, reasonableness of his or her statements and the
15 strength or weakness, weakness, of his or her recollections.

16 If you believe that a witness has lied about any material fact
17 in the case, you may disregard the entire testimony of that witness or
18 any portion of his or her testimony which is not proved by other
19 evidence. That is instruction 19.

20 When a trial witness fails, for whatever reason, to remember
21 a previous statement made by that witness, that failure of recollection
22 constitutes a denial, a denial of the prior statement that makes it a prior
23 inconsistent statement. The previous statement is not hearsay and may
24 be considered both substantively and for impeachment. Now, keep that
25 in mind because you can't just come into a courtroom when you're faced

1 with difficulty in remembering something and be bailed out by
2 conveniently not remembering or saying I don't remember. It's been
3 years. I can't recall. I don't remember. It's been years. I can't recall.

4 Because ladies and gentlemen, one thing that is rock solid,
5 the truth does not change. The truth does not change. Stories change.
6 Characters change. The way somebody remembers something may
7 change. The way that a person chooses to remember something
8 certainly may change. But if something is true, it is rock solid, and it
9 doesn't change.

10 Gustavo Gunera-Pastrana is innocent. He's innocent. He did
11 not sexually assault or commit a lewd act against Meily when she was 12
12 or 13 in August of 2015, or in June of 2016, or July of 2016. Whenever
13 the State wants to convince you that this is around the time something
14 happened, regardless, Mr. Gunera-Pastrana is innocent because it didn't
15 happen. None of this is true because none of it happened.

16 The case from the Government rests on three very shaky legs
17 which unlike truth, which is rock solid, their case rests on believability,
18 reliability, and credibility. Let's think about those.

19 Meily's story keeps changing. They've had to admit it
20 themselves ladies and gentlemen. Her story keeps changing and here's
21 what's more unsettling. It changes depending on when she tells it and
22 when she chooses to use interpretive services. Think back to when Meily
23 was testifying in the trial in this case. Throughout the bulk of
24 Ms. DiGiacomo's direct examination, she didn't have to use interpretive
25 services not five times. During cross-examination, when Ms. Machnich

1 was asking her questions, it seemed as if every question required the
2 assistance of the interpreter. Recall her testimony in the family court
3 proceedings, no interpreter.

4 So every time Meily tells her story of abuse and molestation,
5 it changes depending on when, depending on who, depending on
6 whether she chooses to use the assistance of an interpreter or not. The
7 point is, the story keeps changing, and what have we said about truth?
8 Truth doesn't change.

9 The District Attorney's Office, the police department, Dr. Cetl,
10 Ms. Casillas Ortiz, her younger brother, Jose, Ms. Keith, Ms. Espinoza
11 couldn't tell you any more than what Meily told them, and the reason
12 their stories are so different is because Meily told them a story, a story
13 that continually changed. Truth doesn't change. Consider what Meily
14 and her family have said, how they behaved, both back in the summer of
15 2016 and these past two weeks, and then you'll know that the State's
16 case rests on the believability, reliability, and credibility of one witness
17 and that is Meily.

18 Meily tells horribly stories of sexual abuse but those stories
19 can neither be trusted nor believed because they always change. This is
20 a search for truth and truth doesn't change, ladies and gentlemen. Meily
21 has told so many different and inconsistent stories that you can't believe
22 any one of them is true beyond a reasonable doubt and when you're
23 thinking about this point in particular, I ask that all of you return to your
24 instruction that says clearly if you don't believe the testimony beyond a
25 reasonable doubt, you must find the Defendant not guilty. If you believe

1 that a witness has lied, you may disregard all of their testimony. What is
2 the State left with? Only the testimony of their complaining witness.

3 In the real world, we know that Meily's dad, Mr. Martinez,
4 deserted her and her brother when they were three and two years old.
5 She's not heard from her father since she was about eight. We know
6 that her mother, Ms. Casillas Ortiz, met a new man at her uncle's
7 restaurant. She said that they became a couple and they had two baby
8 sons all inside of two years between 2014 and 2016.

