

2016

**State of Utah Plaintiff/Appellee, v. Abelardo Cruz, Defendant/
Appellant : Brief of Appellee**

Utah Court of Appeals

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Plaintiff/Appellee,

v.

ABELARDO CRUZ,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for two counts of sodomy upon a child, a first degree felony, in the Eighth Judicial District, Uintah County, the Honorable Clark L. McClellan presiding

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FILED
UTAH APPELLATE COURTS

JAN 19 2016

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for two counts of sodomy upon a child, a first degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) (West Supp. 2012).

INTRODUCTION

On November 9, 2013, Yanet Anorve opened the door to her bedroom to find Defendant on their bed with his pants unzipped. Anorve's 6-year-old daughter, M.R., was sitting on the bed next to him.

M.R. had gone into the bedroom for some cookies. But when she tried to leave, Defendant did not let her. Instead, Defendant put his penis in M.R.'s mouth. He told her "not to bite it," but to suck it "like a popsicle. Defendant then put his penis in M.R.'s "butt." Defendant was charged with

two counts of sodomy on a child for this conduct, and the jury convicted him as charged.

When interviewed, M.R. said that Defendant had done similar things before. But M.R. was vague about the prior conduct. Defendant was charged with seven counts related to the prior conduct. The jury acquitted Defendant on one count and hung on the rest.

STATEMENT OF THE ISSUES

1. Did the trial court err in sending the victim's videotaped interviews, which were admitted as exhibits, with the jury for deliberations, where Defendant relied on those interviews almost as much as the State?

Standard of Review. The trial court's decision to send the videos with the jury is reviewed for abuse of discretion. Cf. *State v. Denos*, 2013 UT App 192, ¶12, 319 P.3d 699 (trial court's evidentiary determinations reviewed for abuse of discretion).

2. At times, the victim gave nonverbal responses to questions in her videotaped interviews. At one point while the first video played, the prosecutor asked to make a record that the victim's nonverbal response to a particular question was a nod. Defendant said that he did not object. But Defendant objected when the court started to make a record of the victim's next non-verbal response. A short time later, the court instructed the jury to

disregard its earlier description of the victim's nonverbal response and to decide for itself what the victim's nonverbal response was. Defendant approved that instruction and did not ask for any further relief.

Did Defendant waive any claim related to the trial court's single description of a nonverbal response by the victim, where he did not initially object and then agreed to the court's curative instruction?

Standard of Review. No standard of review applies.

3. Was defense counsel ineffective for joining the State in asking for a modified *Allen* instruction after the jury had deliberated 18 hours?

Standard of Review. This Court reviews ineffective assistance of counsel claims raised for the first time on appeal as questions of law. *See State v. Maestas*, 1999 UT 32, ¶20, 984 P.2d 376.

4. Were the child victim's statements concerning Defendant's abuse and her mother's testimony that she walked in on them sufficient to support Defendant's convictions?

Standard of Review. This Court reviews unpreserved sufficiency of the evidence claims for plain error. *See State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346.

5. Does Defendant's cumulative error claim fail where Defendant has not shown any errors, let alone prejudicial ones?

Standard of Review. No standard of review applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

U.S. Const. amend. VI; Utah const., art. I, §12;
Utah Code Ann. § 76-5-403.1 (West Supp. 2013);
Utah R. Crim. P. 15.5, 17.

STATEMENT OF THE CASE

A. Summary of facts.

In November, 2013, Yanet Anorve lived in a two-floor Vernal apartment with her then boyfriend, Defendant; her six-year-old daughter from an earlier relationship, M.R.; and her two daughters with Defendant, Lola and A.C. R390:599,602-07,609. Defendant's sister, her husband, and their young son also lived in the apartment. R390:609. Defendant's sister's family slept in one bedroom; Anorve, Defendant, and their two daughters slept in another; and M.R. slept in the third. R390:609-10.

For the first five or six months they lived together, the family lived in a brown house. R390:607,613. For the next ten months, they shared a room in the basement of an old white house that had spider webs in it. R390:610-13. They moved into the two-floor apartment in September 2013. R390:613.

Most of the time, Anorve worked on Mondays and Wednesdays outside the house. R390:614. On Mondays, Defendant's sister watched the children. R390:619-20. On Wednesdays, Defendant watched them. *Id.* Defendant worked on Mondays, Tuesdays, Thursdays, Fridays, and Saturdays. R390:614-15.

Although they shared a bedroom with children, Anorve and Defendant were very careful that the children did not see them having sex. R390:618. They would wait until the children had fallen asleep; and they knew that M.R. was asleep because she snored. R390:616.

On Saturday, November 9, Defendant came home during a break at work. R390:623. After Anorve fed him, Defendant went upstairs to rest in their bedroom before returning to work. R390:623-24. Anorve stayed in the living room watching TV. *Id.* M.R. and Lola soon joined Defendant upstairs. *Id.*

After a while, Anorve decided to call her mother in Mexico and went upstairs to get the phone card. R390:623,661. As she walked upstairs, she heard M.R. and Lola laughing with Defendant. R390:656. When Anorve opened her bedroom door, Defendant and M.R. looked "surprised" and "scared." R390:623-24. Defendant was lying on the bed with his pants

unbuttoned, unzipped, and "wide open." R390:625-26. M.R. was lying next to Defendant, "around the hip area." R390:626-27.

Defendant had "never had his pants wide open in front of the girls." R390:628,660,685. Thus, Anorve asked him: "What are you doing with my daughter?" R390:628. Defendant replied, "Nothing. You're crazy. Why would you say I would do something to her?" R390:628.

Anorve took M.R. into the bathroom and asked her what happened. R390:628. Although M.R. was "shaky" and "pale," she said, "Nothing, Mom." R390:628. When Anorve asked again, M.R. told her that Defendant "put his tito in my mouth, but I'm afraid." R390:628. "Tito" was the word Anorve used with the children for "penis." R390:629-30.

Anorve did not say anything to Defendant right away. R390:632. After Defendant went back to work, Anorve called her brother in Salt Lake City to come and get them, but he could not come until the following Friday. R390:631-32,634. Anorve did not have her own car. R390:635.

When Defendant returned from work that night, Anorve told him what M.R. had said. R390:632. Defendant denied it and asked M.R., "why are you saying this if it's not true?" R390:632. M.R. replied, "It's true. It's true, he did it." *Id.* When Defendant said, "no, sweetie, it's not true," M.R.

started to cry. R390:632. But M.R. never changed what she had initially told her mother. R390:632.

When M.R. left the room, Defendant denied that anything had happened and said that he did not know why M.R. would say such a thing. R390:633. Defendant convinced Anorve that nothing had happened, and they continued to have sexual relations over the course of the week. R390:633-35. But Anorve was still confused because one part of her wanted to believe Defendant and another part just "couldn't." R390:635.

Anorve talked with M.R. every day that week, not "really" about what happened but "just asking her whether it was true or not." R390:664-65,684. M.R. "would say that she was not a liar, but [Defendant] was a liar." R390:684.

At the end of the week, Anorve's brother picked up Anorve and the children. R390:639. As they left, Defendant said that he loved them and didn't want them to leave. R390:639. He finished by saying, "It would be better if you killed me." R390:639.¹

The following Monday, November 18, Anorve took M.R. to the doctor. R390:642,703. M.R.'s physical exam was completely normal,

¹After leaving, Anorve spent one weekend with Defendant, during which they had sex. R390:641. When asked why she would stay with him under the circumstances, Anorve testified, "I don't know." R390:641.

meaning that she did not have any injuries. R390:712. This was not surprising because less "than 5 percent of patients" evaluated for sexual abuse have physical findings, even when the evidence is clear that abuse happened. R390:713-15. The doctor called the police. R390:643.

Police interviewed M.R. at a Children's Justice Center in South Jordan on November 19, 2013. R389:368; St.Ex. 1. The first part of the interview was conducted in English by Sergeant James Bigelow. R389:361,368,372. The second part was conducted primarily in Spanish by Detective Jason Boss, who was concerned that M.R. might not have been able "to explain herself or express herself" in English. R389:390,398,401-04; St.Exh. 1.²

At the beginning of the first part of the interview, Bigelow told M.R. it was very important that she tell "only" the truth; M.R. promised to do so. R389:423,425 M.R. told Bigelow that her family moved to Salt Lake "[w]hen my dad did something bad to me." R389:430. M.R. explained that she went to her mother's room "to get cookies," but that Defendant then "put his hand on the door" and "didn't let me out." R389:431-32. Upon further questioning, M.R. said, "My dad unzipped his pants." R389:433. Then, "I was trying to get out and he didn't let me." R389:434. M.R. added, "He told

² The trial transcript includes a transcription of the interview. That transcription and the exhibit of the video recording of the interview are attached at Addendum B.

mom he went to the bathroom," "but he was lying to my mom." R389:435-36. Soon thereafter, Bigelow concluded his part of the interview. R389:438.

Detective Boss then talked with M.R. in Spanish. As they talked, M.R. said: "My dad, I didn't want to do it, but he made me do it. He made me put my mouth on his weewee." R389:439. When Detective Boss asked M.R. whether that had happened more than once, M.R. responded, "When my mom would work." R389:439. Boss asked, "Every time?" *Id.* M.R. nodded. *Id.*; St.Exh. 1.

When asked to describe the first time "it" happened, M.R. said that she wanted cookies and then "wanted to leave, but he didn't let me leave because he put his hand on the door. He lowered his zipper" and "he put his tito in my mouth." R389:444. M.R. added, "I didn't want to." *Id.*

When the Vernal prosecutor reviewed the video of M.R.'s interview, he "determined that there wasn't enough disclosure or information that we needed." R389:468. Specifically, more information was needed about where the conduct occurred and "whether this was ... an isolated instance, or if there had been other instances that were not disclosed." R389:468-69. So a second interview was arranged. R389:468.

The second interview took place in Vernal on November 24, 2013. R389:474; St.Exh. 2.³ David Ryan, an FBI agent who speaks Spanish, was asked to conduct the interview as a courtesy to the Vernal police. R389:476,478-79.

In the interview, M.R. repeated that Defendant "did something bad," that she did not "know why he did that," and that she did not "want to do it." R389:515. M.R. then said that Defendant "put his tito" in her mouth. R389:516. M.R. explained that she went to get some cookies in her mother's room and then wanted to leave. R389:518-19. But Defendant "didn't let me get out because he stuck his hand in the door." R389:518-19. Defendant then put M.R. on her knees "up on the bed," unzipped his pants, and, as he lay on the bed, "put his tito in my mouth." R389:522,524-25. As he did, Defendant "said to not tell anybody, and he said not to bite his tito," but to suck it "like a popsicle." R389:524,526.

M.R. said that while they were lying down, Defendant also took her pants and underwear "off a little bit" and "put his tito in my butt," and "that hurted so bad." R389:527,529. While he did, his hands were on M.R.'s head. R389:528. M.R. said that Defendant put his tito "[f]irst in my mouth

³ The trial transcript includes a transcription of this interview as well. That transcription and the exhibit of the video recording of the interview are attached at Addendum C.

and then my butt." R389:528. M.R. said that her mother then came in, but that Defendant lied to her "because he said he went to his bathroom, but he didn't." R389:518,523,526.

M.R. said that Defendant had done these things to her before. R389:521,523. Asked when, M.R. initially said, "I don't know.... I forgot." R389:531. She then said that it happened "in two houses." R389:534. The other house "was older" and "had a lot of spider webs." R389:34. M.R. added, "on Wednesdays when my mom worked, he did the same thing." R389:534. In that house, "me and my mom and my dad and my sisters" shared "the whole room, and it was dark. He did it in our room." R389:535. "The first time was he put his tito in my butt, and the second time was he put his tito in my mouth." R389:535. Defendant also put his finger in M.R.'s butt. He "put it all the way where it hurt, where we poop, and it hurted really bad, and he said not to yell." R389:537-38. Defendant also made M.R. touch his "tito" under his pants with her hand and told her "to push down a little bit on my hands." R389:539,541-42. When asked if Defendant had ever touched her anywhere else, M.R. said that once in the old house, he put his tito "[w]here I pee." R389:544.

The defense. At trial, Defendant argued that M.R.'s allegations were unintentionally fabricated. In support, Defendant called Dr. Vickie Gregory as an expert in forensic child interviewing protocol. R390:721-74.

Defendant argued that M.R.'s November 9 allegations came from "false beliefs" instilled in her by an overzealous mother who repeatedly questioned M.R., thereby putting ideas into her head that Defendant had done something wrong. R391:839-41. Defendant argued that M.R.'s allegations of Defendant's earlier conduct were the result of "false beliefs" instilled in her by suggestive questioning on the part of the officers who interviewed her. R391:842-43.

B. Summary of proceedings.

Defendant was charged with two counts of sodomy and one count of aggravated kidnapping for his November 9, 2013 conduct. R1-5,40-43. He was charged with two counts of sodomy upon a child, two counts of aggravated sexual abuse of a child, and one count of rape of a child for his earlier conduct. R1-5,40-43.

Before trial, the State moved to introduce M.R.'s second videotaped interview under rule 15.5, Utah Rules of Criminal Procedure. R70-73. After the trial court made its findings supporting the video's admission, Defendant said he didn't "really care about the videos coming in." R386:20-

21,23. Defendant moved to admit the video of M.R.'s first interview, and the State stipulated. R113-16. Both videos were then admitted at trial as exhibits. St.Exh. 1, 2. Over Defendant's objection, the court ruled that the jury could have the video exhibits during deliberations. R146-48.

Once as the first video played, the State asked the trial court to make a record of M.R.'s nonverbal response. R389:439-40. Defendant said he did not object, and the trial court made the record. R389:440. Defendant did, however, object before a record of M.R.'s next nonverbal response could be made. *Id.* A short time later, the court instructed the jury to disregard the single description of M.R.'s nonverbal response it had given and to evaluate for themselves "whether or not the child did anything and what purpose you are going to apply if any to her conduct in response to that question." R389:494-95.

After the jury had deliberated for about 18 hours and upon defense counsel and the State's joint request, the trial court gave the jury a modified-*Allen* instruction and asked the jury whether further deliberations would be fruitful. R392:863-64,867-68. A short while later, the jury told the court that further deliberations would not be useful. R392:869.

The jury convicted Defendant on the two counts of sodomy upon a child and the aggravated kidnapping count related to his November 2013

conduct (counts VI through VIII). R365,367,369. The jury acquitted Defendant on one count and hung on all other counts related to Defendant's earlier conduct (counts I through V). R352-59,361-62.

Before sentencing, the State informed the trial court that it would not retry Defendant on the deadlocked charges and that the kidnapping conviction should merge with the sodomy convictions. R393:22-4. In response, trial court merged the kidnapping conviction into the sodomy convictions and dismissed the deadlocked charges with prejudice. R393:2-4. Defendant was sentenced to concurrent prison terms of 25 years-to-life on the sodomy convictions. R374-76. Defendant timely appealed. R378.

SUMMARY OF ARGUMENT

Point I. Defendant challenges the trial court's ruling that allowed the exhibits of M.R.'s videotaped interviews to go with the jury during deliberations. First, he asserts that neither video was sufficiently reliable to send to the jury because several of the trial court's findings supporting its admission are "truncated" and clearly erroneous. Defendant, however, waived any challenge to the trial court's findings when, after the court made them, Defendant said he did not care about the videos' admissions. Thus, this Court should not reach Defendant's argument.

Second, Defendant asserts that the trial court erred in sending the video exhibits back with the jury because, Defendant claims, he was not able to cross-examine M.R. on them at trial. This contention fails because the confrontation clause applies to the admission of evidence, not whether properly admitted evidence may go to the jury. In any event, Defendant had the opportunity to cross-examine M.R. on the videos; he simply chose not to.

Finally, Defendant argues that video exhibits are no different from written testimony, and courts have long held that juries should not have access to written testimony during deliberations because of their tendency to emphasize evidence to one party's advantage. But whether or not the trial court erred in sending the videos back, Defendant cannot show he was harmed by it. First, nothing in the record indicates that the jury viewed the videos during deliberations. And if they did, the jury convicted Defendant on only three of the eight counts charged, suggesting that viewing the video helped Defendant more than it hurt him. Indeed, both parties relied on M.R.'s videos to support their case, and in his closing, Defendant even urged the jury to review them.

Point II. Defendant argues that the trial court committed reversible error when, at the prosecutor's request, it made a record that M.R. nodded

in response to a question during her first interview. He further argues that the trial court's subsequent curative instruction was neither prompt nor effective.

