

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS JASON BERNAL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Docket No. 82465 Sep 23 2021 03:38 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
D. Ct. 20-CV-00099

APPEAL FROM JUDGMENT OF
THE HONORABLE JOHN P. SCHLEGELMILCH

THIRD JUDICIAL DISTRICT COURT

APPELLANT'S APPENDIX

VOLUME 5

KARLA K. BUTKO
Attorney for Appellant
P. O. Box 1249
Verdi, Nevada 89439
(775) 786-7118
State Bar No. 3307
butkolawoffice@sbcglobal.net

STEPHEN B. RYE/ MATT MERRILL
Lyon County District Attorney
Attorney for Respondent
31 S. Main Street
Yerington, NV 89447
(775) 463-6511

INDEX TO APPELLANT'S APPENDIX

VOLUME 1

<u>Document</u>	<u>Page</u>
Information.....	1-3
Motion to Admit Victim's Out of Court Statement to her Mother and During a Child Forensic Interview.....	4-7
Motion to Admit Confession and Play Audio To Jury.....	8-15
Motion to Admit Prior Bad Acts Pursuant to NRS 48.035 and 48.045	16-23
Supplement to the Motion to Admit Victim's Out of Court Statements to her Mother and During a Child Forensic Interview.....	24-81
Opposition to State's Motion to Admit Confession and Play Audio To Jury.....	82-93
Opposition to State's Motion to Admit Prior Bad Acts Pursuant to NRS 48.035 and 48.045.....	94-99
Opposition to State's Motion to Admit Victim's Out of Court Statements to Her Mother and During a Child Forensic Interview and Supplement to Motion.....	100-102
Motion to Exclude or Limit Defense Expert Witness.....	103-115
Notice of Expert Witness.....	116-170
Opposition to State's Motion to Exclude or Limit Defense Expert Witness.....	171-179

INDEX TO APPELLANT'S APPENDIX

VOLUME 2

<u>Document</u>	<u>Page</u>
Transcript of Proceedings, Pretrial Hearing, September 28, 2020	180-250
Transcript of Proceedings, Pretrial Hearing, September 28, 2020	251-345
Order After Hearing.	346-349
Amended Information.	350-353
Transcript of Proceedings, Motion Hearing, Thursday, October 22, 2020, Yerington, Nevada.	354-389
State's Proposed Jury Instructions.	390-393
Defendant's Objection to the State's Proposed Jury Instructions	394-397
Defendant's Proposed Jury Instructions.	398-402
Defendant's Objections to the State's Proposed Jury Instructions And the Court's Stock Instructions.	403-408
Transcript of Proceedings, Status Hearing, November 2, 2020. ...	409-439
Transcript of Proceedings, Jury Selection – Day One, November 3, 2020.	440-500

VOLUME 3

Transcript of Proceedings, Jury Selection – Day One, November 3, 2020.	501-603
Transcript of Proceedings, Jury Trial, Day Two, November 4, 2020.	604-750

INDEX TO APPELLANT'S APPENDIX

VOLUME 4

Transcript of Proceedings, Jury Trial, Day Two, November 4, 2020.	751-871
Transcript of Proceedings, Volume 3, Jury Trial, Thursday, November 5, 2020.	782-1000

VOLUME 5

Transcript of Proceedings, Volume 3, Jury Trial, Thursday, November 5, 2020.	1001-1083
Transcript of Proceedings, Volume 4, Trial, November 6, 2020. .	1084-1183
Notice of Appeal.	1184-1185
Jury Instructions.	1186-1213
Verdict.	1214
Transcript of Proceedings, Judgment and Sentencing, January 25, 2021.	1215-1223
Letters	1224-1228
Judgment of Conviction.	1229-1230
Verdicts	1231-1232

1 lying, you know. Like they say they were at a certain place
2 and you thought, oh, that place was closed that night and
3 nobody was there. You find out evidence. So we do found out
4 that people are lying to us. But we're not as good as we
5 think we are about getting to tell.

6 So why is this? And this goes to why the
7 interrogators' methods don't work like they think they work.
8 Well, let me just tell you -- I know that I can't see it and
9 maybe if I put my glasses on. But the red ones are the ones
10 where a cue that people use to assess whether someone is
11 lying or not where they are right. I should have probably
12 put green. But, anyway, it's where people think that this
13 particular thing reflects lying or truth and it actually
14 does.

15 So it says these are things about vocal cues. So
16 hesitation, do you have a lot of hesitations while you're
17 trying to talk. Speech errors, a high pitch, talking too
18 fast, too much latency before you answer a question, how much
19 you're pausing, you know, during your speech and pause
20 frequency, how long they are and how frequently you do it.

21 So, there are seven different things here and on
22 the middle column it says what the real truth is. Most of
23 these are not diagnostic. So, out of those seven, four of
24 them don't reflect anything about truth or lying.

1 But the real question is which ones are we using
2 correctly. And we're only using correctly two out of those
3 seven. And the rest of them you are using wrong. But when
4 people use them, they think you're going to hesitate more and
5 you're going to have more speech errors if you're lying, but
6 that's not true.

7 So, the point of this and the next couple of
8 graphs that people are using the wrong things and they're
9 using them incorrectly to decide whether someone is lying.

10 This next one is visual. And this one is really
11 important. So people think that liars avert their gaze and
12 they look down and they don't look you in the eye. That's
13 not true. But that is, like, the number one thing that
14 people think that liars are going to be shifty-eyed and look
15 away. No. Same for liars and truth tellers.

16 But now we have, what, nine things on this list
17 and you can see there's only two that are red. That's only
18 two out of nine that people are correct about how they're
19 using that cue. And we have gaze, smiling, self adaptors,
20 meaning fidgeting, scratching your head and touching
21 yourself, illustrators. Like if I were to say it was really
22 long, you know, and I do this, that's an illustrator. So
23 liars actually do that less but people think that they do it
24 more. Finger movements, hand movements, leg movements,

1 moving your trunk. So a lot of it is these indications,
2 well, you're nervous, you move around and fidget a lot, but
3 it doesn't reflect lying, but we think it does.

4 And the interrogators put the wrong things in
5 their manuals because they're really going on intuition
6 rather than all of the scientific studies that have been
7 done.

8 And these last ones are verbal things, the kinds
9 of things that you say. Consistencies, for example. People
10 think liars are very inconsistent or they're less consistent.
11 But, in fact, they're not any less consistent than truth
12 tellers are. Everybody screws up their accounts of stuff
13 because memory is not perfect in part, you know. And same
14 with contradictions in their stories. Truth tellers do it
15 the same as liars but people believe there's going to be more
16 contradictions with liars when there's not.

17 So, now, what does this all mean? We're using
18 the wrong things. If you look at studies that look at the
19 difference between people that are trained in the Reid method
20 to detect deception and those that are not, then this study
21 that's up here, they use students who had not been trained in
22 the Reid method, students that they trained in the Reid
23 method, and then police investigators, real life police
24 investigators. And they showed them people who were giving

1 true or false information.

2 And so what you see on the right-hand side, you
3 can see that the 90 students, which are the very left-hand
4 bar, if I can point to it. I don't know. The red X -- Well,
5 anyway. It disappears when it goes on the screen. But the
6 left-hand bar on the right-hand side are 90 students and how
7 accurate they are. And what it tells you is that they are
8 about 55, 56 percent accuracy. Right around chance. Again,
9 flip a coin. But the trained students are only about maybe
10 45, 46 percent accurate, so they're less accurate. And the
11 investigators are right about 50 percent. So they're not as
12 good. They're not quite as good as the students who were
13 never trained. But they think that they're spectacular. And
14 that's what's on the left-hand side. They rated how
15 confident they were of all of their judgments.

16 And look at the difference between the 90
17 students on the left and that one -- and the investigators on
18 the right. The investigators are far, far more confident of
19 their judgment, but they're less accurate than the students
20 are, you know. But the training makes people more confident
21 because they're sitting there telling you, oh, if you get
22 this down, you're going to be able to tell with at least 85
23 percent accuracy who is lying to you and who is telling the
24 truth. So it builds their confidence up, but they're

1 teaching them wrong, so it doesn't help them. It hurts them
2 with accuracy. So that's one study. We have many more.

3 And the other important thing and the second
4 thing and I'll tell you about it, what it says. But the
5 thing is that, remember, I said one of the main things that
6 people use that they think reflects deception is their
7 aversion of gaze and then consistency or the inconsistencies
8 and stuff like that that aren't really reflective. But some
9 of these visual things, the fidgeting, gaze aversion have a
10 big impact on people's judgment of deception.

11 So they ask in this study are you going to do a
12 better job of distinguishing between truth tellers and liars
13 if you can only see them, if you can only hear them, or if
14 you can do both. And, again, now they just have students and
15 investigators. They didn't bother training any students.
16 They just contacted 90 students with investigators.

17 And basically two things emerged from this. One
18 is that the audio tape only, where they could only hear,
19 people did much better than if they could see. So seeing the
20 person misleads people, you know, compared to just hearing
21 exactly what they're saying.

22 And the other thing on here again is the students
23 did better than the investigators. So even in the condition
24 where they just heard them, the students, 64 percent got the

1 right answer. The investigators 54 percent. And when they
2 could do both, the students were about five percent better.
3 But, again, the investigators were much more confident that
4 they were right.

5 And this is the kind of thing that we keep seeing
6 over and over again. The training makes people much more
7 confident, but it doesn't make them better at it, especially
8 if you are training these methods that have been trained for
9 decades by law enforcement.

10 Q. What about the example of voice stress analysis,
11 have there been studies of its accuracy?

12 A. About the voice stress analysis?

13 Q. Yes, ma'am.

14 A. There have been -- There have not been nearly as
15 many as there have been for polygraphs. But, basically, yes,
16 there have been studies that look to see whether voice stress
17 analysis, number one, does it do a good job of detecting
18 stress? Nevermind where it's coming from. And, number two,
19 does it distinguish accurately between those that are lying
20 and those that are telling the truth?

21 So this has some terminology on here that
22 probably isn't familiar to you. But the important thing is
23 that if somebody -- a false negative means if someone is
24 actually lying, does the test tell you that they're telling

1 the truth. So, of all the liars, 27 percent of the time it
2 would tell them that they were telling the truth. But, of
3 all the people who were telling the truth, 48 percent of the
4 time said they were lying.

5 So -- And, again, if we go back, this tested five
6 different voice stress technologies and 56 different audio
7 files. That's just one study though. And what you keep
8 getting though is that the voice stress analyzer doesn't do
9 better than chance because it really is not a valid
10 technique. It was something that was made up by a guy who
11 actually doesn't have any qualifications, who never tested
12 his technology before he put it on the market.

13 And, for us scientists, it's one of the most
14 irritating things. So many of them are out there where
15 people just make stuff up and then they make millions of
16 dollars selling it to people without ever having any evidence
17 whatsoever that it works. It's been disendowed by polygraph
18 organizations. Of course, I mean, it's kind of their
19 competition. But it's also in the scientific literature
20 wherever you do test it, it just simply doesn't work.

21 Q. So the choice suspect is the root cause of false
22 confession. What about the suspect's assumptions and point
23 of view? How is that involved?

24 A. Okay. Well, in looking at why people falsely

1 confess, there's been a few kinds of things to identify that.
2 And the most important ones are these three out of the four
3 here. One is that people can become so distressed and upset
4 that they would do anything to get out of that room. And so
5 they don't recognize that they can terminate the
6 interrogation anytime by saying I want my lawyer or I don't
7 want talk to you anymore. A lot of people think if they ever
8 talk to the police they no longer have the right to say I
9 don't want to talk to you, where, in fact, you can say that
10 at any time. But they get distressed and say whatever they
11 think they need to do.

12 But the second one convinced that confession will
13 maximize the long-term outcomes. And that just means that
14 you think you're convinced by what the interrogators say to
15 you that you're going to get -- either less likely to get
16 charged at all, that the charge is to be less serious, that
17 people are going to go easier on you if you do get convicted
18 because, you know, you admitted this or presumably lied about
19 it. But for some reason you're convinced that you'll be
20 better off. And that's what the interrogation manuals intend
21 to do is to convince you that confession is in your self
22 interest, as I'll show you.

23 On this bottom left, it says, you may be unable
24 or unwilling to resist the interrogator. And that means that

1 some people very -- first of all, you can be very
2 conflict-avoided and unwilling to keep engaging them in a
3 social interaction where somebody is calling you a liar and
4 pressuring you and that person has a lot of status and
5 authority, you might be afraid of them if they're police in
6 some cases. But you can't just bring yourself to keep saying
7 no to this person in authority who is asking you to do this
8 particular thing.

9 This one on the bottom right, sometimes there
10 have been some studies that show that certain people don't
11 mind going to jail that much as compared to others, because
12 if they're a part of a community where a lot of their friends
13 are in jail or people that they know or their family have
14 been in jail. It's not as adverse to them as it would be
15 to somebody who is not around that at all.

16 The other one I mentioned before when I said
17 there was an overlap between the studies of memory and
18 confession that you can become convinced that you actually
19 did something that you didn't do. This is most likely to
20 occur when police use a tactic of presenting evidence against
21 you that actually is false.

22 So, for example, claiming that they have a
23 witness who saw you do it or saw you there or claiming to
24 have your DNA, you know, and they don't or your fingerprints

1 when they don't or that you had failed a polygraph or a voice
2 stress analyzer when you didn't.

3 So false evidence is one of the primary causes
4 really of false confession because it can convince people
5 maybe I did it and I didn't realize it or I was too drunk to
6 know or it was so long ago and so on. Or just convince them
7 to believe that they did it or it can cause them to have
8 false memories under certain conditions, which are probably
9 too complicated and not relevant. But they can do that
10 because people have for some period of time falsely
11 remembered committing crimes that they didn't commit because
12 of the techniques that the police used on them.

13 So then less often you see somebody like the
14 people that falsely convinced -- confessed to killing Jon
15 Benet Ramsey and things like that, just do it for attention,
16 to protect somebody else or because someone in their family
17 or somebody in their gain or something is saying that you
18 need to do this, you need to confess to this.

19 But the main causes are those top three of doing
20 it to get out of there, doing it because police have
21 convinced you you're going to be better off if you do, or
22 just because you can't resist an authority that's demanding
23 that you do it.

24 Q. Okay. You said that for the most part people

1 false -- the false confession results from the desire to
2 terminate an adverse situation or from the conviction that
3 confession is in one's best long term interest; right?

4 A. Right.

5 Q. Do these short term and long term priorities tend
6 to compete and interfere with one another?

7 A. Yes, they do. You know, we always have this in
8 life. You know, should we do what we really want to do in
9 the short term and maybe be lazy or should we work hard
10 because we get all the money in the long term or, you know,
11 what is it in the moment that we really want to do and is
12 that the best idea. And humans are naturally prone to do
13 whatever is most pleasant in the moment. And we have to
14 learn as we grow up to control these kind of impulses to do
15 what we want to do in the moment to make sure we get the best
16 outcomes in the long run.

17 But they always compete with one another. If you
18 are in the interrogation room and you're thinking, I can't
19 stand this anymore, why don't I just say what they want me to
20 say to get out of here, to keep yourself from doing that, you
21 have to really have an accurate understanding of what's going
22 to happen to you if you do confess, and especially if you
23 confess falsely, you know, what's going to happen to you.
24 And then really keep that at the forefront of your brain

1 rather than I don't like being here right now.

2 And so sometimes people have very strong
3 misconceptions about what's going to happen once they
4 confess. Maybe their lawyer will straighten it out or there
5 will be evidence discovered to prove them innocent or maybe
6 this person that accused me will finally tell the truth, you
7 know. But they don't realize that once you confess and
8 nobody is really listening to you anymore because people
9 think confessions are so powerful pieces of evidence.

10 But this is the same thing, same kind of thing
11 that we use in every day life to convince people to do
12 things, convince them that it's a good idea or nag them until
13 they agree to do it even if they don't want to kind of thing.

14 Q. All right. Can you explain more about how we
15 know suspects confess just to escape the interrogation?

16 A. Well, first we know generally that interrogation
17 is pretty stressful for people. We listen to them talk about
18 it while they're in there. They often refer to how nervous
19 they are or how upset they are and so on. But, objectively,
20 what's going on in that interrogation is stressful. Nobody
21 believes you, they're calling you a liar and pressuring you
22 and so on.

23 So I mention this is human temporal discounting.
24 But we know that if you take all of the people that have

1 confessed, whether they confess truly or falsely, and you ask
2 them why, a very large percentage of them will tell you that
3 they did it to get out of there.

4 So this is one example of a study where 40
5 percent said that they confessed falsely, of those who
6 confessed falsely, and 42 percent that confessed truly said
7 they did it to avoid detention or to get released to get out
8 of there.

9 That reflects two things. One, that the
10 interrogation will be over. But also the misconception they
11 have that they would be going home instead of arrested. But
12 the reason they have that misconception really typically is
13 because what's said to them in the interrogation is very
14 misleading.

15 But, anyway, that's just some of the data from
16 that study to avoid being detained any longer, 40 percent in
17 that case.

18 Q. Now, are there some suspects who are vulnerable
19 to confession for this reason?

20 A. Yes. If you think about what's going on and, you
21 know, we'll come back to this later when we talk about who is
22 most vulnerable to false confession, you know, you feel like
23 if you're in this interrogation and feeling a tremendous
24 amount of stress because of the interrogation, it's hard to

1 tolerate that distress if you're already really distressed,
2 which often is the case. Before you go in there, you may
3 know you're accused of this crime. Somebody could be dead,
4 you know, and you're accused of the murder, but that person
5 is dead and you're distressed over the murder. You know,
6 when parents are accused of killing their kids or doing
7 something to their kids.

8 So, the more pre-existing stress you have, the
9 less you can tolerate more of it before it becomes too much
10 for you. So that's one thing.

11 Certain people also don't have much impulse
12 control. They're just prone to do what they feel like in the
13 moment and they can't stop themselves as well as other
14 people.

15 And then, you know, if you are in there, you're
16 distressed, you're having trouble with, you know, feeling all
17 the pressure of the demands of the police officers, you may
18 be more ready to confess to get out of there.

19 And then this last one, like I said, it's very
20 important, when you can't recognize other ways to get out of
21 there. Like saying I don't want to talk to you anymore, I
22 want a lawyer. But you have to understand that when people
23 are in that situation, a lot of times they don't understand
24 that that is still available to them. And if they do ask for

1 a lawyer, a lot of times the police will say, well, we can
2 get you one but we are actually wondering why you think you
3 need one, if you're telling us the truth, what do you need a
4 lawyer for, you know, kind of thing.

5 And then we know that people who are especially
6 young or have mental problems or low IQ are more vulnerable
7 to this kind of confession.

8 Q. Okay. You also mentioned that suspects might
9 just comply with the interrogator demands because they're
10 unwilling or unable to resist. What affects the amount of
11 pressure a person would feel to comply?

12 A. Well, some of these things are elicited in here.
13 We have personality types that are very high in what we call
14 conflict avoidance. They just can't stand any conflictual
15 interaction. And I think we all know somebody like that. If
16 an argument starts, they just get out of there and can't
17 stand it.

18 But some of it is, you know, about how they feel,
19 what they feel that their rights are with police, you know,
20 do they feel that they can tell the police to get lost or,
21 you know, I didn't do this, I'm done talking to you. Do they
22 feel that or do they feel more pressure because that is an
23 authority figure. And there's certain kinds of personality
24 types that are more deferent to authorities and so on than

1 others.

2 And there's also people that -- You know, most
3 people that are -- know a lot more about the legal system or
4 have more financial resources, they feel better to tell the
5 police to buzz off. So it's a lot about who you are and what
6 you think you as a person can get away with if you try to
7 defy the police that would lead you to just cave because of
8 the pressure itself.

9 Q. Okay. Let's go to the third cause of false
10 confession. Convincing the suspect that it's in their best
11 interest. How is that done?

12 A. Well, okay, police interrogation tactics are
13 designed in part to take away any source of resistance that
14 you would have to confess. So, let's say, there's two
15 things. One is get rid of whatever you think is holding the
16 person up most and then give them some positive incentives
17 for doing the things that you want them to or negative
18 incentives for defying you. So, you know, the police are
19 dealing with what I call here is what you would naturally
20 think that, wow, this should be obvious that a false
21 confession is a bad idea and they know -- the police
22 interrogator knows going in that most people are going to
23 think, wow, if I didn't do that, there's no good reason for
24 me to confess to them. Even if they think I did it, there's

1 no reason for me to be confessing to them.

2 And, secondly, there's no reason -- it's obvious
3 it's a bad idea. And what reason would I possibly have for
4 doing this because I am innocent. If I'm innocent, there
5 shouldn't be any evidence that I did do it and there should
6 be evidence to show that I didn't do it.

7 And then, also, if I did confess, you would think
8 a person would think, if I confess, I'm going to get charged
9 and convicted for this stuff and put in jail and at the very
10 least it's going to really trash my reputation and my family
11 and friends might desert me because they think I did it and
12 so on.

13 You know, but -- So that's what the interrogators
14 know people will actually be thinking this. Let's say we
15 have to disabuse them of all of these notions that would keep
16 them from confessing. And, like I said before, if we use the
17 most powerful techniques of influence out there, you are
18 going to convince people to do what you want to do, some
19 people.

20 So this is from one of the primary interrogation
21 manuals by the Reid group, the investigator of anthology, and
22 it says, psychologically speaking, a successful interrogation
23 is analogous to selling a resident of the Yukon air
24 conditioning in January. For a suspect to acknowledge a

1 criminal act involving negative consequences requires that
2 the suspect believe a confession is in his best interest.

3 So they're, right there, acknowledging that what
4 their goal is is to convince the suspect that this is
5 actually in their best interest. They're not going to lose
6 in all of those ways that they would naturally think they
7 would by confessing and instead they're going to be better.

8 So why should I confess if I didn't do it?
9 Because the evidence clearly says that you did. You know,
10 there is no question about whether you did this. We're
11 really here to find out how it happened and why it happened.
12 Your guilt is firmly established and here's how it's
13 established. We have this evidence against you, you know,
14 and so on.

15 And, also, interrogators commonly say, this is
16 your chance to tell your side of the story. Because if you
17 don't we're going to have to believe what everyone else is
18 saying, you know. The only way to keep that from happening
19 is tell us your side of the story. And it makes you think,
20 well, you'll be charged with a serious crime. The
21 interrogators imply that maybe you won't be charged at all.
22 This isn't as serious as you think it is. Maybe there's a
23 way to get help or counseling. But definitely telling your
24 side of the story is going to be better than just relying on

1 your accusers, the witnesses against you.

2 So then you're thinking, well, I'm going to go to
3 jail. Well, maybe not. There are different ways to work
4 with this. And, you know, the way that we end up working
5 with it is implied, but it depends on whether you choose to
6 confess or don't, if you keep denying. You know, you're a
7 nice person you were just in a bad situation. Anything could
8 happen for this reason. It's not so terrible. It's
9 understandable. The judge is going to look at you better if
10 you take responsibility than if you just lie to his face and
11 so on.

12 And these are all messages that are promoted in
13 interrogation. And if they're not about legal consequences,
14 it may be, you know, your children are going to respect you
15 more if you stand up and take responsibility. And what kind
16 of model do you want to be for your kids. And if they think
17 they have a particularly religious person in there, they
18 might refer to, you know, ethical or moral reasons why they
19 should.

20 But, you know, this is another thing that's
21 called a phenomenon of innocence that innocent people have
22 sometimes said I didn't think it was going to be a big deal
23 if I confessed. I just wanted to get out of there. I
24 figured my lawyer would clear it up and as soon as they

1 investigate they would know I didn't do it, you know. So
2 they don't recognize what is actually going to happen, as I
3 mentioned before.

4 So the interrogation is designed, like I said, to
5 sweep away all sources of resistance to confession and
6 replace it with thinking, yeah, this is a good idea.

7 Q. Are there other false assumptions or
8 misunderstandings that may make a false confession seem
9 unlikely?

10 A. Yes. You know, as I said, there is this
11 assumption out there, there's been some surveys that show
12 that the general public think that people do falsely confess
13 because something is wrong with them, that they are mentally
14 ill or they have a low IQ, something is wrong with them.
15 But, of all the false confessions that have been identified,
16 the majority of them are mentally normal.

17 Now, it is true that if you put somebody who is
18 young, who is mentally ill, or a low IQ in the interrogation
19 room and they're innocent, they are more likely to falsely
20 confess than people who are not mentally ill or young or low
21 IQ. But most people that have falsely confessed are not --
22 it doesn't take a defect.

23 People that -- There is a really well known case
24 of somebody who had an IQ of over 150, which is right around

1 Einstein, and he falsely confessed. And it depends on what
2 you're told, what your -- what your situation is as to
3 whether people can make it seem like, yes, under the
4 circumstances with all of this apparent evidence against me,
5 maybe it is a bad idea for me to admit that and tell a good
6 story rather than just be thought a liar. But it does not
7 take anything wrong with you. That's the main point.

8 Q. Are there other false assumptions or
9 misunderstandings that make false confessions seem unlikely?

10 A. Yeah. I think the main thing that keeps people
11 from really understanding this is that we sit there and we
12 think -- look at somebody that allegedly falsely confessed to
13 killing their kid or raping their kid or killing their mother
14 and we cannot imagine any circumstances where they would do
15 that. And, like I say, I can't imagine doing that either.
16 But I have never been in that kind of a situation in an
17 interrogation room without all of the legal background and
18 knowledge that I have confronting an expert apparently law
19 enforcement officer who knows much more about the legal
20 system than I do. And it's hard for us to know what we would
21 do in a situation we've never been in anything like it. And
22 so that's a problem in people understanding this topic.

23 Q. Okay. Let's go to persuasive strategies. Can
24 you tell us about the role of persuasion in interrogation?

1 A. Okay. Well, you know --

2 THE COURT: So this is kind of going in to a new
3 area.

4 MS. SCHUMANN: Yes.

5 THE COURT: So why don't we take a little break
6 since we're going in to a new area. Okay. All right. It's
7 2:30. We've been going at it for about an hour and 15
8 minutes.

9 So, Ladies and Gentlemen, we're going to take a
10 little break. Let's do about ten minutes so you can stretch
11 your legs and stretch out, go to the bathroom, do whatever
12 you need.

13 So, during the recess we're about to take, you're
14 admonished that it's your duty not to discuss amongst
15 yourselves or with anyone else any matter having to do with
16 this case. It is your further duty not to form or express
17 any opinion regarding the guilt or innocence of the defendant
18 until the case has been finally submitted to you for
19 decision. You are not to read, review, or listen to any
20 report in the newspaper, radio, television, or the internet
21 concerning this case nor allow anyone to read or comment upon
22 them to you or in your presence. This includes viewing any
23 type of social media relating to this case. You are not to
24 investigate or attempt to obtain any additional information

1 about this case outside the courtroom. Do not visit the
2 scene or attempt any investigation on your own. Do not go on
3 line and review any information relating to this case. Do
4 not read any legal text or book regarding any issue raised in
5 court. Should any person attempt to discuss the case with
6 you or in any manner attempt to influence you with respect to
7 it, you are to advise the bailiff who will in turn advise the
8 Court. And I will take care it. Ladies and gentlemen,
9 stretch out.

10 (Recess was taken)

11 THE COURT: Anything to bring up before we get
12 started again?

13 MR. MERRILL: Your Honor, one matter of concern.
14 Are we going to get in, with this witness, are we going to
15 get in to any of her opinion regarding the facts of the case?

16 MS. SCHUMANN: No.

17 THE COURT: She's talking about what can result
18 in a false confession. I think that's fair enough. The
19 voluntariness of the confession is always at issue and
20 it's her testimony and --

21 MS. SCHUMANN: It's just general.

22 MR. MERRILL: Okay.

23 THE COURT: So, I mean, that's up to you. I
24 mean, I don't know where she's going exactly, but we'll see

1 what happens.