9 We know that Meily had surgery to remove her left ovary
10 when she was 12 years old. We know that in her new blended family,
11 with a step-father in the house, a man who is not the father of the oldest
12 two children. We know that they were not rich. We saw video footage of
13 their residence. We know that they moved frequently. Ms. Casillas Ortiz
14 told us that.

15 Her step-dad, Mr. Gunera-Pastrana, is a day laborer who laid
16 tiles and decorated bathrooms. He also had an expectation that his new
17 family, the mother of his two children, his two step-children, had to work
18 for everything that they had. But we also learned that in the real world,
19 Ms. Casillas Ortiz said that Meily was still too little to work and Meily
20 agreed.

21 In Meily's world, where things change, we know that she
22 learned about being touched inappropriately from a classmate who
23 accused her step-father of sexual misconduct and that young girl didn't
24 have to live with a step-father that she didn't like anymore. We learned
25 about relationships, or her knowledge of relationships, relations, sexual

1 intercourse, she used the term -- all her terms, her euphemisms in the
2 first two instances for sex, in health class.

3 We know that from the video footage, the body cam footage
4 that Officer Kravetz was wearing, that fingers inside you, the suggestion
5 of fingers inside you was given to Meily when the police arrived at her
6 mobile home on July 12th by solo beat Officer Kravetz. And the other
7 part, the mouth on the vagina part, was given to Meily by Ms. Espinoza
8 and not until, you remember, page 17 of the interview. It was the first
9 time, July 12th, at the Children's Assessment Center, that anyone heard
10 anything or was told anything about Mr. Gunera-Pastrana putting his
11 mouth on Meily's vagina. Where did she get the idea? From
12 Ms. Espinoza when she asked did any other part of his body touch
13 another part of your body? And that's when the oral sex allegation
14 arose.

15 But back in the real world, not Meily's world, here where the
16 adults are, where the people charged with a duty are, we know that
17 Meily made the whole thing up because the man who used to be nice
18 according to Jose, according to Meily, according to Ms. Casillas Ortiz.
19 All three admitted that when they first began their relationship, things
20 were good. They called him Papa. The man who used to be nice called
21 her useless and worthless and a dumb girl. He expected her to work but
22 Meily [sic] is not her real father and she knows it.

23 These expectations are high especially for a child who isn't
24 accustomed to them and especially given the fact that this is not her real
25 father and she knows it. Meily wasn't a toddler. She wasn't an infant

1 when Gustavo and Ms. Casillas Ortiz first got together. She knew that
2 she had a father, a real biological father. His name is Jose Juan
3 Martinez, just like her brother. But her real father left her family when
4 she was about two or three. Her brother was a year younger. The two
5 baby brothers weren't born.

6 So here comes this man, this new man, into her life who has
7 high expectations of learning and earning for a child who is
8 unaccustomed to it. We know that Meily loved her baby brothers, all
9 three of them, including Jose, but Gustavo was now the man of the
10 house. Meily was babysitting while the rest of the family learned and
11 earned.

12 Meily wanted Gustavo gone and right before eighth grade
13 graduation, the summer of 2016, her English class friend showed her the
14 way to get rid of a man that she didn't like. Meily lied. Meily lied.
15 Gustavo is innocent because Meily lied.

16 If you do not believe the testimony of the alleged victim of
17 sexual assault beyond a reasonable doubt, you must, you must find the
18 Defendant not guilty, because Meily lied and the truth doesn't change.

19 What else did you hear? What else did all of us hear? We
20 heard brother Jose's testimony. Jose was very clear. He indicated that
21 he understood me very well. There was a language barrier. He was
22 more comfortable speaking in Spanish but when I asked questions and
23 they were translated for him, the young man understood me, and he was
24 able to answer my questions as best he could.