Defendant, however, affirmatively told the court he did not object when the trial court made the record of M.R.'s nonverbal response. Moreover, Defendant approved the trial court's later curative instruction—that directed the jury to disregard the trial court's prior action and decide for itself "whether or not the child did anything"—without seeking any other remedy. Thus, Defendant waived these claims.

Point III. Defendant argues that his defense counsel rendered ineffective assistance of counsel when, after the jury had deliberated for 18 hours, he joined the State in asking for a modified *Allen* instruction. Defendant argues that counsel should have objected to the instruction because it was coercive. Defendant further argues that counsel should have objected to the trial court's comment after reading the instruction—that it wanted a response from the jury "in a relatively short period of time"—because that added to the coercion.

To prove ineffective assistance, Defendant must show both that his counsel performed deficiently and that he was prejudiced by counsel's

deficient performance. Here, this Court need not decide whether counsel performed deficiently, because Defendant cannot show prejudice.

First, the concern with a coercive *Allen* instruction is that it will affect a jury's deliberations by encouraging jurors to give up their "conscientiously held convictions." *State v. Lactod*, 761 P.2d 23, 29-30 (Utah App. 1988). That concern, however, presupposes that the jury has continued to deliberate after the instruction was given. In this case, the record supports that the jury conducted no deliberations after the court's instruction, but rather convened only long enough to agree that further deliberations would not be fruitful. Thus, the jury could not have been coerced by the instruction, even if it were coercive.

Second, Defendant nowhere quotes the language of the modified *Allen* instruction given in this case. Therefore, he has not shown that the instruction was in fact coercive. Thus, he also has not shown either that he was prejudiced by the instruction or that his counsel was deficient in agreeing to it. Furthermore, the trial court's subsequent comment related only to two questions in the instruction asking whether further deliberations would help the jury reach verdicts in this case. Thus, nothing in the court's comment implied, as Defendant now asserts, that the court wanted jury verdicts in a relatively short period of time. Rather, the court

simply wanted to know whether the jury believed that further deliberations would be helpful. Thus, Defendant cannot show either prejudice or deficient performance related to the court's comment.

Finally, Defendant's claim fails because defense counsel could have reasonably decided that the jury had reached an impasse and that any further deliberation could lead to convictions on counts that the jury was currently deadlocked on. Defendant therefore cannot show that his counsel lacked a sound strategic reason for joining the State in requesting the instruction.

In short, Defendant has not proved either prejudice or deficient performance related to this claim.

Point IV. Defendant argues for the first time on appeal that the evidence was insufficient to support his convictions. Instead of viewing the evidence in the light most favorable to the jury's verdicts, however, Defendant merely reargues the evidence he claims undermines his convictions. Such an argument does not establish insufficient evidence, let alone an insufficiency so obvious and fundamental that the trial court erred in submitting the case to the jury.

In any event, the evidence was plainly sufficient on the counts the jury convicted Defendant on. M.R.'s mother testified that she walked in on

Defendant with his pants "wide open" and M.R. right next to him. In addition, M.R. said that Defendant put his penis in her mouth. And she said that when he did so, he told her "not to bite it" but to "suck it like a popsicle." Finally, M.R. said that Defendant also put his penis in her "butt" and that it "hurt so bad." This evidence more than suffices to support Defendant's convictions.

ARGUMENT

I.

DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT ERRED IN ALLOWING THE VIDEO EXHIBITS OF THE VICTIM'S INTERVIEWS TO GO WITH THE JURY FOR DELIBERATIONS

Defendant "makes no wholesale constitutional attack on the admission of M.R.'s videotaped interviews." Aplt.Br. 26. Instead, he argues that the trial court should not have allowed the jury to have the videos during deliberations, because the court's findings as to their reliability were "truncated" and erroneous. *Id.* 26-30. Defendant also argues that sending the videos into the jury room violated his confrontation rights because he could not cross-examine M.R. on them at trial. *Id.* Finally, Defendant argues that sending the videos into the jury room unfairly emphasized that evidence. *Id.*

Defendant's challenges to the trial court's findings fail because he waived them below. Defendant's confrontation clause challenge fails because, even if the confrontation clause governed a jury's access to exhibits during deliberations – which it does not – Defendant had the opportunity to cross-examine M.R. regarding the videos, and he chose not to. Defendant's final challenge fails because Defendant has not shown that under the facts of this case, the trial court's decision to send the video exhibits with the jury was erroneous or prejudicial.

Rule 17(l), Utah Rules of Criminal Procedure, provides: "Upon retiring for deliberation, the jury may take with them ... all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband."

A. Proceedings below.

As stated, M.R. was interviewed twice. The first interview – conducted in West Jordan – took place on November 19, 2013, about 10 days after M.R.'s mother walked in on her and Defendant. R389:368. The second interview – conducted in Vernal – took place five days after the first interview, on November 24, 2013. R389:474.

Before trial, the State moved under rule 15.5, Utah Rules of Criminal Procedure, to admit only the video of M.R.'s second interview and to allow M.R. to testify through closed-circuit television. R70-73. Rule 15.5 allows for the admission of a child victim's recorded statements "for good cause shown," provided that eight conditions are met. Utah R. Crim. P. 15.5. Those conditions include technical requirements, such as that "the child is available to testify and to be cross-examined at trial" or that "the defendant had a previous opportunity to cross-examine the child" on the statement; that no party's attorney was present during the interview; and that the recording has not been altered. *Id.* They also include a requirement that the trial court find the recording "sufficiently reliable and trustworthy and that the interest of justice will best be served by [its] admission." *Id.*

Defendant's only objection to the video was that the State had not shown "good cause" for "why the video should be played instead of live testimony." R76-78. At a hearing on the State's motion, the trial court noted that *State v. Nguyen*, a Utah Supreme Court case, held that a separate showing of "good cause" is not required under rule 15.5, so long as all of the rule's other requirements are met. R386:6.⁴ See *State v. Nguyen*, 2012 UT

⁴A transcript excerpt of the relevant portion of the hearing is attached at Addendum D.

80, ¶1, 293 P.3d 236 ("separate showing of good cause not required under rule 15.5").

The trial court then turned to rule 15.5's technical requirements. *See* Utah R. Crim. P. 15.5(a)(1)-(8). Defendant stipulated to the technical requirements. R386:8,10-12.

But Defendant did not stipulate to a finding that the video was "sufficiently reliable and trustworthy and that the interest of justice [would] best be served" by its admission. R386:8,10-12. The court thus made detailed findings on that requirement. R386:12-19. Specifically, the court found that (1) M.R. was an "engaging" six year old; (2) the interviewer made clear "the importance of telling the truth and ... not answering or guessing or speculating when she didn't know the answer"; (3) M.R. "understood that if she didn't know something, she was supposed to say, 'I don't know'"; (4) the interviewer's questions for the most part were "open-ended"; (5) the interviewer's close-ended questions were only for "clarification where he tried to summarize or recap, but it was only after the child had made statements"; (6) the interviewer "didn't put words in [M.R.'s] mouth"; (7) M.R. "was consistent throughout that these events occurred"; (8) M.R.'s "testimony was linear and logical"; (9) M.R. used language that "without some kind of experience like this," a child "would

[not] be able to formulate," including" that Defendant "told her not to bite his penis, but rather to suck his penis like a popsicle"; (10) "at least one of these events occurred within a short period of time" of the interview; (11) M.R. "did not appear to make grandiose or exaggerated or very bizarre or estranged statements"; and (12) there was no "indication that there was any coaching." R386:12-19.

At one point, defense counsel interjected, "I'm not sure that you need to make all these temporary findings, because I don't agree with half the things you're saying." R386:15. When the court ruled that it had to make findings, counsel said that "if you're going to say that there was (sic) no inconsistencies then ... I disagree with your findings, because I do think there was (sic) inconsistencies." R386:16. The court responded by finding that "if there were inconsistencies, they were of a minor nature and of the kind that a six-year-old may well do.... Thus, the inconsistencies weren't of a nature that I believe undermines the reliability of them." R386:17.

Defense counsel raised no further objection to the trial court's findings. To the contrary, when the court then sought argument on whether M.R. should be allowed to testify by closed circuit, counsel stated: "I don't really care about the video coming in, and I don't care whether it's close[d] or in Court. So I'm not going to object to that." R386:20-21. But, counsel

argued: "you only get one shot, though. If you play the video, you can't put the victim up there and ask her all the things that you already got in the video, because the video's your one shot." R386:23. Counsel concluded: "So I have no problem with the video coming in" as "long as we don't put the victim on except" that "I get to cross examine on the things that were already covered in the direct part of it." R386:23.⁵

Defendant then moved to admit the M.R.'s first videotaped interview, and the State stipulated to its admission. R113-16;R167:5,29,42-44. The State then addressed making the videos available to the jury during deliberations. R167:48. Defendant objected that the jury should not have the videos during deliberations "as a matter of due process and fairness." R167:49;R389:354-56. Defendant argued that the videos were testimonial, not demonstrative, evidence and that it would therefore be improper to send them to the jury room. R389:355-56. Defendant pointed out that "if I have a cross examination of the child, my cross examination doesn't get to go to the jury room." R167:49;R389:355-56. The State countered that just like

⁵Defendant did later move to strike certain parts of the interview about "what do you like to play," and such, because "it's not relevant" and "just build[s] a bond between a witness and the jury." R386:27; R91-93,138-40. He also moved to strike any portions that were "repetitive of the same thing." R386:29;R91-93,138-40. The trial court rejected Defendant's objections. R387:2-43. Defendant does not renew these objections on appeal.

police interviews with defendants, these videos will be admitted as exhibits, and "exhibits go to the jury." R167:50;R389:357. The trial court ruled that the videos, if admitted, would go back to the jury room. *Id.*

The State played the video exhibits during the interviewing officers' testimony. R389:421,500. After the first video was played, but before the second, defense counsel stated that "now that we're getting close to the [cross-]examination part of it," he wanted to argue for a change to rule 15.5 or at least "make ... a record" that rule 15.5 "is improperly applied, because "even though I get to cross examine the girl, it limits my ability." R389:456. Counsel explained that the "State was allowed to make a video shortly after [the alleged events]. Now it's almost a year." R389:456. And because a child's "understanding of time is difficult," it is "extremely difficult to cross examine a child that's five or six years old about something that happened a year ago." *Id.*

The State noted that counsel's concern, though perhaps more applicable with children, is "true for every human witness where a statement is recorded sometime in advance, shortly after events occur, but well in advance of trial." R389:457. The court understood defense counsel's argument, but opined that "the Court has already ... weighed the benefit of the child witness statement and the admissibility of that, and made that

determination.” R389:458. The court then concluded, “I am applying [the rule] as I believe the law requires.” *Id.*

M.R. testified after both videos were played. R389:559-65 (attached at Addendum E). The State did not ask M.R. any questions concerning Defendant’s abuse. R389:559-60. Rather, the State just asked M.R. to confirm that she told the truth during the interviews, which M.R. did. *Id.*

Defendant’s cross-examination of M.R. spanned six transcript pages. R389:560-65. On cross, M.R. testified that she did not remember much about living in Vernal. R389:562. When asked, however, she confirmed that Defendant lived with them; that her mother worked during that time; that Defendant’s sister watched her and her sisters when her mother worked; and that Defendant’s sister had a son named William. R389:562-64. Defendant did not ask M.R. a single question regarding her videotaped interviews. R389:560-65. Nor did he ask M.R. a single question regarding her allegations against him. *Id.*

The State referenced M.R.’s videotaped statements during its initial closing argument, but did not ask the jury to review them during deliberations. R391:795-818. In his closing, Defendant argued what he thought were problems with the interviews. R391:826-37. As he did so, Defendant encouraged the jury to review the videos: “You can watch the

video You can go and watch them. This is not necessarily a requirement, but I submit to you it should be.” R391:834-35.

In rebuttal, the State connected each charge to an allegation M.R. made in the videos. R391:850-52. The State then specifically identified the relevant parts of the second video, “if you choose to review it.” R391:851-52.

Before excusing the jury for deliberations, the trial court noted that Spanish interpreters were available if the jury needed them to review M.R.’s videos. R391:855. The court stated, “I’m not telling you you have to use the interpreters, but if you chose to listen to the videos and you want interpretation, you need to let us know.” *Id.* Nothing in the record indicates that the jury requested an interpreter.

B. Defendant waived his challenge to the trial court’s rule 15.5 reliability findings.

“As a general rule, ‘in order to preserve an issue for appeal[,] the issue must be presented to the [district] court in such a way that the [district] court has an opportunity to rule on that issue.’” *State v. Moa*, 2012 UT 28, ¶23, 282 P.3d 985 (alterations in original) (citation omitted). When a party fails to present an issue to the trial court, the party must “articulate an appropriate justification for appellate review” by arguing that his claim should be “evaluated under the plain error standard or that his claim

qualifies as an exceptional circumstance.” *Id.* at ¶24. Under the invited error doctrine, however, this Court will not “engage in even plain error review when ‘counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the proceedings.’” *State v. Winfield*, 2006 UT 4, ¶14, 128 P.3d 1171 (citations and internal quotation marks omitted).

Here, Defendant argues that several of the trial court’s findings regarding the reliability of M.R.’s videotaped interviews are “truncated” and clearly erroneous. Aplt.Br. 27-30. For example, Defendant challenges the trial court’s finding that M.R. demonstrated an ability to tell the truth and its finding that M.R. did not appear to be coached. *Id.*

But Defendant did not raise any of his challenges below. R386:12-19. Instead, after the trial court made its findings, Defendant told the court, “I don’t really care about the video coming in.” R386:20-21; *see also* R386:23 (“I have no problem with the video coming in.”). Defendant therefore “affirmatively represented to the [trial] court that he” had withdrawn any objection to the videos being admitted. *Winfield*, 2006 UT 4, ¶14. Defendant has therefore affirmatively waived any challenge to the trial court’s findings. *See id.*

Even if this Court overlooks Defendant's affirmative waiver, his challenges to the trial court's reliability findings fail. This Court reviews a trial court's factual findings for clear error. See *State v. Perea*, 203 UT 68, ¶32, 322 P.3d 624. This Court will find clear error only if "the court's factual findings 'are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination.'" *Id.* (citation omitted). "This standard is highly deferential to the trial court." *State v. Green*, 2005 UT 9, ¶25, 108 P.3d 710 (citation omitted).

Defendant asserts that the trial court erred in finding M.R.'s videotaped statements reliable because her interviewers "were unable to follow standard procedure ... to establish sufficient competency of the child to understand the subject matter, to recall information and probe memory, and importantly, ... to have the child demonstrate an understanding of what it meant to tell the truth." APlt.Br. 27,29.

But the trial court found that M.R.'s interviewers made clear "the importance of telling the truth" and "not answering or guessing or speculating when she didn't know the answer." R386:13. The trial court also found that M.R. described at least some events close in time to the interviews, that she "was consistent throughout that these events occurred," and that to the extent there were inconsistencies, "they were of a minor

nature and of the kind that a six-year-old may well do.” R396:17-18. The court found that the details M.R. gave concerning Defendant’s abuse—that he told her not to bite his penis but “to suck it like a popsicle,” for example—were consistent with a child experiencing abuse. R386:18. And the court found that M.R.’s testimony was “linear and logical” and that she did not make any “grandiose” or “bizarre” statements. R396:19.

Each of these findings support that M.R. had sufficient competency to understand the subject matter, to recall information at the level expected of a six year old, and to tell the truth. Defendant cites none of the evidence in the videos that supports those findings. Apl’t.Br. 26-30. Thus, he has not shown that the trial court’s findings were clearly erroneous. *Cf. State v. Nielsen*, 2014 UT 10, ¶42, 326 P.3d 645 (a party “will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal”).

Next, Defendant argues that the trial court erred in finding M.R.’s interviews reliable because, according to Defendant, “M.R. did not describe any physical acts that she could not have potentially witnessed her mother and [Defendant] perform with her own eyes.” Apl’t.Br. 28,29. But Defendant cites nothing to support that a child’s allegations of abuse are rendered unreliable merely because she might have observed sexual conduct between someone else. Apl’t.Br. 25-30. Moreover, Defendant

ignores the testimony of M.R.'s mother, who testified that she and Defendant were very careful to limit their sexual activity to when the children were sleeping. R390:616,618. And he ignores that even if M.R. had witnessed some of their sexual activity, the trial court found that she could not have offered certain details concerning Defendant's abuse—that he told her not to bite his penis but to suck it "like a popsicle"—"without some kind of experience like this." R386:18.