2 MS. SCHUMANN: It's just general, your Honor.

3 MR. MERRILL: Okay. Thank you.

4 THE COURT: All right. Anything else?

5 MS. SCHUMANN: No, your Honor.

6 MR. KALTER: No, your Honor.

7 THE COURT: Okay. Please bring them in.

8 Counsel stipulate to the presence of the jurors?

9 MR. MERRILL: Yes, Judge.

10 MS. SCHUMANN: Yes, your Honor.

11 THE COURT: Okay. Continue, Ms. Schumann.

12 MS. SCHUMANN: Thank you, your Honor.

13 Q. (By Ms. Schumann) Okay, Dr. Davis. So let's go
14 to persuasive strategies. Can you tell us about the role of
15 persuasion in interrogation?

16 A. Okay. Well, as I mentioned, the interrogation is
17 based on the most scientifically-tested and supported
18 principles of social influence. And, so the goal is, as it
19 said, convince the person that this is in their best
20 interest. The second goal -- And the interrogation manuals
21 talk about it -- that you'll be more effective if you make
22 them somewhat anxious and uncomfortable so they really can't
23 think clearly and, you know, really carefully about what
24 you're saying because some of it -- Well, most all of it is

1 deceptive at the least and a lot of times just an outright
2 lie, you know, and you don't want the suspect to recognize
3 that maybe you're deceiving them in any way. So keep in mind
4 and stuff like that, they're not able to think as clearly.

5 Q. Are there other false assumptions or
6 misunderstandings that make false confessions seem unlikely?

7 A. That make them where? What?

8 Q. I'm sorry. What's the primary goal of
9 interrogation?

10 A. Well, that was to convince the people that it's
11 in their best interest. And then the secondary goal that's
12 covered is enhancing the anxiety and discomfort to make it
13 harder for them to recognize that you're deceiving them in
14 the first regard.

15 Q. Okay. Now, are the persuasive strategies
16 supplemented by other strategies to increase discomfort?

17 A. Right. In fact, there are some deliberate
18 strategies to increase discomfort. They're not used by every
19 interrogator, but the manuals do say set the room up in a
20 certain way and have chairs that are uncomfortable and make
21 the temperature a little bit uncomfortable and stuff like
22 that to -- also to increase anxiety and a variety of the
23 other tactics that we'll talk about. So, you know.

24 Q. What specifically does the interrogator try to

1 get the suspect to admit?

2 A. Well, you always want to get them to admit to
3 what would be the elements of the crime that they need to
4 prove to get a conviction basically. And, you know, so
5 they're different depending on what the crime is. But you
6 want them ideally to admit to everything that is necessary.
7 So not just doing it, but in some cases they're doing it for
8 a particular reason. So, you know, whatever is necessary,
9 you want them to include in that confession. So there's a
10 whole set of strategies that are around taking the
11 confession. Once you get them to start admitting, how do you
12 go about taking a confession and getting all of these things
13 that you need?

14 Q. What else are interrogators trained to get from
15 the suspect?

16 A. Well, ideally, you want them to tell a story that
17 makes sense so that what they confess to seems so thoroughly
18 coherent and has everything that you need in it that no one
19 to come would possibly believe that that conviction wasn't
20 true. So if it's a complex thing, like a murder, you want
21 them to tell the whole story, how it happened, what led up to
22 it, what their motives were, how they planned it, and exactly
23 how it was executed. And you want them, if it's something
24 like that, you want them to have details in there that they

1 shouldn't know if they weren't the person who did it, like
2 where the murder weapon is or something like that.

3 And preferably to express a lot of emotion and
4 remorse. Because people find it difficult to believe that
5 it's a false confession if you are crying and you express a
6 lot of remorse. And then they also try to get you, at the
7 end usually -- Well, the beginning and the end -- to
8 acknowledge that you're there voluntary and say did we treat
9 you right and did we give you what you need and all of that
10 so that the suspect wouldn't challenge it as involuntary to
11 try to get it excluded from trial.

12 They often ask the person to write an apology to
13 the victim because, again, why would they write an apology if
14 they didn't do it. It's explicitly to say we want to make it
15 challenge proof. We want that confession to be perfect and
16 no one can ever make anybody believe it's not true from this
17 point on.

18 Q. So are the techniques interrogators use unique or
19 are they the same techniques widely used by professionals to
20 persuade?

21 A. Well, there are techniques of influence developed
22 in my own area of social psychology. Again, they acknowledge
23 that. This is one where they say, you know, this is the same
24 way that my son is taught to sell newspapers, the same kind

1 of techniques a lot of times that salespeople evolve
2 strategies or influence professionals of all types use.

3 This is from a social psych textbook outlining
4 some of these techniques which, you know, one, friendship and
5 liking. You know, the idea is if someone likes you, it's
6 much easier to convince them of anything or to convince them
7 to do anything. And so interrogators try to make themselves
8 very likable. They're not harsh and mean for the most part
9 like you might see in some movies. They're very nice and
10 they chat with people and tell them all about their children
11 and express commonalities.

12 One of my friends who is a master interrogator
13 for the Air Force, he says, you know, I am who ever I need to
14 be in that interrogation room. If they have children, I have
15 children. If they like to fish, I like to fish, you know.
16 And whatever they like, I like. And you bring out these
17 similarities and commonalities because that increases liking
18 and it makes you then able to convince people better.

19 And then there's scarcity. I would like to help
20 you, you're a nice guy, you know, I think that we're just in
21 an unusual situation, maybe you made a mistake. I would like
22 to help you, but once you leave here, I can't help you
23 anymore. It's the deadline technique in sales. The price is
24 only good today. Tomorrow it's no good. And many others.

1 But this is from a basic textbook.

2 Here's from an FBI training manual and you see
3 the same thing. Reciprocity, contrast, social proof, liking,
4 authority, scarcity. All the same stuff.

5 Q. Okay. So let's talk about the specifics of
6 interrogation technique. Is there a particular widely-used
7 set of strategies?

8 A. Yeah. We talked about the Reid technique being
9 the basis of these strategies. But what all of them are
10 trying to do is communicate this basic thing right here. You
11 definitely did this, no question about it, we have all the
12 evidence we need, no matter what, what you're telling us now
13 is not the truth, we know it's not the truth. You'll be
14 better off if you do tell us the truth. Here's what the
15 truth is, here's what the evidence tells us, here's what the
16 other witnesses tells us, here's what the victim tells us.
17 Now tell me the truth. That's the basic messages that come
18 across through these set of, you know, techniques that are
19 taught in the interrogation manual.

20 Q. But, overall, what's the central message of the
21 interrogation?

22 A. That you'll be better off if you confess.

23 Q. Okay. Now, can you just preview basically a bit
24 about how these basic messages are conveyed before we focus

1 on the details of how it's done?

2 A. Yeah. So, remember, the first basic message, you
3 definitely did this. Usually the interrogator will talk
4 about the investigation they've done. And so, you know,
5 we've been investigating this for days or weeks or however
6 long it is, and we've talked to many, many people and they
7 may name some of the people that they've talked to. But
8 usually they say, we talked to really a lot of people and,
9 you know, they've been telling us a lot of things, we know
10 more than you think we know at this point. So they overall
11 make -- you know, try to convey the impression that they have
12 a massive investigation that has a lot of information from a
13 lot of sources. And they may also refer to a lot of
14 evidence. So we have your fingerprints, we have your DNA,
15 or, you know, you failed this lie detector test, you know, we
16 got the basic claim of this very credible victim. We know
17 you did it. And then, you know, similar things to say your
18 story is not the truth, you know, you're telling us that this
19 is what happened but we really know that that is what
20 happened because your story is inconsistent, you know, your
21 story has some kind of holes, you haven't told us everything.
22 None of us believe you. We've got a very credible other
23 person here, witnesses or victims, and so on. All of this
24 says otherwise, so your story is definitely not the truth.

1 You're going to be better off if you tell the truth. Just
2 like I would like to help you but I can't do it if you're not
3 going to tell the truth. Or you're going to feel so much
4 better when you get this off your chest. Everybody is going
5 to look at you better if you stand up like a man and take
6 responsibility rather than if you lie to their face. Your
7 family will respect you. Your children will respect you.
8 Maybe there's other ways to deal with this. We're still
9 working with that here. But you're definitely going to be
10 better off.

11 And the implication, you know, often the suspect
12 will say am I going to go to jail. Well, we don't know yet,
13 we're still working with this. There's many ways that this
14 can go. You know, what you did is not so horrible. You're
15 not a predator or you're not a cold-blooded murderer. You
16 probably didn't mean to get in to this situation. You got in
17 to this situation that got out of control and so on.

18 It's always seemingly understandable reasons why
19 it might have happened and so it might not be so bad for you.
20 And then, again, if you don't tell us, we can't help you.
21 Here's what the truth is. This is what the witness is, the
22 evidence and so on. And so this is a crucial thing. Why
23 don't you help yourself out here and tell me the truth.

24 It's always these kinds of statements that this

1 is your opportunity to help yourself or tell your side of the
2 story. But there's all of this help yourself idea. You're
3 helping yourself by telling us what happened. And maybe it
4 means you're helping yourself if you tell us what we think
5 happened, not what you think happened. But if you admit to
6 what we think that you did, you're going to be better off.

7 Q. So tell us about setting the stage.

8 A. So any influenced professional will tell you that
9 it's better to set the stage, to be the most available
10 circumstances for trying to persuade somebody of something.
11 You know, pick your time and your location and everything, so
12 that the person's hackles are not raised or the resistance is
13 not raised and preferably it's calmed down.

14 So, you know, one thing is that whereas you might
15 think that for any big deal in your life you would want to be
16 rested up and in the best physical and mental condition you
17 can. Interrogators like it if the suspect is compromised in
18 some way, if they're really tired or really stressed out,
19 because they know that that helps them. And that's easy to
20 have happen. If they're in distress because of the crime or
21 because of weeks of this situation hanging over their head,
22 you know, or they're tired and haven't gotten enough sleep
23 and so on, that helps the interrogator.

24 And you probably all heard of Miranda rights

1 because it's on TV all the time. But the Miranda court
2 specifically said the entire thrust of police interrogation
3 there as in all cases today was to put the defendant in such
4 an emotional state to impair his capacity for rational
5 judgment.

6 Again, so they won't see through all the
7 persuasive techniques designed to make you think that
8 something is going to send you to jail for years or the rest
9 of your life is actually good for you, you know, because
10 that's what they're doing.

11 So it's very stressful anyway. These are some of
12 the things about the interrogation itself that are stressful.
13 You're in a small room with one or more interrogators. It's
14 uncomfortable. And it's away from all of your normal sources
15 of comfort and other people. You're isolated from anybody
16 that might advise you or comfort you. And you feel out of
17 control. You're not the one that's controlling that
18 situation or you don't typically feel like it.

19 And then it's very unpleasant for people and
20 distressing to be constantly told that you're not telling the
21 truth and especially to be accused of things that make you
22 seem like a really bad person.

23 So it's very threatening to your self esteem as
24 well to be accused of these kind of things. And people are

1 feeling fear and shame and so on. And often you can hear
2 them talk about how stressed out they are in an interrogation
3 or how afraid they are and so on. So all of those make it
4 more difficult for people to think clearly.

5 Q. Now, are innocent people also at enhanced risk to
6 waive Miranda rights when they shouldn't?

7 A. Yes. There's actually some studies that look at
8 this where innocent people are more likely to waive Miranda
9 rights than guilty, and they are. And, in part, because an
10 innocent person doesn't see that they have anything to lose.
11 They don't realize what's going to happen to them in
12 interrogation and how strongly and resistantly and
13 unremittingly that interrogator is going to try to convince
14 them to confess. And they don't really recognize that
15 they're actually at risk to falsely confess. Who would think
16 that, right. So they don't think they have anything to lose.

17 And interrogators kind of encourage the sense and
18 people feel it anyway, even without the interrogator, that if
19 I refuse to talk to them, they're going to think that I have
20 something to hide, that I'm guilty and that's why I'm not
21 talking to them. So they go ahead and talk to the police.

22 Q. Okay. Do suspects also sometimes waive Miranda
23 rights to be let go?

24 A. Yes. This is a direct quote from a suspect in

1 one of the cases that I worked on. You know, the detective
2 said, now that I've talked to you about your right, do you
3 still want to talk. How am I going to get out of here if I
4 don't talk to y'all?

5 There's so much misunderstanding of people's
6 rights and what they really mean and when they can really
7 invoke them and how they can get out of there. People can
8 walk out. If they're not under arrest, they can walk out.
9 And the police often tell you at the beginning of an
10 interrogation, you understand that you came here voluntarily,
11 right, you're not under arrest, you came in freely and
12 voluntarily, right. Yes. So they can walk out. They're not
13 under arrest, but they don't realize that.

14 Q. Okay. Now, generally, is there an effort to keep
15 suspects' attention away from the consequences of confessing
16 throughout the interrogation?

17 A. Yes. Because -- Well, I mean, obviously, if
18 you're going to convince them that it's okay for them to
19 confess without serious consequences, then you don't want to
20 remind them of anything about going to jail or about the name
21 of the crime even, you know. You don't say murder. You say
22 this thing or this situation. It's kind of funny in a way to
23 look at all the euphemisms that people have and the
24 interrogators have to avoid naming things in a way that

1 reminds people of the serious nature of the crime. They said
2 don't have any pictures of handcuffs or jail bars or anything
3 around there that might remind them of what might actually
4 happen to them should they confess.

5 Q. Is there evidence that such a strategy is
6 effective?

7 A. Well, in general, these strategies, you know,
8 keeping their mind off the consequences as far as persuasion
9 stuff in general, yes, you want people to have on their minds
10 only the things that are consistent with what you're wanting
11 them to do. But, as far as the other principles, you know,
12 the liking principle, there's whole books written about how
13 important this is.

14 Dale Carnegie, who is not as well known to people
15 as he was in my younger days, he still is selling books on
16 how to win friends and influence people. It still sells a
17 lot of books and it's all make them like you. That works
18 really well.

19 The other techniques that we'll talk about also,
20 all of them have been tested as far as whether they
21 specifically promote false confessions or not. And all of
22 them do make it more likely. They also make true confessions
23 more likely. But they also make false confessions more
24 likely because they're very persuasive to people, who ever

1 they are, basically.

2 Q. Okay. Let's talk about the interrogator in
3 authority, establishing the interrogator's control over the
4 suspect's fate.

5 A. Yeah. So, in order for some of these techniques
6 to work, like one we call the sympathetic detective, if the
7 interrogator says I would like to help you but I can't do it
8 unless you confess here, they're implying that they can help
9 you. Because, you know, the way that the interrogation
10 works, it's this person here convincing you that it's a good
11 idea and also in many cases convincing you that they have
12 some degree of power. They don't really. Because, if you
13 confess, then it's up to the DA from that point. But they
14 want you to have the illusion that they can help you get
15 different, you know, better outcomes in some way, whether
16 it's counseling or whether it's lighter charges or something
17 like that. But they have some kind of authority to deal with
18 you, you know, so it matters that you please them, that you
19 do what they want kind of thing.

20 But it's a fundamental principle of influence
21 that, you know, we're more influenced by people we think
22 have, A, expertise, you know, that they know what they're
23 talking about. And if they tell us that this is going to
24 work better for you that they do know what they're talking

1 about, and, B, that they can do something about it. And
2 then, of course, that they're trustworthy, that you can
3 believe that they're telling you the truth, which is why the
4 friendliness and all the stuff applies to establish rapport
5 as is technically talked about.

6 Q. What else is done to give this illusion of
7 negotiations?

8 A. Well, the sympathetic detective. As I've
9 mentioned, the ones, I really like you and I would like to
10 help you but I can't do it unless you tell me the truth and
11 then confess while you're here. So that tactic has been
12 tested. And I'm going to blow through some of this because I
13 said it. And we know that if the detective says things like
14 I would like to help you but I can't do it unless you tell me
15 the truth why you're here, that -- it does in fact cause
16 people to believe that the detective likes the suspect more,
17 genuinely wants to help them more, doesn't really think
18 they're that bad or that guilty and less likely to just be
19 trying to get him convicted.

20 So, in other words, it's effective in deceiving
21 people, that the interrogator has the suspect's best interest
22 in mind. And that is absolutely not the case. They just
23 want them to confess to facilitate a conviction.

24 Q. Now, is this tactic somewhat threatening as well?

1 A. Yeah. Because it's saying that if you don't
2 cooperate, basically, and admit what you've done, then I'm
3 going to withdrawal my help. And sometimes they'll say, you
4 know, I don't need to be here. I'm just here to help you.
5 But if you don't want to tell me what really happened, I'll
6 just go ahead and turn you over to the DA and let them do
7 what they're going to do and go home to my family, you know.
8 So it's threatening that do this or else.

9 Q. Can interrogation strategy be broadly grouped in
10 to several phases, each with its own goal?

11 A. Yes. And this is the essence of what goes in to
12 interrogation. The first broad phase, but it's primary
13 because it happened first, but it also happens throughout.
14 And, that is, you know, normally you would think a person,
15 whether they're innocent or guilty really, they're going to
16 try to convince people that they're not, you know. If you're
17 innocent, of course, you're going to say, no, I didn't and
18 try to convince people that you really are. If you're
19 guilty, a lot of people will too.

20 So, they recognize, quite rightly, that if you
21 make it seem to them that it's impossible that they're going
22 to convince anybody that they're innocent, then they'll start
23 thinking about, well, what's the best way to deal with this?
24 If everybody is going to be convinced that I did it, what's

1 the best way to deal with it? And that's where innocent
2 people get in to trouble in part is that if the detectives
3 present evidence against them that seems like it's at least
4 thoroughly entrapped and appearing to implicate them that
5 nobody is going to believe them and they can't imagine how
6 they can prove that they didn't do it. They might think, oh,
7 my gosh, now I got to think about what I'm going to do to get
8 the least serious outcome. And that's the intent, turn your
9 attention away from trying to get out of it to trying to see
10 how they can get the least serious outcomes, given that
11 they're going to be seen as guilty. And that makes the
12 second phase easier.

13 So you tell them at the beginning that it's clear
14 they did it. You present whatever evidence against them.
15 And throughout you never -- the interrogator is told don't
16 ever show the slightest chink in this armor. You know,
17 whatever they try to do, just don't show the slightest hint
18 that you might believe them. Preferably interrupt them when
19 they're trying to deny it so they don't even get it out of
20 their mouth. But if they do get it out, then you just tell
21 them what's wrong, well, we know that's not true because
22 of -- You don't give any hint that they might convince you of
23 anything.

24 And then, while that's going on, then you start

1 trying to convince them that confession is not going to be
2 that bad and it's not going to be especially as bad as you
3 think it is and it will definitely be better than if you
4 continue to lie.

5 And then the third phase, get the confession with
6 all of those details that we talked about that make it look
7 so compelling.

8 Q. Okay. Let's go through the first broad phase.
9 What do interrogators refer to as step one of the Reid
10 nine-step method of interrogation?

11 A. Well, they call it positive confrontation. Since
12 I'm an old Trekkie, I call it the Borg maneuver. Because
13 they say resistance is futile. You will comply, you know.
14 And that's the message of that step one. So I think I've
15 said most of what goes on in that step one. But that is from
16 their, sort of their interrogation manual, step one, confront
17 them with the accusations or the evidence against them and so
18 on.

19 And then step three, any denials throughout,
20 you're not supposed to let any chink in that armor, handle
21 denials, overcome objections, making sure that you keep their
22 attention on what you're saying and so on.

23 Q. Okay. What effects do these confrontation
24 behaviors have on the suspect?

1 A. Well, it can make people feel really very
2 hopeless like there's nothing that they can do about it and
3 make them start thinking about what they're going to do
4 instead. This is an example of a person's reaction to it.
5 This is a child sex abuse case where the guy was accused. It
6 turns out we know his confession was false in that instance
7 because when the victim was asked to identify him in court
8 and he said is that your uncle, Mario Matthews, over there.
9 And she said, well, that's not the guy. I have two uncle
10 Mario Matthews and it was the other one that did this.

11 But he had falsely confessed. But he was
12 arrested after the detective said, you know, we put your
13 picture in a lineup and she picked you out. And he just hung
14 his head and said I have no way. I have no way. And he just
15 started telling the story about how he molested her when he
16 didn't. That's hopelessness. You know, you just give up and
17 start doing what they're asking you to do.

18 Q. How do we know that the presentation of false
19 evidence contributes to false confessions?

20 A. Well, we know in so many ways. But one way is in
21 studies of real life interrogations we know that the ratings
22 of how strong the evidence that the detectives talk about
23 against the suspect predict whether they confess or not.
24 It's one of the strongest predictors of whether anyone will

1 confess is what the perceived strength of evidence against
2 them is. But we also know in laboratory studies where we try
3 to get people to falsely confess to things like cheating or,
4 you know, the computer crash is a simple one but now people
5 use things that they can actually get in trouble for in the
6 laboratory that when you present evidence against them,
7 whether it's true evidence or false evidence, it increases
8 the rate of false confession. But, particularly, false
9 evidence increases the rate of false confessions. So,
10 anyway, that's some of the ways that we know.

11 This is one of those real-life studies that I was
12 talking about that you have much lower confession, 23 percent
13 when the evidence seems weak and 66 when it seems strong.

14 And then this is true even if they're innocent,
15 if the evidence seems strong, you're more likely to get the
16 false confession. I showed you this one earlier. When you
17 got a false witness against the suspect they're more likely
18 to falsely confess. There's other studies that illustrate
19 that same kind of thing. So there's a good bit of evidence
20 at this point.

21 And also the case studies about false confessions
22 have actually shown when you go and look at what was
23 presented against them in trial that false evidence is often
24 present in cases where people have been proven to have

1 falsely confessed.

2 Q. What kind of false or flawed evidence is commonly
3 presented to suspects?

4 A. Well, witnesses that may be wrong or they maybe
5 don't exist at all. And flawed evidence, you know, can also
6 be the case. You know, not that they don't always have to be
7 lying. It could be that that evidence doesn't go along with
8 it, it's not good. Like a forensic examiner may have made a
9 mistake and said it's your fingerprint when it really isn't.
10 You know, they made a mistake in their analysis. But
11 fingerprints are common.

12 Co-perpetrators, if it's that kind of case, very
13 often, you know, they'll say your friends have already said
14 that they did it and they confessed and implicated you and
15 said that you planned it or whatever.

16 False lie detector tests of whatever kind where
17 there's a polygraph or a voice stress analysis. If it's
18 voice stress analysis, we know that's not a correct result.

19 And then, you know, like I said, you reinforce
20 this throughout the interrogation. Whenever they come up
21 with something to say why they didn't do it or what might
22 show that they didn't do it, then you tell them what's wrong
23 with that.

24 Q. What effects does the constant confrontation of

1 evidence have on the suspect?

2 A. Well, it stresses people out quite a bit. And
3 then, like I said, make them feel hopeless and make them
4 think that they're going to be convicted no matter what and
5 start trying to think about how to minimize the consequences.

6 Q. What else can make the suspect feel hopeless
7 about being believed?

8 A. Well, this is an important question, because one
9 of the things that really promotes false confessions and as
10 I've just shown you really is how effectively basically do I
11 think I can defend myself against this. And if they present
12 a lot of evidence against you, then it lowers this idea that
13 you're going to be able to defend yourself against it.

14 But there are other things too. You know, as
15 you're asking not only how effectively can I dispute this
16 evidence, but am I the kind of person that people will
17 believe or are they just going to assume that I'm a jerk or a
18 dead beat and they don't believe anything I say. So if you
19 are a prior offender, for example, you could feel more
20 hopeless that people aren't going to believe you because you
21 know that this will make them think less of you and make them
22 think you're probably more of a liar.

23 If the detectives have previously caught you
24 lying about something, like, if you lied at something at

1 first and then it was an innocuous lie or an understandable
2 one. But once you lied then they're going to confront you
3 with the fact that you lied and why should we believe you
4 because we know you're a liar, you know. Or that you did
5 something having to do with a crime but not what you were
6 accused of. Like you might have been in the vicinity at the
7 time but you didn't really assault anybody or kill anybody.
8 But just that you were somehow, you know, had an opportunity
9 might make you feel hopeless.

10 So, in the case of child sex abuse suspects, I
11 mentioned earlier that two of the chapters I've written about
12 this is special things that have to do with child sex abuse
13 suspects. But what makes you not feel hopeless is the sense
14 that, hey, I can prove that I didn't do this or I can hire
15 the best lawyer and have them prove it or, you know, all the
16 things that would help you defend yourself.

17 But when you have a crime when there's no other
18 evidence except one person's word and another person's word,
19 then you can't think, well, I can prove myself innocent in
20 this way because there is no way. There isn't any evidence.
21 Mario Matthews, I have no way, I have no way, because here
22 this person says I did this and picked me out of a lineup and
23 I can't prove I didn't do it.

24 So, you know, you have a child against a credible

1 adult -- a credible child against an adult of whatever
2 credibility. If you happen to fit the stereotype of the type
3 of person who commits a certain crime, like, if you are
4 accused of drug running and in America our stereo types are
5 Hispanics, in particular, and blacks are that they're more
6 likely to commit drug crimes. That would make them feel more
7 hopeless than, you know, a white guy accused of the same
8 thing.

9 In this case, step fathers are stereotypically
10 thought to be child molesters and there's studies showing
11 that. So if you're a stepfather and you're accused of this
12 by a young child, how confident can you be that you can prove
13 to anybody that you didn't do it.

14 Now, do I think that this or is there something I
15 know about it? Well, my lab and I have done probably about
16 four different studies now about what people who are not the
17 suspects but people who just read about the basics of a case
18 and they read an interrogation that has the typical tactics
19 in it and doesn't end up with any confession, but they're
20 asked what should this suspect do. Half of them are told
21 he's really guilty and the other half are told he's for sure
22 innocent, what should they do. Should they keep talking to
23 the police but not confess. Should they invoke their rights
24 and refuse to talk to them anymore. Should they confess to

1 what the detectives suggest, oh, maybe this happened while
2 you were asleep and you rolled over and you thought it was
3 your wife and before you knew it, you know, you were touching
4 her and then you woke up and you realized it was not your
5 wife and you quit. Should they confess to that or should
6 they confess to deliberately doing it.

7 And in these graphs it shows what percentage of
8 the subjects recommended true and false confessions versus
9 these other alternatives. But what you can see here is --
10 Oh, and also, we had some just make that recommendation
11 without reading the interrogation and others made it after
12 they had read the interrogation.

13 So if -- Down on the bottom it says three percent
14 recommend confession for innocence versus 53.6 percent before
15 the interrogation. So most people are saying, yeah, the
16 guilty person should, you know, confess to have the least
17 likelihood of being charged, which is kind of crazy, right,
18 you would think. That's what they say.

19 But, after the interrogation now, 26 percent of
20 people are saying that this innocent person should falsely
21 confess to avoid getting charged with this crime. More of
22 them for the guilty person.

23 Now, what about the least likelihood of being
24 convicted, what should you do? Still 29 percent are saying

1 you should falsely confess to have the least likelihood of
2 being convicted to get the least serious charges. 57 and a
3 half percent are saying this innocent person should falsely
4 confess to get the least serious charges.

5 But we also ask them why do you recommend that.
6 And that's where this hopelessness thing come in. Because
7 the most frequent response about why they thought that the
8 innocent person should falsely confess, nobody is going to
9 believe him, and it's better to tell the best story you can
10 than just be thought a total predator, molester, and liar.
11 So even an observer in this guy's situation is hopeless
12 because he's got a little girl accusing him, he's the
13 stepfather or step grandfather in that case and, you know,
14 nobody is going to believe it.

15 So, you know, we can't test in the laboratory to
16 see if we can get people to confess falsely to child
17 molesting. But the best we can do is ask people like our
18 research what do you think the best thing is given that he's
19 in this situation.

20 Q. So interrogation tactics also communicate a
21 message that the person will benefit from the confession,
22 don't they?

23 A. Yeah. So there's two parts of it. One, you want
24 to lower the perceived bad things that are going to happen.

1 Make them think that bad things are less likely and also
2 point to good things. So the main things that are the most
3 widely used interrogation tactics. And I say that because
4 not all detectives are so skilled that they put in to play
5 every single thing recommended in the manuals. But the thing
6 that they're most likely to put in to play are the
7 hopelessness tactics and these, minimization and
8 maximization.