25 He said that he liked Gustavo at first. He said that Meily told

1 him something at some point before July of 2016, but she didn't tell
2 specifics. Jose said that at 12 years old, with a very unclear
3 understanding of adult concepts and ideas like sexuality and rape in
4 particular, he said that he thought he could predict what was going to
5 happen. Jose didn't remember very much. I asked him several
6 questions. A lot of those that caused him trouble, he said that he
7 couldn't recall. But remember our instruction about not being able to
8 recall something. Jose was sworn as a witness in this case.

9 Jose looks up to Meily. He admitted as much. She told him
10 something happened, and he believed it. He testified that his first
11 instinct was to do what he could to protect his big sister. No one blames
12 Jose for that. In fact, there has to be a modicum of admiration that you
13 feel for a 12 year old who would be willing to do anything that he could
14 to protect his sister.

15 The problem that will confront all of you when you consider
16 Jose's testimony is that Meily lied. She lied to her brother. She lied to
17 him. He believed what he told her -- what she told him because she's his
18 big sister, but she lied to him and everything that happens after Jose is
19 told the lie, that's Meily's responsibility.

20 We know that Meily told a version of her story to Jose Juan,
21 to her brother, but that was the first time. Over the phone, maybe
22 through text messages, we know that both teenagers did have
23 cellphones. She told a version to her mother, Ms. Casillas Ortiz. She
24 told another version to Officer Kravetz when he arrived at space 254 in
25 the Miracle Mile Mobile Home Park. We know that there was a version

1 told to Ms. Espinoza that differed from the version that she told to
2 Officer Kravetz.

3 We know that there was a version told to Dr. Cetl, perhaps by
4 mom, in November of 2016. We know that Dr. Cetl examined her. We
5 know that a child of 13 is probably not able to relay her medical history
6 to an examining doctor completely, thoroughly, and there had to have
7 been a reason for her examination. We know who Dr. Cetl worked for.
8 So it's reasonable for us to understand, to conclude that a fifth version
9 was told to Dr. Cetl.

10 There was a sixth version of the story told at preliminary
11 hearing and you heard Ms. DiGiacomo read the transcript from those
12 proceedings to you in court here yesterday. There was a seventh
13 version told at the family court hearing where she describes the incident
14 where Gustavo is alleged to have taken her pants down and inserted his
15 finger in her vagina and performed oral sex with -- my pants were pulled
16 down to about my ankles. Interestingly, she pointed to her foreleg, this
17 area right here. But my pants were taken down to that area. Gustavo
18 inserted his fingers in her vagina and then proceeded to perform oral sex
19 with her knees -- with her shorts, her gym shorts still around her
20 forelegs. Let's talk about that for a moment.

21 This is a story told by a girl who knows that if I say someone
22 touched me in appropriately, her own term, someone touched me in a
23 way that felt weird, her own term, someone touched me in a way that
24 was disgusting, her own term, someone threatened me by touching me
25 and saying I'm going to make you my woman, her terms for what she

1 says Gustavo said, that description of an episode of oral sex was told by
2 a 13 year old who has never experienced anything like that because if
3 you revert to your instruction, it asks you to use your common sense.
4 He's going to perform oral sex on a 12-year-old girl with his two infant
5 babies in the small mobile home that he shared with a family -- in a
6 family of five, with her pants, her gym shorts and her underwear still
7 near her knees, or her foreleg area. Her description was her ankles, but
8 she actively pointed to this area.

9 Well, if someone is going to kiss my vagina, her term, my
10 pants have to be down. I can't have pulled them down myself because
11 I've told my mom the day before that he kissed me by force. We'll get to
12 the version. Or we've gotten to that version. It's -- it becomes difficult to
13 keep them all straight, I promise you, ladies and gentlemen. But that
14 version in particular was told by a child who had made something up
15 and it had to have specific details that rang true but were impossible to
16 disprove. Keep that in mind.