Defendant also challenges the trial court's finding that M.R. did not appear to have been coached, asserting that "it is apparent that M.R. had talked to adults before being interviewed" and "it appears that M.R. echos (sic) words that she has heard adults say, such as 'tito.'" Apl't.Br. 29. Again, Defendant cites nothing to support that a child's allegations must have been coached merely because he had talked to adults about the abuse before the interviews. *See id.* Defendant also ignores that the hesitation in M.R.'s responses to the interviewers' questions supports the trial court's finding that she was not coached. *See* St.Exh. 1, 2. And he ignores the testimony of M.R.'s mother, who testified that the children in their household used the word "tito" to refer to a man's penis. R390:629-30.

Finally, Defendant asserts that the trial court erred in finding that M.R.'s statements were reliable because, according to Defendant, "M.R. was

easily distracted and playful.” Aplt.Br. 27. Defendant, however, cites nothing in the record to support his contention. Granted, M.R. may have been playful during some parts of the second video when she and the interviewer were not talking about the abuse, but she was largely subdued when describing Defendant’s abuse. *See* St.Exh. 1,2.

In sum, Defendant affirmatively waived any objection to the admission of the videos when he told the trial court that he had no problem with their admission. He has not shown clear error in the court’s reliability findings in any event. *See Perea*, 203 UT 68, ¶32.

C. Defendant’s reliance on the confrontation clause is misplaced.

Defendant argues that the trial court erred in allowing the jury access to the video exhibits because “M.R.’s videotaped testimony ... was not subjected at all to cross-examination and thus implicat[es] the confrontation clause.” Aplt.Br. 33.

Defendant’s focus on the confrontation clause as a ground for challenging the trial court’s ruling is misplaced. The primary concern of the confrontation clause is with “the admission of testimonial statements of a witness who did not appear at trial,” *Crawford v. Washington*, 541 U.S. 36, 54 (2004), or of a witness who appeared but could not be subjected to cross-examination, *State v. Villarreal*, 889 P.2d 419, 423 (Utah 1995). The

confrontation clause therefore focuses on the *admission* of evidence, not on whether properly admitted evidence may then go with the jury during deliberations. Here, Defendant affirmatively waived any objection to the admission of M.R.'s videotaped statements. R386:20-21,23. And Defendant cites nothing to support that evidence otherwise properly admitted—with Defendant's agreement—violates the confrontation clause merely because the jury is permitted to have that evidence during deliberations. *See* Aplt.Br. 25-35.

Defendant cannot show a confrontation violation, in any event, because he had an opportunity to cross-examine M.R. about her interview statements. And that is all the Confrontation Clause requires.

In support of his confrontation challenge, Defendant relies primarily on *Crawford* and *Villarreal*. *See* Aplt.Br. 25-26,30-35. *Crawford* held that under the confrontation clause, testimonial statements made by a non-testifying declarant are admissible only if the declarant "was unavailable to testify" and the defendant "had a prior opportunity for cross-examination." 541 U.S. at 53-54, 68. *Villarreal* held that a defendant's confrontation rights are violated when a witness "refuse[s] to answer the prosecutor's questions" and thus cannot be cross-examined, and the prosecutor then

proceeds through leading questions “to present to the jury what he thought [the witness] should have testified to.” 889 P.2d 423.

“However, the Supreme Court made clear in *Crawford* that there is no Confrontation Clause violation when” — as M.R. did here — “the declarant appears for cross-examination at trial.” *State v. Rhinehart*, 2006 UT App 517, ¶26 n.7, 153 P.3d 830 (citing *Crawford*, 541 U.S. at 59 n.9); see also *State v. Nelson*, 725 P.2d 1353, 1356 (Utah 1986) (“The United States Supreme Court has stated that ‘where the declarant is not absent, but is present to testify and to submit to cross-examination ... the admission of his out-of-court statements does not create a confrontation problem’ under the federal constitution.”) (quoting *California v. Green*, 399 U.S. 149, 162, (1970)).

And *Villarreal* does not apply where, as here, the victim takes the stand at trial, acknowledges her videotaped statements, and is open to cross-examination. See *Nelson*, 725 P.2d at 1357 (defendant had opportunity to cross-examine where victim took stand at trial and affirmed that she spoke with investigators about her sexual assault, even though victim did not provide details of attack); see also *State v. Pecht*, 2002 UT 41, ¶39, 48 P.3d 931 (by questioning child victim in court, State provided defense with opportunity to cross-examine victim “not only on the matters addressed in

direct examination, but also on the substance of the information contained in the videotapes").

Nothing in this record suggests that M.R. was unwilling or unable to answer Defendant's questions concerning the videotapes or his abuse. Defendant simply chose not to cross-examine M.R. on those matters. R389:560-65.

The fact that Defendant chose to forgo cross-examination "does not mean that the opportunity was not available." *Nelson*, 725 P.2d at 1357. And it "is the opportunity to cross-examine that is guaranteed by the state and federal constitutions, not whether that opportunity is exercised." *Id.*; accord *Pecht*, 2002 UT 41, ¶39.

Defendant's confrontation challenge to the video exhibits going to the jury room therefore fails.

D. Defendant has not shown that allowing the video exhibits in deliberations emphasized M.R.'s statements.

Finally, Defendant argues that giving the video exhibits to the jury was erroneous because it "only served to over-emphasize that evidence ... to the exclusion of all other evidence." Aplt.Br. 31.

In making this argument, Defendant acknowledges that rule 17(l), Utah Rules of Criminal Procedure, allows the jury to take exhibits with it for deliberations. Aplt.Br. 32; see also Utah R. Crim. P. 17(l) ("Upon retiring for

deliberation, the jury may take with them ... all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband."). Defendant contends, however, that "Utah appellate courts ha[ve] long held that testimonial evidence may not be taken to the jury room." Aplt.Br. 31 (citing, inter alia, *State v. Solomon*, 87 P.2d 807 (Utah 1939), *State v. Davis*, 689 P.2d 5 (Utah 1984), and *State v. Carter*, 888 P.2d 629 (Utah 1994)).

But *Solomon* involved excerpts of a transcript of an unavailable witness's prior testimony that, by statute, a party could only read into evidence. See *Solomon*, 87 P.2d at 810-11 (statutes governing both prior testimony and depositions allowed only that a party "*may read in evidence the testimony of the witness*") (emphasis in original). Similarly, *Davis* involved a partial deposition, where the statutory rule of evidence expressly excluded depositions as evidence jury could have during deliberations. *Davis*, 689 P.2d at 14 (citing former Utah Code Ann. §77-35-17(k)). And *Carter* involved an abstract of witnesses' prior testimony under the same rule as *Davis*. See *Carter*, 888 P.2d at 641 (citing former Utah R. Crim. P. 17(k)). The applicable rule of evidence today, however, no longer expressly excludes

depositions from evidence that may be provided to jurors. See Utah R. Crim. P. 17(l).

Even assuming that testimonial evidence should generally not go to the jury because it might emphasize evidence to one party's detriment, however, that does not mean that the trial court erred in letting the jury have the video exhibits during deliberation in this case. Defendant's primary defense to the five counts unrelated to the November 9 incident was that M.R.'s interviewers unwittingly planted the allegations in M.R.'s mind by not following proper interviewing techniques. R391:842-43. Therefore, at least to these counts, M.R.'s videos were as important to Defendant as they were to the State. And, indeed, it was Defendant—not the State—who in closing urged the jury to review the videos. R391:834-35 (defense counsel in closing argument: "You can watch the video You can go and watch them. This is not necessarily a requirement, but I submit to you it should be."). Thus, under the facts of this case, Defendant cannot show that submitting the video exhibits to the jury unfairly emphasized evidence to his detriment.

But even if the trial court erred in sending the video exhibits to the jury room, Defendant cannot show that he was harmed by the error. See *State v. Binkerd*, 2013 UT App 216, ¶35, 310 P.3d 755 (error harmless if "there

is no reasonable likelihood that the error affected the outcome of the proceedings"). Defendant cites nothing in the record suggesting that the jury replayed M.R.'s videos during deliberations. Apl't.Br. 25-35. *See State v. Ashby*, 2015 UT App 169, ¶47, 357 P.3d 554 (submitting DVD of victim's interviews to jury harmless where "record does not suggest that the jury actually played the DVD" during deliberations). More tellingly, even if the jury watched the videos during deliberations, it did not help the State because the jury did not convict Defendant on five of the eight charges. R352-59,361-62. And the only counts on which the jury convicted Defendant were those related to the November 9 conduct—where M.R.'s mother walked in on Defendant and thus partially corroborated M.R.'s allegations.

In sum, Defendant has not shown either that the trial court erred in sending the video exhibits into the jury room or that any error harmed him.

II

DEFENDANT WAIVED ANY CLAIM RELATED TO THE TRIAL COURT'S SINGLE DESCRIPTION OF A NONVERBAL RESPONSE BY THE VICTIM, WHERE HE INITIALLY SAID THAT HE DID NOT OBJECT AND THEN AGREED TO A CURATIVE INSTRUCTION

While playing the video of M.R.'s first interview at trial, the prosecutor at one point asked the trial court to make a record that M.R.'s non-verbal response to a particular question was a nod. R389:439-40.

Defendant said he did not object. R389:440. When the court then sought to make a record of M.R.'s next non-verbal response, Defendant objected on the ground that the jury could decide for itself what the non-verbal response was. R389:440-41,454. The court did not make a record of the next nonverbal response. R389:441. A short time later, the court instructed the jury to disregard the single description of M.R.'s nonverbal response it had given and to evaluate for themselves "whether or not the child did anything and what purpose you are going to apply if any to her conduct in response to that question." R389:494-95. Defendant approved that instruction and asked for no further relief. R389:455.

Defendant now asserts that the trial court "erred by intervening at trial at the behest of the State in instructing the jury to assume that non-verbal cues made by the child-witness constitute an affirmative response." Aplt.Br. 35 (bolding and capitalization omitted). He argues that the court's "needless intervention more likely than not influence[d] the jury to believe that M.R. testified credibly, and thus" made the jury "more likely to convict Cruz for sodomy." *Id.* 37. Finally, he argues, the trial court's "curative instruction was neither prompt nor effective." *Id.* 38.

Defendant affirmatively waived his argument when he expressly told the court that he did not object to the prosecutor's request and then later

agreed to the court's curative instruction as a remedy. In any event, Defendant's conclusory statements do not show either that the trial court erred or that he was prejudiced by the error.

A. Relevant proceedings.

During both her recorded interviews, M.R. often gave nonverbal responses to the questions asked. *See* St.Exh. 1,2. Towards the end of the first interview, M.R. revealed that Defendant made her "put my mouth on his weewee." R389:439. When asked whether that had happened more than once, M.R. responded, "When my mom would work." R389:439. M.R. was then asked, "Every time?" *Id.* M.R. gave no verbal response, but she responded by nodding her head. *Id.*; St.Exh. 1.

The State asked that the record reflect that M.R.'s nonverbal response was "an affirmative nod." R389:439-40. Defense counsel stated: "I'm not going to object to what he just said, but I'm not—I don't remember what I saw her do, so I'm not going to respond." R389:440. The trial court then indicated "for the record that the child moved her head up and down." *Id.*

When the video reflected another nonverbal response, the court said: "Okay, we need to reflect what happened." R389:440. At that point, defense counsel interjected that "we just watched forty minutes while the child was doing nonverbal cues.... Why are we making a difference now?"

R389:440. The court replied that no one had requested clarification of M.R.'s nonverbal responses before, so "there would be no reason for me to make any discussion about what had occurred nonverbally." *Id.* After defense counsel argued that the jury could "see for themselves whether the child's doing that," the court refrained from making a record of M.R.'s nonverbal responses. R389:440-41.

When the first video ended, the court excused the jury for lunch and let defense counsel make a more complete record of his prior objection. R389:445-47. Defense counsel noted that during the first part of the interview, which was in English, "the child was making nonverbal gestures the whole time, and nobody was trying to make a record of those nonverbal gestures." R389:447. Then, when the Spanish part came, "there was an indication that the child had nodded, and the prosecutor wanted to make a record of that. I did not object." *Id.* But then "it appeared" that the prosecutor "was going to start making them every time the child made a nod." *Id.* And "[w]hat I was trying to get at is that the jury could see for themselves if they were nodding." R389:448.

At a later break in the proceedings, defense counsel revisited the issue, noting that "[o]ne of the problems that happens is we have a video where the child is making movements." R389:454. "Sometimes it could be

interpreted as a nod, but basically by allowing the Court to take notice or the prosecutor to take notice, then you're speculating as to what those movements are." *Id.*

The prosecutor agreed that "I have no need to make those requests that the record reflect this or that, because" a video is "not ephemeral like live witness testimony from the stand." *Id.* The prosecutor concluded: "In fact, I'm fin[e] if the Court wants to let the jury know that I was in error in asking for that in the first place, because the record already reflected as an admitted exhibit." R389:455.

The court then asked whether defense counsel wanted it "to clarify that the State shouldn't have asked for that and I shouldn't have said anything about the young lady's movement of the head." R389:455. Defense counsel responded, "Yes." *Id.* Counsel asked for no further relief.

Before playing the second interview, the trial court gave the following curative instruction:

When we broke just before lunch, we had talked about — there had been an issue arise where [the prosecutor] had asked me to take — make a record of the actions of the child in response to some questions.

Upon further reflection, I believe that that was not something I should have done. I don't want you to consider my statement about the child moving her head up and down for any purpose. You can evaluate for yourself whether or not the child did anything and what purpose you are going to apply if any to her conduct in response to that question. That's

not a question that I should have—that's not an issue that I should have made a statement as to, okay? So disregard that completely. Consider only what you saw on the video, okay?

R389:494-95.

B. Defendant affirmatively waived his claim when he initially said he did not object to the State's request and then approved the trial court's curative instruction as the appropriate remedy.

As stated, under the invited error doctrine, this Court will not “engage in even plain error review” of a defendant's claim on appeal “when ‘counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the proceedings.’” *State v. Winfield*, 2006 UT 4, ¶14, 128 P.3d 1171 (citations and internal quotation marks omitted).

Here, the State asked the trial court to make a record of only one nonverbal response that M.R. gave in her first video. R389:439. Defendant did not object to the State's request. Indeed, he affirmatively stated that he did not object: “I'm not going to object to what he just said.” R389:440,447. By affirmatively stating that he did not object to making the record as the prosecutor proffered, Defendant invited the trial court into the very error he now complains of. He thus is not entitled to any review of his claim. *See Winfield*, 2006 UT 4, ¶14.

Defendant likewise affirmatively led the trial court into believing that the court's curative instruction was sufficient to cure any problems with describing M.R.'s nonverbal response. When the court asked whether defense counsel wanted an instruction "to clarify that the State shouldn't have asked for that and I shouldn't have said anything about the young lady's movement of the head," defense counsel answered, "Yes." R389:455. Defendant asked for no other relief and never suggested that the curative instruction would not be enough. Defendant thus led the trial court to believe that its instruction was enough to cure any problems. *See Winfield*, 2006 UT 4, ¶14.

Even if Defendant did not affirmatively invite any error, he at least waived these claims. Because he did not even preserve his claims, he can only prevail if he argues and shows plain error. *See State v. Moa*, 2012 UT 28, ¶24, 282 P.3d 985 (party raising unpreserved claim on appeal must "articulate an appropriate justification for appellate review" by arguing either "plain error" or "exceptional circumstances.>").

Here, Defendant nowhere argues plain error. Aplt.Br. 35-38. For this reason alone, his claim fails. *See State v. Tingey*, 2014 UT App 228, ¶3, 336 P.3d 608 ("Because Defendant does not argue that plain error or exceptional

circumstances permit our review of this claim, we decline to consider it further.”).

But Defendant cannot show plain error, in any event. See *State v. Holgate*, 2000 UT 74, ¶13, 20 P.3d 346 (to prevail on plain error claim, defendant must show obvious and prejudicial error). Defendant cites no authority holding that a trial court may not make a record describing a witness’s nonverbal responses merely because the witness’s nonverbal responses came in a video. See *Aplt.Br.* 35-38. Thus, Defendant has not shown any error, let alone an obvious one. See *State v. Dean*, 2004 UT 63, ¶16, 95 P.3d 276 (“To establish that an error should have been obvious to the trial court, [an appellant] must show that the law governing the error was clear at the time the alleged error was made.”) (citation omitted); *Anderson v. Anderson*, 2015 UT App 260, ¶6, 361 P.3d 698 (“An appellate court is not a depository into which parties may dump the burden of their argument and research.”).