9 Minimization is things that tend to make a person
10 think, oh, well, maybe this is not as serious as I thought.
11 Or if I did it under the circumstances this guy suggests,
12 then it won't be that bad, to lower the perceived cost of the
13 confession.

14 Maximization are more of the scare tactics. Oh,
15 man, this is really serious and if you don't confess, these
16 bad things might happen. So raise the perceived cost of
17 denial.

18 Now, again, you know, against this are people's
19 lack of understanding of what really will happen once they
20 confess. And, I mentioned before, so I'll go through that.
21 But the main way that this is done -- And this is step two of
22 the Reid method. But, Reid method or not, people do it,
23 whether they call it that or not, theme development. And
24 theme development is, this is what they say about it in the

1 interrogation manuals. They're trying to find something --
2 You know, once you say, we know you did this and these are
3 the ways we know it, you know, I don't think you're a
4 terrible person, this probably wasn't something you do all
5 the time, you probably got in this situation and it got out
6 of hand or you weren't anticipating. And here's what I think
7 happened, you know. And you say, like in many cases, you
8 were asleep and you thought it was your wife or your
9 girlfriend and it was really this kid or, you know, it was an
10 accident. While you're bathing them, you know, your hand
11 just happened to slip and go where it didn't mean to go.

12 You know, but a theme development is something
13 where the interrogator presents a scenario for how it
14 happened or why it happened that seems not that serious or
15 maybe not that illegal or maybe not as bad as other things.

16 You know, an example that would be really easy to
17 understand is in a murder case where the interrogator might
18 want to say, I don't think you meant to kill him, you
19 probably just shoved them a little harder than you meant and
20 then she tripped and fell and hit her head on the coffee
21 table and you never meant for this to happen. It wasn't an
22 intentional murder at all. It was an accident. The accident
23 theme is really common. Self defense is also common in
24 murder.

1 But it's something, how this happened, that makes
2 it sound like maybe it wasn't even a crime at all, like self
3 defense or an accident. And even if it was, it was just a
4 one-time thing instead of an all-the-time thing. But it
5 sounds like a justification.

6 Psychologically they wanted it to be something
7 that the suspect would think, yeah, that's how it happened.
8 It totally justifies it. It's not bad. I'm not a terrible
9 person. It's maybe not illegal in tone. That's theme
10 development.

11 So this book, down at the bottom, Anatomy of
12 Interrogation Themes, is one that has a lot of different
13 themes all organized by what crime it is. And it suggests
14 all of these kinds of minimizing the seriousness kind of
15 themes that one could use for every kind of case, including
16 child sexual molestation, adult sexual assault, murder,
17 burglary, everything.

18 So that is a crucial, crucial component of the
19 Reid method that's used by people that have called themselves
20 Reid interrogators or not, as is all of the stuff about
21 making them feel hopeless and so on and often to help in the
22 sympathetic detective. And that is step two in the Reid
23 method.

24 Q. Okay. Does the Reid -- Well, I guess you already

1 covered that theme selection. It does give advice on how to
2 select themes for the individual cases.

3 A. Yes. In part they use their initial interview to
4 just get to know the person and try to figure out, given
5 everything I found out about them so far, what kind of things
6 would be most likely to work with them. And everything also
7 that they found out about the crime allegation, something
8 that would seem to fit, you know, and be something that that
9 person would find, you know, satisfactory or credible.

10 Q. What are some of the main kinds of themes?

11 A. Well, like others would do the same thing, you
12 know, you get into a situation you didn't anticipate and, you
13 know, like if somebody is trying to run towards you and you
14 got a gun in your hand, everybody is going to defend
15 themselves, you know. I would do the same thing. Or I have
16 friends and relatives who have done this. You know, it's
17 hard to avoid. Just generally convey sympathy that it's not
18 that weird or heinous that it can't be understood as
19 something that people would do if you put them in that
20 situation. Make it seem not so morally reprehensible.

21 And one way that's done, you see it in child
22 molestation cases, you'll see an interrogator say, you know,
23 I don't think you're a real predator. You're not one -- You
24 don't hide behind a bush waiting for children to come by and

1 hanging out in school yards. You're just a nice guy and you
2 got in a situation, you have that kid right there, walking
3 around the house in these shorts and she's starting to look
4 pretty sexy, she's turning in to an adult, and, you know,
5 you're a man and da da da da. But you're not the type of guy
6 who tries to do this all the time. Or, it's not like you
7 raped her, all you did was touch her a little bit, you know.
8 The contrast to something that seems worse. All you did was
9 this, where you could have been doing this horrible thing.

10 Motives that are less reprehensible, I mentioned
11 accident. Sometimes people weren't trying to molest. You
12 were trying to teach her about the facts of life or teach her
13 about her body and prepare her so that she would be able to
14 defend herself against other people who would or you were
15 drunk or something like that. I already mentioned this kind
16 of thing, you thought it was somebody else. Also blaming the
17 victim is another kind of theme they might recommend -- use,
18 you know, the victim was walking around wearing too sexy
19 clothes or something like that or got up in your lap and
20 started hugging you and kissing you and what are you going to
21 do.

22 There's just a long, long, long list of them. I
23 mean, probably for the child sexual assault, they must offer
24 about 30 to 40 different possibilities in that one book, so.

1 Q. Are there also things for non-emotional
2 offenders?

3 A. Yeah. For non-emotional ones, they focus --
4 really say focus most on the evidence and non-criminal intent
5 rather than moral justifications or other kinds of excuses.
6 Because they're going to be evaluating really just the legal
7 issues that kind of offender rather than the emotional ones.

8 Q. And are there specific themes for specific
9 crimes?

10 A. Yeah. This is one of the books that has such
11 things. And, you know, they -- Yeah. I took out all the
12 examples of it. But, yeah.

13 Q. Have there been studies testing theme
14 development?

15 A. Yeah. This is an example from -- Remember I said
16 the laboratory there are some studies to see if you can get
17 people to falsely confess to academic cheating, which is
18 grounds for being expelled if somebody chooses to pursue it.
19 And so in this case they accused people who actually had
20 cheated or who actually had not. And they just asked them to
21 confess without any really tactics or they offered an
22 explicit deal and said if you will sign this confession then
23 we won't pursue this or they just used minimization, which in
24 that case, you know, you probably really didn't understand

1 how important it was that you not collaborate with others or
2 cheat on this, you know.

3 And then the last condition they had the
4 minimization and also the explicit deal. And you can see the
5 percent that truly confessed and falsely confessed. And what
6 you can see is that you use either an explicit deal or
7 minimization or both, that the rate of false confession more
8 than doubles. And in some cases you use both. It went up to
9 43 percent of people were falsely confessing. That is when
10 they said we won't pursue it. But with just minimization, 18
11 percent of innocent people were falsely confessing. So
12 that's one study about the minimization issue. But there are
13 a number of them.

14 Q. Okay. In addition to theme development, do
15 detectives do anything else to influence a suspect's account
16 of what happened?

17 A. Yes. And this is one of the things that -- One
18 issue is did they falsely confess to committing the crime.
19 So do they give a false confession with all of those elements
20 in it, like I was talking about, that the detectives need to
21 justify a -- you know, to prove in court the crime in
22 question.

23 But, the other question is what are all the
24 details, are they true or false, you know. Because

1 everything that the suspect says about what happened could
2 really matter. And a lot of it can be false. Not just, yes,
3 I did this. Because, first of all, in step two, the
4 detective is already suggesting that this is what I think
5 might have happened, you know. And they do it because they
6 expect the suspect to eventually admit as an initial
7 admission to whatever the interrogator is suggesting, because
8 that doesn't sound so bad. And then from there they start to
9 challenge that and try to get them to admit more and more and
10 more serious things until they admit to what the interrogator
11 thinks is actually true. But they're constantly really
12 trying to get them to make false statements on the way to
13 presumably initially getting the true statement. But, in the
14 meantime, they say, here's what I think happened. This is
15 what the witnesses are saying. Well, this evidence suggests
16 and on and on and on, that they're telling the suspect what
17 happened rather than asking them what happened and then
18 reenforcing them if the suspect says, you know, yeah, maybe
19 this happened. Well, thank you for finally telling us the
20 truth and that, you know, you're really starting to stand up
21 like a man and we really appreciate that. So they express
22 all of these positive reactions and the suspects starts
23 saying what they think they want to hear and what they think
24 is true and negative reactions when the suspect says anything

1 they don't think is true.

2 So they really are strongly shaping everything
3 the suspect ends up saying. So a lot of the details can be
4 false as well as the fundamental admission, if there is one,
5 to the criminal act in question.

6 Q. Now, are there other ways to communicate
7 consequences of confession versus denial?

8 A. Yes. And I think that we can go through these.
9 Let me just -- Well, that's what I just said. Stepping stone
10 to the full story. Yeah. So the way that you do it
11 otherwise -- Yeah. I think it's in the stick section that we
12 talk about the other ways.

13 But some of the other ways for the positive ones
14 are referring to getting help and getting counseling. We got
15 to get past this and get you the help you need, but that
16 doesn't sound like a prison cell; right? But the stick, the
17 other way is that you start communicating threats or you're
18 not -- I mean, if you're sticking to what you should be
19 doing, you shouldn't directly start threatening them to get
20 the death penalty or horrible things. You have to imply that
21 they're going to get bad things. So usually that's done
22 mostly by referring to how other people are going to react to
23 you if you tell the truth versus a lie, as I mentioned
24 before. What do you think the judge is going to think of

1 you? What do you think the jury is going to think of you if
2 you just lie to their face, you know, versus stand up and
3 take responsibility? Or the threat to leave you and let the
4 DA take over and, you know, with the implication the DAs are
5 going to be much harsher than the interrogator would be.

6 So, that is mostly how the threats are
7 communicated. Withdraw help, to turn it over to somebody
8 more merciless, and constantly referring to what reactions
9 are going to be if you don't tell the truth, so.

10 Q. Okay. Can we end the discussion of the
11 interrogation method with a brief summary of how this all
12 combines to get the person to confess and sometimes to
13 confess falsely?

14 A. I know probably you guys don't really need it by
15 now. But just make them distressed so they're not thinking
16 clearly and then make them feel helpless, communicate these
17 things about how they're going to be better off. And then,
18 finally, take the confession with enough detail to get the
19 person convicted.

20 Q. Okay. We're getting close to the end. Okay.
21 Let's turn to the issue of what specific processes that make
22 these populations and some other types of people more
23 vulnerable to falsely confess. What do we need to know to
24 understand what would make one person more vulnerable than

1 another person?

2 A. Well, this can be more of a summary because I did
3 refer to some of this early on. But then when we get through
4 the first part can tell you some of what the research has
5 shown about some specific types of people. But, first, we
6 have to think, remember, why people falsely confess. They
7 experience so much distress they'll do anything to get away.
8 So to understand that, you have to understand what are the
9 circumstances under which a person is going to feel more
10 distressed and what kind of people are going to feel more
11 distressed and they need to escape.

12 Secondly, they can be convinced that it's a good
13 idea to confess. What is it about a person that might
14 facilitate that? Well, you know, do they know enough to know
15 better? And, you know, can they really think clearly on the
16 spot and tell them or not telling them the truth. They
17 wouldn't be able to tell just from looking at the detectives,
18 but some of the things the detectives say is really you would
19 think that people would know better than to believe it, but a
20 lot of them don't. Are they the personality type who can
21 stand up for themselves and endure the conflict and tell
22 somebody else no if they need to?

23 You know, and so to do this, as far as not
24 confessing to just escape, what needs to be true? Executive

1 function means controlling yourself. If you start to feel
2 distressed are you the type of person who can tell yourself
3 calm down and actually get calmer or are you the type of
4 person who just lets emotions run out of control? And there
5 are real strong personality differences in that respect. You
6 know, some people once they start to get upset, it's very
7 hard for them to calm down. You know, for example, people
8 that score high in emotional instability on the big five
9 personality scale, once they start getting upset, they stay
10 upset much longer than other people and their heart rates
11 escalate and everything differently.

12 So, what are your abilities to regulate your
13 emotions? And we're all different in that, in our ability to
14 calm down and control our impulses. We're all different
15 about that too. And that's why young people are vulnerable
16 or people with mental illness or low IQ have very low impulse
17 control compared to others.

18 Can you recognize other ways to get out of it?
19 What do you know about the legal systems and your rights in
20 the moment in the middle of an interrogation? What do you
21 know about what your options are and so on? And do you
22 really recognize how important it is for you not to just
23 confess to get out of there? Do you recognize what's going
24 to happen to you if you do? All of those things can help

1 stop you from confessing just to get away.

2 So now if you -- persuasion, what do you need --
3 what kind of personal resources do you need for that? You
4 need to be able to think on the spot so you can think clearly
5 about what you're being told and the ability to analyze what
6 you're being told. If they're telling you about false
7 evidence, could they have that, is it possible, you know. I
8 mean if a detective tells you, oh, well, you know, this dog
9 walked in the room and started sniffing you and said, yeah,
10 she followed you for three miles from the crime scene to here
11 even though you were in a car and going through traffic that
12 dog could follow you all the way here. Is that plausible?
13 Do you know enough to dispute that? Can you think about
14 what's wrong with it on the spot? Can you keep yourself calm
15 enough to think on the spot and realistically assess what the
16 impact is going to be.

17 And then compliance. Are you the type of person
18 who can stand up for yourself like we were just talking about
19 a moment ago? Do you really think your rights are
20 legitimate? Like some minority immigrants and so forth don't
21 really understand what their rights are and they don't really
22 know what's going to happen to them if they defy the police
23 in our country, where in their country they might have been
24 killed, you know. What is it like here? What's the real

1 availability of my rights?

2 So that one I think is mostly relevant for
3 communities, like I said, where a lot of their community is
4 in jail. So I'll skip that one.

5 So what do you need ultimately? You need to be
6 able to control yourself, to control your thinking, calm
7 down, think critically, control your impulses and your
8 emotions. And you need to know enough about what your real
9 rights are, what the real consequences are, all kinds of
10 things that they're telling you, is it plausible or not, you
11 know, that they could have this kind of evidence or that so
12 and so could have said this. It means you need to really be
13 aware of what all the evidence is and what people could be
14 saying reasonably truthfully, you know, and so on. How do
15 you evaluate this to know whether what they're saying is or
16 is not true? Are you confident in yourself? You know, are
17 you the type of person that people are going to believe
18 whether it's here or whether it's in court or whatever, you
19 know. Are you willing to defy the interrogator?

20 Now, this, self advocacy for defense means what I
21 referred to earlier that all the things that you think you do
22 or do not have that would make you effective in fighting this
23 charge. What is the evidence against me exactly and how
24 powerful is that evidence? Stereotype threat means are they

1 going to not believe me because I'm the stepfather, for
2 example. Do I understand my rights and can I defend myself
3 in that way? Do I have financial resources to defend myself?
4 And is this a fair system where people are going to look at
5 me fairly or just believe the other person because they think
6 they're more credible? All of those things matter. And
7 people are different in this respect.

8 And then, finally, all of this stuff is a lot of
9 stuff but it all boils down to do you really understand
10 what's going to happen to you if you confess versus if you
11 don't.

12 Q. Okay. Are there some other specific personal
13 characteristics that have been shown to increase
14 vulnerability to influence generally or to falsely confession
15 specifically?

16 A. Yes. So, you know, these people -- Now I told
17 you what people need, who has it and who doesn't. These are
18 some of the things that have been shown to result in greater
19 vulnerability to false confession. So you can see your IQ
20 matters. Your dispositional level of anxiety. Are you a
21 very anxious person generally? Some people are more
22 suggestible and compliant, you know. And there are actually
23 ways to measure that both with questionnaires and with
24 clinical evaluations. Are you a particularly impulsive

1 person? How well can you tolerate the stress without running
2 away and getting out of there? ADHD makes you more
3 vulnerable. On the right-hand side, people who come from
4 difficult life history who as children endured abuse of any
5 kind, verbal, physical, sexual, who live with alcoholics or
6 adults who went through divorces with their parents, who lost
7 their parents to, you know, incarceration or death or who had
8 difficulties with drugs and alcohol as children or as adults,
9 of course. So, statistically, people with those kind of
10 histories are more likely to confess at some point.

11 Psychopathology entailing failures of reality
12 monitoring, meaning that people who are not really that good
13 at telling what's real and what isn't. So that's primarily
14 psychotic people who hear voices or who, you know, aren't
15 really right about where they are and who's with them.

16 High need for approval is when you feel free to
17 defy others because you are always seeking somebody to like
18 you. You know, if the interrogator is trying to get you to
19 confess and you want him to like you, it's harder to do it,
20 you know, to defy them because you'll think they won't like
21 you if you don't do what they ask.

22 Trusting the authority too much. Believing that
23 they can't lie to you. One of the things that has been found
24 in a number of surveys is about two-thirds of the American

1 public believe that police are not allowed to lie to
2 suspects. But, as you can see, that isn't true, because
3 pretty much most everything you're told -- not most
4 everything. I mean they do refer to some evidence as true
5 and stuff like that. But, like, they want to help you, well,
6 that's not true, you know. That confession is best. Well,
7 that's not true. You know, a lot of the evidence is not
8 true. Police can and do lie to suspects. But people don't
9 understand that. So, when a suspect is in there, they may
10 think that everything that the interrogator says must be true
11 because they're not allowed to lie to them. So, if you're
12 too trusting of authority, then you're more vulnerable to
13 giving the sense of hopelessness and the idea that confession
14 is good for you.

15 And then there's cultural issues where some
16 cultures defying authority is much more unthinkable than
17 others. And, of course, substance abuse. And then you also
18 look at what is true to the person in the moment or in that
19 interrogation room, what's their physical condition or are
20 they too tired, are they, you know, having any kind of drug
21 use or drug withdrawal, are they ill or are they, you know,
22 has it been hours and hours since they ate, so they have --
23 Glucose depletion does not help with thinking. Are they
24 uncomfortable and so on. And then their mental condition.

1 What are they distressed? How distressed are they? The more
2 distressed they already are, the less they can tolerate being
3 more distressed by being in the interrogation room, the
4 greater that impulse comes to get away no matter what.

5 So, those are some of the things that you look at
6 to think, well, would this particular suspect be particularly
7 vulnerable, but it doesn't require any of these things for
8 them to falsely confess. Those are just things that make it
9 more likely.

10 Q. Okay. Let's turn to the issue of how to assess
11 the confession itself and the difficulty of recognizing a
12 false confession. Is there some evidence that false
13 confessions are difficult to recognize?

14 A. Yes. Some of those studies that I showed you
15 earlier about not detecting deception at better than that
16 level, those were confessions that they were looking at in
17 trying to tell which ones were true and which ones were
18 false. And people were doing half and half.

19 But why are they difficult? First, we know,
20 also -- I mentioned earlier -- that the very extremely high
21 conviction rate for somebody if they do falsely confess tells
22 you that people are not recognizing that that was a false
23 confession. The interrogator didn't recognize it. The DA
24 didn't recognize it. The judges and juries didn't. So, you

1 know, that's another reflection of them being difficult to
2 recognize. And, you know, generally, everything I told you
3 about our difficulty with correctly detecting deception.

4 But, in addition to that, we know that, you know,
5 people don't understand -- I mentioned this earlier too. If
6 you haven't been in a situation, it's difficult to imagine
7 that you would falsely confess. And to understand somebody
8 who is in that situation that you've never been in. And it's
9 really bad at predicting even what our own behavior would be
10 even in situations we haven't been in. We're very good as
11 predicting in ones that we have been in.

12 And then, you know, people tend to assume that
13 once a person confesses that they are guilty. And there's
14 that sort of confirmation by -- You kind of presume them
15 guilty if they confess. And, again, I'm blowing through
16 these slides on things that I've already said. I don't want
17 to be any more massively redundant than I am.

18 But, you know, the interrogators are trained to
19 take confessions in a way that make them seem unassailable.
20 Then, you know -- But if you look at the confessions, some of
21 the false confessors, they cry and they express remorse.
22 They've written apology letters and done all of these things
23 and, yet, it wasn't true. Maybe they're crying because
24 they're telling a story that's not true rather than it is

1 true. So it's very, very difficult to see after the fact.
2 It's really the evidence that tells you the story.

3 MS. SCHUMANN: Thank you, Dr. Davis. I'll pass
4 the witness.

5 THE COURT: All right. So we're going to take
6 another break, ten minutes. And then we'll get back here for
7 Mr. Merrill's questions, okay. So stretch out.

8 So, during the recess we are about to take,
9 you're admonished that it's your duty not to discuss amongst
10 yourselves or with anyone else any matter having to do with
11 this case. It is your further duty not to form or express
12 any opinion regarding the guilt or innocence of the defendant
13 until the case has been finally submitted to you for
14 decision. You are not to read, view, or listen to any report
15 in the newspaper, radio, television, or the internet
16 concerning this case or allow anyone to read or comment upon
17 them to you or in your presence. This includes viewing any
18 type of social media relating to this case. You are not to
19 investigate or attempt to obtain any additional information
20 about this case outside the courtroom. Do not visit the
21 scene or attempt any investigation on your own. Do not go on
22 line to research any issues in relation to this case. Do not
23 read any legal text or book regarding any issues raised in
24 court. Should any person attempt to discuss the case with

1 you or in any manner attempt to influence you with respect to
2 it, you shall advise the bailiff, who will in turn advise the
3 Court and I will take care of it. Ladies and Gentlemen, take
4 a break.

5 All right. So, apparently, one of the jurors
6 just handed a note to the bailiff. Will we be here tomorrow?
7 I need to let the school know. From Ms. Coke. Do you want a
8 copy of that? I'll mark it Court Exhibit 1 or 2.

9 THE CLERK: 2.

10 THE COURT: Court Exhibit 2.

11 MS. SCHUMANN: Your Honor, can Dr. Davis take a
12 break?

13 THE COURT: Oh, yeah, absolutely. I'm just
14 dealing with these guys right now.

15 THE WITNESS: Okay.

16 THE COURT: All right. So mark it as Court
17 Exhibit Number 2. And then why don't I -- Can I just answer
18 that yes?

19 MR. MERRILL: Yes.

20 THE COURT: So mark that Court Exhibit 2, make a
21 copy, give it to the juror so she can call the school.
22 Apparently she needs to call the school.

23 All right. Anything else?

24 MS. SCHUMANN: No, your Honor.

1 THE COURT: Okay.
2 Can I just instruct the bailiff to tell her yes?
3 MR. KALTER: That's fine.
4 THE COURT: Is there any objection to that?
5 MR. MERRILL: No.
6 MR. KALTER: No.
7 THE COURT: You can just tell her yes we are
8 going tomorrow.
9 THE BAILIFF: Okay.
10 (Recess was taken)
11 THE COURT: So anything to bring up to the Court
12 before we get back --
13 MS. SCHUMANN: No, your Honor.
14 THE COURT: -- with the jury? Okay. Bring them
15 in.
16 Counsel stipulate to the presence of the jurors?
17 MR. MERRILL: Yes, your Honor.
18 MS. SCHUMANN: Yes, your Honor.
19 THE COURT: Go ahead, Mr. Merrill.
20 MR. MERRILL: Thank you.
21 CROSS-EXAMINATION
22 By Mr. Merrill:
23 Q. Good afternoon, Dr. Davis.
24 A. Good afternoon.

1 Q. Thank you for being here.

2 A. My pleasure.

3 Q. So we talked a lot about false confessions --

4 A. Yes.

5 Q. -- in your previous examination. At this point I
6 want to ask you about true confessions. When do those
7 happen?

8 A. Well, I mean, fundamentally, of course, is when
9 the person actually did whatever they said they did. But the
10 same kinds of social influence techniques that promote false
11 confessions can also promote true confessions. Like I said,
12 the real problem is when you put an innocent person in the
13 interrogation room, those are powerful techniques and they
14 can convince anyone. Selectively, what tends to promote
15 false confessions especially have an even greater impact on
16 false confessions than true -- or the false evidence.

17 Q. Okay. Now, are there any data on how many
18 confessions are true?

19 A. On how many of them were?

20 Q. Correct.

21 A. People talk about trying to determine what
22 percent of all the confessions out there are false but are
23 true. But everyone agrees, all the scholars agreed, that we
24 can't know that because there isn't any what we call ground

1 truth, you know. For most cases there's not perfect proof of
2 whether the person did do it or didn't do it, especially in,
3 you know, the kind of crimes where there is no evidence other
4 than people's word.

5 So we don't have a totally valid truth criterion
6 to know whether it's a true or a false confession. In the
7 laboratory we know because we know what people did or didn't
8 do. But, in real life, you know, you need that unavailable
9 totally valid truth criteria to be able to tell, which we
10 don't have.

11 Q. Okay. Now, what about the lab? Has that been
12 tested in the lab as far as true confessions?

13 A. Yeah. I mean one of those studies I showed you.
14 I mean, we have some that we knew were guilty and some that
15 we knew were not guilty and then you look to see what those
16 interrogation tactics do to both of them. Many, many lab
17 studies have both innocent and guilty people in their
18 studies.

19 Q. Okay. And we spoke previously about DNA and how
20 DNA exonerated individuals who provided false confessions;
21 correct?

22 A. Well, I mean, if you were exonerated, obviously
23 it means that you were later proven to be innocent, even
24 though you were convicted. In some cases it's the DNA that

1 ultimately proves they didn't do it. In some other cases,
2 it's some other kind of evidence.

3 Q. Now, to the inverse of that, when someone
4 confesses and the DNA shows that the confession is then true,
5 is there any studies as far as that goes?

6 A. Well, I mean, no. Not the way you put it that
7 I'm not sure what one would do. Because those studies that
8 are looking at the DNA proving they were false were all
9 looking at wrongful convictions. They weren't looking at
10 true convictions. So -- But DNA obviously can prove people
11 did it for sure.

12 Q. So are there just not very many studies that
13 show -- that talk about true confessions?

14 A. No, I wouldn't say that. You know, like I said,
15 I'm not sure that -- I wouldn't say all of the laboratory
16 studies look at true and false. But a great number of them
17 do because, you know, it is important to show what tactics
18 work on whom and do they work on innocent people and guilty
19 people.

20 One of the reasons that false evidence or
21 misleading evidence has a selective impact on innocent people
22 is because guilty people a lot of times know that it's false
23 evidence. You know, if you claim something and they know
24 they did it and they know how they did it and everything

1 else, and if you claim something that you couldn't have, the
2 guilty person will know it. But the innocent person may not
3 know it, so -- But, yeah, even in real life too some of the
4 ones looking at actual confessions, they're looking at true
5 confessions too. And the perceived evidence is very
6 important for both true and false confessions.

7 Q. Now, have any of your research or studies that
8 you've looked at involve confessions not involving police?

9 A. My research?

10 Q. Anything that you've looked at as a part of your
11 career.

12 A. Well, you know, I mentioned earlier that in my
13 own lab we're doing a lot of studies that have to do with
14 pretext calls. They do have to do with the police because a
15 pretext call means, you know, the police actually get the
16 person, the victim or in the case of, let's say, a child
17 sexual molestation case, they might get the victim to call
18 the person, but they also might get the mother to call the
19 person. It's not always a victim but an associate of the
20 victim and the police record the call and they sort of coach
21 them as to what to say in the call. So the police are not
22 doing the interrogation, but they're coaching the person
23 that's kind of their surrogate interrogator.

24 But, you know, there's instances -- I'm not sure

1 about studies of it, you know, in the lab or anything else.
2 But there are certainly well-known circumstances under which
3 people confess to others besides the police.

4 Q. Okay. And do you know in what kind of
5 circumstances those confessions usually occur?

6 A. I don't know when they usually occur. I can give
7 examples of things that, you know, I mean, people go -- I
8 don't know why they do it, but they maybe go out and kill
9 somebody and then they tell their friends about it. You
10 know, and then their friends are now witnesses.

11 Q. Have you looked at any studies or done any
12 research about when a confession is made to a loved one and
13 then later on another confession is made to the police after
14 the initial confession?