17 There was another version, the eighth one told at the District
18 Attorney's office. We know that she prepared for trial. Both children
19 admitted that they had spoken with people who worked with
20 Ms. DiGiacomo. I referenced her as the lady sitting here and the ladies
21 behind them. There was another version.

22 There was a ninth version. The first part of her trial
23 testimony with Ms. DiGiacomo where she did not seem to need the
24 assistance of the Spanish interpreter as much as she did for the tenth
25 version of the story, her cross-examination by Ms. Machnich, where the

1 inconsistencies were pointed out in exacting detail. And then there was
2 finally an eleventh version, her redirect examination at trial.

3 The State has said, ladies and gentlemen, she's consistent
4 overall. Yes. But keep that in mind also. Consistency overall. This idea
5 of consistency overall being enough.

6 What else did you hear? We heard from Ms. Casillas Ortiz.
7 We heard that Meily told her mother that Gustavo kissed her by force
8 and Gustavo told her that she was going to have relations, relationships,
9 some term that the 13 year old used for sex, with him, Gustavo, the next
10 day. But what was Meily's testimony in the trial? In trial, Meily said that
11 the incident that occurred on July 11th was the finger in the vagina, the
12 oral sex episode. Both things can't be true. Right? And what do we
13 know about truth? Truth doesn't change, especially about something
14 like this, being told by a young girl, 16 now, 13 when the allegations
15 were made. Both of those things can't be true.

16 But what did mom do? Mom called the police the next day.
17 What's interesting about that is Meily says that she told her mom on the
18 11th about an incident that happened. It's either the kiss by force or it's
19 the throwing on the bed and the finger in the vagina and the performing
20 oral sex. We know both of those can't be true, but Meily's testimony was
21 that on the 11th of July 2016, she told mom that. Mom was at work. She
22 went to work at about I believe she said 3:00, 3:30. Meily called at
23 around 5:30.

24 After receiving the news that your domestic partner, the man
25 with whom you've had two babies inside of two years, has depending on

1 which one we'll go with for the next 40 seconds or so, kissed your
2 daughter by force and threatened her that he was going to have sex with
3 her the next day, or performed oral sex on her and inserted his finger in
4 the vagina -- in her vagina, mom chose to finish her shift at work where
5 her brother, her adult brother, runs the restaurant. Now, returning to
6 your commonsense instruction, ladies and gentlemen, if that's a call that
7 a reasonable person receives and, again, I don't have any ax to grind or
8 grudge against Ms. Casillas Ortiz, but my concern in these proceedings is
9 the search for truth. The truth doesn't change.

10 If Meily had told her mother the same thing that she told us,
11 Gustavo kissed me yesterday versus Gustavo took down my pants,
12 inserted his finger in my vagina, performed oral sex on me for about two
13 to three minutes, again, she finishes her shift at work where her brother
14 runs the restaurant? Her explanation, Ms. Casillas Ortiz' explanation for
15 that was I couldn't go home. Gustavo took me to work. Cesar, take me
16 home right now. Meily has just told me something terrible. I have to go.
17 What's her brother going to do, fire her? Fine. But I need to get home to
18 be with my daughter because she's just told me something horrific.

19 She's relayed her terrible story of sexual abuse but ladies
20 and gentlemen, that was to her mother. To all of you, that story cannot
21 be believed nor trusted because it's not true. The truth doesn't change
22 and if you don't believe that story beyond a reasonable doubt you must
23 find the Defendant not guilty.

24 Ms. Casillas Ortiz watched as her daughter told her story to
25 the officers, Officer Kravetz, Officer Larson, Officer Delaria, who said that

1 he had a little bit of Spanish, and because of what Meily told her,
2 Ms. Casillas Ortiz said that she was afraid. Not afraid enough to leave
3 work, but afraid here in trial.