Nor has Defendant shown prejudice. First, Defendant was charged with three counts related to his conduct on November 9, 2013, the day M.R.’s mother walked in on him. R1-5,40-43 (Counts VI-VII). The remaining five charges were based on conduct occurring before November 9, 2013. *Id.* (Counts I-V). When the State asked the trial court to make a

record of R.M.'s nonverbal response to a question, M.R. was responding to a question related to the latter charges. R389:439. Defendant was not convicted on any of those charges. R352-62.

Second, Defendant does not even tell this Court what the trial court's curative instruction said, let alone show how it was not "effective." See Apl't.Br. 35-38. Nor does he explain why the court's single instance of recording M.R.'s nonverbal response was—as he now claims—"so prejudicial and devastating ... as to vitiate the mitigating effect of the court's curative instruction." *Id.* 38. Thus, Defendant has not shown that the curative instruction was "neither prompt nor effective," Apl't.Br. 38, let alone obviously so. See *State v. Harmon*, 956 P.2d 262, 271-72 (Utah 1998) ("[C]urative instructions are a settled and necessary feature of our judicial process and one of the most important tools by which a court may remedy errors at trial."); *State v. Curtis*, 2013 UT App 287, ¶25, 317 P.3d 968 ("[C]urative instructions are 'ordinarily presumed on appeal to be effective,' *State v. Winward*, 941 P.2d 627, 635 (Utah Ct.App.1997), absent a 'substantial and prejudicial underlying error or irregularity, *State v. Hodges*, 30 Utah 2d 367, 517 P.2d 1322, 1325 (1974).").

Even if this Court reaches Defendant's claim, therefore, it fails.

III

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR JOINING THE STATE IN ASKING FOR A MODIFIED ALLEN INSTRUCTION AFTER THE JURY HAD DELIBERATED 18 HOURS⁶

Defendant argues that his trial counsel rendered ineffective assistance when, after the jury had deliberated about 18 hours, he joined the State in asking that the trial court give a modified *Allen* instruction. Aplt.Br. 38-42. Defendant asserts that “the nature of the instruction, given *before* the jury indicated it was actually deadlocked, and the substance and delivery of it—asking whether verdicts had been reached on any counts, and whether further deliberations would result in unanimous verdicts on other counts—was undoubtedly coercive.” *Id.* 41-42. He further asserts that the trial court’s concluding statement “that he wanted a decision by the jury ‘in a relatively short period,’” added to the coercion. *Id.* 40-41.

This Court may dispose of Defendant’s claim on the prejudice element where the jury did not deliberate after the court’s instruction and thus could not have been coerced by it. Defendant’s claim also fails because

⁶A modified *Allen* instruction is one that differs “whether by omission or embellishment” from the instruction given in *Allen v. United States*, 164 U.S. 492 (1896). *State v. Harry*, 2008 UT App 224, ¶4, 189 P.3d 98 (citation and internal quotation marks omitted).

neither the instruction nor the court's comment after was coercive. And defense counsel had a sound reason for requesting the instruction.⁷

To prevail on an ineffective assistance claim, Defendant must prove both that his counsel performed deficiently and that counsel's performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficient performance, Defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997) (quoting *Strickland*, 466 U.S. at 689). To rebut the presumption, Defendant must "persuad[e] the court that there was *no conceivable tactical basis* for counsel's actions." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis in original) (quotations and citation omitted).

To prove prejudice, Defendant must show "'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *State v. Hales*, 2007 UT 14, ¶86, 152 P.3d 321 (quoting *Strickland*, 466 U.S. at 695). He must therefore show that the "likelihood of a

⁷In one sentence in one heading of his argument, Defendant also references plain error. Aplt.Br. 39. But he nowhere develops a plain error argument. *Id.* 39-42. In any event, where Defendant has not shown any error, he necessarily has not shown plain error. *See State v. Holgate*, 2000 UT 74, ¶13, 20 P.3d 346 (to prevail on plain error claim, defendant must show obvious error).

different result" is "substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 792 (2011).

Finally, if "it is 'easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,'" this Court may "do so without analyzing whether counsel's performance was professionally unreasonable." *Archuleta v. Galetka*, 2011 UT 73, ¶41, 267 P.3d 232 (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052).

A. Relevant proceedings

The jury began deliberations at 12:37 p.m. on October 2, 2014. R303. At 12:10 a.m. on October 3, the jury informed the court that jurors needed sleep. R392:861. The trial court released the jury for the night at 12:23 a.m. R303;R392:861-62.

The jury resumed deliberations at 9:00 a.m. on October 3, 2014. R392:863. At 3:56 p.m., defense counsel and the State jointly proposed a jury instruction that reiterated the jurors' need to be open to each other's varying opinions, but which was "not urging the verdict." R392:863-64. Defense counsel explained that they wanted the court to "read this instruction" and then "say we have a question that we want you to deliberate in the—not out here, but amongst yourselves and come back to us about." R392:864. The question would be: "Is there any reasonable

likelihood that continued discussion will result in a unanimous decision?" *Id.* "If they come back and say 'yes,' then they continue; if they come back and say 'no,'" then "there's no reason to keep here hour after hour." R392:865-66.

After noting that the proposed instruction was "pretty close" to the "ABA *Allen* instruction," the court said, "one of the things that I was going to explore is 'Have you reached a decision on any specific counts: If you have, let me know. If you haven't, let me know.'" R392:866. Defense counsel replied, "That's fine." R392:867.

At 4:09 p.m., the trial court addressed the jury. R347. The court noted that the jury had "been at this a very long time," "approximately eighteen hours of deliberations." R392:867. And in light of that time, "I wanted to give you an instruction and see where you were as far as continued deliberations." *Id.* "If you are progressing towards a resolution, don't take this in any way as an attempt to cause you to hurry your process." *Id.*

The trial court then read the following instruction:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty to consult with one another and to deliberate. Your goal should be to reach an agreement if you can do so without surrendering your individual judgment. Each of you must decide the case for yourself, but do so only after

impartially considering the evidence with your fellow jurors. Do not hesitate to reexamine your own views and change your position if you are convinced it is mistaken. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or just to return a verdict.

You are judges—judges of the facts. Your sole interest is to determine the truth from the evidence in this case.

I now ask you to take the following two questions back with you into the jury room and discuss them as a group. I do not want any of you to indicate your answer now. Only answer after you have discussed it as a group.

Question One:

Have you reached a unanimous verdict on any of the Counts 1 through 8?

Question Two:

Is there any reasonable likelihood that continued deliberations will result in a unanimous verdicts on any counts that you have not yet as a group been able to unanimously agree upon?

R351 (Instr. 55) (attached at Addendum G).

The trial court then added: "I'll ask you to talk about these questions" and "get back with me *in a relatively short period of time* to let us know where you are in this matter, because that's what I think is appropriate, okay?" R392:868 (emphasis added). The court concluded, "So let us know when you're ready to answer those questions for me, okay?" R392:868-69.

In short order, the jury responded to the court's questions by answering "Yes" to whether it had reached a unanimous verdict on any count and "No" to whether continued deliberations would result in a unanimous verdict on any of the other counts. R392:869. The jury was then called back into the courtroom, where it gave its guilty verdicts on the counts related to November 9 and its not guilty verdict and non-verdicts on the other counts. R392:872.

B. Analysis

Here, this Court need not decide whether defense counsel performed deficiently because this Court can dispose of Defendant's ineffectiveness claim on the prejudice element. *See Archuleta*, 2011 UT 73, ¶41. In any event, defense counsel did not perform deficiently.

In *Allen v. United States*, 164 U.S. 492, 501 (1896), the Supreme Court approved the use of supplemental jury instructions designed to encourage a deadlocked jury to keep deliberating. This Court has since held that such a charge "is a 'proper exercise of the court's power to guide the jury in reaching a fair and impartial verdict provided it made clear that jurors were not to give up their conscientiously held convictions.'" *State v. Lactod*, 761 P.2d 23, 29-30 (Utah App. 1988) (citation omitted); accord *State v. Dalton*, 2014 UT App 68, ¶47, 331 P.3d 1110.

Modified *Allen* instructions, however, should not “coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts.” *Bey v. Stine*, 159 F. Supp. 2d 657, 664 (E.D. Mich. 2001) (quotations and citation omitted). Of concern, therefore, is language that “overemphasize[s] the importance of an agreement, suggest[s] that any juror surrender his independent judgement,” or implies “that the court is indicating anxiety for or demanding some verdict.” *State v. Harry*, 2008 UT App 224, ¶9, 189 P.3d 98 (quoting *Lactod*, 761 P.2d at 31).

But “there is no prescribed ‘ritual of words’” governing whether a modified *Allen* instruction was coercive. *Lactod*, 761 P.2d at 31 (citation omitted). Rather, whether an instruction was coercive depends on “the facts of each case and the exact words used by the trial court.” *State v. Ginter*, 2013 UT App 92, ¶6, 300 P.3d 1278 (citations omitted); accord *Lactod*, 761 P.2d at 30. To prevail on a challenge to an *Allen* instruction, therefore, the defendant must show either that (1) “the language of the supplemental charge can properly be said to be coercive” per se, or (2) the language of the charge “is coercive under the specific circumstances of the case.” *Harry*, 2008 UT App 224, ¶7 (quoting *Lactod*, 761 P.2d at 30).

Under this case law, Defendant cannot show prejudice related to his ineffectiveness claim. First, the concern with a coercive *Allen* instruction is

that it will affect a jury's deliberations by encouraging jurors to give up their "conscientiously held convictions." *Lactod*, 761 P.2d at 29-30. That concern, however, presupposes that the jury continued to deliberate after the instruction was given. Here, the record supports that the jury did not conduct any deliberations after receiving the court's instruction. Thus, it could not have been coerced by the instruction, even if the instruction were coercive.

Although the court's instruction addressed future deliberations, it first directed the jury to answer two questions: (1) whether it had reached a unanimous verdict on any of the charges; and (2) whether continued deliberation would result in a unanimous verdict on any counts on which jury had not yet agreed. R351. After giving the instruction, the court asked the jury to respond to those two questions "in a relatively short period of time." R392:868-69. And, indeed, the jury responded to the court's questions in a short period of time indicating that further deliberations would not be helpful. R392:869.

This record supports that the jury did not conduct any further deliberations upon receiving the court's instructions. Rather, it met only long enough to answer the court's questions. And if it did not deliberate after the court's instruction, it could not have been coerced by the

instruction, even if the instruction were a coercive one. For this reason alone, Defendant cannot show prejudice on his ineffectiveness claim.

In addition, however, Defendant neither provides this Court with the text of the trial court's modified *Allen* instruction nor cites any of the instruction's language. Aplt.Br. 35-38. Thus, he necessarily has not shown that the instruction's language was coercive such that his counsel's approval of it prejudiced him. See *Ginter*, 2013 UT App 92, ¶6 (whether instruction coercive depends on "'exact words used by the trial court'").

In any event, the instruction was not coercive, where it was consistent with the ABA standard this Court approved in *Harry* as "an even-handed approach designed to foster productive deliberations without putting undue pressure on dissenting jurors." *Harry*, 2008 UT App 224, ¶25 (citing ABA Standard 15-5.4).⁸ Indeed, like the ABA standard, the instruction stated that the jury had a "duty to consult with one another and to deliberate" with the goal of reaching "an agreement if you can do so without surrendering your individual judgment." R351. See ABA Standard 15-5.4(a)(2) (instruction may direct "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"). In addition, the

⁸ A copy of ABA standard 15-5.4 is attached at Addendum G.

instruction stated that each juror "must decide the case for yourself, but do so only after impartially considering the evidence with your fellow jurors." R351. See ABA Standard 15-5.4(a)(3) (instruction may direct "that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors"). The instruction directed jurors to "not hesitate to reexamine your own views and change your position if you are convinced it is mistaken." R351. See ABA Standard 15-5.4(a)(4) (instruction may direct that "a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous"). And the instruction directed jurors to "not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or just to return a verdict." R351. See ABA Standard 15-5.4(a)(5) (instruction may direct "that no juror should surrender his or her honest believe as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict").

Defendant argues, however, that the instruction was coercive because it was given before the jury had actually informed the court that it was deadlocked. Appt.Br. 40-42. But the jury had been deliberating for 18 hours by the time the parties suggested the *Allen* instruction. R392:867. It was

reasonable therefore to conclude that the jury had reached an impasse. In any event, this Court has endorsed the giving of such non-coercive instructions "before an impasse occurs." *Harry*, 2008 UT App 224, ¶25; *see also* ABA Standard 15-5.4(b) (if "it appears ... that the jury has been unable to agree," the court "may give or repeat an instruction as provided in ... section (a)").

Alternatively, Defendant argues that the trial court rendered the instruction coercive when, according to Defendant, the court told the jury that it "wanted a decision by the jury 'in a relatively short period,'" i.e. that the court "want[ed] a verdict in a short order." Apl't.Br. 40-41.

But Defendant misreads the court's comment. As noted, the court's supplemental instruction concluded by asking the jury to consider two questions: (1) whether it had reached a unanimous verdict on any of the charges; and (2) whether continued deliberation would result in a unanimous verdict on any counts the jury had not yet "been able to unanimously agree upon." R351. The court then said, "I'll ask you to talk about these questions, get back with me in a relatively short period of time to let us know where you are in this matter, because that's what I think is appropriate, okay." R392:868. Contrary to Defendant's contention, therefore, the court never directed the jury to reach a verdict "in a relatively

short period.” *Id.* Rather, it merely asked for a response to its two questions within that period.

Defendant also asserts that the instruction must have been coercive because the jury responded “swiftly” to the charge. *Aplt.Br.* 40. But “[w]hether the time it takes a jury to reach a verdict after receiving a verdict-urging instruction demonstrates coercion must be determined on a case-by-case basis.” *Harry*, 2008 UT App 224, ¶33 n.13. And, as stated, the facts here support that no deliberations took place after the instruction was given; rather, the jury only met long enough to respond to the court’s two questions.

For all these reasons, Defendant cannot show that he was prejudiced by either the modified *Allen* instruction or the court’s comment after it. Thus, Defendant’s ineffectiveness claim fails on its prejudice element.

Defendant’s claim also fails on its deficient performance prong because Defendant cannot show that defense counsel lacked a conceivable tactical basis for seeking the instruction. This case rested almost solely on a six-year-old’s statements. Defense counsel therefore could reasonably have concluded that if the jury was deadlocked, at least some jurors were leaning Defendant’s way on at least some charges. And defense counsel could reasonably have concluded that forcing further deliberations risked having

those jurors change their minds. *See Clark*, 2004 UT 25, ¶6 (counsel not deficient if *any* reasonable basis supports counsel's decision).

IV

THE CHILD VICTIM'S STATEMENTS CONCERNING DEFENDANT'S ABUSE AND HER MOTHER'S CORROBORATING TESTIMONY WERE SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTIONS

Defendant next challenges the evidence supporting his convictions. Aplt.Br. 42-50. Because he did not preserve this claim below, he raises it both for plain error and ineffective assistance of counsel. *Id.* Because M.R.'s testimony and CJC interviews alone sufficed to support the jury's verdicts, Defendant's challenge fails under either rubric.

Even where a sufficiency claim is preserved, the "standard of review for a sufficiency claim is highly deferential to a jury verdict." *State v. Workman*, 2005 UT 66, ¶29, 122 P.3d 639 (citation omitted). This Court views all the evidence in the light most favorable to the verdict, *State v. Workman*, 852 P.2d 981, 984 (Utah 1993), and reverses only when the evidence, so viewed, "'is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt.'" *State v. Boss*, 2005 UT App 520, ¶9, 127 P.3d 1236 (citation omitted). This Court's "'inquiry ends when there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can

reasonably be made.’” *State v. Lucero*, 2012 UT App 202, ¶2, 283 P.3d 967 (memorandum decision) (citation omitted).

Where, as here, Defendant did not preserve his sufficiency claim, his burden is even heavier because he must show that it was “plain error for the trial court not to discharge [him].” *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346. Thus, Defendant must show not only “that the evidence was insufficient to support a conviction of the crime charged,” but that “the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.” *Id.*

Defendant was convicted on two counts of sodomy upon a child. A person commits sodomy upon a child if he “engages in any sexual act upon or with a child who is under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.” Utah Code Ann. § 76-5-403.1 (West Supp. 2013).