15 A. Well, studies, no. But, I mean, that's kind of
16 what pretext calls are about, because it's usually a loved
17 one that makes the call. And they may or may not say
18 something to them in that call. But, I mean, studies, no.
19 But, instances in which people confess to various people,
20 yes. I mean, people are not very smart about who they tell
21 things if they want to keep them quiet. So, yes, people have
22 confessed to friends. They've confessed to associates, even
23 before or after confessing to the police.

24 But one has to look at why they did that also. I

1 mean, part of the pretext call thing is, you know, why would
2 you say when somebody calls you up on the phone and wants you
3 to admit it, why would you admit it if you didn't do it.

4 Well, sometimes they threaten to call the police if you don't
5 admit it or they threaten to leave you and not let you see
6 your children ever again if you don't admit it.

7 So, wherever they confess, you have to look at
8 the circumstances under which they did it. Were there some
9 threats or promises made? What kind of incentives were they
10 given to confess or not? Or did they just come out with it
11 because they were proud of it and bragging to people about
12 what they did? So, no matter where it is, you need to look
13 carefully at what the circumstances were.

14 Q. You talked a little bit about friendship and
15 liking principle.

16 A. Uh-huh.

17 Q. The question I have regarding that -- And I hope
18 it's part of the friendship and liking principle there -- is
19 how often do people confess to big crimes such as sexual
20 assault to a perfect stranger?

21 A. To a what?

22 Q. To a perfect stranger.

23 A. I have no idea.

24 Q. Okay. So usually the confession is to someone

1 they know?

2 A. Well, let's be clear about one thing. There's
3 some things that there aren't studies to address. And I
4 don't think that -- I've never seen a study that tried to ask
5 how often people confess to somebody they don't know. So
6 that's why if there's not a study about it then I don't know.
7 We can all point to instances in which it might have
8 happened. But how -- do we know how often it happened is a
9 different question, and I'm not aware of any research on
10 that.

11 Q. And you haven't made any opinion in this case at
12 all; is that correct?

13 A. Right.

14 MR. MERRILL: Okay. Thank you.

15 THE COURT: Any follow-up, Ms. Schumann?

16 MS. SCHUMANN: No follow-up, your Honor.

17 THE COURT: Okay. Thank you, Doctor. You're
18 excused from further testimony in this matter.

19 THE WITNESS: Okay. Thank you. Would I be in
20 the way if I disassemble my computer?

21 THE COURT: Yeah, go right ahead. We're going to
22 take the evening recess. So I think it's probably a good
23 idea for us to take the evening recess. It's a quarter after
24 four. So, by the time we get another witness in here and do

1 whatever, it's going take a while.

2 Ladies and Gentlemen, we're going to take the
3 evening recess. We'll start again at 9:00 o'clock tomorrow.
4 So it's anticipated that this case will get to you tomorrow.
5 So, you know, barring some kind of craziness, you never know
6 what's going to happen, right. Still don't know what's going
7 to happen, right. Okay.

8 So, you know, be back here at nine. We'll get a
9 fresh start again in the morning and hopefully we'll get this
10 case to you early tomorrow, okay.

11 So, Ladies and Gentlemen, during the recess we're
12 about to take, you're admonished that it's your duty not to
13 discuss amongst yourselves or with anyone else any matter
14 having to do with this case. It is your further duty not to
15 form or express any opinion regarding the guilt or innocence
16 of the defendant until the case has been finally submitted to
17 you for decision. You are not to read, view, or listen to
18 any report in the newspaper, radio, television, or the
19 internet concerning this case, nor allow anyone to read or
20 comment upon them to you in your presence. This includes
21 viewing any type of social media relating to this case. You
22 are not to investigate or attempt to obtain any additional
23 information about this case outside of the courtroom. Do not
24 visit the scene or attempt any investigation on your own. Do

1 not do any internet searches relating to anything occurring
2 in this case. Do not read any legal text or book regarding
3 any issue raised in court. Should any person attempt to
4 discuss the case with you or in any manner attempt to
5 influence you with respect to it, you are to advise the
6 bailiff who will advise the Court, and I'll take care of it.
7 Have a good evening, Ladies and Gentlemen.

8 Okey dokey. You can certainly get your stuff,
9 Doctor. All right. So is anybody going to present any other
10 jury instructions?

11 MR. KALTER: I presume that I will have a
12 discussion with Ms. Schumann tonight about our theory, but
13 that would be it.

14 THE COURT: That would be it?

15 MR. KALTER: Yeah.

16 THE COURT: So, otherwise, I made rulings on
17 certain instructions. If you want to include them, you need
18 to have a copy with you tomorrow, all right, to make it at
19 the time of -- to make an official objection or a
20 non-objection or request at the time of settling the jury
21 instructions. Okay. So since we have -- even though we've
22 discussed them and I've made some preliminary rulings on
23 them, you know, things do change occasionally, so who knows?
24 All right. So, otherwise, so if you want anything, you need

1 to bring it with you.

2 MR. KALTER: Okay.

3 THE COURT: Okay. On your theory instruction, if
4 it's the same one that you presented previously, I do have a
5 copy of that that's in my chambers. But if you want to add
6 to it or do something else to it, that's up to you, okay.
7 What else? So, because I would like to, you know, have the
8 jury instructions 99 percent done, you know, so that this way
9 you can view the jury instructions and then, you know, not
10 leave the jury waiting around forever. So you have
11 Dr. O'Donohue that you're going to have testify tomorrow;
12 right?

13 MR. KALTER: Correct. And I would anticipate,
14 just so the Court and Mr. Merrill knows, probably a shorter
15 direct than I was planning. So I'll probably estimate around
16 20 minutes, maybe a half hour.

17 THE COURT: Okay. All right. Well -- All right.
18 And will you have any rebuttal case, Mr. Merrill?

19 MR. MERRILL: I don't believe so, your Honor. I
20 will let you know first thing in the morning. But as of
21 right now --

22 THE COURT: I don't want to put any pressure on
23 you, but do you think --

24 MR. MERRILL: As of right now, no, I don't plan

1 on any rebuttal.

2 THE COURT: All right. Well, I mean, that's okay
3 one way or another. I mean, if you have a couple of rebuttal
4 witnesses that you want to call, it is what it is. But if
5 O'Donohue's testimony is going to be relatively short first
6 thing in the morning, then we'll be able to settle jury
7 instructions hopefully very quickly, get back in here, and
8 then get it to the jury well before noon, okay. So alrighty
9 then. Very good. Anything else for the Court?

10 MR. KALTER: No, your Honor.

11 MR. MERRILL: No, Judge. Thank you.

12 THE COURT: All right. Well, thank you both.
13 Court is in recess.

14 (Evening recess was taken)
15
16
17
18
19
20
21
22
23
24

1 STATE OF NEVADA)
2) ss.
3 COUNTY OF LYON)

4 I, CHRISTY Y. JOYCE, Certified Court Reporter
5 of the Third Judicial District Court of the State of Nevada,
6 in and for Lyon County, do hereby certify:

7 That I was present in Department 1 of the
8 above-entitled court and took stenotype notes of the
9 proceedings entitled herein, and thereafter transcribed the
10 same into typewriting as herein appears;

11 That the foregoing transcript is a full, true,
12 and correct transcription of my stenotype notes of said
13 proceedings.

14
15 Dated at Reno, Nevada, this 24th day of May,
16 2021.

17
18
19 Christy Joyce/
20 CHRISTY Y. JOYCE, CCR #625
21
22
23
24

1 CASE NO. 20-CR-0099
2 DEPT. NO. I
3
4

5 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA
7 BEFORE THE HONORABLE JOHN P. SCHLEGELMILCH
8 DISTRICT JUDGE, PRESIDING
9

10 THE STATE OF NEVADA,)
11)
12 Plaintiff,)
13 vs.)
14 THOMAS JASON BERNAL,)
15 Defendant.)
16

17 TRANSCRIPT OF PROCEEDINGS
18 TRIAL
19 VOLUME 4
20 NOVEMBER 6, 2020
21
22

23 Reported By: Kathy Jackson CSR
24 Nevada CCR #402
California CCR #10465

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

APPEARANCES:

For the State:

MATTHEW MERRILL
Deputy District Attorney
Yerington, Nevada

For the Defendant:

JESSE KALTER, ESQ.
Attorney at Law
1150 Selmi Drive, #505
Reno, Nevada 89512

LEANN SCHUMANN, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

INDEX OF WITNESSES

NAME	PAGE
DR. WILLIAM O'DONOHUE	
Direct Examination by Mr. Kalter	658
Cross-Examination by Mr. Merrill	670
Redirect Examination by Mr. Kalter	675

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

YERINGTON, NEVADA, NOVEMBER 6, 2020

-oOo-

THE COURT: Can we fix the split screen here so we can have Dr. O'Donohue.

You can hear us fine, doctor?

THE WITNESS: Yes, I can.

THE COURT: Okay. All right. So anything to bring up?

MR. MERRILL: No, judge.

MR. KALTER: No, Your Honor.

THE COURT: Okay. Bring in the jurors.

Counsel, stipulate to the presence of the jury.

MR. MERRILL: Yes, judge.

MR. KALTER: Yes, Your Honor.

THE COURT: Okay. Mr. Kalter, your next witness?

MR. KALTER: Dr. William O'Donohue.

THE COURT: Okay. Doctor, could you please raise your right hand and be sworn by the clerk.

DR. WILLIAM O'DONOHUE

called as a witness on behalf of the Defendant having been first duly sworn, was examined and testified as follows:

1 THE COURT: Go ahead, Mr. Kalter.

2 MR. KALTER: Thank you.

3 DIRECT EXAMINATION

4 BY MR. KALTER:

5 Q. Good morning, doctor. Can you please state your
6 name and spell your last name for the court reporter.

7 A. Yes. It's Dr. William O'Donohue. O'Donohue is
8 spelled O apostrophe D-o-n-o-h-u-e.

9 Q. Thank you. Sir, what is your current job?

10 A. I'm a professor of clinical psychology at the
11 University of Nevada, Reno.

12 Q. Okay. And tell the jury a little bit about your
13 education.

14 A. I have a bachelor's degree in psychology from the
15 University of Illinois at Champaign-Urbana. I have a
16 master's in Ph.D in clinical psychology from the State
17 University of New York at Stony Brook. Then I have a
18 master's degree in philosophy from Indiana University.

19 Q. Thank you. Are you licensed in the State of
20 Nevada?

21 A. Yes. I'm a licensed psychologist in the State of
22 Nevada.

23 Q. And how long have you been a professor?

24 A. I've been a professor at the University of Nevada

1 for about 25 years, and before that I was a professor at
2 Northern Illinois University and for four years, and before
3 that for four years I was an assistant professor at the
4 University of Main.

5 Q. Okay. What does being a professor of clinical
6 psychology at UNR entail?

7 A. The job is usually divided into three separate
8 categories. One is that we teach and I teach, we have an
9 undergraduate program where students can work on their
10 degree, and then we have a Ph.D program where students are
11 working on their doctorate degree, and I teach in both of
12 those.

13 The second basket of activities that we do is
14 research. So I publish books and general articles and book
15 chapters. I do research with my graduate students because
16 they need to do both a master's research project and a
17 doctoral dissertation.

18 And the third category is service. So we provide
19 some activities and help to the community. So I do two major
20 things there. I'm the director of psychological service
21 center which is a clinic where the students all work to get
22 clinical supervision so they can learn to do psychotherapy.
23 They namely serve community clients.

24 And then I'm the director of Victims Of Crime

1 Treatment Center. This is a center that I directed for about
2 25 years. Each year I write a grant to the National
3 Institute of Justice and the State of Main, usually the
4 Attorney General's office, and I receive funding for the
5 university so we can provide free services to children who
6 have been physically abused, children who have been sexually
7 abused and adults who have been sexually abused.

8 Q. And does --

9 A. I've --

10 Q. Does that include teenage victims?

11 A. Yes, it includes teenage victims. Yes.

12 Q. Okay. How long have you been involved with that,
13 the Victims Of Crime Treatment Center?

14 A. About -- about 25 years.

15 Q. Okay. And do those services that you provide
16 come at a cost to the victims you treat?

17 A. No. They are absolutely free.

18 Q. Okay. You mentioned -- well, let me ask you
19 this, through this service approximately how many children
20 that have been abused have you assessed and treated in this
21 clinic?

22 A. In my career I've treated about 2000 children who
23 have been sexually abused, and a majority of those would have
24 been in this clinic in the past 25 years.

1 Q. And have you published any books related to child
2 abuse?

3 A. Yes, several. I published over 80 books total, a
4 couple of devoted, several actually devoted entirely to child
5 sexual abuse, some devoted to understanding the sexual
6 deviance, why, particularly pedophilia, why individuals would
7 do such terrible acts. But I've also published books where
8 there's sections and chapters on what are evidence based
9 methods for assessing and treating and even attempting to
10 prevent child sexual acts.

11 Q. Okay. So you have been awarded grants from the
12 state and/or federal government related to child abuse?

13 A. Yes. These past 25 years I've been awarded a
14 grant again from the National Institute of Justice. But I've
15 also been awarded grants from the National Institute of
16 Mental Health to develop a protocol to evaluate forensic
17 interviews.

18 I've also been awarded a grant from the National
19 Institute of Mental Health to treat pedophiles in prison to
20 come up with training technologies for mental health
21 professionals in a forensic setting. And then I receive
22 grants to treat traumatized children in medical settings.

23 Q. And as far as testimony like this today, have you
24 testified in courts regarding child sex abuse and/or even the

1 legislature?

2 A. I've testified in both. I testified
3 approximately 200 times in courtrooms in several states, and
4 then I testified two times in front of the Nevada Legislature
5 on various issues related to child sexual abuse.

6 Q. And in those courts where you testified you
7 testified within your capacity as an expert in the field?

8 A. That's correct.

9 Q. Okay. Have you done any trainings for other
10 types of professions on child abuse?

11 A. Yes. I was asked to train police officers in
12 Reno on interviewing children who have been sexually abused,
13 and I've been in trainings of other mental health
14 professionals on how to assess and treat child sexual abuse.

15 Q. And in your career have you worked with actual
16 sexual offenders as well?

17 A. Yes, I have. I've assessed these -- assessed
18 child molesters. I've treated child molesters, and I've done
19 evaluations for Courts in other states, presentencing on the
20 severity of the pedophilia and their mental health status.

21 Q. Okay. And today, who hired you to be here today?

22 A. I think I'm being paid by the county, but you
23 were the individual who asked me.

24 Q. Okay. And you're being paid for your services?

1 A. Correct.

2 Q. Okay. Is there anything about who is paying you
3 that would influence your testimony to give open honest
4 answers?

5 A. No. That would be unethical if I slanted my
6 opinion by who was paying me. My job is to give my expert
7 opinion to help the trier of fact arrive at decisions.

8 Q. Okay. So you've established that you've treated
9 around 2,000 victims in this field and that you've published
10 in this area as well?

11 A. Right.

12 Q. Okay. So when treating somebody what is the
13 first thing you do in your role?

14 A. Well, the first thing you have to do is to
15 understand their allegations, what they say happened to them
16 and that can be relevant for coming up with an assessment
17 plan, what sort of test you're going to give, what sort of
18 questions you're going to ask. So your second goal is really
19 to diagnose what sort of problems they have. Do they have
20 post traumatic stress disorder or depression or conduct
21 disorder. And then once you understand their problems what
22 you need to do is then come up with a treatment plan.

23 Q. Okay.

24 A. And actually then perform treatment.

1 Q. Based on the research you've reviewed as well as
2 your personal experience in treating child sex victims are
3 the majority of the allegations founded?

4 A. Yes. The majority of sexual abuse allegations
5 are true.

6 Q. In your career treating child victims of sexual
7 assault, have you seen situations where an allegation has
8 been made because they don't like someone?

9 A. Yes. You mean a false allegation that the
10 motivation for making the allegation is they don't like
11 someone and an allegation is fabricated?

12 Q. Correct.

13 A. Yes, I've seen that.

14 Q. How about to get revenge?

15 A. Yes, I've seen that.

16 Q. How about if they wanted this person out of the
17 house?

18 A. Yes, I've seen false allegations related to that
19 motivation too, yes.

20 Q. How about if they are just simply angry at that
21 person for something?

22 A. That's another pathway I've seen for false
23 allegation, correct.

24 Q. How about the -- there's strict discipline

1 involved?

2 A. Right. Especially with teenagers, they can get
3 rebellious and not like the strict discipline. I've seen
4 cases where false allegations were fabricated in that
5 context.

6 Q. When you take on a case do you -- do you develop
7 into the logistics of the allegations of themselves?

8 A. Yes. By logistics do you mean the allegation
9 makes sense to conform to the usual ways that children make
10 their allegation. So for example if they are reporting
11 something that ought to be painful, like penetration, do they
12 report pain. Again, do they report that they are usually
13 secluded because most children, nearly are all secluded while
14 the abuse occurs and even after the abuse occurs. So no one
15 can detect, either see the abuse directly or detect the child
16 has been altered by the trauma and begin to ask questions.
17 Perpetrators do this so they won't be discovered.

18 Q. Okay. And in your experience in research
19 regarding seclusion, do you usually see other family members
20 nearby in these cases when the abuse is happening?

21 A. No, we don't. Usually the perpetrator secludes
22 them. In some way takes them. Some take to a lonely place,
23 waits until everybody leaves the house, perhaps waits until
24 everybody is asleep, that sort of thing.

1 Q. So what about if like it's in a small house and
2 the alleged victim's brother is walking all around and mom is
3 in the shower, is that what you see in your experience?

4 A. No, that's not normal. For two reasons, again,
5 they don't want to be discovered doing the abuse, but
6 perpetrators will also know that a child doesn't act normally
7 after the abuse. So if the abuse say we're to occur between
8 12 and 12 and ten they would want the child secluded, but at
9 12, 11 the child is not going to behave as they normally
10 behave. They are going to be traumatized.

11 At 12, 12, at 12, 15 it can take a long while for
12 a child to kind of cope with the trauma and get into their
13 usual normal range. So they often have to seclude the child
14 for a long time because otherwise people who know the victim
15 and will see that they are behaving differently that they are
16 anxious, that they are uncomfortable that they are upset,
17 that they are scared, that they are perhaps crying and -- and
18 serve as a cue for people to ask, you know, what is wrong.
19 And then the child can describe the abuse and the perpetrator
20 can get caught. So that's the other reason they want to
21 seclude them for a long period of time so no one is
22 suspicious and start to ask questions.

23 Q. The reactions to the trauma you just described,
24 is that -- does that -- is that prevalent as well as in

1 teenage victims of sex abuse?

2 A. Yes. It's very prevalent because often as a
3 child's cognitive abilities increase they are better -- they
4 can better understand the wrongness of the act, and they are
5 more upset by it.

6 Q. So are you referring to say the difference
7 between a four-year-old being abused than say a 14 or
8 15-year-old as far as their awareness of what has happened to
9 them?

10 A. That's exactly right. A four-year-old might not
11 quite understand what's happening, and perhaps grooming the
12 perpetrator to try to fool them where say a 14-year-old that
13 would be just much more difficult to impossible the
14 14-year-old will generally understand that the act is
15 abusive, that it's wrong and -- and then react intensely to
16 that wrongness.

17 Q. In your experience talk to us about how a -- a
18 victim of sex abuse, including a teenager could show outward
19 indications of their trauma?

20 A. True. Well, there are many ways. First, there
21 would be emotional reactions. The typical reaction to sexual
22 abuse is fear, anxiety. They are scared about this. It
23 upsets their world. It upsets what they think is normal. It
24 upsets their view that they think the world is just and

1 people are fair and people are good.

2 They also -- and people can see this fear. They
3 can see the defensiveness. It's really hard to completely
4 hide fear.

5 Secondly, they can have a dysphoric affect. They
6 can get depressed and sad, especially if this is occurring
7 multiple times. They can feel helpless and hopeless that
8 this is just happening to them often, you know, time after
9 time after time, and there's nothing that -- they hate it,
10 but there's nothing they can do to escape it.

11 Usually when people feel helpless and hopeless
12 they feel depressed or they look down. They don't have the
13 same joy. They have lower energy and this, again, can go on
14 for weeks or months.

15 A third element is this that they often avoid a
16 stimuli that remind them of the abuse and certainly stimuli
17 that are associated with ongoing abuse. So somebody can
18 detect that they are acting differently. They don't want to
19 be around their perpetrator. When the perpetrator is around
20 them they act scared and/or angry or both. They will change
21 their life so they don't have as much contact with the
22 perpetrator or not in a situation where they are at risk for
23 being abused so a child might get more involved in sports or
24 might get more involved with staying at a friend's house to

1 avoid the perpetrator or hanging around their mother or, you
2 know, not going into a private room. So their behavior
3 changes in ways that individuals can kind of note.

4 Another dimension is that they have what's called
5 an exaggerated stutter response. They are hypervigilant. In
6 other words, you can't relax like they used to, kind of
7 scanning their environment for threats. They are not
8 comfortable. They are, again, worried. So they are kind of
9 tense and they are -- and they are more reactive. They are
10 jumpier, again, because they can't go in this feeling of
11 calmness and safeness.

12 Sometimes again nightmares are very common, and
13 individuals can kind of hear them cry out because they are
14 having, you know, a terrible nightmare about the abuse.

15 Q. And, again --

16 A. There's --

17 Q. Sorry. Again, does this apply to teenage victims
18 as well?

19 A. Oh, yes. Yeah.

20 Q. And is there a correlation between, we talked
21 about the difference between a four-year-old victim and a
22 15-year-old victim. Is there a correlation between their
23 different ages as far as how much they try to avoid the
24 perpetrator?

1 A. Yes. An older victim is more cognitively
2 developed, more cognitively sophisticated, and they can
3 figure out more ways and more options to avoid the
4 perpetrator. So for example, a four-year-old, you know,
5 can't join a sports team or clubs at school but, you know, an
6 older teenager can. They can come up with more strategy.
7 Teenagers can stay overnight with friends more. They can be
8 out of the house more.

9 So because of the fact that they are more
10 cognitively sophisticated and because they just have more
11 options because they are older they are avoiding strategies,
12 can be more effective and they can have several of these.

13 Q. Thank you. I'll pass the witness.

14 THE COURT: Okay. Mr. Merrill, do you have any
15 questions?

16 MR. MERRILL: I do, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. MERRILL:

19 Q. Good morning, doctor.

20 A. Good morning.

21 Q. I have a few follow-up questions for you. We
22 just left off on talking about avoiding behavior. I would
23 like to ask you a few follow-up questions on that. Now, it
24 seems nowadays that many teenagers have cell phones. Would

1 you agree with that statement?

2 A. Yes.

3 Q. Okay. Would you agree that many teenagers use
4 their cell phones to communicate with their friends?

5 A. Correct.

6 Q. And if that cell phone was taken away from them
7 during the alleged child abuse or sexual abuse does that
8 hinder their ability to avoid the abusive behavior?

9 A. It would hinder it somewhat. Perhaps they
10 couldn't text their friends about coming over and spending
11 time. It certainly wouldn't prevent avoidance, but I could
12 see a few more strategies being more difficult without a cell
13 phone.

14 Q. Same questions about grounding?

15 A. Yes. If you're not allowed to leave the
16 residence that would make it harder to avoid by any strategy
17 that involved leaving the residence.

18 Q. So a combination between those two of a child
19 being grounded and her cell phone being taken away from her,
20 that would hinder that child's ability to avoid the sexual
21 abuse?

22 A. During that time period, yes, it would hinder.

23 Q. Again, we briefly talked about stimuli that
24 remind the child of abuse during direct.

1 A. That's correct.

2 Q. Now, if the child has moved out of that house,
3 would that be consistent with the child trying to avoid the
4 stimuli?

5 A. Yes.

6 Q. We talked about how perpetrators usually commit
7 their sexual abuse and we talked about how often times a
8 perpetrator will seclude the child. Do you recall that?

9 A. That's correct.

10 Q. Does that also -- well, does the seclusion in the
11 bedroom, does that count as seclusion from the house?

12 A. If -- perhaps if the door was closed, other
13 people weren't there not only during the abuse period but
14 right afterward that could be seclusion.

15 Q. Okay. If it's difficult to see into the bedroom,
16 even when the door is open from the living room?

17 A. That generally would not be seclusion because,
18 again, the idea would be if somebody did move they could see
19 either the abuse or see, you know, the child being very upset
20 because, you know, the abuse just stopped. So that would not
21 be a very good solution.

22 Q. Okay. And when the angles of the, I guess the
23 view from the living room to a bedroom, does that play into
24 seclusion?

1 A. It would play into it in a minor role but it
2 would assume that no one is moving.

3 Q. You talked briefly about grooming behavior.

4 A. That's correct.

5 Q. What is grooming behavior?

6 A. Grooming behavior are strategies that the
7 perpetrator uses prior to the actual abuse in order to
8 increase the likelihood that the perpetrator can get access
9 to the child. That the child will cooperate with the abuse
10 and that the child will not report the abuse.

11 Q. And what types of grooming behavior are there?

12 A. There could be behavior like wrestling to get the
13 child use to touch. Grooming behavior can include starting
14 to keep secrets with the child. I'm going to give you \$5 but
15 don't tell your mother. It can involve starting to have
16 sexualized the relationship and watching an R rated movie
17 with the child or talking to the child about the birds and
18 the bees. It can involve lavish gifts to the child so that
19 the child is perhaps kind of enthralled with the individual.
20 So those are some of the major types that I've seen.

21 Q. Okay. What about massages on a regular basis?

22 A. If it's the perpetrator's idea to massage, yes,
23 that could involve the touching which, again, groom the child
24 to accept that touching between them is okay.

1 Q. And would you agree that the massages in a
2 grooming behavior would perhaps lower a child's adverse
3 reaction to the sexualized behavior?

4 A. No.

5 Q. Did you -- well, what's the point of the
6 massages?

7 A. Well, the child -- it's to get the child more
8 comfortable with touching but just because a person grooms
9 doesn't mean that the child doesn't have an adverse reaction
10 to when the abuse starts.

11 Q. And, doctor, in this case you didn't talk to
12 Haley, did you?

13 A. Right, I did not.

14 Q. And you didn't talk to her mother, Patricia?

15 A. Correct, I did not.

16 Q. And you didn't talk to any of the detectives
17 either?

18 A. Right, I did not.

19 Q. Thank you, doctor.

20 A. Thank you.

21 THE COURT: Mr. Kalter, anything further?

22 MR. KALTER: Briefly, judge.
23
24

1 REDIRECT EXAMINATION

2 BY MR. KALTER:

3 Q. Dr. O'Donohue, in the hypothetical Mr. Merrill
4 provided you where a cell phone was taken away and the person
5 is grounded from leaving the house, could the victim still
6 try to avoid the perpetrator by say being closer to other
7 family members and not being alone in their room or something
8 like that?

9 A. That's correct. They could, you know, hang
10 around another family member and not go to the place where
11 the abuse occurred. They could even, you know, ask to borrow
12 family members phones, you know, to make contact. And,
13 again, this would be a semi effective strategy only during
14 the grounding. The abuse lasted much longer than this
15 grounding and phone taken away during that period I would say
16 close to strategies wouldn't be effective at all.

17 Q. Would an example be say staying in a living room
18 with another family member, watching TV, that kind of stuff?

19 A. Correct. It could be, yeah. Changing clothes
20 makes the abuse more difficult is another strategy. Those
21 two mechanisms would prevent all avoiding strategies.

22 Q. Okay. And then lastly about the grooming, you
23 mentioned if it was the perpetrator's idea to do massages.
24 Is there a contrast if the alleged victim is requesting the

1 messages?

2 A. Yes, a big contrast. The grooming involves the
3 perpetrator being the active agent and trying to come up with
4 sticky strategies to do this, not the alleged victim
5 suggesting these things that could desensitize for example
6 just a touch. It's the perpetrator who would come up with
7 this idea and insist upon it, not the alleged victim.

8 Q. Okay. And would it be less likely that the
9 massaging is grooming behavior if it's being done in front of
10 other people in the household?

11 A. Yes.

12 Q. Thank you.

13 A. And also related to if the massaging turned into
14 abuse, in general the victim would want to avoid that
15 massaging because they could see it as a precursor to a
16 change in to abuse.