4 At trial, she said that she noticed behavioral changes in Meily
5 in 2016. That's what she said on the witness stand, but recall, remember
6 this, when she was talking about her daughter with Detective Huth, the
7 chief detective, she says that, and this was on the day police were called
8 on July 11th -- or July 12th, that she noticed those behavior changes in
9 Meily a year and a half to two years prior to her meeting with Detective
10 Huth. What was happening a year and a half to two years prior to July of
11 2016?

12 Right around the time Meily's mother and Gustavo were
13 growing their blended family, we know that money in the family was
14 tight. We can use our common sense about that. Ms. Casillas Ortiz said
15 that she worked six days a week, often two shifts, in her brother's
16 restaurant. We know that Gustavo worked laying tile with a wet saw and
17 heavy tile in Las Vegas in July. We know that money was tight, and they
18 had to work hard for what they had.

19 We know that Meily had an operation that could be very
20 traumatic according to Dr. Cetl for a 12-year-old child who understands
21 the consequences. We know that Meily is mature. We know that she's
22 able to relate a horrible story of sexual abuse. But from Jose or his
23 mother, neither of them have any independent knowledge and there was
24 no corroboration of Meily's story of sexual abuse.

25 We heard from Ms. Espinoza. She is a member of what she

1 described as an inter-disciplinary team. Very official sounding. Along
2 with law enforcement, the District Attorney's office, Child Protective
3 Services, and others, but her job, she explained, was to conduct an
4 unbiased interview in the same building that houses the juvenile sex
5 abuse unit of the Las Vegas Metropolitan Police Department, as least
6 according to Detective Huth, with detectives listening in to the unbiased
7 interview, and offering input on the questioning of suggestable children.

8 We know that Ms. Espinoza talked to Jose. Jose tried to tell
9 her what Meily told him as best he could. He got his dates confused
10 because the dates were given to him in a confusing way. She talked to
11 Meily. Meily gave Ms. Espinoza some more details including the putting
12 the mouth on the vagina, kissing the vagina at page 17 of the interview.
13 But throughout all of that, all of her explanations of all of her interviews,
14 we learned that Ms. Espinoza had no independent knowledge. She
15 didn't see anything, neither did Jose, neither did Ms. Casillas Ortiz, and
16 there was no corroboration given to Meily's stories. Any of the versions.

17 And this is where I want you to recall what I asked you to
18 keep in mind a few minutes ago. How is it then that Meily has been able
19 to keep this story of sexual abuse and molestation snowballing for so
20 long, since July of 2016 when she first told her mother? How does she
21 keep it going? How do police get involved? How do detectives get
22 involved? How does Child Protective Services get involved? How does a
23 sexual assault medical examiner get involved? How does she end up
24 testifying at a family court proceeding and a preliminary hearing? Well,
25 that's an easy one. It's an allegation of child molesting.

1 The State said it best themselves, ladies and gentlemen. It's
2 consistent overall because it's an allegation of someone touching a child.
3 He touched me. Well, where did he touch me (sic)? I think over my
4 clothes. I think under my clothes. Depending on who's asking, I think
5 it's under my pants but inside my underwear. Another time it might be
6 over my long shorts but on my vagina. I'm sitting on his lap. I'm
7 standing up. I'm laying on the bed after I put the baby down. I told my
8 mother that I was laying on my stomach. I think I saw his penis. It's
9 brown and wrinkly. I had on long shorts. My baby was -- my baby
10 brother was there. Where was mom? My mom was at work. It's
11 consistent overall because it's an allegation of touching children. An
12 allegation of child molesting made by a child with a motive to tell a lie.
13 That's what we had in this case.

14 If you're pressed for details, if you're pressed for specifics in
15 Meily's world, remember that, the way to keep the story going is to say I
16 don't know what you're saying. You can say I don't remember. You can
17 say to Ms. Machnich, you're confusing me. Or you can ask for the help
18 of a Spanish interpreter when someone is pressing you, seriously,
19 because this is serious business, for the details of your story.