In support of those charges, the State presented testimony from M.R.’s mother that on November 9, 2013, she walked into her bedroom to find Defendant lying on the bed with his pants “wide open” and M.R. sitting next to his hip. R390:625-26. M.R.’s mother further testified that both Defendant and M.R. looked surprised. R390:623-24. And when M.R.’s

mother asked M.R. what happened, M.R. looked “shaky” and “pale,” and said that Defendant had put his penis in her mouth. R390:628.

The State also presented M.R.’s videotaped statements. In those statements, M.R. said that before her mother walked in on them, Defendant had put his penis first in her mouth and then in her “butt.” R389:439,444, 516,522-25,527-29;St.Exh. 1, 2. M.R. also said that when Defendant put his penis in her mouth, he told her “not to bite it,” but to suck it “like a popsicle.” R389:524,526;St.Exh. 1, 2. And M.R. said that when Defendant put his penis in her “butt,” it “hurt so bad.” R389:527,529;St.Exh. 1, 2.

This evidence constitutes “some evidence, including reasonable inferences, from which findings of all the requisite elements” of Defendant’s two sodomy convictions “can reasonably be made.” *Lucero*, 2012 UT App 202, ¶2 (citation omitted). Thus, Defendant cannot show that the evidence was insufficient, let alone obviously and fundamentally so. See *Holgate*, 2000 UT 74, ¶17.

In arguing his insufficiency claim, Defendant cites only some of this evidence. Aplt.Br. 44-46. He spends most of his argument citing other evidence that he claims undermines the jury’s verdicts. *Id.* 46-48. On appeal, however, this Court “may not reassess credibility or reweigh the evidence, but must resolve conflicts in the evidence in favor of the jury

verdict.” *State v. Workman*, 852 P.2d 981, 984 (Utah 1993). Thus, “Defendant may not reargue the weight of that evidence, relying upon testimony favoring his innocence and ignoring the conflicting testimony against him.” *State v. Bingham*, 732 P.2d 132, 133 (Utah 1987) (per curiam). “The fact that defendant's evidence contradicts the jury's determination,” therefore, “does not require reversal on appeal.” *Id.*; see also *State v. Lomu*, 2014 UT App 41, ¶17, 321 P.3d 243 accord *In re J.W.*, 2001 UT App 208, ¶10, 30 P.3d 1232 (“mere existence of conflicting evidence ... does not warrant reversal”).

Defendant’s sufficiency challenge—whether reviewed for plain error or ineffective assistance of counsel—therefore fails.

V

DEFENDANT CANNOT SHOW CUMULATIVE ERROR WHERE HE HAS NOT SHOWN ERROR.

Finally, Defendant claims that “cumulative error warrants reversal” of his convictions. Aplt.Br.49-50. “Under the cumulative error doctrine,” this Court will reverse a defendant’s convictions “only if the cumulative effect of the several errors undermines our confidence ... that a fair trial was had.” *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (omission in original) (citation and internal quotation marks omitted). If the issues raised on appeal do “not constitute error” or if the errors are “so minor as to result in

no harm," therefore, the cumulative error doctrine does not apply. *State v. Gonzales*, 2005 UT 71, ¶74, 125 P.3d 878.


For the reasons discussed above, Defendant here has not shown any error, let alone prejudicial error. Thus, the cumulative error doctrine does not apply. *Id.*

CONCLUSION

For the foregoing reasons, the Court should affirm.

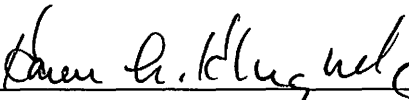
Respectfully submitted on January 19, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 13,497 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



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CERTIFICATE OF SERVICE

I certify that on January 19, 2016, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☐ was filed with the Court and served on appellant.

☒ will be filed and served within 14 days.



Addenda

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ADDENDA

Addendum A: Constitutional Provisions, Statutes, and Rules

Addendum B: Victim's first recorded interview, St. Exh. 1

Trial transcription, R389:421-45

Addendum C: Victim's second recorded interview, St. Exh. 2

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ABA Standard 15-5.4

Addendum A

United States Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Utah const., art. I, §12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Code Ann. § 76-5-403.1 (West Supp. 2013)

(1) A person commits sodomy upon a child if the actor engages in any sexual act upon or with a child who is under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

(2) Sodomy upon a child is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (2)(b), not less than 25 years and which may be for life; or

(b) life without parole, if the trier of fact finds that:

(i) during the course of the commission of the sodomy upon a child the defendant caused serious bodily injury to another; or

(ii) at the time of the commission of the sodomy upon a child, the defendant was previously convicted of a grievous sexual offense.

(3) Subsection (2)(b) does not apply if the defendant was younger than 18 years of age at the time of the offense.

(4) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Utah R. Crim. P. 15.5

(a) In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or other witness younger than 14 years of age which was recorded prior to the filing of an information or indictment is, upon motion and for good cause shown, admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

(a)(1) the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the defendant had a previous opportunity to cross-examine the child concerning the recorded statement, such that the defendant's rights of confrontation are not violated;

(a)(2) no attorney for either party is in the child's presence when the statement is recorded;

(a)(3) the recording is visual and aural and is recorded on film, videotape or other electronic means;

(a)(4) the recording is accurate and has not been altered;

(a)(5) each voice in the recording is identified;

(a)(6) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;

(a)(7) the defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury; and

(a)(8) the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.

(b) In a criminal case concerning a charge of child abuse or of a sexual offense against a child, the court, upon motion of a party and for good cause shown, may order that the testimony of any victim or other witness younger than 14 years of age be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the jury in the court room. All of the following conditions shall be observed:

(b)(1) Only the judge, attorneys for each party and the testifying child (if any), persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be in the room during the child's testimony. A defendant who consents to be hidden from the child's view may also be present unless the court determines that the child will suffer serious emotional or mental strain if required to testify in the defendant's presence, or that the child's testimony will be inherently

unreliable if required to testify in the defendant's presence. If the court makes that determination, or if the defendant consents:

(b)(1)(A) the defendant may not be present during the child's testimony;

(b)(1)(B) the court shall ensure that the child cannot hear or see the defendant;

(b)(1)(C) the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child's testimony;

(b)(1)(D) the defendant shall be permitted to observe and hear the child's testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child's testimony; and

(b)(1)(E) the conditions of a normal court proceeding shall be approximated as nearly as possible.

(b)(2) Only the judge and an attorney for each party may question the child.

(b)(3) As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

(b)(4) If the defendant is present with the child during the child's testimony, the court may order that persons operating the closed circuit equipment film both the child and the defendant during the child's testimony, so that the jury may view both the child and the defendant, if that may be arranged without violating other requirements of Subsection (b)(1).

(c) In any criminal case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of a party and for good cause shown, that the testimony of any victim or other witness younger than 14 years of age be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (b) are observed, in addition to the following provisions:

(c)(1) the recording is visual and aural and recorded on film, videotape or by other electronic means;

(c)(2) the recording is accurate and is not altered;

(c)(3) each voice on the recording is identified; and

(c)(4) each party is given an opportunity to view the recording before it is shown in the courtroom.

(d) If the court orders that the testimony of a child be taken under Subsection (b) or (c), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

Utah R. Crim. P. 17

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(a)(1) In prosecutions of misdemeanors and infractions, the defendant may consent in writing to trial in his absence;

(a)(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(a)(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(b)(1) misdemeanor cases when defendant is in custody;

(b)(2) felony cases when defendant is in custody;

(b)(3) felony cases when defendant is on bail or recognizance; and

(b)(4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least 14 days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impaneled and sworn, the trial shall proceed in the following order:

(g)(1) The charge shall be read and the plea of the defendant stated;

(g)(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(g)(3) The prosecution shall offer evidence in support of the charge;

(g)(4) When the prosecution has rested, the defense may present its case;

(g)(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(g)(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(g)(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(i)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(i)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(i)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may

be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(j) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(k) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(m) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(n) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them,

who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(o) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(p) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Addendum B

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

ALBERADO CRUZ,

Defendant.

Volume II

Case No. 131800746

Jury Trial
Electronically Recorded on
September 30, 2014

BEFORE: THE HONORABLE CLARK A. MCCLELLAN
Eighth District Court Judge

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UTAH APPELLATE COURTS

FEB 25 2015

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1 we've just spent the morning talking about. The disk itself is
2 not marked because it creates problems with an exhibit sticker
3 on it, spinning. It doesn't spin in a balanced way, but the
4 envelope is marked and the disk is marked as "South Valley
5 CJC."

6 THE COURT: Okay, any objection?

7 MR. SIDWELL: No.

8 THE COURT: All right.

9 MR. DRECHSEL: So that's deemed admitted?

10 THE COURT: It is admitted, yes.

11 MR. DRECHSEL: Thank you. I'll provide the envelope to
12 your clerk so she can initial that.

13 (Exhibit No. 1 received into evidence)

14 MR. DRECHSEL: Can I display that to the jury now, your
15 Honor?

16 THE COURT: You can.

17 MR. DRECHSEL: Okay, thank you. Just with some intro-
18 duction for explanation. The first forty-something minutes
19 is in English. There will be a break, and then the remaining
20 minutes the video -- video will be in Spanish, and at that
21 point we've arranged for translation so that the jury will
22 understand what's being said during that portion. The DVD
23 player (inaudible).

24 (Video recording played in the courtroom as follows)

25 DETECTIVE BIGELOW: You can sit right there, huh? So,

1 MR, my name is James, okay? I'm interviewing you at South
2 Valley Children's Justice Center in West Jordan. MR, my job
3 is to talk to children about things that have happened to them,
4 okay? I meet with lots of children, so they can tell me the
5 truth about things that have happened to them, okay?

6 MR, when you talk to me, if I ask you a question and
7 you don't know what I mean, you can say, "I don't know what you
8 mean," and I'll ask it in a different way, okay? If I don't
9 understand something you say, same thing, okay? If I ask you a
10 question and you don't know the answer, MR, don't guess. Just
11 say, "I don't know," okay? So, MR, if I were to ask you, "What
12 is my dog's name?" what would you say?

13 MR: I don't know.

14 DETECTIVE BIGELOW: Okay, can you tell -- when you
15 don't know the answer, don't guess. Just say, "I don't know,"
16 okay? If I say things that are wrong, MR, you should tell me
17 that I'm wrong and correct me, okay? So, MR, if I were to say
18 that you are a five-year-old boy, what would you say?

19 MR: Uh-huh, no.

20 DETECTIVE BIGELOW: What is the correct answer?

21 MR: Six (inaudible) because I'm six.

22 DETECTIVE BIGELOW: And you're a girl? Okay, now, MR,
23 you know you should correct me if I say something that's -- if
24 I make a mistake or say something that's not right, okay?

25 MR: (No verbal response).

1 DETECTIVE BIGELOW: MR, it is very important that you
2 only tell me the truth today, okay? You should only tell me
3 about things that have really happened to you. MR, do you
4 promise to tell me the truth today? Yes? Okay.

5 MR, when I ask you questions, I need you to tell me
6 what happened because I don't know what happened. I will not
7 be able to tell you the answers to my questions, okay? Now,
8 MR, I want to get to know you a little bit better, okay? Tell
9 me about some things you like to do.

10 MR: Play.

11 DETECTIVE BIGELOW: Play? Tell me more about that.

12 MR: I like to play with my sister.

13 DETECTIVE BIGELOW: You like to play with your sister?
14 Tell me more about your sister.

15 MR: She is (inaudible).

16 DETECTIVE BIGELOW: She's what?

17 MR: She's not mean.

18 DETECTIVE BIGELOW: She's not mean? Tell me more about
19 your sister.

20 MR: We play.

21 DETECTIVE BIGELOW: Uh-huh.

22 MR: We play hide-and-seek.

23 DETECTIVE BIGELOW: You play hide-and-seek, okay. Tell
24 me more about your sister.

25 MR: My sister's fun.

1 DETECTIVE BIGELOW: She's fun? Tell me your sister's
2 name.
3 MR: Lola.
4 DETECTIVE BIGELOW: Lola? Tell me how old Lola is.
5 MR: One years old.
6 DETECTIVE BIGELOW: She's one years old? Okay. MR,
7 tell me something that happened this week that made you happy.
8 MR: We go to Nickels.
9 DETECTIVE BIGELOW: You go to Nickels? What's that.
10 Tell me more about that.
11 MR: They're like games that when you win --
12 DETECTIVE BIGELOW: Uh-huh.
13 MR: -- you get tickets to get prizes.
14 DETECTIVE BIGELOW: Okay, tell me more about the
15 Nickels.
16 MR: Nickels is fun.
17 DETECTIVE BIGELOW: It's fun. Tell me more about it.
18 MR: There's a lot of games that are fun.
19 DETECTIVE BIGELOW: A lot of games? Okay, MR, tell me,
20 do you go to school?
21 MR: Yes, but not here, only Vernal.
22 DETECTIVE BIGELOW: Only Vernal? Tell me something
23 that happened in school that made you unhappy.
24 MR: Have friends.
25 DETECTIVE BIGELOW: You had friends, and that made you

1 unhappy?

2 MR: (No verbal response)

3 DETECTIVE BIGELOW: Tell me more about that.

4 MR. They play with me.

5 DETECTIVE BIGELOW: They play with you. (Inaudible)

6 tell me something that happened in school that made you sad.

7 MR: I don't have school.

8 DETECTIVE BIGELOW: You don't go to school?

9 MR: No, when we don't have school.

10 DETECTIVE BIGELOW: That makes you sad when you don't

11 have school? Okay, so you like to go to school. Okay, and

12 tell me more about being sad when you don't go to school.

13 MR: I don't play at school.

14 DETECTIVE BIGELOW: Yeah.

15 MR: And I don't have fun at school.

16 DETECTIVE BIGELOW: You don't have fun when you don't

17 go?

18 MR: And we don't eat, and we waste our morning.

19 DETECTIVE BIGELOW: Okay, MR, it is important to tell

20 me only about things that have happened to you, okay? You can

21 tell me both good things and bad things, okay?

22 MR: (No verbal response).

23 DETECTIVE BIGELOW: Now, MR, I want to get to know you

24 a little bit better, okay? Tell me everything that happened

25 yesterday from the time you woke up until the time you went to

1 bed.

2 MR: I woke up at one other morning.

3 DETECTIVE BIGELOW: Okay.

4 MR: I (inaudible) to eat.

5 DETECTIVE BIGELOW: Okay.

6 MR: I played with my friend when it's morning.

7 DETECTIVE BIGELOW: Okay.

8 MR: I play in the nighttime.

9 DETECTIVE BIGELOW: Okay.

10 MR: I take a shower and then I go to sleep.

11 DETECTIVE BIGELOW: Then you go to sleep? Okay, you

12 told me about playing with your friend. Tell me everything

13 that happened from the time you played with your friend until

14 the time you went to bed.

15 MR: I played with my friend for a minute and went to

16 sleep at 10.

17 DETECTIVE BIGELOW: Uh-huh.

18 MR: Me and my friend had a good time playing.

19 DETECTIVE BIGELOW: A good time playing, okay. Tell me

20 more.

21 MR: It's fun to sleep because when it's morning we

22 have to go -- we have to eat --

23 DETECTIVE BIGELOW: Yeah.

24 MR: -- and then we have to go to sleep again.

25 DETECTIVE BIGELOW: Yeah. Tell me everything that

1 happened today, from the time you woke up until the time you
2 came here.

3 MR: You guys (inaudible) my mom and she told me you
4 guys are coming for us --

5 DETECTIVE BIGELOW: Uh-huh.

6 MR: -- and we changed real fast --

7 DETECTIVE BIGELOW: Okay.

8 MR: -- and we get up -- we got out and you guys
9 weren't here, so we wait still in the house.

10 DETECTIVE BIGELOW: Okay, and then what happened?

11 MR: Then you guys got here and you guys called another
12 cop to come.

13 DETECTIVE BIGELOW: Okay, and then what happened?

14 MR: My sister was playing and then turn it off. She
15 said, "Come with us."

16 DETECTIVE BIGELOW: Uh-huh.

17 MR: Then she (inaudible) by herself.

18 DETECTIVE BIGELOW: Okay, and then what happened?

19 MR: Then we got here.

20 DETECTIVE BIGELOW: Okay, and then what?

21 MR: My mom sat in the pink room.

22 DETECTIVE BIGELOW: Okay, and it's very important you
23 tell me everything about things that have happened to you,
24 okay? Now, (inaudible) a little bit better, I want to talk
25 about why we're here today. Tell me why we're here today.