17 Q. Okay. Thank you for your time.

18 MR. MERRILL: No follow-up, Your Honor.

19 THE COURT: Okay. Thank you, Dr. O'Donohue. You
20 can -- you can leave the Zoom at this point. You're released
21 from further testimony in this matter.

22 THE WITNESS: Thank you very much.

23 THE COURT: Okay.

24 (Witness excused.)

1 THE COURT: All right. Next witness?

2 MR. KALTER: Your Honor, at this time the defense
3 rests its case.

4 THE COURT: Okay. Rebuttal witness?

5 MR. MERRILL: No rebuttal, Your Honor. The State
6 rests.

7 THE COURT: Okay. Ladies and gentlemen, so
8 before the case can be argued by counsel and submitted to you
9 for your deliberations it's necessary that the Court and
10 counsel meet outside your presence for the purpose of
11 settling the instructions that will be given to you by the
12 Court.

13 We will attempt to expedite that process as much
14 as possible. However, it is an extremely critical stage of
15 the entire proceedings, and both counsel and myself ask you
16 to bear with us during this delay. I don't anticipate that
17 it will take more than 20 minutes to a half hour for us to
18 finally settle all of the instructions that are going to be
19 given to you in this matter. But as soon as that is done we
20 will get you back in here, but I would say it's going to be
21 at least 20 minutes. So you can do what you need to do.

22 And then in the meantime, during the recess we're
23 about to take you're admonished that it is your duty not to
24 discuss amongst yourselves or with anyone else any matter

1 having to do with this case. It is your further duty not to
2 form or express any opinion regarding the guilt or innocence
3 of the defendant until the case has been finally submitted to
4 you for decision.

5 You are not to read, view or listen to any report
6 in the newspaper, radio, television or the internet
7 concerning this case nor allow anyone to read or comment upon
8 it to you or in your presence, this includes viewing any type
9 of social media relating to this case.

10 You are not to investigate or attempt to obtain
11 any additional information about this case outside the
12 courtroom. Do not visit the scene or attempt any
13 investigation on your own. Do not conduct any assertion in
14 relation to any matter -- any matters in this matter. Do not
15 read any legal text or book regarding any issue raised in
16 court. Should any person attempt to discuss the case with
17 you or in any manner attempt to influence you with respect to
18 it, you are to notify the bailiff who will notify the Court,
19 and I'll take care of it. Thank you.

20 All right. So does the defendant want to be
21 present for the work session?

22 MS. SCHUMANN: Your Honor, he's going to leave
23 while we settle jury instructions.

24 THE COURT: All right. Well, we'll settle them

1 in open court if he wants to be present during the actual
2 settlement.

3 MS. SCHUMANN: He doesn't.

4 THE COURT: He doesn't, all right. So that's
5 your choice. You don't need to be there when we settle the
6 jury instructions.

7 THE DEFENDANT: Okay.

8 THE COURT: But we're going to have a quick work
9 session first. You know, a couple of minutes, meet in
10 chambers. We'll go over the jury instructions. If the court
11 reporter gives us about 15 minutes or so and then we'll have
12 the court reporter come in and then we can settle them in
13 chambers then.

14 MS. SCHUMANN: Okay.

15 THE COURT: Sounds good. Take a couple of
16 minutes and then we'll meet in chambers.

17 (Whereupon, a brief recess was taken.)

18 THE COURT: All right. So we're back on the
19 record in State versus Bernal, 20CR0099, for the settling of
20 jury instructions. The record will reflect that the Court
21 has reconvened outside the presence of the jury for that
22 purpose.

23 The record will further reflect that the Court
24 has provided both the State and defense copies of the

1 instructions which the Court proposes to give; is that
2 correct, Ms. Schumann?

3 MS. SCHUMANN: Yes, Your Honor.

4 THE COURT: Mr. Merrill?

5 MR. MERRILL: Yes, Your Honor.

6 THE COURT: Okay. Does the State object to any
7 of the Court's proposed instructions?

8 MR. MERRILL: No.

9 THE COURT: Does the defense object to any of the
10 proposed instructions?

11 MS. SCHUMANN: No, Your Honor.

12 THE COURT: Does the State wish to offer any
13 instructions in addition to those proposed by the Court?

14 MR. MERRILL: Not the ones I have in front of me,
15 no. There's no objections the State has.

16 THE COURT: Do you want to give any additional
17 ones?

18 MR. MERRILL: No.

19 THE COURT: Listen to what I ask.

20 MR. MERRILL: No.

21 THE COURT: Okay. Does the defense wish to give
22 any -- wish to offer any instructions in addition to those
23 proposed by the Court?

24 MS. SCHUMANN: No, Your Honor.

1 THE COURT: Okay. All right. Yes, so your
2 theory instruction.

3 MS. SCHUMANN: Yes, Your Honor.

4 THE COURT: Okay. Okay. So theory instruction
5 by the defense is proposed by the defense will be given by
6 the Court indicating Mr. Bernal's theory of the defense that
7 H.S. falsified the allegations in this case to remove him
8 from her life because he was the primary disciplinarian in
9 the home and law enforcement coerced Mr. Bernal into
10 providing a false confession. And that will be given --

11 MS. SCHUMANN: Thank you, Your Honor.

12 THE COURT: -- as Instruction Number 14.

13 Also, let the record reflect that the Court is
14 going to give a limiting instruction in relation to the use
15 of the character evidence that was provided for other acts
16 during the commissions of these crimes.

17 The State to use for propensity evidence for the
18 purpose in that they could use it for the purpose of showing
19 that the defendant acted in conformity with that type of
20 evidence, the defense has requested that that instruction not
21 be given; is that correct?

22 MS. SCHUMANN: That is correct, Your Honor.
23 Pursuant to Mclellan V. State, 124 Nevada 263 2008, Nevada
24 Supreme Court case, defense has the right to weigh the

1 limiting instruction and that's -- that's the order we're
2 requesting.

3 THE COURT: Okay. The State is not objecting to
4 it, correct?

5 MR. MERRILL: We're not objecting, Your Honor.

6 THE COURT: All right. So that instruction will
7 not be given, but I'm going to mark it as Court's 3.

8 THE CLERK: Yes.

9 THE COURT: And I'm going to mark it, not given
10 at the request of defense counsel and I'm handing that to the
11 clerk.

12 Okay. So will counsel stipulate on the record
13 that the instructions have been settled in open court?

14 MR. MERRILL: The State does.

15 MS. SCHUMANN: Yes, Your Honor.

16 THE COURT: Okay. Does either party request that
17 the jury be instructed prior to argument?

18 MS. SCHUMANN: No, Your Honor.

19 THE COURT: You don't want the jury instructed
20 prior to your argument?

21 MS. SCHUMANN: Oh, yes. Yes, we do.

22 MR. MERRILL: Yes.

23 THE COURT: All right. So Nevada's law is really
24 funny. There's a statute that the jury gets instructed after

1 argument unless counsel waives that. It's a very interesting
2 little --

3 MR. MERRILL: I would rather give it.

4 THE COURT: Well, you can't argue the
5 instructions if the jury don't know what they are.

6 MR. MERRILL: Right.

7 THE COURT: All right. So -- so also you've been
8 provided form of verdict in this thick case for Count One,
9 Count Two and Count Three. Are there any objections to the
10 form of verdict to be provided to the jury?

11 MS. SCHUMANN: No, Your Honor.

12 MR. MERRILL: No, Your Honor.

13 THE COURT: Okay. That being said, we'll
14 reconvene in at 25 after 10:00. I know that says 11:00, but
15 it's actually 10:00 because I haven't changed my clock back
16 yet.

17 MR. MERRILL: Okay.

18 THE COURT: All right. So I'll give you guys
19 about ten minutes to set up and we will -- we will start with
20 your argument, Mr. Merrill.

21 MR. MERRILL: All right. Thank you.

22 THE COURT: Okay. Thank you. We're in recess.

23 (Whereupon, a brief recess was taken.)

24 THE COURT: All right. Anything to bring up to

1 the Court before we get the jury back in here?

2 MR. MERRILL: Nope.

3 MS. SCHUMANN: No, Your Honor.

4 THE COURT: Everybody ready?

5 MR. MERRILL: Yes.

6 THE COURT: Okay. Bring them in.

7 Do the parties stipulate to the presence of the
8 jury?

9 MR. MERRILL: Yes, Your Honor.

10 MR. KALTER: Yes, Your Honor.

11 THE COURT: All right. Ladies and gentlemen of
12 the jury, I'm about to instruct you upon the laws that apply
13 to this case. I would like to instruct you orally without
14 reading to you, however these instructions are of such
15 importance that almost every word is critical. Therefore,
16 it's necessary for me to read them to you from carefully
17 prepared written instructions.

18 The instructions are relatively long and
19 complicated. If they are not especially clear when I read
20 them please bear in mind when you go to the jury room you
21 will be able to take these written instructions with you so
22 that you can read and consider them more carefully.

23 20CR0099, State of Nevada versus Thomas Jason
24 Bernal. Instruction Number One, Ladies and gentlemen of the

1 jury, it is my duty to instruct you in the law that applies
2 to this case, and you must follow the law as I state it to
3 you. As jurors it is your exclusive duty to decide all
4 questions of fact submitted to you for the purpose of
5 determining the effect and value of the evidence.

6 In performing this duty you must not be
7 influenced by pity for the defendant or by passion or
8 prejudice against him. You must not be biased against the
9 defendant because he has been arrested for these offenses or
10 because charges have been filed against him or because he has
11 been brought to trial.

12 None of these facts is evidence of his guilt, and
13 you must not infer or speculate from any or all of them that
14 he is more likely to be guilty than innocent. In determining
15 whether the defendant is guilty or not guilty you must be
16 governed solely by the evidence received in this trial and
17 the law as stated to you by the Court.

18 You must not be governed by mere sentiment,
19 conjecture, sympathy, passion, prejudice, public opinion or
20 public feeling. Both the State and the defendant have the
21 right to expect that you will conscientiously consider and
22 weigh the evidence and apply the law of the case and that you
23 will reach a just verdict regardless of what the consequences
24 of such verdict may be.

1 Instruction Number Two, if in these instructions
2 any rule, direction or idea is repeated or stated in
3 different ways no emphasis thereon is intended by me and none
4 must be inferred by you. For that reason you're not to
5 single out any certain sentence or any individual point or
6 instruction and ignore the others, but you are to consider
7 all of the instructions as a whole and regard each in light
8 of all of the others. The order in which the instructions
9 are given has no significance as to their relative
10 importance.

11 Instruction Number Three, the defendant is
12 presumed to be innocent until the contrary is proved. This
13 presumption places upon the State the burden of proving by
14 competent evidence beyond a reasonable doubt every material
15 element of the crimes charged and that the defendant is the
16 person who committed the offenses.

17 A reasonable doubt is one based on reason. It is
18 not mere possible doubt but is such a doubt as would govern
19 or control a person in the more weighty affairs of life. If
20 in the minds of the jurors after the entire comparison and
21 consideration of all of the evidence are in such a condition
22 that they can feel -- that they can see they feel an abiding
23 conviction of the truth of the charge there is not a
24 reasonable doubt.

1 Doubt to be reasonable must be actual, not mere
2 possibility or speculation. If you have a reasonable doubt
3 as to the guilt of the defendant he is entitled to a verdict
4 of not guilty.

5 Instruction Number Four, an information is but a
6 formal method of accusing a person of a crime and is not
7 itself any evidence of guilt. In this case it is charged in
8 an information that on or between the dates of August 1st of
9 2018 and July 14th of 2019 the defendant committed three
10 offenses of sexual assault upon a child under the age of 16
11 not causing substantial bodily harm.

12 It is the duty of the jury to apply the rules of
13 law contained in these instructions to the facts of the case
14 and determine whether or not the defendant is guilty of the
15 offenses charged beyond a reasonable doubt.

16 Madam clerk, would you read the information
17 instruction, please, Instruction Number Five.

18 THE CLERK: The defendant in this case, Thomas
19 Jason Bernal, is being tried upon an information filed in the
20 Third Judicial District Court charging the defendant with the
21 following, Count One, sexual assault on a child under the age
22 of 16 years, not causing substantial bodily harm, a violation
23 of NRS 200.366 sub 3, sub B in the manner following:

24 That the said defendant on or between the 1st day

1 of August, 2018 to the 30th day of June, 2019 at or within
2 the County of Lyon, State of Nevada did willfully and
3 unlawfully subject another person who was under the age of
4 16 years to sexual intercourse and/or fellatio and/or other
5 sexual penetration against her will or under conditions in
6 which the perpetrator knew or should have known that the
7 victim is mentally or physically incapable of resisting or
8 understanding the nature of the conduct.

9 To wit, defendant digitally penetrated the vagina
10 of a known but unnamed juvenile, H.S. Date of birth 7-20
11 2004, all of which occurred at or near 610 U.S. Highway 95
12 Alternate, Yerington, Nevada.

13 Count Two, sexual assault on a child under the
14 age of 16 years not causing substantial bodily harm, a
15 violation of NRS 200.366 sub 3 sub B, in the manner
16 following, that the said defendant on or between the 1st day
17 of July, 2019 to the 14th day of July, 2019 within the County
18 of Lyon, State of Nevada did willfully and unlawfully subject
19 another person who was under the age of 16 years to sexual
20 intercourse and/or fellatio and/or other sexual penetration
21 against her will or under conditions in which the perpetrator
22 knew or should have known that the victim is mentally or
23 physically incapable of resisting or understanding the nature
24 of the conduct.

1 To wit, defendant digitally penetrated the vagina
2 of a known but unnamed juvenile, H.S. Date of birth 7-20
3 2004, all of which occurred at or near 610 U.S. Highway 95
4 Alternate, Yerington, Nevada.

5 Count Three, sexual assault on a child under the
6 age of 16 years not causing substantial bodily harm, a
7 violation of NRS 200.366 sub 3 sub B, in the manner
8 following, that the said defendant on or between the 1st day
9 of December, 2018 to the 28th day of February, 2019 at and
10 within the County of Lyon, State of Nevada did willfully and
11 unlawfully subject another person who was under the age of
12 16 years to sexual intercourse and/or fellatio and/or other
13 sexual penetration against her will or under conditions in
14 which the perpetrator knew or should have known that the
15 victim is mentally or physically incapable of resisting or
16 understanding the nature of the conduct.

17 To wit, defendant digitally penetrated the vagina
18 of a known but unnamed juvenile, H.S. Date of birth 7-20
19 2004 while rubbing her legs, all of which occurred at or near
20 610 Highway 95 -- U.S. Highway 95 Alternate, Yerington,
21 Nevada. The defendant, Thomas Jason Bernal, entered his plea
22 of not guilty to the charges.

23 THE COURT: Instruction Number Six, in every
24 crime or public offense there must exist a union or joint

1 operation of act and intention. Intention is manifested by
2 the circumstances connected with the perpetration of the
3 offense and the sound mind and discretion of the person
4 accused.

5 Instruction Number Seven, in order to prove the
6 commission of the crime of sexual assault on a child under
7 the age of 16 years, not causing substantial bodily harm, the
8 State must prove the following elements beyond a reasonable
9 doubt, that the defendant, Thomas Jason Bernal, two, did
10 willfully and unlawfully, three, subject a minor under the
11 age of 16 years, four, to sexual penetration, five, against
12 the will of the victim or under conditions in which the
13 perpetrator knows or should know that the victim is mentally
14 or physically incapable of resisting or understanding the
15 nature of his or her conduct.

16 Instruction Number Eight, sexual penetration
17 means cunnilingus, fellatio or any intrusion, however slight
18 on any part of a person's body into the genital opening of
19 the body of another, including sexual intercourse in its
20 ordinary meaning.

21 Instruction Number Nine, the word willful when
22 used in these -- in this criminal statute with respect to
23 conduct relates -- relates to an act which is done
24 intentionally, deliberately or designedly as distinguished

1 from an act done accidentally, inadvertently or innocent.

2 Instruction Number Ten, in order for a sexual
3 assault to be against the will of the victim the victim is
4 not required to do more than her age, strength, surrounding
5 facts and attending circumstances make it reasonable for her
6 to do to manifest opposition, considering the facts as you
7 find them relating to this case.

8 Instruction Number 11, physical force is not a
9 necessary ingredient in the commission of the crime of sexual
10 assault. The crucial question is not whether the victim was
11 penetrated by physical force but whether the act was
12 committed without her consent or her ability to consent.

13 Instruction Number 12, time is neither a material
14 nor an essential element of the offense of sexual assault
15 with a minor child and need not be proved precisely as
16 alleged.

17 Instruction Number 13, there is no requirement
18 that the testimony of a victim of sexual assault be
19 corroborated and her testimony standing alone if believed
20 beyond a reasonable doubt is sufficient to sustain a verdict
21 of guilty.

22 Instruction Number 14, Mr. Bernal's theory of the
23 defense is that Haley Smith falsified the allegations in this
24 case to remove him from her life because he was the primary

1 disciplinarian in the home, and law enforcement coerced
2 Mr. Bernal into providing a false confession.

3 Instruction Number 15, the evidence which you are
4 to consider in this case consists of the testimony of the
5 witnesses, the exhibits and any facts admitted or agreed to
6 by counsel. Statements, arguments and opinions of counsel
7 are not evidence in the case. However, if the attorneys
8 stipulate or agree as to the existence of a fact you must
9 accept the stipulation as evidence and regard that fact as
10 proved.

11 You must not speculate to be true any
12 insinuations suggested by a question asked a witness. A
13 question is not evidence and may be considered only as it
14 supplies meaning to the answer. Any evidence as to which an
15 objection was sustained by the Court and any evidence ordered
16 stricken by the Court must be entirely disregarded by you in
17 reaching your verdict.

18 Anything you may have seen or heard outside the
19 courtroom is not evidence and must also be disregarded by you
20 in reaching your verdict.

21 Instruction Number 16, the law recognizes two
22 classes of evidence. One is direct evidence, and the other
23 is circumstantial evidence. Direct evidence consists of the
24 testimony of every witness who with any of their own physical

1 senses perceived an act or occurrence and who relates what
2 was perceived.

3 All evidence that is not direct evidence is
4 circumstantial evidence, and insofar as it shows any act or
5 occurrence or any circumstance or fact tending to prove or
6 disprove by reasonable inference one side or the other an
7 issue it may be considered by you in arriving at a verdict.

8 The law makes no distinction between direct and
9 circumstantial evidence but respects each for such convincing
10 force as it may carry and accepts each as a reasonable method
11 of proof.

12 Instruction Number 17, the degree of credit due a
13 witness should be determined by his or her manner upon the
14 stand, his or her fears, motives, interest or feelings, his
15 or her opportunity to have observed the matter to which he or
16 she testified. The reasonableness or unreasonableness of the
17 statements he or she makes and the strengths or weaknesses of
18 his or her recollections.

19 If you believe that a witness has lied about any
20 material fact in the case you may disregard the entire
21 testimony of that witness or any portion of his or her
22 testimony which is not proved by other evidence.

23 Instruction Number 18, a witness who has special
24 knowledge, skill, experience, training or education in a

1 particular science, profession or occupation is an expert
2 witness. An expert witness may be given his -- may give his
3 opinion as to any manner in which he is skilled. You should
4 consider such expert opinion and weigh the reasons, if any,
5 given for it. You are not bound, however, by such an
6 opinion. Give it the weight to which you deem it entitled,
7 whether it be great or slight and you may reject it if in
8 your judgment the reasons given for it are unsound.

9 Instruction Number 19, neither side is required
10 to call as witnesses all persons who may have been present at
11 any of the events disclosed by the evidence or who may appear
12 to have some knowledge of these events or to produce all
13 objects or documents mentioned or suggested by the evidence.

14 Instruction Number 20, at times throughout the
15 trial the Court has been called upon to pass on questions
16 whether or not certain offered evidence might properly be
17 admitted. You are not to be concerned with the reasons of
18 such rulings and are not to draw any inferences from them.
19 Whether offered evidence is admissible is purely a question
20 of law.

21 In admitting evidence to which an objection is
22 made the Court does not determine what weight should be given
23 such evidence nor does it pass on the credibility of the
24 witnesses. As to any offer of evidence that has been

1 rejected by the Court you, of course, must not consider the
2 same. As to any question to which an objection was sustained
3 you must not conjecture as to what the answer might have been
4 or as to the reason for the objection.

5 Instruction Number 21, if during this trial I
6 have said or done anything which has suggested to you that I
7 am inclined to favor the claims or positions of either party
8 you will not suffer yourself to be influenced by any such
9 suggestion. I have not expressed nor intended to express nor
10 have I intended to intimate any opinion as to which witnesses
11 are or are not worthy of belief, which facts are or are not
12 established or what inferences should be drawn from the
13 evidence. If any expression of mine had seemed to relate an
14 opinion to any of these matters I instruct you to disregard
15 it.

16 Instruction Number 22, although you are to
17 consider only the evidence in the case in reaching the
18 verdict you must bring to the consideration of the evidence
19 your everyday common sense and judgment as reasonable men and
20 women. Thus, you are not limited solely to what you see and
21 hear as the witnesses testify.

22 You may draw reasonable inferences which you feel
23 are justified by the evidence, keeping in mind that such
24 inferences should not be based on speculation or guess.

1 A verdict may never be influenced by sympathy,
2 prejudice or public opinion. Your decision should be the
3 product of sincere judgment and sound discretion in
4 accordance with these rules of law.

5 Instruction Number 23, when you retire to
6 consider your verdict you must select one of your numbers to
7 act as a foreperson who will preside over your deliberation
8 and will be your spokesperson here in court.

9 During your deliberation you will have all
10 exhibits which were admitted into evidence, these written
11 instructions and forms of verdict which have been prepared
12 for your convenience. The forms which have been prepared are
13 for each count, and one must be signed for each count.

14 Your verdict must be unanimous. As soon as you
15 have agreed upon a verdict, have it signed and dated by your
16 foreman and then return with it to this room.

17 Instruction Number 24, if during your
18 deliberation you should desire to be further informed about
19 any point of law or hear again portions of the testimony you
20 must reduce your request to writing signed by the foreperson.
21 The officer will then return to the Court where the
22 information sought will be given you in the presence of and
23 after notice to the district attorney and the defendant and
24 his counsel.

1 Read backs of testimony are time consuming and
2 are not encouraged unless you deem it a necessity. Should
3 you require a read back you must carefully decide the
4 testimony to be read back so that the court reporter can
5 arrange her notes. Remember that the Court is not at liberty
6 to supplement the evidence.

7 Instruction Number 25, the Court instructs you as
8 follows: One, that in order to return a verdict each juror
9 must agree thereto.

10 Two, that jurors have a duty to consult with one
11 another and to deliberate with a view to reaching an
12 agreement if it can be done without violence to individual
13 judgment.

14 Three, that each juror must decide the case for
15 him or herself but only after an impartial consideration of
16 the evidence with his fellow jurors.

17 Instruction Number Four, that in the course of
18 deliberations a juror should not hesitate to reexamine his or
19 her own views and change his or her opinion if convinced that
20 it is erroneous.

21 Number Five, that no juror should surrender his
22 or her honest conviction as to the weight or effect of the
23 evidence solely because of the opinion of his or her fellow
24 jurors and for the mere purpose of returning a verdict.

1 Instruction Number 26, now you will listen to the
2 arguments of counsel who will endeavor to aid you to reach a
3 proper verdict by refreshing in your minds the evidence and
4 showing the application thereof to the law.

5 But whatever counsel may say you will bear in
6 mind that it is your duty to be governed in your
7 deliberations by the evidence as you understand it and
8 remember it to be and by the law as given you in these
9 instructions with the sole, fixed and steadfast purpose of
10 giving equal and exact justice between the defendant and the
11 State of Nevada.

12 Dated this 6th day of November, 2020. Given,
13 Honorable John Schlegelmilch, District Judge.

14 Okay. Ladies and gentlemen, now is the time
15 counsel may give their closing arguments.

16 Mr. Merrill, are you prepared to give your
17 closing argument?

18 MR. MERRILL: Yes, Your Honor.

19 THE COURT: Please proceed.

20 MR. MERRILL: Thank you.

21 Good morning, ladies and gentlemen. Thank you
22 for your attention throughout this trial. We greatly
23 appreciate it.

24 I went up her leg with CBD cream, and I

1 accidentally entered her. So evidently I've been fingering
2 Haley for since I think I said December, and I went ahead and
3 I let it slip in once. And I shut the door and I said
4 exactly what I said I said. So evidently I've been fingering
5 Haley for, since I think I said December or December because
6 that's when all this shit happened. And she goes, well, did
7 you do it. I went once on accident. I know it takes time to
8 break me down, to fucking make me say the truth. Those are
9 the defendant's words about his teenage stepdaughter, Haley
10 Smith, the words he made to the detectives.

11 We don't have to guess what happened here.
12 Accidents like these just don't happen. There's no
13 conspiracy theory where Haley is involved and Patricia is
14 involved and somehow the defendant is involved in the same
15 conspiracy theory. There's no manhunt or even a question of
16 whom the defendant is. There's no second or thirdhand
17 witnesses here.

18 What we have is a stepfather who molested his
19 stepdaughter. What we have is a grown man who has tried to
20 normalize a clearly inappropriate interaction with his
21 teenage stepdaughter. Massage of Haley's legs so close to
22 her private parts, so close to her vagina that a mere slip of
23 his hand allows for the penetration into her vaginal cavity.

24 What we have is the confession to detectives of

1 these massages of a sexual assault that a penetration took
2 place. Massages were on a consistent and regular basis.

3 Now, the defendant certainly tried to explain
4 away most of the damning parts of his statements that he made
5 to detectives and, of course, this is no coincidence.
6 However, the confession that he made to the detectives is
7 also in evidence. It's also something that you can consider,
8 not only the statements that he made here yesterday.

9 So what did he tell us back in October of 2019 to
10 the detectives. I said it over and over. We heard and saw
11 the video when Detective Messman was testifying to you two
12 days ago. You saw what the defendant said happened. Now,
13 was he held against his will while he talked to the
14 detectives? Was he forced to make a confession?

15 During opening statements the defense made it
16 seem like, it seemed like a smoke dark filled room with a
17 lamp swinging in the middle of the room, two detectives, one
18 standing over the defendant, one screaming, the other one
19 playing a good cop, trying to calm his partner down.

20 We didn't see any of that. We didn't see
21 anything thrown. In fact, what did the defendant tell us?
22 He was given food. He was given chips. He was given water.
23 He was allowed to go to the bathroom. The room normally,
24 typically lit as any normal room would be.

1 This defendant was caught sexually assaulting his
2 stepdaughter and admitted to it to Patricia before he had an
3 opportunity to think of an alternate story. He wants you to
4 believe that massage is just a massage. That sometimes
5 fingers slip and sometimes facts and stories change.

6 But what is impossible to be explained away is
7 the timeline in this case. Let me briefly go over the
8 timeline here. July 14th as I told you in opening, Patricia
9 received a text message from the defendant. He tells her to
10 come home. She comes home from work. As she gets home she
11 notices the defendant's bags are already packed. The
12 defendant takes her into the room. This is what Patricia and
13 the defendant tell us, they both confirm those facts.

14 Patricia then tells us inside the room the
15 defendant told her that he has been molesting, molesting
16 Haley. At that point the defendant leaves with his packed
17 bags. Now, two days later Patricia calls law enforcement,
18 two days. She's been married to this man for at least four
19 years, had known him much longer. Confused, perhaps she was,
20 not quite what sure what to do, perhaps she was.

21 But two days later she calls the deputies, calls
22 Lyon County Law Enforcement. Deputy Greenhunt, who testified
23 yesterday on the stand here, he told you what Patricia told
24 him. Patricia at that point said the exact same thing that I

1 described to you. Patricia told Deputy Greenhunt on
2 July 16th that the defendant had told her in the master
3 bedroom that he molested Haley. Now, that's July 16th.