20 You can add a peripheral detail. He performed oral sex in the
21 area where my period comes out. That rings of truth, yeah, that's where
22 the vagina is, and this is a pubescent girl. We know that she'd begun
23 menstruating. The area where my period comes out. But these are
24 details that are impossible to disprove. Remember, we asked, how does
25 a person prove that they didn't do something when it's an allegation of

1 child molesting being made by a child? The first thing that we are
2 inclined to do is believe, but that's why we have trials, and that's why
3 you all swore your oath.

4 If you're pressed, you could look to Ms. DiGiacomo and
5 answer, after having your recollection refreshed, about things that you
6 should surely know and remember. We're talking about -- we know that
7 the child had her ovary removed. I can't imagine that, obviously, but we
8 know that that had to have been just as uncomfortable a situation as
9 anything else that she had been through at that point in her life. The
10 next thing would have to have been being molested by your step-father.
11 You would remember details about that. Those details don't evaporate.
12 They don't dissipate over time because those things, if they are true,
13 they don't what? They don't change. Things you should know and
14 remember.

15 So what did we see over the last nine days? We saw the
16 Government of our state have read to you a charging document where
17 very specific and horrible felony offenses were described as happening
18 on particular dates in a particular timeframe, and then after having the
19 testimony of their chief witness adduced, we had another charging
20 document read to you where those timeframes were expanded. Why?
21 Because the testimony that that witness gave at trial didn't match the
22 stories she told everyone else before she arrived at this point.

23 What did the police tell us, law enforcement? The people
24 who are supposed to know how to get these jobs done to make sure that
25 an allegation isn't the only thing that could land a person in

1 Mr. Gunera-Pastrana's seat. The first officer was Officer Kravetz. He
2 testified in his uniform in front of all of you. He responded to the scene.
3 After Meily told her version of events to Officer Kravetz that included
4 these things started in June of last year, not August of 2015,
5 Officer Kravetz escorted to the family to the Children's Assessment
6 Center and he gave a verbal report and a briefing to Detective Huth.

7 Officer Kravetz, however, did not verbally report -- or debrief
8 his chief detective that there may have been short-lived evidence like a
9 tissue with Meily's DNA or Gustavo's DNA on it in the master bedroom
10 where this was supposed to have happened 24-hours earlier. Detective
11 Huth testified that if Officer Kravetz had reported that there may have
12 been evanescent present still at the scene, he would have included that
13 in his report, and if he did, if it was possible to collect DNA evidence
14 from something that may have been left there, I would have dispatched a
15 crime scene analyst to the scene. Detective Huth didn't do that.

16 Meily wasn't examined until November of 2016 because she
17 never told anyone that version of events. She didn't tell anyone in July
18 of 2016 that the oral sex and the finger in the vagina happened the night
19 before because if she had, certainly everyone that we heard from law
20 enforcement would have taken different steps.

21 Where were the phone conversations? We know that both
22 children had cellphones. Gustavo bought a cellphone for Jose. He
23 bought a cellphone for Meily, and throughout this consistent overall
24 story of abuse, we hear about Gustavo -- or Jose calling Meily and
25 promising to protect her. We hear about Meily calling Jose and

1 explaining everything that Gustavo's doing. Certainly, if it had been
2 relayed to the officers the gravity of the situation, the truth of the
3 situation had been relayed to the officers, then one of them, Kravetz,
4 Larson, Delaria, would have said where are your cellphones? Let me see
5 them. I want to see some of your recent calls. Were the cellphones
6 collected? No. Because Meily didn't give that detail and that version of
7 her story of abuse.

8 We heard from Field Training Officer Delaria. Officer Delaria
9 didn't do very much, but we know that he was supervising
10 Officer Kravetz. He had some Spanish, but not a lot. He said that he's
11 not fluent. He talked to Ms. Casillas Ortiz because he was the only
12 responding officer who had a little bit of Spanish to be able to
13 communicate with the child's mother.