1 MR: I don't know.

2 DETECTIVE BIGELOW: Tell me -- tell me why your mom
3 brought you here to talk to me today.

4 MR: (No verbal response).

5 DETECTIVE BIGELOW: MR, remember I talk to lots of
6 children, okay? They tell me good things and bad things, and
7 it's okay, okay? You can tell me good things and bad things.

8 MR: Because my mom called you guys.

9 DETECTIVE BIGELOW: Your mom called? Tell me why your
10 mom called.

11 MR: (No verbal response).

12 DETECTIVE BIGELOW: MR, tell me why your mom called.

13 MR: Because.

14 DETECTIVE BIGELOW: Because why?

15 MR: (Mumbling inaudibly).

16 DETECTIVE BIGELOW: MR, I understand something may have
17 happened to you. Tell me everything that happened from the
18 beginning to the end.

19 MR: (No verbal response).

20 DETECTIVE BIGELOW: MR, tell me everything that happened
21 from the beginning to the end.

22 MR: That they won't go to jail?

23 DETECTIVE BIGELOW: No, you're not going to go to jail.
24 Just tell me what happened, okay? You're not in any trouble,
25 okay?

1 MR: (Crying).
2 DETECTIVE BIGELOW: Tell me what happened.
3 MR: (No verbal response).
4 DETECTIVE BIGELOW: Remember. MR, I've talked to lots
5 of children about things that have happened to them, okay?
6 Tell me -- tell me why you think you would go to jail?
7 MR: (No verbal response).
8 DETECTIVE BIGELOW: Huh? Did somebody tell you that?
9 MR: (No verbal response).
10 DETECTIVE BIGELOW: Who?
11 MR: Nobody.
12 DETECTIVE BIGELOW: Nobody? So tell me why your mom
13 brought you here to talk to me today.
14 MR: (No verbal response).
15 DETECTIVE BIGELOW: All right, tell me. I understand
16 you talked to your mom. What did you tell your mom.
17 MR: What?
18 DETECTIVE BIGELOW: Tell me what you told your mom.
19 MR: My dad -- my ex-dad --
20 DETECTIVE BIGELOW: Uh-huh. It's okay. Tell me more
21 about your ex-dad. MR, tell me more about your ex-dad. Is
22 that what you told your mom, was something about your ex-dad?
23 MR: (No verbal response).
24 DETECTIVE BIGELOW: Tell me what you told your mom.
25 Tell me when did you guys here -- when did you guys come up

1 here? Because earlier you told me that you go to school in
2 Vernal, right? So tell me when you guys came up here.
3 MR: (Inaudible).
4 DETECTIVE BIGELOW: Right. Tell me when you guys came
5 up here.
6 MR: When my dad did something bad to me.
7 DETECTIVE BIGELOW: Your dad did something bad to you?
8 MR: Yes.
9 DETECTIVE BIGELOW: Tell me what your dad did bad to
10 you.
11 MR: (Witness crying).
12 DETECTIVE BIGELOW: It's okay. Tell me what your dad
13 did bad to you. MR, tell me what your dad did bad to you.
14 Help me understand, okay?
15 MR: (Inaudible).
16 DETECTIVE BIGELOW: Huh? What was that?
17 MR: (Inaudible).
18 DETECTIVE BIGELOW: Huh? They can't -- they can't hear
19 you. They won't hear you. They're just out there talking.
20 MR, can you tell me -- or tell me -- earlier you told me that
21 your dad did something bad to you and that's why you guys came
22 up here. Tell me everything about that, from the beginning to
23 the end. Tell me.
24 MR: (No verbal response).
25 DETECTIVE BIGELOW: It's okay. You remember, MR, I've

1 talked to lots of children about things that have happened to
2 them, okay? You can tell me good things, okay; you can tell me
3 bad things, okay? Tell me what your dad did bad that caused
4 you to come up here.

5 MR: When I got upstairs I was going to eat cookies --

6 DETECTIVE BIGELOW: Uh-huh.

7 MR: -- he didn't let me out, and --

8 DETECTIVE BIGELOW: Then what happened?

9 MR: (No verbal response).

10 DETECTIVE BIGELOW: So, MR, you were upstairs and you
11 were going to eat cookies?

12 MR: I was going to get cookies.

13 DETECTIVE BIGELOW: Uh-huh.

14 MR: Then he put -- my dad put his hand on the door.
15 He didn't let me out.

16 DETECTIVE BIGELOW: Okay, didn't let you in the other
17 room. Then what happened?

18 MR: (No verbal response).

19 DETECTIVE BIGELOW: Then what happened? So your dad
20 put his hand on the door, and then what's the next thing that
21 happens after that?

22 MR: (No verbal response).

23 DETECTIVE BIGELOW: MR, then what happens after that?
24 Tell me who else was in the room.

25 MR: My sister.

1 DETECTIVE BIGELOW: Your sister, okay. Anyone else?
2 MR: No.
3 DETECTIVE BIGELOW: Tell me what room you were in.
4 MR: Mommy's room.
5 DETECTIVE BIGELOW: Your mom's room, okay. So you were
6 in your mom's room, and he -- he puts his hand on the door, and
7 then what happens?
8 MR: (No verbal response).
9 DETECTIVE BIGELOW: Tell me his name.
10 MR: Abelardo.
11 DETECTIVE BIGELOW: Alberado?
12 MR: Abelardo.
13 DETECTIVE BIGELOW: Albelardo?
14 MR: Abelardo.
15 DETECTIVE BIGELOW: Okay, that's his name? Is that his
16 first name or his last name?
17 MR: First name.
18 DETECTIVE BIGELOW: His first name, okay. So tell me
19 what's the next thing that happens, MR, after he puts his hand
20 on the door?
21 MR: (No verbal response).
22 DETECTIVE BIGELOW: MR, can you tell me so I can
23 understand?
24 MR: He just doesn't let me out.
25 DETECTIVE BIGELOW: He doesn't let you out. Then what

1 happens?

2 MR: (No verbal response).

3 DETECTIVE BIGELOW: Okay, then what happens? MR, what

4 happens? Tell me, when he won't let you out does he say

5 anything to you?

6 MR: (No verbal response).

7 DETECTIVE BIGELOW: No? Doesn't say anything?

8 MR: Uh-uh.

9 DETECTIVE BIGELOW: Okay, so now what happens? I

10 understand -- I understand your mom may have saw something.

11 Tell me about that. MR, tell me everything you told your mom

12 about that. MR, tell me -- tell me what you told your mom. Is

13 that why you guys came up here, is because he wouldn't let you

14 out of the room? Tell me why you guys came up here.

15 MR: (No verbal response).

16 DETECTIVE BIGELOW: Tell me. I'm going to take a quick

17 break, okay, see if there's anything I need to ask you. While

18 I'm gone, I need -- I need you to think if there's anything

19 that we need to talk about or that we haven't talked about,

20 okay, or if there's anything else you want to tell me, okay?

21 I'll be right back. I'll leave my stuff in here, okay?

22 (Detective exits room, then returns)

23 DETECTIVE BIGELOW: Did you think of anything else we

24 need to talk about that we haven't talked about? Tell me.

25 MR: My dad unzipped his pants.

1 DETECTIVE BIGELOW: Okay, then what happened? It's
2 important that you tell me what happened, MR, so I understand.
3 So your dad unzips his pants. Then what's the next thing that
4 happens after that? Tell me about -- earlier you told me about
5 the bad thing your dad did. Tell me about the bad thing. You
6 said your dad did something bad. Tell me about that.

7 MR: (No verbal response).

8 DETECTIVE BIGELOW: MR, remember we talked earlier.
9 I need you to tell me what happened because I don't know what
10 happened. I wasn't there. I need you to tell me what happened.

11 MR: I don't understand all that.

12 DETECTIVE BIGELOW: You don't understand all that?
13 Well, you said that your dad unzipped his pants. Then what
14 happened after that? What's the very next thing that happened?

15 MR: I was trying to get out and he didn't let me.

16 DETECTIVE BIGELOW: Okay, and then what happened?

17 MR: (No verbal response).

18 DETECTIVE BIGELOW: You were trying to get out and he
19 didn't let you. Then what's the very next thing that happened
20 after that? Is this when you were up in your mom's bedroom
21 that you were telling me about?

22 MR: Huh?

23 DETECTIVE BIGELOW: Is this when you were in your mom's
24 bedroom? Huh? Yes or no?

25 MR: (No verbal response).

1 DETECTIVE BIGELOW: Okay.
2 MR: And it's my dad's bedroom.
3 DETECTIVE BIGELOW: And your dad's bedroom, too?
4 MR: And my sister's.
5 DETECTIVE BIGELOW: And your sister's? Okay, thank
6 you. Then what happened? MR, I understand you told your mom
7 something that happened. Tell me what you told your mom.
8 MR: (No verbal response).
9 DETECTIVE BIGELOW: Tell me why your dad unzipped his
10 pants.
11 MR: I don't know.
12 DETECTIVE BIGELOW: You don't know. Okay, tell me
13 where you were at when your dad unzipped his pants. Tell me
14 where you were at.
15 MR: He told mom he went to the bathroom.
16 DETECTIVE BIGELOW: He told your mom he went to the
17 bathroom. Okay, and then what happened? Then what did he tell
18 your mom after that?
19 MR: My dad said he went to the bathroom.
20 DETECTIVE BIGELOW: Your dad said he went to the
21 bathroom.
22 MR: He went --
23 DETECTIVE BIGELOW: Uh-huh.
24 MR: -- but he was lying to my mom.
25 DETECTIVE BIGELOW: Lying to your mom?

1 MR: He was lying.

2 DETECTIVE BIGELOW: Okay, tell me -- tell me what the
3 truth was. MR, tell me what he was lying about. Tell me,
4 tell me so I understand, so I know what happened. Remember,
5 I wasn't there. Only you were there. So I need you to tell
6 me what happened, okay?

7 MR: (No verbal response).

8 DETECTIVE BIGELOW: Who was he lying to?

9 MR: My mom.

10 DETECTIVE BIGELOW: Your mom? What was he lying about?
11 Tell me what happened in the bedroom with your dad.

12 MR: I was trying to get out. He didn't let me.

13 DETECTIVE BIGELOW: Yeah? Is that all that happened?

14 MR: I don't know very good.

15 DETECTIVE BIGELOW: Huh?

16 MR: I don't know really good.

17 DETECTIVE BIGELOW: You don't know really good? Tell
18 me -- tell me what else happened. Tell me what you told your
19 mom. Did you tell your mom something? Mariah.

20 MR: My name's not Mariah.

21 DETECTIVE BIGELOW: MR. MR, did you tell your mom
22 something? Tell me what you told your mom.

23 MR: I told my mom that he didn't let me get out.

24 DETECTIVE BIGELOW: Uh-huh. Tell me what else you told
25 your mom. MR, tell me what else you told your mom.

1 MR: That my eye hurts.

2 DETECTIVE BIGELOW: That your eye hurts. Tell me what
3 else you told your mom. Did you tell your mom anything else
4 about your dad not letting you out of the room?

5 MR: (No verbal response).

6 DETECTIVE BIGELOW: What else did you tell her about
7 that? MR, what else did you tell her about that? Did your dad
8 say anything to your mom?

9 MR: Yeah.

10 DETECTIVE BIGELOW: What did he tell your mom?

11 MR: That we'll -- he -- what he told my mom that not
12 move, he didn't want my mom, my sisters and me.

13 DETECTIVE BIGELOW: He didn't want you to move? Okay.

14 MR: Then my mom said we have to.

15 DETECTIVE BIGELOW: Why? Why did you have to move?

16 MR: My dad did something bad.

17 DETECTIVE BIGELOW: Your dad did something bad? Tell
18 me what -- tell me about that, or tell me where he did that.
19 MR, tell me what -- tell me what your dad did bad. Tell me so
20 I can understand it. Tell me if your dad did something bad,
21 too.

22 MR: (No verbal response).

23 DETECTIVE BIGELOW: Is there anything else you need to
24 tell me, MR? Is there anything else you want to tell me?

25 MR: (No verbal response).

1 DETECTIVE BIGELOW: No? If you want to talk to me,
2 your mom has my telephone number, okay?
3 MR: Uh-huh.
4 DETECTIVE BIGELOW: Alberado, is that what you're
5 trying to say to me?
6 MR: Abelardo.
7 DETECTIVE BIGELOW: Oh, okay. Anything else you want
8 to tell me? Anything you want to ask me?
9 MR: Why do you have those things there?
10 DETECTIVE BIGELOW: They're just my work papers. Do
11 you have any other questions?
12 MR: No.
13 (Interview concluded)
14 MR. DRECHSEL: Let's keep playing the break to them.
15 (Continuation of recording as follows)
16 DETECTIVE BOSS: My name's Jason. I talked to -- the
17 other guy that was talking to, I just got done talking to him.
18 I just wanted to ask you a question. Do you understand what
19 I'm saying?
20 MR: (No verbal response).
21 DETECTIVE BOSS: Earlier when you were with him you
22 talked about how your dad wouldn't let you out of the room,
23 right? That he did something bad. Can you tell me about that?
24 If you -- if you don't -- can you tell me in Spanish?
25 COURT INTERPRETER: That's fine, because I do under-

1 stand Spanish.

2 (Court interpreters interpret interview in courtroom
3 as follows)

4 MR: My dad, I didn't want to do it, but he made me do
5 it. He made me put my mouth on his weewee.

6 MR. DRECHSEL: Dan you rewind that.

7 DETECTIVE BOSS: Okay.

8 MR: That's why he didn't (inaudible).

9 THE COURT: Mr. Marquez, I don't think your answer was
10 loud enough for the record to record.

11 COURT INTERPRETER: That's why he didn't let me go out.

12 DETECTIVE BOSS: Did this happen one time or more than
13 one time?

14 MR: When my mom would work.

15 DETECTIVE BOSS: Every time? Okay.

16 MR. DRECHSEL: Can we pause that for a second. Can the
17 record reflect that she nods in response to his question every
18 time. Can we go back and look?

19 THE COURT: I didn't see that.

20 MR. DRECHSEL: Because it's a non-verbal response that
21 if she did from the stand we would --

22 THE COURT: We need to go back, Mr. Gonzales.

23 MR. DRECHSEL: Can the record then -- the State is
24 making a motion that the record reflect that when he asks the
25 question "every time," the nonverbal answer in the video is a

1 nod, an affirmative nod?

2 THE COURT: You want to make a representation of what
3 the nod or the action was?

4 MR. SIDWELL: I'm not going to object to what he just
5 said, but I'm not -- I don't remember what I saw her do, so I'm
6 not going to respond.

7 THE COURT: Okay, I'll indicate for the record -- Jill,
8 is this picking me up?

9 COURT CLERK: Yes.

10 THE COURT: I'll indicate for the record that the child
11 moved her head up and down.

12 DETECTIVE BOSS: Did anything else happen?

13 THE COURT: Okay, we need to reflect what happened.

14 MR. SIDWELL: Okay. We just had a -- we just had a --

15 THE COURT: You've got to speak up.

16 MR. SIDWELL: -- we just watched forty minutes while
17 the child was doing nonverbal cues. So we either need to go
18 back and for the record make for every nonverbal cue for that.
19 Why are we making a difference now? That's --

20 THE COURT: Well, there was no -- no attempt to tell
21 the -- to clarify the record with the nonverbal cues. So there
22 would be no reason for me to make any discussion about what had
23 occurred nonverbally.

24 MR. SIDWELL: So I'm objecting that we're doing it now,
25 because now we're taking -- the child was making nonverbal cues

1 either the other -- negative the whole time and we didn't do
2 that. So we're just making it for the record, because the jury
3 can see for themselves whether the child's doing that, they'll
4 be the -- they're the judge for themselves, not for us now, to
5 then tell them what they're doing. Do you understand what I'm
6 saying?

7 THE COURT: Yeah, I understand what you're saying.
8 Mr. Drechsel, do you want to respond?

9 MR. DRECHSEL: I made the request when I believed it
10 was important for the case that I'm presenting.

11 THE COURT: I'll indicate that when there was a request
12 made for a record to be made as to what the video was showing,
13 I made that determination. The fact that it wasn't done at
14 other points in the proceeding, because there was no request
15 made for that. So that's the explanation of why there's any
16 difference. I'm not going to go back through it. The jury
17 certainly did see what nonverbal communications there were and
18 they're going to make their determinations. All I'm doing is
19 establishing for the record what happened when the request was
20 made.

21 MR. SIDWELL: What I'd like to do is I'd like the jury
22 to go out, and then I want to make a proper record of this and
23 then have them come back in, because I've got some issues that
24 I want to raise as to -- to him doing this now, but I'd like to
25 have that outside of the jury.