4 I asked Patricia on the stand have you talked to
5 the defendant after that point. She told us no. She had no
6 other conversation with the defendant. Now, what's
7 remarkable is the defendant had an interview in October,
8 three months later, with the detectives. And why that's
9 remarkable is because what he told the detectives. It's so
10 identical to what Patricia said happened back on July 16th.

11 He told the detectives that he text Patricia.
12 Patricia came home. His bags were packed, same thing
13 Patricia just told us. He then took Patricia into the master
14 bedroom. He then told the detectives three months after this
15 happened the same thing Patricia said which was evidently
16 I've been fingering Haley for since I think I said December
17 or December because that's when all of the shit happened.
18 And she goes, well, did you do it. I went once on accident.

19 Now, if there's some grand conspiracy where Haley
20 made up these accusations, where Patricia is in on the
21 accusations, how does three months later when the defendant
22 has his own interview with the detectives tells the exact
23 same story. We know that's what he said. We have a video of
24 it. Detective Messman testified to it. The defendant

1 himself, when I asked him questions verified that he did, in
2 fact, say that.

3 But now the story has changed. Now, the story
4 from the defendant is this, yes, in fact, he did text
5 Patricia. He admitted he sent those text messages to her.
6 Yes, in fact, Patricia did come home on July 14th. Yes, in
7 fact, he took Patricia into the master bedroom. Yes, in
8 fact, his bags were already packed.

9 I am sorry. That's the alarm to pick up my
10 children from school.

11 In fact, his bags were packed. He confirmed all
12 of those things. He confirmed that he had a conversation
13 with Patricia. And he told us at that point that he was then
14 angry with Haley. There was something going on with the pool
15 and we heard that from Haley too. There was something going
16 on with the pool, but that's where the story changes.

17 Instead of the defendant telling Patricia I'm
18 angry about the pool. We have got to work this out. Haley
19 has typical teenager issues. That's not what happens. We
20 know that's not what happens because again he told the
21 detectives that a year ago. Patty told us that even before
22 the defendant met with the detectives, and then he left again
23 when confronted.

24 Now on the left side there, the defendant's

1 statements to detectives back in October of 2019. On the
2 right side, the defendant's statements at trial yesterday.
3 Now, he confirmed with us that text messages were, in fact,
4 sent. He confirmed for us yesterday that his bags were, in
5 fact, packed before Patricia even got home. It was confirmed
6 that they went into the master bedroom. Again, it was
7 confirmed there's a discussion in the master bedroom. The
8 defendant told detectives back in October that he molested
9 Haley.

10 Yesterday he told us he did not molest Haley.
11 Defendant confirms he leaves the residence. He confirms that
12 he massages Haley. In fact, everyone in the house receives
13 massages. The defendant's statements to the detectives,
14 while massaging Haley's legs he did sexually assault her.
15 Yesterday, while massaging Haley's legs he did not sexually
16 assault her.

17 So what do we believe? I asked the defendant
18 those questions and he told us he was being untruthful to the
19 detectives but yesterday he was being truthful to us.

20 Now, it's interesting though when you look at the
21 timeline of this, as he briefly discussed, July 16th, 2019,
22 Patricia tells Deputy Greenhunt who testified yesterday that
23 the defendant told her he was molesting Haley. Once that
24 statement is made you can't take that statement back. The

1 deputy testified that's what she said. Patricia testified
2 that's what she said when she was on the stand two days ago.
3 She's been consistent the entire time.

4 Now, October 21st, 2019, getting back to the
5 defendant's interview by the detectives he told that he
6 molested Haley. Admittedly, he said he slipped while he was
7 massaging her legs. Do you recall yesterday he indicated
8 that he would typically start down towards the calf and a few
9 inches above the knee is where he would typically stop. He
10 also told us yesterday that he was massaging her upper --
11 upper thigh area near her hip. Now, how does one just slip?
12 Those are not kinds of slips that are made, hymen or no
13 hymen.

14 Now, if you recall, Patricia had no conversation
15 with the defendant between July 16th and July 14th when he
16 left the house, went to Reno, and for sure October 21st of
17 2019 when he made those statements to the detectives. That
18 can't be explained away. How did those two match so closely?

19 It's because he, in fact, made those statements
20 to Patricia on July 14th. That's the only explanation. Now,
21 one year later the defendant tells us there was a
22 conversation in the room. It was about something about
23 Haley, and I did not say anything about being -- being
24 molested. I didn't do that. I didn't say that.

1 Now, when he was on the stand yesterday I asked
2 him a few questions. He discussed some rumors. There was
3 some rumors going around apparently at school in December or
4 January, December of '18, January of 2019, and the rumors
5 were maybe by Haley's boyfriend, I don't know, and the rumors
6 were that the defendant was molesting Haley.

7 Well, there was massages going on at that time.
8 That entire time there's still massages going on. I asked
9 him, okay, well, did you stop massaging Haley after those
10 rumors came out? No was his response. He continued to give
11 Haley massages even after that, a teenage stepdaughter. Not
12 only did the defendant inappropriately touch Haley on a
13 regular basis but he sexually assaulted her at least three
14 times. Haley told us that.

15 Haley told us it occurred sometimes five times a
16 week, between the massages and sexual assaults. Once on the
17 couch, once in the bedroom, a couple of times when her mom
18 was in the shower.

19 Now I want to talk about the couch incident that
20 Haley brought up and that was in July of 2018. Apparently
21 Owen was in the room, her younger brother. And there was
22 some discussion about kind of how that room is laid out and
23 what's going on. But remember what we learned from the
24 defendant? Everyone in that house was receiving massages,

1 including Owen. Owen would receive massages on a regular
2 basis. He had something going on. Patricia receiving
3 massages on a regular basis. She had some issue. And then
4 Haley, she was getting massages on a regular basis,
5 apparently her knees when she was younger would hurt. So she
6 had knee issues. So everyone in that house was receiving
7 massages, and that's what the two defense witnesses that
8 testified via electronic equipment told us. Massages were a
9 normal thing.

10 So Owen who is in the room that Haley told us
11 about when the sexual assault happened, playing a video game,
12 it's normal for massages. This is normal for these things to
13 happen.

14 I'm going to show you what has been admitted as
15 State's 4. This is one side of the layout of the house. You
16 got the TV off to the far left of the family room and the
17 bedrooms down that hall past the screen door there.

18 If you notice where the couches are in relation
19 to the TV there there's plenty of testimony that Owen for
20 sure likes his video games. We know he likes his video
21 games. And Haley could have told us that Owen had his
22 headset on that day. That's not what she told us though.
23 She told us he had no headset on.

24 And we're all adults here. During the course of

1 a massage on the couch that Haley told us about, the slipping
2 of a finger, what does that look like? What does that sound
3 like? He never said this was some sort of dark alley,
4 stranger, stranger grabs the person out of the alley. This
5 is a normal typical occurrence with the massages where Owen
6 is playing a video game, staring at a computer screen or a TV
7 screen, and the defendant places his finger inside of Haley's
8 vagina. That's what the testimony was.

9 Now, Haley testified there was a time that this
10 happened when she was in Ms. Wheeler's class. That was in
11 ninth grade, and she testified that it started. She got home
12 from school. The defendant started rubbing her legs. Again,
13 this is normal, massaging of the legs. That time, again, he
14 penetrated her vagina. I asked her did you ask for these.
15 Did you want this to happen. She told us no. This became
16 normal in the house. The massages would happen and
17 frequently he would sexually assault her.

18 Now, let's look at the additional layout of the
19 house here. I'm going to show you State's 7. This is a view
20 from the living room, and we can see down the hallway here,
21 and we know Haley's room is right there off to the right when
22 you open that screen door, and the couches are behind
23 actually Haley's wall. So door open or door closed you can't
24 see inside that room.

1 Dr. O'Donohue talked about seclusion. Haley told
2 us often times she would go into her room, close the door and
3 the defendant would follow her into the room. Seclusion, you
4 can't see between walls, behind walls. You can't see through
5 walls. That's seclusion. Taking away her cell phone is her
6 testimony. Grounding her, that's seclusion.

7 You heard from Jennifer McCann, who was the
8 interviewer that Haley went to from the Washoe Child Advocacy
9 Center. She told us that that's what Haley told her a year
10 and a half ago. She was in Ms. Wheeler's class in ninth
11 grade and that's what happens, one year ago, over one year
12 ago.

13 She testified about times when her mom was in the
14 shower. Again, no other adult present, the opportunity.
15 Owen is playing video games. He sexually penetrated her.

16 Now, again, the defendant talked to us about
17 these rumors that were going around in December 2018 to
18 January 2019. He told us he had a conversation with Patricia
19 and also with Haley. He put a stop to these rumors. It was
20 taken care of. Fast forward to July 14th, 2019. There
21 wasn't an attempt to stop anything. There wasn't an attempt
22 to stop if you believe the defendant that Haley was not
23 telling the truth. What did he do before Patricia even got
24 home? His bags were packed. He was ready to leave. He knew

1 something was going to happen.

2 Now, we heard some testimony from Dr. Davis
3 yesterday. She told us about false confessions, and she
4 specifically talked to us about this John E. Reid and
5 Associates, nine step method, actually pretty extensive that
6 she talked about that with us.

7 Now, when I had Detective Messman on the stand I
8 asked him specifically about John E. Reid and Associates. I
9 asked about that method. He told us I've never taken a
10 training. I'm not even sure I heard of that before.

11 I asked her, okay, well, let's talk about true
12 confessions. What about true confessions? What is the
13 percentage of true confessions. She didn't have a number for
14 us. She didn't give us any information on true confessions.

15 I asked her about DNA because DNA was talked
16 about. Now, certainly it makes sense if DNA is involved and
17 it's some sort of other case where a person is injured or a
18 person is or there's a homicide. There's DNA involved, okay.
19 I understand. Okay. What about true confessions. How did
20 true confessions line up with DNA? How often did those line
21 up? She didn't have an answer for us again.

22 Again, today Dr. O'Donohue, massages. I asked
23 him is that grooming behavior? The testimony I heard was,
24 yes, it certainly can be.

1 Now, I find it interesting that Patricia needs
2 the kids back. Patricia and the defendant get married.
3 Haley tells us that how did it start when he placed his foot
4 between my legs, pressed against my vagina while he was near
5 the computer and then everyone started getting massages.

6 Now, we heard from two Zoom witnesses here. What
7 did they tell us? They told us they moved out, one in 2017
8 and one in 20 -- August 2018. Now, you're going to be able
9 to take the jury instructions back with you, and the State
10 alleges that this didn't start until 2018, August 2018 when
11 the other witness or the other Zoom witness actually left the
12 house.

13 I want to go over a few jury instructions with
14 you. This is Jury Instruction Number Seven that you're going
15 to be able to take back with you. The State must prove each
16 one of those elements beyond a reasonable doubt. We must
17 prove the defendant, Thomas Jason Bernal, did willfully and
18 unlawfully subject a minor under the age of 16 years to
19 sexual penetration against the will of the victim or under
20 conditions in which the perpetrator knows or should know the
21 victim is mentally or physically incapable of resisting or
22 understand the nature of his or her conduct. All three
23 counts the State has alleged you must meet each one of those.

24 Again, we know it's the defendant. Haley told us

1 that. The defendant confessed to that to the detectives.
2 Willfully, unlawfully Haley told us it's not what she wanted.
3 We were told that she used her foot one time to push his hand
4 away. Haley told us her age. She's now 16, but she was
5 under 16 when this happened and sexual penetration against
6 her will.

7 Now, Instruction Number Eight, the sexual
8 penetration, however slight, a full finger does not have to
9 go in. It's however slight.

10 Instruction Number Ten, in order for a sexual
11 assault to be against the will of a victim the victim is not
12 required to do more than her age, strength, surrounding
13 facts, and attending circumstances make it reasonable for her
14 to do and manifest opposition considering the facts as you
15 find them relating to this case. What are the facts? We
16 know he's massaging her on a constant basis. We know that
17 the sexual assaults and massages happens at times almost five
18 days a week. Those are the facts.

19 Instruction Number 14, this is the defense's
20 theory, what do the facts tell us? Again, the defendant told
21 us he called Haley home or called or text Patricia home.
22 Patricia got home and went into the master bedroom. Patricia
23 told us that he told her that he had been molesting Haley and
24 he left.

1 July 16th Patricia told us that she called law
2 enforcement. She told them the same thing. Deputy Greenhunt
3 told us the same thing. Interesting enough, the defendant on
4 October 2019 says the exact same thing. Yesterday the
5 stories changed.

6 So, ladies and gentlemen, the defendant is guilty
7 beyond a reasonable doubt of three counts of sexual assault
8 of Haley Smith, his teenage stepdaughter. That's what the
9 facts have shown. That's what the evidence has shown.
10 That's what the defendant's confession stated.

11 When you take all of the jury instructions back
12 with you, when you deliberate, you all come to the same
13 conclusion that the defendant is guilty of not only one, not
14 only two but of three sexual assaults against his teenage
15 stepdaughter, Haley Smith. Thank you.

16 THE COURT: Okay. Ladies and gentlemen, let's
17 take a quick break, and then we'll get back to it. So we'll
18 take about ten minutes.

19 All right. During this break I'm going to get
20 some menus for lunch, okay, from Port of Subs. So we'll get
21 each of you an individually wrapped sandwich, okay. All
22 right. So we'll get some of those. You can just -- each of
23 you will get like a menu and circle what you want and get
24 them ordered and, you know, and then they should be here

1 sooner hopefully rather than later, okay.

2 But still during the recess we're about to take
3 you're admonished that it is your duty not to discuss amongst
4 yourselves or with anyone else any manner having to do with
5 this case.

6 It is your further duty not to form or express
7 any opinion regarding the guilt or innocence of the defendant
8 until the case has been finally submitted to you for
9 decision. You are not to read, view or listen to any report
10 in the newspaper, radio, television or internet concerning
11 this case nor allow anyone to read or comment upon them to
12 you or in your presence. This includes viewing any type of
13 social media related to this case.

14 You are not to investigate or attempt to obtain
15 any additional information about this case outside the
16 courtroom. Do not visit the scene or attempt any visitation
17 on your own. Do not do any internet searches. Do not read
18 any legal text or book regarding any issue raised in the
19 court.

20 Should any person attempt to discuss the case
21 with you or in any manner attempt to influence you with
22 respect to it you are to notify the bailiff who will notify
23 the Court, and I'll take care of it. We'll take about ten
24 minutes or so.

1 Okay. We're in recess.

2 (Whereupon, a brief recess was taken.)

3 THE COURT: Is everybody ready? Okay. Bring

4 them in.

5 Counsel, stipulate to the presence of the jury?

6 MR. MERRILL: Yes, Your Honor.

7 MR. KALTER: Yes, Your Honor.

8 THE COURT: Okay. Mr. Kalter, are you ready for

9 your closing argument?

10 MR. KALTER: Yes, sir.

11 THE COURT: Please come forward. Good morning

12 folks. Three days ago my co-counsel came before you in

13 opening statements and told you our job was to give you all

14 of the facts and specifically to not make up your mind until

15 you got all of the facts.

16 Now, all of the evidence is in, and we can talk

17 about it. The most important thing we learned in this case

18 was that Haley had clear motives to fabricate and lie about

19 these allegations. The bottom line, we learned from day one

20 when she was introduced to T.J. and moved back with her

21 biological mother that she was not happy about it and

22 certainly not happy about living with a brand new stepfather

23 that had ability to discipline her.

24 We learned from Haley that she's 16 years old and

1 finally got her wish which is to move back with her
2 biological father. Now, she told several things during her
3 testimony that several other witnesses contradict and even
4 herself, and there's a jury instruction, Number 17, that
5 deals specifically with this. The degree of credit due a
6 witness should be determined by their manner upon the stand,
7 including his or her fears, motives, interest or feelings.
8 It goes on to say the reasonableness or unreasonableness of
9 the statements.

10 And, finally, if you believe that a witness has
11 lied about any material fact in this case you may disregard
12 the entire testimony of that witness or any portion of his or
13 her testimony which is not proved by other evidence. That's
14 Instruction Number 17. So let's delve in to Haley's
15 testimony and contradictions.

16 First, chores, Haley told you on the stand that
17 she always does her chores. There's never an issue there,
18 but we heard not only from T.J. and not -- but from Patty as
19 well and from Marlene that not doing her chores was a problem
20 in this household, and these would turn into temper tantrums
21 and storming off into her room and that is the truth.

22 She lied to her parents about breaking up with
23 C.J. After getting caught under the bleachers at school they
24 forced her to break up with him. She said she would but

1 didn't for two weeks until she was caught by T.J. messaging
2 this boy.

3 And, importantly, one of these is that she never
4 asked for massages. That was her testimony, and we know from
5 Marlene and T.J. and most importantly from Haley that that
6 wasn't true. And how do we know from Haley? Because the
7 forensic interviewer, Jennifer McCann, told you she said that
8 very thing to her, that I would request the massages of T.J.,
9 and then two days ago tells you no way.

10 When I asked her about it she had various
11 excuses. At one point said her arms were too short to do
12 them herself. It makes no sense. And then getting into the
13 details about the alleged abuse, she told Jennifer McCann,
14 the forensic interviewer, that this only ever took place in
15 her bedroom yet got on the stand and described to you an
16 incident that she alleges happened in the living room with
17 her brother five feet away. Both of those things cannot be
18 true and they both could be false. So that's not
19 consistency.

20 She told Jennifer McCann it always happened right
21 before bed. Yet we learned of this -- this last incident on
22 July 14th she alleges happening during the day. Jennifer
23 McCann specifically asked her if anything, this wasn't just
24 an omission by Haley, she asked her did this ever happen

1 outside of your bedroom. Answer no. Did this ever -- and
2 then she actually followed up and said did this ever happen
3 anywhere else in your bedroom. So the idea of anything else
4 outside of the bedroom Haley made crystal clear upon
5 questioning that that never happened. Now tells you on the
6 stand of this incident with Owen where Owen was present.

7 It makes no sense that the alleged final incident
8 that the same day leads to T.J. being -- removing himself
9 from the house and the cops getting called two days later
10 would be one she would forget when she talked to Dr. -- to
11 Jennifer McCann. That makes no sense.

12 And then there's the frequency of the incidents.
13 She testified and told you this happened at least five times
14 a week for the last two years. For the last two years she
15 was with T.J. Yet when two days after the -- T.J. left the
16 house on December 16th, 2019, when Deputy Greenhunt came to
17 the house, Patricia who had spoken to Haley told him first it
18 had been happening for six months. Then went and talked to
19 Haley and came back and said it was a year and now it's grown
20 to two years.

21 And then there's the rumors after the parents
22 made her breakup with the boyfriend. She sat on the stand
23 two days ago and told you I know nothing about that. I heard
24 nothing about that. Yet you heard from both Patty and T.J.

1 that these rumors were a real thing going -- going on. T.J.
2 -- Owen is the one that told T.J. about them, and he then
3 confronted Haley and told his wife.

4 She stood on the stand under oath and told you,
5 well, I don't know anything about that. And we learned that
6 her mom believed T.J. and not her daughter and you can use
7 common sense. Why does one person believe someone and not
8 another?

9 And then there was the residence. I asked her
10 did anyone else ever live with you and T.J. and Patty and
11 Owen. No. You sure? No. But we learned that Marlene Nish
12 lived there in the same household, had dinner with them for
13 two years and that Logan, who is actually a school teacher in
14 the house, was there for five months. Yet she told you no.

15 So back to July 14th, 2019, there's two very
16 contradicting stories of the events of that day. You have
17 Haley's rendition of the events regarding her birthday party
18 coming up the next week in this pool. That she was mad and
19 annoyed because no one in the household ever does anything.
20 All they do is talk about it. And that Mr. T.J. was so lazy
21 he told Owen to do it, and never once did Owen go out there.
22 Her version of events are logistically unbelievable and
23 contradicted by herself.

24 We learned from T.J. that he and Owen were

1 building the frame of the pool. They got three quarters of
2 the parts done, and she wouldn't come out to help. You can
3 judge based on all of the evidence you heard of what's going
4 on in this house and how people do and do not do chores what
5 the truth is.

6 She claims on that day in direct contradiction to
7 what she told Jennifer McCann that this never happened
8 outside of her bedroom, that she's on the couch. Owen is
9 playing video games five feet away, no blanket covering and
10 that T.J. took this opportunity to finger me. She claims
11 this lasted five to ten minutes. I would ask her, did you
12 get up? Yes, I did. No, I didn't. You saw the testimony.
13 She then goes on to say he was actually inside her for one to
14 two minutes before she told him to stop. That was her
15 testimony two days ago. Her testimony wasn't it just slipped
16 in. So if that's a theory that the State is -- is looking at
17 that's not what she even said. That's not seclusion. That's
18 asking to get caught and that's not how real sexual assault
19 happen. And, again, this is the last alleged assault and
20 doesn't remember it.

21 Now, we gotta talk about the logistical aspects
22 of these allegations, and I'm sorry to get somewhat graphic
23 but these are serious charges and we got to go there. The
24 State would make it seem as if putting a finger into an

1 unconsenting person's vagina, and this person is clothed, is
2 something that just happens easily nor -- or even to continue
3 digitally penetrating a clothed person that's not consenting.
4 That doesn't make sense in reality. If someone didn't want
5 that to happen they would move. There's all kinds of way to
6 do it, and I'm not here saying it happened.

7 But I'm saying logistically what she is saying
8 doesn't square with reality. He was fingering me for one to
9 two minutes. That he could actually keep his finger inside
10 her with clothes on for one to two minutes, think about that.
11 That doesn't square with reality.

12 And when it came to avoidance and I asked her
13 about that with regards to the July 14th, 2019 incident that
14 she now alleges, why didn't you get up and get away when T.J.
15 was coming. And I had this in quotes because it jumped out
16 to me. She said I didn't think anything was going to happen.
17 I didn't think anything was going to happen. Now, how does
18 that possibly square when you're alleging this is happening
19 five or six times a week for the last two years? I didn't
20 think anything was going to happen because nothing happened.

21 We heard about the incidents with mom. She's in
22 the shower. Owen is there. One occasion she talked about
23 Owen knocking on the door. Family members having free reign
24 in the house. That's not seclusion. That's asking to get

1 caught, and that she was never taken to any secluded areas.
2 T.J. had plenty of access to her because mom worked so much
3 that he had that opportunity.

4 And then she says no opportunity to tell mom.
5 Well, that's simply false. How do we know that? We know
6 that from Patty. In fact, that there was a couple of times
7 she tried to get her to talk on car rides. T.J. wasn't
8 there. She did not talk because there was nothing to talk
9 about. The two times these allegations came up were in
10 direct response to grounding, phones being taken away and
11 your boyfriend no more.

12 She also made an odd comment that on July 14th,
13 2019, four days -- ten days after the 4th of July she was
14 worried about school and had stressed over exams. She was
15 mad no one would set up the pool for her birthday. She's not
16 telling the truth there, folks.

17 Now, you didn't hear from Owen. You have what
18 you have. But what makes sense in light of all of the
19 evidence is based on all of the testimony T.J. -- T.J.'s
20 story regarding July 14th makes sense. Haley, in typical
21 fashion, not wanting to help out, not even for her birthday
22 party, when confronted and her phone is taken from her, she
23 throws another tantrum and this time threatens to tell her
24 mother, threatens to tell her mother you've been fingering

1 me.

2 In response to taking her phone, in response to
3 discipline, in response to not getting her way the State has
4 alleged three particular incidents. Each one is one of the
5 charges. All of which Haley somehow could testify and
6 articulate some sort of narrative on the stand. That doesn't
7 make sense in the context of the fact that she says this
8 happened five to six times a week for two years.

9 There's nothing -- if that's true, what is
10 distinguishable about these two particular incidents she's
11 claiming to describe a narrative for? Perhaps the final one
12 in July would make sense that you would remember that because
13 of the events of T.J. leaving and getting the house to
14 yourself. But then, again, she contradicts herself because
15 she tells Jennifer McCann that nothing like that ever
16 happened. A couple of months after T.J.'s removed, the
17 interview happened, three months I believe.

18 So turning to two of the maybe focuses of the
19 State's case, number one, was the conversation between T.J.
20 and Patty on July 14th and number two the interrogation at
21 the Silver Springs police station. So let's start with
22 number one, Patty, no one is coming before you to dispute
23 that when Patty came home T.J. and her went into their
24 bedroom and T.J. said so evidently I've been fingering Haley

1 since December. No one disputes that. Because that's what
2 Haley was threatening T.J. with.

3 And now you got to look at this in the context of
4 their relationship. What has happened since Patty blew off
5 the rumors six months ago in July 14th? Their relationship
6 had grossly deteriorated, and she was staying out late after
7 work. T.J. is frustrated, home with the kids, staying out,
8 drinking, gambling. She didn't want T.J. in her life
9 anymore.

10 In fact, we learned from the Aunt Teresa who went
11 over there the day that T.J. left that it didn't seem like a
12 somber occasion. She testified that Haley was happy,
13 laughing, trying to get rid of the passwords off T.J.'s
14 computer. So there were no tears noticed. Patty wanted them
15 out.

16 Now, the fact that T.J. packed his bag before
17 this conversation with Patty makes perfect sense. He
18 explained it. I was getting so fed up. I was hurt, fed up.
19 My wife doesn't come home from work. I'm taking full-time
20 care of my stepchildren. I don't have my own kids, and now
21 I'm dealing with this accusation again. He had his bags
22 packed and depending on how that conversation was going to go
23 with her, he would leave or not leave.

24 And in evidence are text messages leading up to

1 her coming home. You guys should look at them when you go
2 back there because there's all of these smiley and kissy
3 faces and I love you. I love you and mostly from T.J. to his
4 wife.

5 And a person that's asking their spouse to come
6 home to tell them that they're molesting their daughter, does
7 that make sense that they would be texting that kind of
8 stuff? There's no gravity of the moment in that. That is
9 come home. We got to discuss something. Love you. I'm
10 hoping this is going to go well. Haley is making up stories
11 again, not text messages from I'm going to tell you that I'm
12 molesting your daughter.

13 So let's jump to the interrogation because that's
14 what it is, and this is not about the detectives being bad.
15 They were doing what they were trained to do in Lyon County.
16 But no question prior to their interview, their interrogation
17 rather of T.J., they had their minds made up. As detectives
18 you would think they would want to come to the truth and
19 explore all avenues, but their mind was clearly made up.
20 They wouldn't believe him.

21 And as we've learned officers are given,
22 especially detectives and interrogators incredible
23 psychological tools and strategies to come to one result, an
24 admission, a confession, and all of what they are taught is

1 to lead to that. And the fact that the one detective,
2 Detective Messman, had not heard of the Reid method, what
3 Dr. Debra Davis said is that all interrogation methods stem
4 from the Reid method, not that every law enforcement agency
5 uses that specific method.

6 But we learned from yesterday's presentation
7 about how the training may have gone too far. Yes, you want
8 to bring criminals to justice and get confessions and hold
9 people accountable, especially for sex crimes. But in this
10 zealous advocacy to do that there's been some overreach. In
11 clear cases of false confessions, because these tools are so
12 powerful the psychological strategies employed. It's real,
13 and it happens and we know, no question, because of DNA it
14 happens, and it's dangerous.

15 I know Dr. Debra Davis' presentation was long,
16 and I thank you for your patience in listening to it
17 yesterday, but it was so critical in this case. It really
18 is. So much of the State's case is focused on this. That I
19 know it was -- it was hard at the end of the day, but thank
20 you for your patience, but you know how important it was.

21 Debra Davis is clearly one of the top experts.
22 She's testified all over the country, instructing law
23 enforcement. And through her we -- we found out how a false
24 confession happens and to start she talked about the average

1 length of interrogations based on a study.

2 The average length of an interrogation is two
3 hours, but you have to look deeper into the numbers because
4 80 percent of interrogations are less than 30 minutes and
5 95 percent of interrogations are with one hour. So those
6 other percentages obviously are very long in order to make
7 the average two hours.

8 The interrogation of T.J. was almost five hours.
9 And the false confession or admission didn't happen until the
10 final 30 minutes of that interrogation, not in the beginning
11 but at the very end when he was fatigued, felt hopeless, felt
12 trapped, couldn't get a cigarette.