14 What did Detective Huth tell us? She conducted a single
15 interview, just one, with Ms. Casillas Ortiz, but she did not order that
16 crime scene analysts be dispatched to the mobile home. She did not
17 instruct either Officer Delaria, Officer Kravetz, or Officer Larson, the
18 uniformed officers who arrived, to collect their cellphones. Let's see this
19 digital trail of communication where she's describing all of these things
20 that Gustavo supposedly did or at least there would be a record of all of
21 these calls to her brother telling her about -- telling him about what the
22 step-father is allegedly doing in the house. No one got that. Why?
23 Because Meily didn't tell the first responders that the oral sex and the
24 finger in the vagina incident occurred the day before. Didn't tell them
25 that. She didn't tell them that and they didn't respond in a way that

1 would suggest that law enforcement officers were given truthful
2 information, because if they had been, they would have taken different
3 steps.

4 There was no corroboration. There was no other evidence.
5 The police when responding to a 426 I believe that they called it, have to
6 believe Meily. They have to because it's a child talking about a story of
7 sexual abuse. You, ladies and gentlemen, cannot. This is the search for
8 truth. A trial is the search for truth. Cross-examination is the crucible in
9 which truth is ferreted out. The officers heard their story. You saw the
10 testimony. You've heard that there were at least 11 different versions.
11 They had to believe Meily. You cannot because Meily lied. She lied.
12 That's hard to conceptualize perhaps, but it's easy to understand
13 because that's what happened.

14 Her story of sexual abuse doesn't make sense because it's
15 not true. It's not consistent within, it may be consistent overall, but it's
16 not consistent within because it didn't happen. It's a 12-, 13-, 16-year-old
17 child telling a story about someone touching her inappropriately, using
18 terms that she learned in health class, from another friend of hers, and
19 perhaps from watching her mother in a relationship with her new
20 step-father.

21 Dr. Cetl said that there were normal findings. There were no
22 injuries indicative of the kind of sexual abuse that Meily described. Dr.
23 Cetl, however, did not examine Meily until some four months later.
24 Why? Because Meily didn't tell them the version that she told all of us at
25 trial. Right? By the time Dr. Cetl examines Meily, she's already been

1 seen by Detective Huth. The determination has already been made that
2 this is not an acute case because she didn't tell them that the finger in
3 the vagina and the oral sex occurred on July 11th. No independent
4 knowledge. No corroboration.

5 So what has the State left you with? A victim that you
6 cannot believe, no science, no certainty, just a whole lot of typically,
7 usually, can you rephrase, I don't remember, it's been years, you're
8 confusing me, and so many unanswered questions.

9 A reasonable doubt is one based on reason. It is not mere
10 possible doubt. But it is such a doubt as would govern or control a
11 person in the more weighty affairs of life. If the minds of the jurors after
12 the entire comparison and consideration of all the evidence are in such a
13 condition that they can say they feel an abiding conviction of the truth of
14 the charge, there is not a reasonable doubt.

15 Doubt to be reasonable must be actual, not mere possibility
16 or speculation. Beyond a reasonable doubt. The Government has the
17 burden of proving all four charges against Mr. Gunera-Pastrana beyond
18 a reasonable doubt. Not consistent overall. Not maybe, we think so.
19 Not something must have happened. I'm not really sure because the girl
20 can't keep her story straight, but something must have happened. I'm
21 just not sure what. Beyond a reasonable doubt.

22 Ladies and gentlemen, Meily lied and because she did,
23 you're here, and you're here, and they're there, and we're here, and he's
24 there. You can't believe what she told you. Consistency overall when
25 we're talking about charges like these are not enough. There must be

1 proof beyond a reasonable doubt, not excuses, no second chances, no
2 splitting the baby. Each of you has to be convinced that Meily has told
3 the truth and ladies and gentlemen, she did not. She lied because she
4 was tired all right. She was tired of having high expectations set on her,
5 just like Jose was tired.