1 THE COURT: Okay, let's finish with the video and then
2 I'll let you make your record.

3 MR. SIDWELL: Okay, I'll say it now, because there is
4 no reason for him to make a record --

5 THE COURT: Okay, don't --

6 MR. SIDWELL: -- because he gets no --

7 THE COURT: Don't make --

8 MR. SIDWELL: -- he gets no appeal.

9 THE COURT: -- don't make your argument that you want
10 to make outside of the presence of the jury in the presence of
11 the jury.

12 MR. SIDWELL: Could we approach the bench.

13 (Discussion at the bench off the record)

14 THE COURT: Okay, we're going to go -- continue with
15 the translation.

16 (Recording turned back on)

17 DETECTIVE BOSS: So you were saying that he wouldn't
18 let you leave the room. Is that what happened; is that what
19 you said? Huh? Okay.

20 COURT INTERPRETER: I need a repetition on that. Can
21 you rewind that.

22 MR: Then I told my mom, and my mom told my dad for us
23 to not move.

24 COURT INTERPRETER: I'm sorry, your Honor, it's impos-
25 sible to make out what she's saying during that part of the

1 sentence. I can just make out what she said --

2 THE COURT: Is there any words you can make out?

3 COURT INTERPRETER: She said to us to not move, to us

4 -- it's hard to make out the complete sentence in a way that is

5 a complete sentence.

6 THE COURT: Is there any way for you to tell us the

7 words that you can make out with any certainty?

8 COURT INTERPRETER: Those are the words, the words I

9 just said.

10 THE COURT: Okay.

11 COURT INTERPRETER: She said to us to not move. To us--

12 THE COURT: Okay.

13 MR: She said that we were going to move with my --

14 DETECTIVE BOSS: That's why you're here; and you said

15 that he put his tito? What does "tito" mean? I don't know

16 that word. Do you know what it means?

17 MR: Uh-huh.

18 DETECTIVE BOSS: What's that?

19 MR: His nuts.

20 DETECTIVE BOSS: His what?

21 MR: His nuts.

22 DETECTIVE BOSS: His nuts, okay. Okay, and you said

23 that every time your mom goes to work he does that?

24 MR: (No verbal response).

25 DETECTIVE BOSS: Can you tell me about the first time

1 that it happened?

2 MR: I wanted cookies, and with the cookies I wanted to

3 leave, but he didn't let me leave because he put his hand on

4 the door. He lowered his zipper --

5 DETECTIVE BOSS: Uh-huh.

6 MR: -- and he put his tito in my mouth.

7 DETECTIVE BOSS: Uh-huh.

8 MR. I didn't want to, and I told my mom that my dad --

9 DETECTIVE BOSS: Okay.

10 MR: -- and she told my dad and she spoke to my uncle

11 to come for us on Friday.

12 DETECTIVE BOSS: Uh-huh.

13 MR: He told us to not leave, and my mom made the

14 decision. She said she didn't want this to happen to me again,

15 so that's why we moved.

16 DETECTIVE BOSS: So that's why, okay. When you said

17 -- when you told me that he put his tito in your mouth, did he

18 say something? Did he say something to you? What did you do?

19 When he put his tito in your mouth, what did you do?

20 MR: Nothing.

21 DETECTIVE BOSS: Did he -- did he say something? What

22 happened afterwards?

23 MR: I told my mom.

24 DETECTIVE BOSS: Okay, that's when -- okay. So then

25 you told your mom. Very good. Thank you for talking to me.

1 That's why you couldn't talk to the other guy because you
2 couldn't express it in Spanish, right -- or in English? If
3 you want to come back, that's fine. We're going to go out
4 and you're going to go see your mom, okay? Okay, thanks for
5 talking to me.

6 (Interview completed)

7 THE COURT: Is that it?

8 MR. DRECHSEL: It is, but it's the exhibit, so I thought
9 I'd let it play through.

10 (Recording ends)

11 MR. DRECHSEL: I'm going to retrieve that from the DVD
12 player and give it to the Court's clerk, if that's all right?

13 THE COURT: Yes.

14 MR. DRECHSEL: As an exhibit. Based upon the viewing
15 of the video, I don't have any further questions to ask, but I
16 could understand if Mr. Sidwell has some he wanted to ask the
17 interviewers.

18 THE COURT: Mr. Sidwell, do you want to talk to either
19 Detective Bigelow or Detective Boss or both of them?

20 MR. SIDWELL: No, I don't need to talk to either one.

21 THE COURT: Okay, so there will be -- it's 11:48 or so.
22 You don't have any other witnesses for the next twelve minutes
23 or so, I don't suppose.

24 MR. DRECHSEL: There's no one that we could easily --

25 THE COURT: Yeah.

Addendum C

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF UINTAH COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

ALBERADO CRUZ,

Defendant.

Volume II

Case No. 131800746

Jury Trial
Electronically Recorded on
September 30, 2014

BEFORE: THE HONORABLE CLARK A. MCCLELLAN
Eighth District Court Judge

APPEARANCES

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1 THE COURT: They may want to, but go ahead --

2 MR. DRECHSEL: If they want to, I guess --

3 THE COURT: -- and have a seat if you wish. You can
4 stand if you want.

5 MR. DRECHSEL: Saw us all standing here. I need to make
6 a motion that what I've marked as State's Exhibit No. 2, which
7 is the CJC interview conducted in Vernal, Utah on November 24th,
8 2013 be admitted as Exhibit 2, and be allowed to who this to
9 the jury.

10 MR. SIDWELL: I don't object.

11 THE COURT: No. 2 will be admitted.

12 (Exhibit No. 2 received into evidence)

13 MR. DRECHSEL: I'm going to hand -- again, as with
14 Exhibit 1, the exhibit sticker is not on the disk, it's on
15 the envelop contained in the disk. The disk itself is marked
16 "Vernal CJC," and the reason for the exhibit sticker being on
17 the envelope is because the sticker on the disk makes the disk
18 not spin uniformly, like having tires off balance. The inter-
19 preters have the remote. I guess -- we'll be turning it over,
20 I guess, to the interpreters and their pacing of this.

21 THE COURT: Yes, we are going to have to, because we
22 are relying on them.

23 MR. DRECHSEL: If for any reason anybody can't hear me,
24 just let me know, and I'll be sure to up the volume.

25 (Recording played in courtroom as follows as inter-

1 preter interprets interview)

2 AGENT RYAN: She will have the food when you come back.

3 Would you like to sit here? Have a seat there. Are you okay?

4 I like the -- what are they called? -- boots. I like them.

5 MR: Thank you.

6 AGENT RYAN: How are you? Good. Very good. Like I
7 told you before, my name is Dave, okay? Today is what day; do
8 you know?

9 MR: Saturday.

10 AGENT RYAN: Saturday. No. One day after Saturday is?
11 Sunday. Today is Sunday, the 24th of November. I am here with
12 MR, right? Your name is MR, right? What is your last name,
13 MR? Then there's some mumbling, and I could hear Anorve.
14 Okay, can you tell me again? MR, yeah, right?

15 MR: MR.

16 AGENT RYAN: MR, okay. Very well. Just so you know,
17 my job is to speak with kids about things that have happened to
18 them.

19 MR. DRECHSEL: Could we pause for just one second. Just
20 in terms of making a record here, we may run into some of what
21 we have in the past hearings. That is, it's not entirely clear
22 who is doing the speaking as the translator is translating,
23 because it's back and forth sometimes the question, the answer,
24 and the clarification. For the record's purposes could we at
25 least identify one or both of the speakers before they make

1 their -- so that we know who is saying what words, as it
2 relates to what is being translated.

3 THE COURT: Mr. Marquez, is that something you can do?

4 COURT INTERPRETER: I think so.

5 MR. DRECHSEL: Can we identify words that would say
6 this was the interviewer, this was the child, or you know,
7 however we want to say. So interviewer, and then they said
8 child, that they said interviewer.

9 COURT INTERPRETER: I guess if you'd like, would you
10 like me to like previously, and have both of us interpret out
11 loud, and one does the voice of one and one does the voice of
12 the other.

13 THE COURT: Let's do this. Let's have Mr. Marquez
14 begin, at least, doing the voice of the interviewer, and
15 Mr. Gonzales be the voice of the child.

16 COURT INTERPRETER: There is just one thing. It gets
17 to a point where they start speaking English. I'm going to
18 have to switch, and that's where we have problems earlier --

19 THE COURT: I know.

20 COURT INTERPRETER: -- that I forgot that I needed to
21 translate into Spanish for the defendant.

22 COURT INTERPRETER: But to solve that problem, if you
23 guys don't mind, we can just do that out loud, and then he can
24 just hear us without the headphones.

25 THE COURT: Sure.

1 COURT INTERPRETER: Would that be okay?
2 THE COURT: That would be fine.
3 MR. DRECHSEL: I just want to make sure that it's very
4 clear for the jury that when a child says something it's what
5 the child said and not a restatement from the detective -- or
6 from the agent. I'm sorry to interrupt.
7 THE COURT: No, I think that -- I think that that will
8 clarify it. Mr. Marquez will be the voice of the interviewer
9 and Mr. Gonzales will be the voice of the child.
10 MR. DRECHSEL: Okay, go ahead.
11 (Recording turned back on. Cell phone rings)
12 THE COURT: One second. Okay, do you need to play that
13 again, Mr. Marquez?
14 COURT INTERPRETER: No.
15 THE COURT: Okay.
16 AGENT RYAN: I meet with a lot of kids so that they
17 can tell me the truth about things that have happened to them.
18 Okay, so it's very important that today you only tell me the
19 truth. You should only tell me about the things that really
20 happened to you. Do you understand?
21 Okay. If I ask you a question and you don't know what
22 it means, you can say, "I do not know what that means or what
23 you are saying." So then I will ask you in a different way;
24 or maybe I might ask you in English because you speak both
25 languages, right?

1 MR: Not a lot.

2 AGENT RYAN: Not a lot. What do you prefer to speak,
3 English or Spanish?

4 MR: Spanish.

5 AGENT RYAN: Spanish? Okay, perfect. We're going to
6 speak in Spanish, okay? If you do not understand a question
7 that I'm making, you can tell me, "I do not understand you,"
8 and I can ask you the question in another way. Okay? All
9 right. If I ask you questions to which you do not know the
10 answer, do not guess. Just say, "I do not know." So then if
11 I asked you, "What is the name of my dog?" what would you say?

12 MR: I don't know.

13 AGENT RYAN: Perfect, very good. Very good, because
14 you do not know the name of my dog, right? Okay, when you do
15 not know an answer, do not guess. You just have to tell me
16 you don't know, okay? If I say things that are mistakes, you
17 should correct me. So then if I tell you, you are a two-year-
18 old girl, what would you say?

19 MR: No, that's not correct.

20 AGENT RYAN: That is not correct. Very good. Why is
21 that? How old are you?

22 MR: Six.

23 AGENT RYAN: If I call you "Issabella," what would you
24 tell me?

25 MR: There is not --

1 AGENT RYAN: So if I tell you -- if I call you "Issa-
2 bella" --
3 MR. DRECHSEL: What was the button we were pushing
4 before where it goes back a little bit quicker? Israel, do
5 you remember what the button was you were pushing --
6 COURT BAILIFF: I think it was --
7 MR. DRECHSEL: -- where it said --
8 COURT BAILIFF: -- yeah, it was that one.
9 MR. DRECHSEL: -- there was a time signal. That one.
10 That goes back a little bit, okay.
11 AGENT RYAN: That is not -- that is not your name.
12 Because that is not your name, right?
13 MR: Yes.
14 AGENT RYAN: Very good. Okay, so now I want to get t
15 know you a little bit better. Tell me some of the things you
16 like to do.
17 MR: Play with my sisters.
18 AGENT RYAN: What are the names of your sisters?
19 MR: LR, AR.
20 AGENT RYAN: LR, AR and what?
21 MR: CR.
22 AGENT RYAN: CR. Okay, you like to play with your
23 sisters. What do you like to do with the sisters, with your
24 sisters?
25 MR: Play hide-and-seek.

1 AGENT RYAN: In the house? Outside? Very good. Where
2 do you like to hide? Do you have a favorite spot?
3 MR: Yes.
4 AGENT RYAN: Yes? Where?
5 MR: At home.
6 AGENT RYAN: At home?
7 MR: In my uncle's room.
8 AGENT RYAN: Oh, okay, in your uncle's room. What
9 other things do you like to do with your sisters?
10 MR: To play freeze tag.
11 AGENT RYAN: Describe to me how you play that.
12 MR: Huh?
13 AGENT RYAN: How do you play that?
14 MR: Like when you're tagged you have to stay, and
15 (inaudible) I tag you and you can't move.
16 AGENT RYAN: I can't move. So is the game over, then?
17 MR: No, you have to (inaudible).
18 AGENT RYAN: We're playing with other people. You have
19 to touch all of them?
20 MR: Uh-huh.
21 AGENT RYAN: So once you touch me, I can't move. I
22 can't move. What if -- what if one of the others touches me,
23 can I still -- can I still move?
24 MR: Yes.
25 AGENT RYAN: Yeah? Oh, wow.

1 MR: He -- he stays -- he -- I don't know the --
2 (inaudible).
3 AGENT RYAN: So they unfreeze?
4 MR: Uh-huh.
5 AGENT RYAN: So if someone else touches them, they
6 unfreeze. Oh, okay. Well, good. Okay, what else? Tell me
7 another thing you like to do.
8 MR: (Inaudible), tic-tac-toe.
9 AGENT RYAN: What?
10 MR: Tic-tac-toe.
11 AGENT RYAN: Tic-tac-toe. Do you like tic-tac-toe? I
12 like tic-tac-toe. Yeah, and who do you play tic-tac-toe with?
13 MR: With my sisters.
14 AGENT RYAN: Who wins?
15 MR: I do.
16 AGENT RYAN: You do? Do you play with your mom? Yes?
17 Oh, very good.
18 MR: I played just now.
19 AGENT RYAN: What was that?
20 MR: Right now.
21 AGENT RYAN: With your mom?
22 MR: Uh-huh.
23 AGENT RYAN: And who else?
24 COURT INTERPRETER: Actually let me correct that. I
25 didn't hear that very well.

1 AGENT RYAN: Okay, so with your mom; and who won?
2 MR: My mom and I.
3 AGENT RYAN: Your mom or you?
4 MR: Both.
5 AGENT RYAN: You both won? That's awesome.
6 MR: But sometimes my sister (inaudible).
7 AGENT RYAN: So sometimes you win twice and she wins
8 once?
9 MR: No. So my mom won two times and I won one time.
10 AGENT RYAN: Oh, okay, so right now, just now, she won
11 twice and you won once. Do you go to school?
12 MR: Yes.
13 AGENT RYAN: What grade are you in?
14 MR: First grade.
15 AGENT RYAN: First grade, wow. Okay, tell me something
16 that -- tell me something that has happened in school.
17 MR: It's fun.
18 AGENT RYAN: Yeah? What makes it fun?
19 MR: Do phonics.
20 AGENT RYAN: Do phonics. You like phonics, okay. What
21 else?
22 MR: Math.
23 AGENT RYAN: What kind of math are you learning?
24 MR: Take away and plus.
25 AGENT RYAN: Really. Take away and plus. Very good.

1 MR: And we're doing (inaudible).
2 AGENT RYAN: That's what happens in school, huh? You
3 (inaudible) harder.
4 MR: (Inaudible).
5 AGENT RYAN: You do harder problems so you can learn,
6 and then you get to go to second grade.
7 MR: Then third grade, fourth grade, fifth, high school
8 and (inaudible).
9 AGENT RYAN: Then after that you can go to college.
10 What's the name of your school right now?
11 MR: I don't know. It's (inaudible) Salt Lake. I
12 don't know (inaudible).
13 MR. DRECHSEL: I'm sorry to interrupt. There's a
14 significant part where it's in English for a short time here,
15 but could we do that simultaneously so we don't have to pause?
16 COURT INTERPRETER: Yes, and I suggest it's about a
17 minute 22 and it goes about a minute 36 where and it goes all
18 in English.
19 MR. DRECHSEL: Yeah.
20 COURT INTERPRETER: So for that I'll just put the head-
21 phones.
22 MR. DRECHSEL: Okay.
23 COURT INTERPRETER: Then at a minute 36 we'll come back
24 and --
25 MR. DRECHSEL: All right.