13 We learned yesterday about the three broad phases
14 of interrogation. Establish hopelessness. I'm not going to
15 be able to get out of here. I'm not going to be able to
16 leave. They don't believe me. No matter for four hours of
17 telling them the truth they don't believe me. The
18 interrogator then sells the confession as the best
19 alternative. That definitely happened here, right? Telling
20 them that if you confess the D.A.'s and the judges are going
21 to give you leniency. And if you don't, they are going to
22 bring down the hammer.

23 And then the third phase is to finally get some
24 type of confession with specific details such as maybe it was

1 an accident. Maybe it was an accident. Maybe it was an
2 accident. Five, six times Ms. Schumann went over to the
3 transcript of the interview of the interrogation with them
4 five or six times.

5 And we learned about the pathways to a
6 confession. How does it happen? How do you go from an
7 innocent man, walking in, being interrogated to giving a
8 false confession? Well, there's the establishment of
9 distress and the need to escape and she also talked about
10 preexisting stress. Here you got a guy who is out of his
11 home. His wife and him are done almost, going through --
12 probably headed for a divorce. He's being alleged to have
13 done these things. You're walking in stressed, and that
14 stress doesn't go away when the people you're telling your
15 story to won't believe you.

16 And the longer it goes, the longer it goes the
17 more the person breaks down. We learned all about that.
18 There's lots of tools and methods. And finally you're unable
19 or unwilling to resist the interrogator anymore because
20 you're fatigued mentally, physically fatigued.

21 And we learned how T.J. had unique
22 vulnerabilities. That he's in a social category for just
23 being a stepfather, the idea that a biological father would
24 be less likely to do something like this. So he fits into

1 that very category as well.

2 And if you put up the slide Debra -- Dr. Davis
3 had, T.J. was aware of the stereotype. The interrogators
4 were aware of it. They discussed it and the accusations of
5 apparently a credible victim. So there was one time, and
6 this was played for you on the video, where Detective Messman
7 even said I got a 13-year-old or 14-year-old girl making
8 these accusations and vouching for her and not believing him.
9 That he somehow was not credible. The expectations of losing
10 the he said she said dispute they are not going to -- and
11 this all builds to the psychological wearing down.

12 This person doesn't believe me. The judges, the
13 D.A.'s they are going to put the hammer down on me. I can't
14 win the he said she said. I'm trapped. And this is where it
15 all happened right here in the Lyon County, Silver Springs
16 Sheriff's Department, not in T.J.'s home, not at a Starbucks,
17 not at a neutral location. And we know the investigators
18 already made their mind up because they didn't believe a SART
19 exam was necessary. They didn't -- they didn't believe that
20 any forensic testing was necessary. And when Detective Dues
21 was asked about it on the stand his excuse was that the
22 statute only calls for slight penetration.

23 Folks that is inexcusable. They are to get to
24 the truth, and we have a child here alleging that for two

1 years against her will, I'm sorry, but that someone is
2 ramming their fingers in her vagina and he doesn't want to
3 check for scars, for scratching, for any type of trauma.
4 This is inexcusable because they had their mind made up and
5 they went into this interrogation with their mind made up,
6 not to get to the bottom of it.

7 And then they tried to tell you they were sending
8 her to a neutral place to be interviewed, a neutral place
9 funded by the Washoe County D.A.'s office. And I asked
10 Jennifer McCann, why didn't you ask this. Why didn't you ask
11 this to try and get to the truth of it. How much penetration
12 was there. Nowhere in that interview was that explored, and
13 that's the only thing Detective Dues reviewed. It's
14 unacceptable and the State has the burden of proof as you
15 well know. These accusations absolutely warranted forensic
16 follow-up and a SART exam.

17 We know from the studies, folks, that a huge
18 percentage of the exonerations, a substantial percentage
19 involve convictions involving false confessions, example
20 after example. And in this room here in Exhibit 19, they put
21 on the stress. There was distress. There was prestress.
22 There was a minimization of the actions by Detective Messman.
23 Oh, that thing or maybe it was just an accident. Maybe you
24 didn't mean to do it. He did that five or six times.

1 And then they got him unable to resist. He had
2 to ask for bathroom breaks. Detective Messman is a big guy,
3 both of them are. Standing right there, T.J. told you he
4 couldn't have gone to the bathroom and walked out without
5 going by him, without having a confrontation, not necessarily
6 a physical confrontation but having to deal with this officer
7 and no cigarette for two and a half hours. He tells you he
8 smokes a pack a day. He tells you how he feels when he goes
9 longer than his body is used to having nicotine.

10 And the officers knowing he needed a cigarette
11 pushed him for another two and a half hours until he finally
12 gave them just enough. Okay, then fine, it was an accident.
13 And then what happened? He got to go outside and have three
14 cigarettes. Hmm, wow. They convinced him that the child was
15 more believable. What you're telling me is not the truth,
16 that D.A.'s and judges will favor you and give you leniency.

17 The interrogation of T.J. itself could be a Debra
18 Davis slide. Dr. O'Donohue and Dr. Piasecki, you guys
19 actually got to hear from three UNR professors, excellent
20 experts, all three of them, in this case which is pretty
21 neat.

22 Dr. Piasecki talked about delays. That delays
23 are not necessary, indicative that something didn't happen,
24 that people for different children for different reasons

1 delay reporting, but she gave mostly examples of I like this
2 person, and I don't want my family to fall apart and things
3 like that. Well, Haley never liked T.J. She wanted him out
4 of the house. So that doesn't really square. And even
5 Dr. Piasecki delays happening, delays happening of course
6 don't make the allegations true.

7 And she talked about trauma, much like
8 Dr. O'Donohue, PTSD, avoidance, nightmares, hypervigilance,
9 exaggerated startled response and avoidances, especially of a
10 teen. And none of those symptoms of trauma were evident in
11 this case, not even avoidance. There's no evidence of these
12 types of things. And as we learned they are much more likely
13 to be there if the trauma is consistent, right?

14 And most important, I asked her at the end of her
15 testimony, Dr. Piasecki, whether it was typical for an
16 assault, an actual sex assault victim to tell their
17 perpetrator I'm going to report you to someone else before
18 actually reporting it. And, of course, she was kind of
19 startled at it, hadn't gotten that question before, but
20 that's the facts of this case. Nobody disputes she said to
21 T.J. I'm going to tell my mom. And Dr. Piasecki had never
22 seen that or heard the question.

23 Dr. O'Donohue talked about seclusion and the
24 State touched on it in their closing argument. Seclusion is

1 getting the person away from a situation where you can get
2 caught is what it boils down to. T.J. had all the
3 opportunities in the world to seclude Haley, and there's no
4 allegations of seclusion. You got Owen walking around,
5 knocking on the door if it was closed. The door is open.
6 Mom is in the shower. Owen is playing video games five feet
7 away. There was no seclusion that these experts see.

8 And, again, the symptoms of PTSD, this is
9 important guys. No evidence of nightmares. No evidence of
10 depression. Her grades have been great, and that's awesome
11 for Haley. No avoidance of the perpetrator. And that teens
12 have more ability to avoid because they have a larger
13 cognitive ability to understand the situation. A
14 four-year-old doesn't know they are being abused. A
15 15-year-old does, and they want to avoid this trauma.

16 And the question of grooming in this case,
17 Dr. O'Donohue made it very clear, grooming is not when the
18 alleged victim is asking for the massages. In fact, we had
19 evidence in this trial that even after, between January of
20 2019 and July 14th of 2019 she continued to ask for massages.
21 This wasn't grooming. He gave massages to Owen. He gave it
22 to his wife. This was not grooming. Dr. O'Donohue told you
23 what grooming is. Here's five bucks. Don't tell your mom.
24 It's all right. We'll go watch the R rated movie. Don't

1 tell your mom. That's grooming.

2 So, folks, in conclusion the State simply has not
3 put on sufficient evidence to sustain this man's guilt beyond
4 a reasonable doubt. Why because it doesn't exist. There
5 were clear motives to lie and fabricate and want T.J. out of
6 the house by both his wife and Haley. You have no DNA. No
7 forensic, no physical evidence to corroborate any of this.
8 The State has the burden of proof.

9 And I come back to this, just listen to Haley
10 regarding her allegation of assault on 7-14-20 and why she
11 didn't see a need to avoid T.J. I didn't think anything
12 would happen. I didn't think anything would happen after now
13 alleging five times a week for two years.

14 The State will get up here and try and
15 rehabilitate its case, but there's no more evidence coming
16 your way, folks. That's it. You have it all. And jury
17 selection, you each agreed to afford T.J. the presumption of
18 innocence unless the State met its burden of overcoming that
19 by proving each element of the crime it actually happened
20 beyond a reasonable doubt. They have not done that in this
21 case and, therefore, the only just verdicts are not guilty.
22 If you apply the laws that have been given to you in the
23 instructions to the facts and evidence you received in this
24 case it's not guilty.

1 Thank you so much for your time during this week
2 and your patience.

3 THE COURT: Mr. Merrill, rebuttal?

4 MR. MERRILL: Yes, Your Honor. July 14th, 2019,
5 sexual assault on the couch. The defendant was not only
6 asking to be caught on the couch on July 14th of 2019, he
7 caught himself. He's the one that texted Patricia to come
8 home. He's the one that told Patricia that he had been
9 molesting his daughter -- her daughter. That's the same
10 report that she told the deputy two days later.

11 And how does that match four months later when
12 the defendant goes in, tells the detectives it's identical.
13 You can't get around that. That's the facts. You're going
14 to be able to take that video back. That's what he says.
15 That's what Patricia tells us. That's what Deputy Greenhunt
16 told us that Patricia told us.

17 There wasn't some other factual scenario that he
18 came up with at that point. It was the same factual scenario
19 that Patricia told us about on July 16th. Coincidence? That
20 same thing, the same words and I shut the door. I said
21 exactly what I said. So evidently I've been fingering Haley.
22 Who says that for since I think December or December because
23 when all this shit happened. And this is, again, where they
24 are both being consistent, his wife. And she goes, well, did

1 you do it? And he goes once on accident.

2 The fact is, like he told us he wasn't being
3 truthful because it happened more than once and it wasn't an
4 accident. And there's -- there's this idea that there's some
5 sort of marital strife going on and -- and Patricia is out
6 doing who knows what and causing all kinds of problems and
7 the defendant, you know, he's home with the kids, not
8 working, just taking care of all of the kids and Patty is
9 working.

10 Well, let's look at the text messages.
11 Peek-a-boo. I love you. That's from Patty. Are you alive.
12 Checking in with her husband, the defendant. The defendant's
13 response, my phone didn't tell me again I had messages. Love
14 you too. Trying my luck, okay. Love you. K, babe. Hurry
15 home, please. We need to talk. Love you. That's the text
16 messages. You have them. That's the testimony. You can
17 take that back with you.

18 The idea there's some sort of grand conspiracy
19 where mom and child got together and probably defendant got
20 together because he confessed about the same thing, got
21 together and stated the same thing that he had been molesting
22 Haley is just -- it just doesn't add up.

23 I want to show you Exhibit 19. Detective Messman
24 touched upon this at his testimony. Defense laid these up

1 there on the table and you can see his hands are there on his
2 leg. Remember Detective Messman told us, this is what
3 defendant described to what he did to Haley that day.

4 Remember, this is what he told Detective Messman that she had
5 on these really cool big pants, pajama type pants. This is
6 on the video you can take back with you, Exhibit 20. She had
7 these cool big pants, and he started rubbing her legs down by
8 her ankles, and he was underneath the pants, rubbing her legs
9 and he got higher and higher and oops, accidentally he
10 slipped maybe on a piece of paper or something is what he was
11 saying. The idea that accidents like that happen is just --
12 they don't happen.

13 I asked him when he was on the stand about that
14 same situation. He said, yeah, that happened but this time I
15 wasn't underneath her pants. This time I was over her pants.
16 Okay. I think if you want to believe that, how does the
17 finger penetrate? At what point do you believe him? Do you
18 believe him in October of 2019? Did you believe him
19 yesterday?

20 Haley testified that every time she told her
21 mother the defendant came in standing over her. Haley is a
22 typical teenage girl, normal. Her life is not perfect. I
23 don't think anyone claims that. It wasn't normal. It's what
24 the defendant did to her. That's what this case is about.

1 If you have the idea that Patty's relationship
2 was falling out and she conspired with Haley, it doesn't bear
3 out. Again, not to beat a dead horse, it doesn't work. You
4 can't go back in time. The statements were made. They were
5 made because they were true. The defendant talked -- the
6 defense talked a little bit about the experts. I asked them
7 if they provided any kind of an opinion on this case. They
8 said they didn't provide any kind of opinion on this case.
9 It's purely educational.

10 But we do remember Dr. Piasecki telling us that
11 stepfathers according to studies are seven times more likely
12 to sexual abuse their stepdaughters. Avoidance, yeah, she
13 told us she went into her room constantly to get away from
14 him. Closed the door.

15 Ladies and gentlemen, you have the evidence. I
16 appreciate you coming down here, spending time with us.
17 Analyze the facts. Analyze the evidence. You'll come to the
18 same conclusion. The defendant is guilty on three counts of
19 sexual assault of Haley Smith. Thank you.

20 THE COURT: Okay. Ladies and gentlemen, all
21 right, the jury may take with them into the jury room all of
22 their papers and other items which have been received as
23 evidence in this case. You'll get the written instructions
24 from the Court. Of course you can take your notes back now,

1 okay.

2 So the jury may request through the bailiff
3 further information on instruction. From this point forward
4 though, any request or questions must be made by the
5 foreperson on behalf of the jury. So as I instructed you
6 previously it's the first thing you pretty much need to do
7 select amongst yourself who is going to act as foreperson,
8 okay, and that is the only person that can communicate with
9 the bailiff until deliberations are complete, okay?

10 If you do have a question or anything like that
11 the foreperson needs to sign it. Print that name too,
12 please, and hand it to the bailiff. There will be bailiffs
13 positioned on both sides of the doors or law clerk or
14 somebody to make sure you have no interference during the
15 time of your deliberation.

16 If you do wish to view any of the videos we'll
17 provide those to you with a computer, okay, so that you can
18 watch them on a computer. We don't have any video,
19 audio/video stuff in the -- in the actual jury room, but you
20 certainly would be able to view them on a computer. So if
21 you want to see them we will certainly get them to you just
22 request that through the bailiff as well, okay.

23 Cell phones are off from now on, okay. You do
24 not turn them on. You do not go on-line, okay. Some judges

1 just take them away, all right. I'm not that kind of judge.
2 I trust you guys. Just turn them off, okay. Don't look up
3 anything. Even if you think it's a name, it means nothing,
4 all right. Even if you need an explanation as to a
5 definition, you need to ask it through your foreperson to the
6 bailiff, okay.

7 So you're allowed to take breaks, okay. But if
8 you take a break you must all take a break. That means you
9 stop deliberations. You don't discuss the case during the
10 break, especially if somebody leaves the jury room to, you
11 know, take five minutes or whatever, okay. So when you do
12 take a break, decide to take a break one way or another you
13 all have to take a break, okay.

14 So, like I said, you'll be provided everything
15 that was admitted into evidence in this particular matter.
16 So and, like I said, you'll be provided the video at your
17 request. You'll get a computer in there, and you can have
18 videos that were admitted into evidence.

19 So your lunch will be here soon I hope. I guess
20 they are getting the order ready, and there's a lunch mob
21 over there. So I'm -- I hope it gets here soon. As soon as
22 we get it, we will get it to you. Apparently my staff was so
23 on top of it they already previously given you all of the
24 menus before I even told you about it and I thought I was

1 going to give you some good news. All right. So thank
2 goodness I have a good staff, right.

3 So now I don't tell you not to talk about it
4 anymore. Now it's your time to go back there and talk about
5 it, okay.

6 As for the alternates, you can hang around for
7 your sandwiches. If you wish to go home that's okay. But
8 you need to leave a number at the clerk's office where you
9 can get immediately -- they can immediately get in touch with
10 you folks, okay.

11 We will also let you know when the jury has
12 concluded and when you're released. But for you folks it
13 continues to be your duty not to discuss your case with
14 anyone, okay. That you should not -- you do not -- you have
15 a duty not to form or express any opinion regarding guilt or
16 innocence at this point, okay, until you are called to
17 deliberate, okay.

18 You are not to read or view or listen to any
19 reports in the newspaper, radio, television or internet
20 concerning this case. You're not to discuss it with anyone.
21 You don't let anyone read or comment about it to you or in
22 your presence. You don't view any kind of social media.
23 Don't investigate anything. Don't attempt to obtain any
24 information. You two don't go on-line. I'll let you leave

1 your cell phones on if you want. Don't go to the scene or
2 attempt any investigations.

3 Don't read any legal text or anything else in
4 relation to any matters that might have been brought up with
5 the Court. If anybody tries to talk to you about this case,
6 continue to call the Court. Notify the bailiff if you're
7 still in the courthouse. There will be a couple of bailiffs
8 that I'm going to charge here in a minute to take charge of
9 the jury. So if anything happens advise the bailiff or the
10 court clerk and they will let me know, all right.

11 So the alternates at this point are free to
12 leave. Okay. So why don't you guys go first.

13 THE COURT: Yeah, okay. And please leave your
14 pads with the bailiff, okay.

15 So the clerk will now swear the officers to take
16 charge of the jury.

17 (Whereupon, the bailiffs were duly sworn.)

18 THE COURT: Okay. So, ladies and gentlemen, now
19 it's your turn. So please go and deliberate.

20 (Discussion after jury was excused for
21 deliberations.)

22 Anything to bring up to the Court?

23 MR. MERRILL: Your Honor, one of the --

24 THE COURT: All right. So, yeah, all right. So

1 I have something to bring up. All right. So you have this
2 flash drive and it's three videos on it, all right. Two of
3 which have been admitted.

4 MR. MERRILL: Right.

5 THE COURT: So you better get just those two
6 videos, Exhibit 21 and 23.

7 MR. MERRILL: So can we not delete it from that
8 card because it was not entered.

9 THE COURT: No, because it was marked.

10 MR. MERRILL: Okay. Well --

11 THE COURT: So you should have put each separate
12 exhibit on a separate flash drive so that this way this
13 problem wouldn't have happened. But confirm that they are
14 the correct videos, but we can't just delete it off of there
15 because it was previously marked even though if it wasn't
16 admitted.

17 MR. MERRILL: Okay.

18 THE COURT: Okay. All right. So and then
19 because I almost forgot about that issue, but make sure the
20 right videos are on whatever flash drive is submitted, okay?

21 Now, if we want to duplicate Exhibits 21 and 23
22 from the one that was previously done I think the Court has a
23 flash drive where we can do that. But I want you all to be
24 present when that is being done so we're sure it's the

1 correct one, okay, or ones. But we're not going to take the
2 flash drive and modify it once it's been marked. We're just
3 not going to do it, okay. All right. I mean, we can take
4 the two segments that were admitted and put it on a separate
5 flash drive, all right.

6 Okay. Anything else?

7 MR. MERRILL: Nope.

8 MS. SCHUMANN: No, Your Honor.

9 THE COURT: All right. So very good. The Court
10 will be in recess subject to the call of the jury.

11 All right. So the Court received a note in
12 relation to this case. So we're back on the record.
13 20CR0099, State versus Bernal. So both of you got a copy of
14 the note?

15 MR. MERRILL: Yes.

16 THE COURT: I'm just going to say refer to the
17 information instruction which is what, four? Which one is
18 the information instruction?

19 THE CLERK: I don't have them. The jury --

20 THE COURT: I gave my instructions to the jury.
21 Which number was it, four or five? I think it was five.

22 THE CLERK: The charges were five that I read.

23 THE COURT: Right. So any suggestions or?

24 MR. KALTER: It's worth taking a look.

1 MS. SCHUMANN: It's number five I think. I'm
2 trying to find it. Here, I've got it.

3 THE COURT: I'm pretty sure it was five.

4 MS. SCHUMANN: Yep, it's number five. You're
5 talking about the language in the information with the
6 counts.

7 THE COURT: Yeah, with the dates.

8 MS. SCHUMANN: That's Instruction Number Five.

9 THE COURT: Okay. So is there any objection to
10 me saying please review Instruction Number Five?

11 MR. KALTER: No.

12 MR. MERRILL: No.

13 THE COURT: Okay. So that's how I'll answer the
14 question. So mark that as Court's Exhibit?

15 THE CLERK: Four.

16 THE COURT: A copy of this and give it to the
17 jury as Court's Exhibit?

18 THE CLERK: Five.

19 THE COURT: Five, and then give them a copy of
20 Court's Exhibit 5. So the one you have is Court's Exhibit 4,
21 okay. Court's Exhibit 5 will be a copy with my --

22 MR. MERRILL: Understood.

23 THE CLERK: Do you want me to make copies of
24 that?

1 MS. SCHUMANN: That would be great.
2 THE COURT: Okay. Thank you.
3 (Whereupon, a brief recess was taken.)
4 THE COURT: All right. So they did ask to look
5 at the video of the confession. So we sent back
6 Exhibit Number 23. So just so you have a copy of the
7 request.
8 MR. MERRILL: Thank you.
9 THE COURT: Okay. So is there anything to bring
10 before the Court prior to me bringing the jury back in?
11 MR. MERRILL: No, judge.
12 MR. KALTER: No.
13 THE COURT: Okay. Please bring the jurors in.
14 Counsel, stipulate to the presence of the jurors?
15 MR. MERRILL: Yes, judge.
16 MR. KALTER: Yes, Your Honor.
17 THE COURT: Okay. Clerk, please call the roll of
18 the jurors.
19 THE CLERK: Angela Miller.
20 THE COURT: Just say here.
21 THE JUROR: Oh, here, sorry.
22 THE CLERK: Chad Hughes.
23 THE JUROR: Here.
24 THE CLERK: Aaron Taylor?

1 THE JUROR: Here.
2 THE CLERK: Elizabeth Stix?
3 THE JUROR: Here.
4 THE CLERK: Jonathan Staab?
5 THE JUROR: Here.
6 THE CLERK: Hillary Cole?
7 THE JUROR: Here.
8 THE CLERK: Loretta Wilson?
9 THE JUROR: Here.
10 THE CLERK: Joshua Gray?
11 THE JUROR: Here.
12 THE CLERK: Victoria Gould?
13 THE JUROR: Here.
14 THE CLERK: Eldawna Koch?
15 THE JUROR: Here.
16 THE CLERK: Acacia Rizzo?
17 THE JUROR: Here.
18 THE CLERK: Branid Lett?
19 THE JUROR: Here.
20 THE COURT: Okay. Ladies and gentlemen, it looks
21 like, Mr. Staab, you've been selected as foreman of the jury.
22 THE JUROR: Yes.
23 THE COURT: Okay. And without telling me what
24 they are, have you reached verdicts on each counts?

1 THE JUROR: Yes.

2 THE COURT: All right. If the foreman will
3 please hand the bailiff the forms of verdict. We'll hand
4 them over to the Court. The clerk will now read the
5 verdicts.

6 THE CLERK: In the Third Judicial District Court
7 of the State of Nevada in and for the County of Lyon, State
8 of Nevada, plaintiff versus Thomas Jason Bernal, defendant.
9 Verdict, we the jury in the above entitled matter find the
10 defendant, Thomas Jason Bernal, not guilty on Count One of
11 sexual assault on a child under the age of 16 years. Dated
12 this 6th day of November, 2020. Jonathan Staab, foreperson.
13 Verdict, we the jury in the above entitled matter
14 find the defendant, Thomas Jason Bernal, not guilty of sexual
15 -- of Count Two, sexual assault on a child under the age of
16 16 years. Dated this 16th day of November, 2020. Jonathan
17 Staab, foreperson.

18 We the jury in the above entitled matter find the
19 defendant, Thomas Jason Bernal, guilty of Count Three, sexual
20 assault on a child under the age of 16 years. Dated this 6th
21 day of November, 2020. Jonathan Staab, foreperson.

22 THE COURT: Ladies and gentlemen of the jury, is
23 that your verdict so say you one so say you all?

24 THE JURY: Yes.

1 THE COURT: Okay. Before the verdict is
2 recorded, does either the State or defense request that the
3 jury be polled?

4 MR. KALTER: Yes.

5 THE COURT: Okay. Ladies and gentlemen, the
6 clerk is going to poll each one of you to ensure that those
7 are your verdicts.

8 Go ahead, madam clerk.

9 THE CLERK: Angela Miller, are those your
10 verdicts?

11 THE JUROR: Yes.

12 THE CLERK: Chad Hughes, are those your verdicts?

13 THE JUROR: Yes.

14 THE CLERK: Aaron Taylor, are those your
15 verdicts?

16 THE JUROR: Yes.

17 THE CLERK: Elizabeth Stix, are those your
18 verdicts?

19 THE JUROR: Yes.

20 THE CLERK: Jonathan Staab, are those your
21 verdicts?

22 THE JUROR: Yes.

23 THE CLERK: Hillary Cole, are those your
24 verdicts?

1 THE JUROR: Yes.

2 THE COURT: Loretta Wilson, are those your
3 verdicts?

4 THE JUROR: Yes.

5 THE CLERK: Joshua Gray, are those your verdicts?

6 THE JUROR: Yes.

7 THE CLERK: Victoria Gould, are those your
8 verdicts?

9 THE JUROR: Yes.

10 THE CLERK: Eldawna Koch, are those your
11 verdicts?

12 THE JUROR: Yes.

13 THE CLERK: Acacia Rizzo, are those your
14 verdicts?

15 THE JUROR: Yes.

16 THE CLERK: Brandi Lett, are those your verdicts?

17 THE JUROR: Yes.

18 THE COURT: The clerk will now record the verdict
19 and the verdicts of the jury in the minutes of the Court.

20 Okay, ladies and gentlemen, thank you very much
21 for all your efforts in this case.

22 Now is the time that the things are opened up and
23 after court generally counsel like to talk to members of the
24 jury to get their impressions and those kinds of things. It

1 is your option whether or not to talk to them or not, okay.
2 So that is 100 percent your option. If you tell them no,
3 they will respect it, okay. And if they don't respect it let
4 me know, okay, because now we can talk too.

5 Okay. And what I do like to do is once I recess
6 court, which will be in about two minutes, after I release
7 you folks if you -- you know, if you want to stick around in
8 the jury room I would love to come back and say hello real
9 quick, get some of your impressions on the performance of the
10 Court, things that we might be able to do better, especially
11 in these very trying times, okay.

12 Okay. So if you want to stick around, great.
13 Then again you don't have to talk to me either. That's
14 completely 100 percent up to you. You can take off as quick
15 as you want to or stick around for a couple of minutes and
16 give me some of your own impressions, okay.

17 So thank you for your very hard work over the
18 last week, and I'll be back there in just a few minutes. You
19 need to leave all of your notes and everything else in the
20 jury room. You can't take anything out with you. So and I
21 will be in in just -- you can turn your cell phones back on.
22 Okay. And I'll be in in just a couple of minutes, okay.
23 Thank you.

24 You're excused.

1 Okay. The Court, the jury having found the
2 defendant guilty of Count Three of sexual assault on a child
3 under the age of 16 the Court is remanding the defendant to
4 the custody of the sheriff at this time pending sentencing
5 upon the verdict of the jury. Sentencing will be set for?

6 THE CLERK: January 25th.

7 THE COURT: January 25th. Is that good with your
8 calendar, Mr. Kalter?

9 MR. KALTER: Yes.

10 THE COURT: Are you going to want additional time
11 as opposed to just on a law and motion calendar?

12 MR. KALTER: No.

13 THE COURT: All right. So January 25th at
14 10:00 a.m.

15 Is the State going to want additional time?

16 MR. MERRILL: No, Your Honor.

17 THE COURT: All right. So 10:00 a.m. We'll put
18 you on private counsel calendar, okay.

19 Until then we're in recess. Thank you folks.
20 Have a good day.

1 STATE OF NEVADA)
2) ss.
3 COUNTY OF LYON)
4

5 I, KATHY JACKSON, Certified Court Reporter of the
6 Third Judicial District Court of the State of Nevada, in and
7 for Lyon County, do hereby certify:

8 That I was present in Department I of the
9 above-entitled Court and took stenotype notes of the
10 proceedings entitled herein, and thereafter transcribed the
11 same into typewriting as herein appears;

12 That the foregoing transcript is a full, true and
13 correct transcription of my stenotype notes of said
14 proceedings.