6 Ms. Casillas Ortiz testified that her son didn't want to go to
7 work with Gustavo. Certainly, what 12-year-old boy wants to go to work
8 laying tile in Las Vegas in July? He'd much rather stay home and talk on
9 his cellphone or play video games or whatever. But because his big
10 sister had a new papa in the house who expected her to work just like he
11 did, to learn a trade just like he was trying to teach Jose, and to go to
12 work six days a week, just like her mother was doing, to support their
13 family with two new little babies in the house who all of you saw. She
14 was tired of it and didn't want to have to deal with it anymore. So just
15 like her friend in eighth grade who got her step-father out of the house
16 after making an allegation and got to go live with her real dad, Meily told
17 a lie. That's it. That's what you have.

18 You're not going to hear from us again. You're not going to
19 hear from Mr. Gunera-Pastrana again because the State has the burden
20 of proving their case beyond a reasonable doubt. But when you hear
21 their rebuttal to the truth, understand that what you were served with
22 this week was a platter of lies.

23 When you retire to deliberate, I ask that you find my client,
24 Mr. Gunera-Pastrana, as to Count I, not guilty, and Count II, not guilty,
25 and Count III, not guilty, and Count IV, not guilty. Thank you all very

1 much.

2 THE COURT: Thank you.

3 State?

4 MS. DIGIACOMO: Thank you.

5 STATE'S REBUTTAL CLOSING ARGUMENT

6 BY MS. DIGIACOMO:

7 Let's think about something. Every day you on your way to
8 work, and you work five days a week, you stop at Starbucks son the way
9 and most days it's uneventful. You get there, you get your coffee or your
10 tea, and you leave and you --

11 COURT RECORDER: Ms. DiGiacomo, I need you to --

12 MS. DIGIACOMO: Oh, yes, I apologize.

13 [Counsel Confer]

14 MS. DIGIACOMO: The Court's indulgence. I just broke it.

15 THE COURT: Does anyone need a break before we -- I don't
16 see any hands. Go ahead.

17 BY MS. DIGIACOMO:

18 All right. Back to Starbucks. So you go every day. Usually
19 it's non-eventful. You get your coffee or tea, you leave, get to work. But
20 you have one week where it was a particularly good week. On Monday
21 you get there, yay, pumpkin lattes are back so you're like getting a
22 pumpkin latte. I wait for it all year. You get a grande. You get your
23 pumpkin latte and you go to work and you're like telling your co-workers,
24 a great day. I got my favorite drink.

25 The next day, you stop at your Starbucks and you know

1 what? You're waiting in line. It's kind of a long line. You're kind of
2 stressing about getting to work. You get up to the line, you order your
3 drink and you find out from the person at the cashier that the person in
4 front of you bought your drink for you. A really nice gesture and it's like,
5 that kind of made your day a little better. You get to work, enjoy your
6 coffee.

7 Then the next day, you go, and you find that the barista that
8 you have known forever and kind of consider a friend was there. He's
9 back at work. He's been gone for a while and you didn't know what
10 happened to him. So you're talking to him and catching up and he
11 makes your drink perfect, and then you go on your way to go to work.
12 The next day, you go to Starbucks and you get your coffee, get back in
13 your car, you're driving to work, and you spill it. The whole thing. The
14 lid pops off and it goes everywhere in your car. All over your clothes, all
15 over the floor.

16 And then you go Friday and you're thinking, I hope I have a
17 better day than yesterday, and you get your drink. You get -- your
18 barista's there. You have an okay experience and you leave and get to
19 work. And you're talking at the water cooler with, you know, one of your
20 good friends at work and you're saying hey, you know, I had this crazy
21 week talking about Starbucks and it's like on Monday I went, and they
22 had my favorite drink. On Tuesday I went and the person in front of me
23 in line bought my drink. It was so -- Your Honor?

24 MS. MACHNICH: Sorry.

25 THE COURT: Turn yours off.

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GUSTAVO GUNERA-PASTRANA,) No. 79861
)
 Appellant,)
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 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 19 day of May, 2020. 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