15 DATED: At Carson City, Nevada, this 25th day
16 of May, 2021.
17

18 _____
19 KATHY JACKSON, CCR
20 Nevada CCR #402
21
22
23
24

FILED

2021 FEB -8 AM 11:31

TANYA SORRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Jessie Kalter

Case No. 20-CR-00099

Dept No. I

The undersigned affirms that this document
does not contain the social security number
of any individual.

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Defendant above-named, THOMAS JASON BERNAL, by and through his attorneys, JESSE KALTER LAW, P.C., hereby appeals to the Supreme Court of Nevada from the JUDGMENT OF CONVICTION entered in this action on the 4th day of February, 2021, in the Third Judicial District Court of the State of Nevada, in and for the County of Lyon.

DATED this 4th day of February, 2021.

JESSE KALTER LAW, P.C.

Leann E. Schumann
LEANN E. SCHUMANN, ESQ.

Nevada Bar No. 12862

1150 Selmi Dr. Ste. 505

Reno, NV 89512

(775) 331-3888(phone)

Attorney for THOMAS JASON BERNAL

JESSE KALTER LAW, P.C. | 1150 SELMI DRIVE, STE 505 | RENO, NV 89512

(775) 331.3888 (PHONE) | (775) 331.3891 (FAX)

www.jessekalterlaw.com

1184

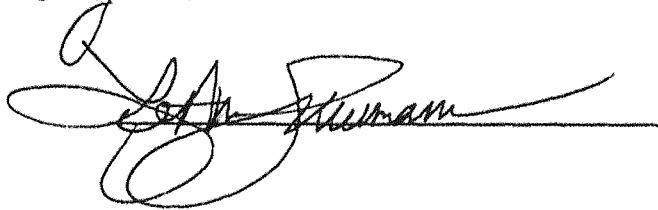
1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of JESSE KALTER LAW, P.C.
3 and that on this date I sent via first class mail, a true copy of the foregoing document addressed to
4

5 Stephen B. Rye, Esq.
6 Lyon County District Attorney
7 31 South Main Street
8 Yerington, NV 89447

Attorney General
State of Nevada
100 N. Carson Street
Carson City, NV 89701-4717

9 DATED this 4th day of February, 2021.

10 
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Case No. 20-CR-00099
Dept. No. I

FILED

2020 NOV -9 AM 11:00

TANIA S. SCURINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
Tania Scurine

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

Defendant.

INSTRUCTION NO. 1

LADIES AND GENTLEMEN OF THE JURY:

It is my duty to instruct you in the law that applies to this case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you for the purpose of determining the effect and value of the evidence. In performing this duty you must not be influenced by pity for the Defendant or by passion or prejudice against him. You must not be biased against the Defendant because he has been arrested for these offenses, or because charges have been filed against him or because he has been brought to trial. None of these facts is evidence of his guilt and you must not infer or speculate from any or all of them that he is more likely to be guilty than innocent.

In determining whether the Defendant is guilty or not guilty, you must be governed solely

1 by the evidence received in this trial and the law as stated to you by the Court. You must not be
2 governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public
3 feeling. Both the State and the Defendant have a right to expect that you will conscientiously
4 consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict
5 regardless of what the consequences of such verdict may be.
6

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others; but you are to consider all the instructions as a whole and regard each in light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

The Defendant is presumed to be innocent until the contrary is proved. This presumption places upon the State the burden of proving by competent evidence beyond a reasonable doubt every material element of the crimes charged and that the Defendant is the person who committed the offenses.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 4

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Information, that on or between the dates of August 1, 2018 and July 14, 2019, the Defendant committed three offenses of SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT CAUSING SUBSTANTIAL BODILY HARM.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of the offenses charged beyond a reasonable doubt.

INSTRUCTION NO. 5

The Defendant in this case, THOMAS JASON BERNAL, is being tried upon an Information filed in the Third Judicial District Court charging the Defendant with the following:

Count I: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT CAUSING SUBSTANTIAL BODILY HARM, a violation of NRS 200.366(3)(b), in the manner following:

"That the said Defendant on or between the 1st day of August, 2018 to the 30th day of June, 2019, at and within the County of Lyon, State of Nevada, did willfully and unlawfully subject another person who is under the age of sixteen (16) years to sexual intercourse and/or fellatio and/or other sexual penetration against her will or under conditions in which the perpetrator knew or should have known that the victim is mentally or physically incapable of resisting or understanding the nature of the conduct, to-wit: Defendant digitally penetrated the vagina of a known but unnamed juvenile H.S. (dob: 07/20/2004), all of which occurred at or near 610 US Highway 95 Alternate, Yerington, Nevada."

Count II: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT CAUSING SUBSTANTIAL BODILY HARM, a violation of NRS 200.366(3)(b), in the manner following:

"That the said Defendant on or between the 1st day of July, 2019 to the 14th day of July, 2019, at and within the County of Lyon, State of Nevada, did willfully and unlawfully subject another person who is under the age of sixteen (16) years to sexual intercourse and/or fellatio and/or other sexual penetration against her will or under conditions in which the perpetrator knew or should have known that the victim is mentally or physically incapable of resisting or understanding the nature of the conduct, to-wit: Defendant digitally penetrated the vagina of a known but unnamed juvenile H.S. (dob: 07/20/2004), all of which occurred at or near 610 US Highway 95 Alternate, Yerington, Nevada."

\\

\\

\\

\\

\\

\\

\\

\\

1
2 **Count III: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS,**
3 **NOT CAUSING SUBSTANTIAL BODILY HARM, a violation of NRS 200.366(3)(b), in the**
4 **manner following:**

5 "That the said Defendant on or between the 1st day of
6 December, 2018 to the 28th day of February, 2019, at and
7 within the County of Lyon, State of Nevada, did willfully and
8 unlawfully subject another person who is under the age of
9 sixteen (16) years to sexual intercourse and/or fellatio and/or
other sexual penetration against her will or under conditions in
which the perpetrator knew or should have known that the
victim is mentally or physically incapable of resisting or
understanding the nature of the conduct, to-wit: Defendant
digitally penetrated the vagina of a known but unnamed
juvenile H.S. (dob: 07/20/2004) while rubbing her legs, all of
which occurred at or near 610 US Highway 95 Alternate,
Yerington, Nevada."

10 The Defendant, THOMAS JASON BERNAL, entered his plea of "NOT GUILTY" to the
11 charges.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 6

In every crime or public offense there must exist a union, or joint operation of act and intention.

Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.

INSTRUCTION NO. 7

In order to prove the commission of the crime of Sexual Assault on a Child Under the Age of Sixteen (16) Years, Not Causing Substantial Bodily Harm, the State must prove the following elements beyond a reasonable doubt:

1. That the Defendant, Thomas Jason Bernal;
2. Did willfully and unlawfully;
3. Subject a Minor under the age of sixteen (16) years;
4. To sexual penetration;
5. Against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct.

INSTRUCTION NO. 8

Sexual penetration means cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body into the genital openings of the body of another, including sexual intercourse in its ordinary meaning.

INSTRUCTION NO. 9

The word "willful" when used in this criminal statute with respect to conduct relates to an act which is done intentionally, deliberately or designedly, as distinguished from an act done accidentally, inadvertently or innocently.

INSTRUCTION NO. 10

In order for a sexual assault to be against the will of the victim, the victim is not required to do more than her age, strength, surrounding facts and attending circumstances make it reasonable for her to do to manifest opposition considering the facts as you find them relating to this case.

INSTRUCTION NO. 11

Physical force is not a necessary ingredient in the commission of the crime of sexual assault.

The crucial question is not whether the victim was penetrated by physical force, but whether the act was committed without her consent or ability to consent.

INSTRUCTION NO. 12

Time is neither a material nor an essential element of the offense of sexual assault with a minor child and need not be proved precisely as alleged.

INSTRUCTION NO. 13

There is no requirement that the testimony of a victim of sexual offenses be corroborated, and her testimony, standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

INSTRUCTION NO. 14

Mr. Bernal's theory of the defense is that Haylee Smith falsified the allegations in this case to remove him from her life because he was the primary disciplinarian in the home and law enforcement coerced Mr. Bernal into providing a false confession.

INSTRUCTION NO. 15

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence, and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded by you in reaching your verdict.

Anything you may have seen or heard outside the courtroom is not evidence, and must also be disregarded by you in reaching your verdict.

INSTRUCTION NO. 16

The law recognizes two classes of evidence; one is direct evidence, and the other is circumstantial evidence.

Direct evidence consists of the testimony of every witness who, with any of their own physical senses, perceived an act or occurrence, and who relates what was perceived.

All evidence that is not direct evidence is circumstantial evidence and, insofar as it shows any act or occurrence or any circumstance or fact tending to prove or disprove by reasonable inference one side or the other of an issue, it may be considered by you in arriving at a verdict.

The law makes no distinction between direct and circumstantial evidence, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

INSTRUCTION NO. 17

The degree of credit due a witness should be determined by his or her manner upon the stand, his or her fears, motives, interest, or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness, or any portion of his or her testimony which is not proved by other evidence.

INSTRUCTION NO. 18

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

INSTRUCTION NO. 19

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

INSTRUCTION NO. 20

At times throughout the trial, the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

INSTRUCTION NO. 21

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not, established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. 22

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences which you feel are justified by the evidence, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 23

When you retire to consider your verdict, you must select one of your numbers to act as foreperson, who will preside over your deliberation and will be your spokesman here in court.

During your deliberation you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

The forms which have been prepared are for each Count and one must be signed for each Count.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreman and then return with it to this room.

INSTRUCTION NO. 24f

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to the court where the information sought will be given you in the presence of, and after notice to, the district attorney and the Defendant and his counsel.

Readbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a readback, you must carefully describe the testimony to be read back so that the court reporter can arrange her notes. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 25

The Court instructs you as follows:

1. That, in order to return a verdict, each juror must agree thereto.
2. That jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.
3. That each juror must decide the case for him or herself, but only after an impartial consideration of the evidence with his fellow jurors.
4. That, in the course of deliberations, a juror should not hesitate to re-examine his or her own views and change his or her opinion, if convinced it is erroneous.
5. That no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 26

Now you will listen to the arguments of counsel, who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence, and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be, and by the law as given you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

DATED: This 6th day of November, 2020.

Given,


HON. JOHN P. SCHLEGELMILCH,
DISTRICT JUDGE

FILED

Case No. 20-CR-00099

Dept. No. I

2020 NOV -9 AM 11:01

TANYA BULLOCK
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Scuring

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

vs.

VERDICT

THOMAS JASON BERNAL,

Defendant.

We, the jury in the above-entitled matter, find the Defendant, THOMAS JASON BERNAL,

☐ GUILTY

☒ NOT GUILTY

of Count II: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS.

DATED: This 6 day of November, 2020.

[Signature]
Foreperson

1 CASE NO. 20-CR-00099

2 DEPT. I

3
4 THE THIRD JUDICIAL DISTRICT COURT - THE STATE OF NEVADA

5 IN AND FOR THE COUNTY OF LYON

6 THE HONORABLE JOHN P. SCHLEGELMILCH, DISTRICT JUDGE,

7 PRESIDING

8
9
10 THE STATE OF NEVADA,

11 PLAINTIFF,

12 v.

13 THOMAS JASON BERNAL,

14 DEFENDANT.

15 ----- /

16
17
18 TRANSCRIPT OF PROCEEDINGS

19 JUDGMENT AND SENTENCING

20 JANUARY 25, 2021

21 COURTHOUSE

22 YERINGTON, NEVADA

23
24 REPORTED BY:

KATHY TERHUNE, CCR #209

1 APPEARANCES:

2 FOR THE STATE:

MATTHEW MERRILL
Deputy District Attorney
Courthouse
Yerington, NV 89447

5 DEFENDANT PRESENT IN COURT.

6 FOR THE DEFENDANT:

JESSE B. KALTER, ESQ.
780 Vista Blvd.
Suite 500
Sparks, NV 89434

9 FOR THE DEPARTMENT OF
10 PAROLE AND PROBATION:

ROCHELLE ALTURAS-MCKENNA,
Parole/Probation Officer

11 NO OTHER APPEARANCES.

12

13 * * * * *

14

15 TRANSCRIPT OF PROCEEDINGS

16

17 THE COURT: All right. State versus Bernal.

18 All right. So, this is Case 20-CR-00099, State
19 of Nevada versus Thomas Jason Bernal. This time set
20 for sentencing.

21 Let the record reflect that the defendant was
22 convicted by jury trial on November 6th of 2020, to the
23 charge of sexual assault on a child under the age of
24 16. The matter was set over to today's date for

1 sentencing.

2 Court has received and is familiar with the
3 Presentence Investigation Report. Has counsel received
4 a copy of it, are they familiar with it, and ready to
5 proceed, Mr. Merrill?

6 MR. HASLEM: State did, has, and has no factual
7 corrections.

8 MR. KALTER: Yes, Your Honor.

9 THE COURT: Any factual corrections,
10 Mr. Kalter?

11 MR. KALTER: Not specifically for purposes of
12 today's hearing.

13 THE COURT: If it relates to the offense
14 synopsis, I'll strike it and put in a transcript of the
15 jury trial.

16 MR. KALTER: Yes, Your Honor, we did have an
17 issue with the reporting of the CVSA. Obviously, that
18 didn't come up at trial.

19 THE COURT: Well, it's part of the PSI.

20 MR. KALTER: Correct. So, for purposes of
21 today, we're prepared to move forward with the report
22 as is.

23 THE COURT: Okay. Very good.

24 All right. So, aggravation by the State.

1 MR. HASLEM: Your Honor, I have two letters
2 here I'd like to present to the Court. One is from HS,
3 the victim in this case, and the other one's from
4 Ryan Smith, the father.

5 THE COURT: Weren't those previously provided?

6 MR. HASLEM: They were not, Your Honor.

7 THE COURT: Mr. Kalter don't have it?

8 MR. HASLEM: I just handed Mr. Kalter both
9 letters.

10 THE COURT: Well, first of all, do you have any
11 objections to these?

12 MR. KALTER: If I could just look at the second
13 one, I -- probably not.

14 THE COURT: All right. So, did you look at the
15 one that HS wrote?

16 MR. KALTER: I'm reading it now.

17 No objection for purposes of sentencing.

18 THE COURT: Okay. I would also indicated that
19 I got a couple of letters from defense counsel as were
20 previously filed with the Court as well.

21 MR. KALTER: Correct.

22 THE COURT: Okay. So, have these letters
23 marked as Exhibit 1 -- State's Exhibit 1.

24 (Whereupon, State's Exhibit 1 was marked for

1 evidence.)

2 THE COURT: Okay. And by Mr. Smith as State's
3 Exhibit 2.

4 (Whereupon, State's Exhibit 2 was marked for
5 evidence.)

6 THE COURT: Okay. Go ahead, Mr. Merrill.

7 MR. HASLEM: Your Honor, certainly the Court
8 sat through the testimony during the jury trial. It
9 was a clean jury trial. There's really only one
10 sentence the Court can impose here. It's life with the
11 possibility after 25 years.

12 The trauma and the extent of the trauma that HS
13 has faced in her life as outlined in her letter will
14 forever be there. And she's indicated that she has
15 been unhappy, unable to trust others. A person that
16 she was supposed to trust, her stepfather, violated her
17 trust and committed these crimes against her.

18 Your Honor, she is here today. Her family's
19 here. Her mother's here. Her father's here and the
20 stepmother. They're in the courtroom. I spoke with
21 them. They do not wish to make any sort of statements,
22 and so, the Court does have the letters in front of --
23 in front of it.

24 Really, Your Honor, this is a terrible crime.

1 Scars that HS will have to deal with for the rest of
2 her life in trusting individuals and trusting other
3 people, and perhaps trusting herself. And so, Your
4 Honor, I ask that you sentence the defendant to life
5 with the possibility after 25 years.

6 THE COURT: Thank you.

7 Mr. Kalter, mitigation.

8 MR. KALTER: Real brief, Your Honor. The Court
9 has no discretion in this case as far as the life with
10 the possibility of parole after 25 years. With that
11 being said, and the Court having stated it has read the
12 letters that we have submitted, I would ask the Court
13 to impose judgment. However, to grant credit for time
14 served in this matter of 92 days. My client did do a
15 brief written statement which is attached to the PSI.

16 THE COURT: I have that as well.

17 MR. KALTER: Thank you. And I have advised him
18 not to make further statement at this time for his own
19 best behalf going forward.

20 THE COURT: Okay. All right.

21 So, do you have anything you want to tell me,
22 Mr. Bernal?

23 THE DEFENDANT: No, Your Honor.

24 THE COURT: All right. Any legal cause to show

1 why judgement should not now be pronounced against the
2 defendant?

3 MR. KALTER: We have none, Judge.

4 THE COURT: Hearing no legal cause and based
5 upon your plea of guilty, the Court does now pronounce
6 you guilty on sexual assault of minor under the age of
7 16.

8 In accordance with applicable statutes, State
9 of Nevada, in addition to \$25 administrative
10 assessment, \$150 DNA fee, \$3 administrative DNA
11 assessment, you're sentenced to life in Nevada State
12 Prison with possibility of parole after completing
13 25 years. That a special sentence of lifetime
14 supervision is also ordered by this Court.

15 Okay. Thank you.

16 Remanded to the custody of the sheriff to serve
17 his sentence. 91 -- 92 days credit time served.

18 MR. KALTER: Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Kalter.

20 Mr. Kalter, while you're here. Are you going
21 to remain for the Daley pretrial?

22 MR. KALTER: I believe Ms. Schumann's going to
23 handle it.

24 THE COURT: Okay. Well, she asked for a Zoom.

1 I wasn't sure if you were going to be present or not.

2 MR. KALTER: Yeah.

3 THE COURT: I was just asking the question.

4 MR. KALTER: I have one more case. I mean, if
5 it brings me -- if I'm still here at that time, I'm
6 happy to do it. Hopefully --

7 THE COURT: Well, that's fine. Well, if she
8 wants to do it by Zoom, that's fine. Either way.

9 MR. KALTER: Thank you, Judge.

10 THE COURT: Just wondering if you were going to
11 stick around.

12 MR. KALTER: Thanks, Judge.

13 THE COURT: So, you have another case in this
14 department or another?

15 MR. KALTER: No, in the other. Department II.

16 THE COURT: Okay. Thank you.

17 MR. KALTER: Thank you.

18

19 (End of Proceedings.)

20

21 * * * * *

22

23

24

CERTIFICATE

STATE OF NEVADA)
) SS.
CARSON CITY)

I, Kathy Terhune, CCR 209, do hereby certify
that I reported the foregoing proceedings; that the
same is true and correct as reflected by my original
machine shorthand notes taken at said time and place
before the Honorable John P. Schlegelmilch, District
Judge, presiding.

Dated at Carson City, Nevada, this
9th day of February, 2021.



CCR #209

FILED

2021 JAN 15 PM 12:46

TANYA SCORINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen

1 CODE:
2 JESSE KALTER LAW, P.C.
3 Jesse B. Kalter, Esq.
4 Nevada Bar No. 9846
5 1150 Selmi Drive, Ste 505
6 Reno, NV 89512
7 775.331.3888
8 775.331.3891 (f)
9 Attorney for THOMAS BERNAL

10
11 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
12
13 IN AND FOR THE COUNTY OF LYON

14 THE STATE OF NEVADA,

15 Plaintiff

16 vs.

17 THOMAS BERNAL,

18 Defendant.

Case No. 20-CR-00099

Dept. No. 1

19
20
21
22
23
24
25
26
27
28
LETTERS

1-12-2021

To Whom it may concern,

I have known Thomas Bernal his whole life.

He has always been a vey nice and good person. He has never been one to get into trouble with the law. TJ has always been a provider.

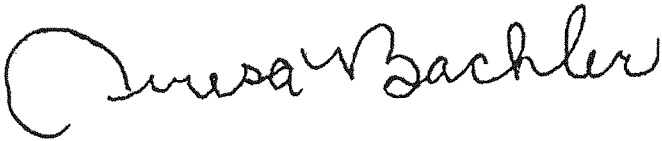
TJ was the sole caregiver for his mother when she was dying of cancer. He had given up his online schooling to care for his mother. He basically gave up his personal life to care for her.

When TJ married his wife, he helped her get off drugs an get custody of her kids back. TJ helped raise them like they were his own kids. He helped with support, food, clothes ect. Like a father would do.

I ask for you to consider this and to show leniency when sentencing TJ as he will not do well in prison.

Sincerely,

Teresa Bachler (Aunt)

A handwritten signature in cursive script that reads "Teresa Bachler". The signature is written in dark ink and is positioned below the typed name.

FROM THE DESK OF

Tawney DeWitt

January 12, 2021

Tawney DeWitt
2047 Lonnie LN
Dayton Nv 89403

To Whom it may concern,

Thomas J. Bernal and I were raised together I have known him my entire life. He always looked after me growing up and treated me with the most respect. I watched as he put his life and college education on hold to care for his mother while she was battling cancer. Thomas has always put other peoples needs ahead of his own and has been an upstanding person.

Sincerely yours,

Tawney DeWitt

A handwritten signature in black ink that reads "T. DeWitt". The signature is written in a cursive, slightly stylized font.

From: Michael D. Stout
To: Honorable Judge John P. Schlegelmilch

Subj: CHARACTER STATEMENT, ICO THOMAS J. BERNAL


1. My name is Michael Stout; I am the older brother of Thomas Bernal. I am currently a High School Teacher; I served over 22 years in the United States Marine Corps, and most importantly I am the father of three children. My son is 19, and my two daughters are 17 and 6 years old. Over the course of my life, I have found that to make the best possible decision, it is imperative to attempt to gain as much information as possible. This letter is submitted as a statement of character on Thomas Bernal to assist in your decision on his sentencing.

2. Thomas has three brothers; two older and one younger. Although he is not the oldest, Thomas was always known as the most intelligent and compassionate of the group. As a child, Thomas was always the one who would volunteer to help. In teenage years Thomas was the head of household. This was due to our older brother being married, and I serving in the Marine Corps. It was during this time that Thomas proved his ability to lead and care for his family. Our mother was diagnosed with cancer in 1999 and unfortunately succumbed to her illness in 2006. Thomas was our mother's personal care giver during the last 7 years of her life and was the one who ensured the house was in order and our mother was taken care of. It was at this time when Thomas truly showed his compassion for not only his family, but for the sanctity for human life and caring for others. His ability and willingness to put his life on hold to care for our mother is something I will never be able to fully repay him for.

3. Once our mother passed, Thomas was finally able to begin his life and had met his future wife. During their relationship, Thomas' instincts as a provider and caring person were on full display as he assisted his wife in fighting to regain custody of her children. His efforts were successful, and Thomas and his wife were allowed custody of the children. During this time Thomas would call me frequently in search for guidance on parental advice and concerns of how to be a good father. Thomas has always shown me his desire to be a positive role model and constantly looked for ways to better himself.

4. I believe Thomas to be a man of great intellect and integrity, and that compassion or leniency shown on your behalf will afford Thomas the ability to reintegrate and once again become a productive member of society.

5. Point of Contact in this matter is Michael Stout (760) 464-9535 or by email at MDStout23@msn.com.


Michael D. Stout
U.S.M.C. (Ret)

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 13th day of January, 2021.

Q32

~~JESSE B. KALTER, ESQ.~~
ATTORNEY FOR Thomas Bernal

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Pursuant to NRCP 5(b), I certify that I am an employee of Jesse Kalter Law, P.C., and that on this date I sent via email, and mailed by first class mail, from Reno, Nevada, a true copy of the foregoing document addressed to:

Lyon County District Attorney's Office
ATTN: Matthew Merrill, Esq.
 31 S. Main Street
 Yerington, NV 89447
mmerrill@lyon-county.org

Dated this 13 day of January, 2021.

Jessica Combs, Paralegal to
JESSE B. KALTR, ESO.

1 Case No. 20-CR-00099

2 Dept No. I

3 DA Case No. W19.0187

4
5
6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON
8

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 THOMAS JASON BERNAL,

13 Defendant.

JUDGMENT OF CONVICTION

14 On February 3, 2020 the above-named Defendant, **THOMAS JASON**
15 **BERNAL**, Date of Birth: July 18, 1982, entered an Not Guilty plea to the crimes of
16 **SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT CAUSING**
17 **SUBSTANTIAL BODILY HARM, a CATEGORY A FELONY**, in violation of NRS
18 **200.366(3)(b)**

19 Further, that the Defendant was found guilty by jury on November 6, 2020, to
20 **SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT CAUSING**
21 **SUBSTANTIAL BODILY HARM, a CATEGORY A FELONY**, in violation of NRS
22 **200.366(3)(b)**

23 This Court having set the date of January 25, 2021, as the date for imposing
24 judgment and sentence and the Defendant having appeared at such time, represented
25 by counsel, and the Defendant having been given the opportunity to exercise the right
26 of allocution, and having shown no legal cause why judgment should not be
27 pronounced at that time.
28

1 This Court thereupon pronounced **THOMAS JASON BERNAL** guilty of the
2 crimes of **SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT**
3 **CAUSING SUBSTANTIAL BODILY HARM, a CATEGORY A FELONY**, in violation
4 of **NRS 200.366(3)(b)**

5 In accordance with the applicable statutes of the State of Nevada this Court
6 sentenced the Defendant to:

7 Imprisonment in the Nevada State Prison for a minimum term of TWENTY-FIVE
8 (25) YEARS, with a maximum term of LIFE WITH POSSIBILITY OF PAROLE
9 AFTER TWENTY-FIVE (25) YEARS;

10 The Court will include as part of this sentence, in addition to any other penalties
11 provided by law, lifetime supervision commencing after any period of probation
12 or any term of imprisonment and period of release upon parole; said special
13 sentence of lifetime supervision must begin upon release from incarceration.

14 The Defendant is given credit for Ninety-Two (92) days of pre-sentence
15 incarceration time served. The Court further exonerated any bond heretofore posted.

16 In addition, said Defendant shall pay:

- 17 1. An Administrative Assessment in the amount of Twenty-five Dollars
18 (\$25.00)
- 19 2. A DNA Fee in the amount of One Hundred Fifty Dollars (\$150.00)
- 20 3. A Genetic Marker Fee in the amount of Three Dollars (\$3.00)

21 Pursuant to NRS 176.0913, Defendant must submit a biological specimen to
22 determine genetic markers and/or secretor status.

23 Therefore, the Clerk of the above-entitled Court is hereby directed to enter the
24 Judgment of Conviction as a part of the record in the above-entitled matter.

25 DATED: This 29th day of January, 2021.

26 
27 DISTRICT COURT JUDGE
28

1 Case No. 20-CR-00099

2 Dept. No. I

FILED

2020 NOV -9 AM 11:01

THOMAS J. BERNAL
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Janey Scerine

6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

VERDICT

12 THOMAS JASON BERNAL,

13 Defendant.

14 We, the jury in the above-entitled matter, find the Defendant, THOMAS JASON BERNAL,

15 ☐ GUILTY

16 ☒ NOT GUILTY

17 of Count I: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS.

18 DATED: This 6 day of November, 2020.

20 *[Signature]*
Foreperson

1231

FILED

2020 NOV -9 AM 11:01

TANYA SCERONE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
Tanya Scerone

Case No. 20-CR-00099

Dept. No. I

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

vs.

VERDICT

THOMAS JASON BERNAL,

Defendant.

We, the jury in the above-entitled matter, find the Defendant, THOMAS JASON BERNAL,

☒ GUILTY

☐ NOT GUILTY

of Count III: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS.

DATED: This 6 day of November, 2020.

[Signature]
Foreperson

1232

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd.,
P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing
document to be delivered to all parties to this action by



E-flex delivery of the Nevada Supreme Court

Stephen Rye
Lyon County District Attorney

DATED this 23rd day of September, 2021.



KARLA K. BUTKO, Esq.