1 COURT INTERPRETER: -- do a little more Spanish, a
2 round.
3 AGENT RYAN: Okay, and who do you live with in Salt
4 Lake?
5 MR: My mommy, my uncle, my aunt, my cousins.
6 AGENT RYAN: Yes, your mom, your uncle, your aunt and
7 your cousins. Very good.
8 MR: And my sisters.
9 AGENT RYAN: Your sisters, too?
10 MR: Yeah, but CR doesn't live with me.
11 AGENT RYAN: And CR, is she older than you or younger?
12 MR: Older.
13 AGENT RYAN: Okay, she's older. How old is she?
14 MR: A thousand.
15 AGENT RYAN: What? A thousand years old? A thousand
16 years? Do you know how old she is?
17 MR: No.
18 AGENT RYAN: No, okay. Very good. I don't want you to
19 guess. Okay, very good.
20 MR: Why do you guys have that?
21 AGENT RYAN: We might use that a little bit later. Do
22 you like to draw?
23 MR: Uh-huh.
24 AGENT RYAN: You like to draw, right? Maybe we'll use
25 it at one point, okay? Tell me about your uncle and your aunts

1 and your -- and your aunt and your cousins. How many cousins
2 do you have? (Inaudible) is the word for cousins. So it's
3 your uncle and your aunt?

4 MR: Uh-huh.

5 AGENT RYAN: No? Not that either?

6 MR: No, so it's my uncle, my aunt. It's just those
7 two and my sisters.

8 AGENT RYAN: Now, do they have -- your uncle and your
9 aunt, do they have kids or not?

10 MR: No, my uncle is not here.

11 AGENT RYAN: He's not here?

12 MR: I don't know how to explain this.

13 AGENT RYAN: You don't know how to explain it?

14 MR: Uh-uh. No.

15 AGENT RYAN: Okay, tell me something that makes you
16 happy.

17 MR: Playing.

18 AGENT RYAN: Like what kind of things?

19 MR: Freeze tag.

20 AGENT RYAN: Those are the things you like to do, the
21 things that make you happy?

22 MR: Uh-huh, and hide-and-seek.

23 AGENT RYAN: And hide-and-seek. I see.

24 MR: Video games.

25 AGENT RYAN: Okay, tell me something that hasn't made

1 you -- hasn't made you very happy.

2 MR: Not playing.

3 AGENT RYAN: Oh, when you don't play, okay. All right.

4 It is very important that you tell me about the things that
5 have really happened to you. You can tell me both things, good
6 things and bad things. Okay, you can tell me what happened,
7 what you did yesterday. Do you remember what happened yester-
8 day?

9 MR: Uh-uh.

10 AGENT RYAN: Where were you yesterday?

11 MR: I was at Salt Lake.

12 AGENT RYAN: In Salt Lake? Tell me what happened from
13 the moment you woke up.

14 MR: Hmm, I don't know.

15 AGENT RYAN: No? You don't remember?

16 MR: No.

17 AGENT RYAN: Did you have breakfast?

18 MR: No.

19 AGENT RYAN: No? Why not?

20 MR: Because we only eat on Mondays.

21 AGENT RYAN: You only eat Monday? Did you eat yester-
22 day? You didn't eat yesterday? No? Did you have breakfast?
23 Did you have lunch? Okay, can you tell me some things you did
24 yesterday? Yes? What did you do?

25 MR: Yes, I played tag and hide-and-seek, video games.

1 AGENT RYAN: Video games, okay. Can you tell me what
2 happened from the moment you got up?
3 MR: I don't know.
4 AGENT RYAN: You don't know?
5 MR: Uh-uh. Well, yes, I do. I waked up in the middle
6 of the night.
7 AGENT RYAN: You woke up in the middle of the night?
8 MR: Yeah.
9 AGENT RYAN: How come?
10 MR: Because we had to get into the bus, the bus to
11 drive us over here.
12 AGENT RYAN: So you had to wake up in the middle of the
13 night?
14 MR: No, no, I don't know how to say it.
15 AGENT RYAN: You can say it in Spanish or in English.
16 MR: I woke up at -- at zero in the morning, and then
17 -- what? Because the bus -- because we had to come with some-
18 one who brought us.
19 AGENT RYAN: How did you come?
20 MR: Good.
21 AGENT RYAN: Yeah? And what did you come in?
22 MR: By train.
23 AGENT RYAN: Oh, yeah?
24 MR: No, no, no, no. Bus.
25 AGENT RYAN: Bus? Okay, and that was this morning,

1 right?

2 MR: What?

3 AGENT RYAN: That you came this morning over here?

4 MR: (Nonverbal response).

5 AGENT RYAN: All right, do you remember today is
6 Sunday, yesterday was Saturday, the day before yesterday was
7 Friday. Did you go to school on Friday?

8 MR: No, tomorrow.

9 AGENT RYAN: Tomorrow you will go to school; but you
10 didn't go on Friday?

11 MR: No, because we did this today.

12 AGENT RYAN: Oh, okay. What happened -- what did you
13 do the day before yesterday? You told me about this morning,
14 betting up and coming over here. Tell me what happened yester-
15 day. What did you do?

16 MR: Played.

17 AGENT RYAN: What did you have to eat for breakfast?

18 MR: Uh, uh, bread. Bread.

19 AGENT RYAN: Tell me -- tell me about that.

20 MR: I ate a carrot.

21 AGENT RYAN: A carrot?

22 MR: Chicken, vegetables.

23 AGENT RYAN: Vegetables? You ate all of that for
24 breakfast?

25 MR: No.

1 AGENT RYAN: Or also for dinner?
2 MR: Dinner. Just dinner.
3 AGENT RYAN: Just dinner, okay. Can you tell me about
4 your entire day yesterday?
5 MR: I played.
6 AGENT RYAN: You always play, right? Okay, now that I
7 know you a little bit better I would like to speak about why
8 you are here. Do you know why you are here?
9 MR: Uh-huh.
10 AGENT RYAN: Can you tell me why you are here?
11 MR: Yes, it's about my ex-dad.
12 AGENT RYAN: It's about your ex-dad? What about?
13 MR: He did something bad.
14 AGENT RYAN: He did something bad. Can you tell me
15 more about that?
16 MR: I don't know why he did that, but um, I don't want
17 to do it.
18 AGENT RYAN: You don't know why he did it?
19 MR: Uh-huh.
20 AGENT RYAN: And you didn't want to do it?
21 MR: Uh-huh.
22 AGENT RYAN: Tell me more about that.
23 MR: He put his tito --
24 AGENT RYAN: His -- he put his what?
25 MR: Tito.

1 AGENT RYAN: Tito? Okay.

2 MR: In my mouth, and my mom -- I told her that he did
3 it, and that's why we moved to Salt Lake.

4 AGENT RYAN: So he put his tito in your mouth, and you
5 told your mom that he did it, and that's why you moved to Salt
6 Lake?

7 MR: No, my mom sawed it and told -- I told her and --

8 THE COURT: It's occurred to me that on several occa-
9 sions the word "tito" has been used without any translation.
10 So I need you to translate that so -- I think the jury may
11 already have heard what the word is, but I need you to trans-
12 late that.

13 MR. DRECHSEL: Can we have a standing --

14 COURT INTERPRETER: Just an explanation. Being from
15 Peru, from South America, that's a word I've never heard. It
16 could imply what I think it implies, but (inaudible) I believe
17 has heard the word before and can probably express what that
18 means.

19 COURT INTERPRETER: We in the past we have used -- it's
20 a childlike word to express penis, so weewee; but she also was
21 asked what that meant in the previous -- in the previous video
22 we saw, and she gave an English response. That's why --

23 THE COURT: Okay.

24 COURT INTERPRETER: -- we didn't say the English word.

25 MR. SIDWELL: Okay, so let me ask.

1 COURT INTERPRETER: Go ahead.

2 MR. SIDWELL: Maybe we can recover this. They --

3 because they have protocols for interpreting when they don't

4 think the word is (inaudible). So then it just has to be left

5 the way it is.

6 COURT INTERPRETER: I don't think that's the case,

7 though.

8 COURT INTERPRETER: No.

9 MR. SIDWELL: Okay, so you know what the word means?

10 COURT INTERPRETER: Yes.

11 MR. SIDWELL: Okay.

12 COURT INTERPRETER: So and I know what the word means.

13 I just never -- I'm not familiar with the word, never used it

14 growing up.

15 THE COURT: Okay, so I want you to tell us the word --

16 COURT INTERPRETER: Okay, so the word is tito.

17 THE COURT: Right.

18 COURT INTERPRETER: It's spelled t-I-t-o.

19 THE COURT: Okay.

20 COURT INTERPRETER: "T" as in Tom, and it's just a

21 childlike word to say the word "penis," which you could equate

22 it to "weewee" or "peepee," whatever you've heard.

23 THE COURT: The child earlier used -- she defined it as

24 "nuts," correct?

25 COURT INTERPRETER: Previously she said "nuts."

1 THE COURT: Okay, I guess that's as clear as we're
2 going to get it.

3 COURT INTERPRETER: Did everybody hear me?

4 THE COURT: Okay, go ahead.

5 COURT INTERPRETER: Can I just play it or --

6 THE COURT: No, I think that we've made the record and
7 we've clarified what the concern was.

8 (Recording turned back on)

9 MR: Dad was lying to my mom.

10 AGENT RYAN: Your dad was dying to your mom?

11 MR: Because he lied to my mom because he said he went
12 to his bathroom, but he didn't. I got cookies. I wanted to
13 get up, but he didn't let me get out because he stuck his hand
14 in the door, so that's why I didn't go -- that's why he didn't
15 -- that's why we moved.

16 AGENT RYAN: That's why you moved, okay. Can you tell
17 me about that situation when your mom saw; where were you at?

18 MR: My mom's room.

19 AGENT RYAN: You were in whose room?

20 MR: My mom's.

21 AGENT RYAN: You were in your mom's room, and who was
22 -- who all was in the room?

23 MR: My dad, the TV, the bed.

24 AGENT RYAN: Was there anyone else in the room?

25 MR: No.

1 AGENT RYAN: Can you tell me more about that? Where
2 were you at?
3 MR: I was going to get cookies (inaudible).
4 AGENT RYAN: You were going to get what?
5 MR: Cookies.
6 AGENT RYAN: Okay.
7 MR: I didn't want (inaudible) down, I wanted to, but
8 she didn't, and (inaudible) out. I told my mom.
9 AGENT RYAN: Where were the cookies at?
10 MR: My mom's room.
11 AGENT RYAN: Your mom's room. What kind of cookies
12 were they; do you know?
13 MR: No.
14 AGENT RYAN: No?
15 MR: Just circles, rectangles and rainbow ones.
16 AGENT RYAN: Circles, rectangles and rainbow ones?
17 Okay.
18 MR: Like circles with (inaudible).
19 AGENT RYAN: Okay, and they were in your mom's room.
20 Did you eat some of those cookies?
21 MR: No, I got some. I wanted to get out.
22 AGENT RYAN: Okay, you wanted to get out. Okay, but
23 you said you and your dad were in the room. Where were you at
24 in the room?
25 MR: On the floor.

1 AGENT RYAN: On the floor, okay. Were you just standing
2 on the floor; were you sitting; were you laying, or something
3 else?

4 MR: Sitting -- no, I mean, standing.

5 AGENT RYAN: You were standing. Where was your dad?

6 MR: In the bed.

7 AGENT RYAN: On the bed. Was he sitting or laying on
8 the bed or something else?

9 MR: Laying. Laying.

10 AGENT RYAN: Laying on the bed, okay. Can you tell me
11 more about that? What happened next?

12 MR: I don't know. He (inaudible) did not because he
13 told my mom I was lying, but I wasn't. Then my mom trusted me
14 instead of my dad.

15 AGENT RYAN: Okay.

16 MR: That's why we moved; and my mom told me almost
17 (inaudible) that she told us to go and get stuff from the room.
18 Then when (inaudible) comes we're going to get another stuff.

19 AGENT RYAN: Okay, so did you get you more stuff today?

20 MR: Uh-huh, but (inaudible) in my room.

21 AGENT RYAN: Okay, so let me ask you this. When you
22 were in the bedroom you said you were standing on the floor,
23 and your dad was laying on the bed?

24 MR: (No verbal response).

25 AGENT RYAN: Okay, and you had said that he put his

1 tito in your mouth. Was this the time that he put the tito --
2 his tito in your mouth?

3 MR: No.

4 AGENT RYAN: When did he do that?

5 MR: He did it when my mom worked, and hiding.

6 AGENT RYAN: Okay, do you remember the first time that
7 he put his tito in your mouth?

8 MR: (No verbal response).

9 AGENT RYAN: You don't remember the first time? Okay,
10 do you remember the last time that he put -- yeah? Can you
11 tell me about that.

12 MR: On Friday.

13 AGENT RYAN: On Friday?

14 MR: I got the keys. I got them, and he put his hand
15 in the door, and my mom was calling me, and he (inaudible) his
16 hand didn't let me go down, and I got (inaudible), and then he
17 (inaudible), and I wanted to stay outside, but I couldn't.

18 AGENT RYAN: Okay, is this -- are you telling me about
19 the last time that he put his tito in your mouth?

20 MR: (No verbal response).

21 AGENT RYAN: Can you tell me about the last time that
22 he put his tito in your mouth?

23 MR: I got cookies and was -- I got cookies when I
24 wanted.

25 AGENT RYAN: Who gave you the cookies?

1 MR: I got them.

2 AGENT RYAN: You got them, okay.

3 MR: I said that to (inaudible) come back and I just
4 got some more, and I wanted to get out. He said, "Just a
5 minute."

6 AGENT RYAN: Why did you want to get out?

7 MR: Because I wanted to go with my mom.

8 AGENT RYAN: Okay, and why didn't he let you out?

9 MR: I don't know.

10 AGENT RYAN: What happened?

11 MR: When he didn't let me out, he put his tito in my
12 mouth.

13 AGENT RYAN: Okay, where were you when he put his tito
14 in your mouth?

15 MR: He put me up on the bed.

16 AGENT RYAN: He put you up on the bed. Were you
17 standing or sitting or laying on the bed or something else?

18 MR: On my knees.

19 AGENT RYAN: On your knees, okay. Were his pants up
20 or down or just unzipped or something else?

21 MR: Unzipped.

22 AGENT RYAN: Unzipped. Can you tell me more about
23 that, and tell me how it happened?

24 MR: (No verbal response).

25 AGENT RYAN: MR, remember I talk with kids quite a bit

1 about things that have happened with them. Good things and
2 bad things. You are not in trouble. All I want you to do is
3 tell me the truth, okay? All I want you to do is tell me the
4 truth about what happened. You don't need to be embarrassed;
5 you don't need to be afraid, okay? So can you tell me what
6 happened?

7 MR: He put his tito in my mouth and I didn't want to,
8 and he shut the door. Then my mom walked in the door, and she
9 saw, and then she was going to take a shower, my mom, and then
10 (inaudible), and then told me what happened, and I told her.
11 When I was done telling her, she said to stay in the bathroom
12 and don't talk to my dad, and that she told me to not answer
13 question what he said -- what he says, and I followed my mom
14 everywhere.

15 AGENT RYAN: You followed your mom everywhere. Did
16 your dad put his tito in your mouth one time or more than one
17 time?

18 MR: More than one time.

19 AGENT RYAN: More than one time, okay. This time that
20 you're describing to me, when your mom saw, was this Friday
21 when it happened?

22 MR: (No verbal response).

23 AGENT RYAN: It was Friday? Okay.

24 MR: No, after Valentines.

25 AGENT RYAN: It was after Valentines?

1 MR: This Friday that already past Valentines.
2 AGENT RYAN: So did it happen a Friday that passed a
3 long time ago?
4 MR: No, it was in November 3rd.
5 AGENT RYAN: November 3rd, okay.
6 MR: And was a Friday.
7 AGENT RYAN: Okay, and you said you were -- you were
8 kneeling on the bed; and where was your dad?
9 MR: On the bed.
10 AGENT RYAN: On the bed?
11 MR: Laying.
12 AGENT RYAN: Laying on the bed?
13 MR: He unzipped his pants, and (inaudible) up, and --
14 what did I say?
15 AGENT RYAN: You said that he was laying on the bed and
16 he took his tito out.
17 MR: And he put his mouth -- his tito in my mouth.
18 AGENT RYAN: He put it in your mouth?
19 MR: (No verbal response).
20 AGENT RYAN: Okay, was this when you were here on in
21 Salt Lake?
22 MR: Here.
23 AGENT RYAN: Did you go to Salt Lake after that?
24 MR: No, on Friday.
25 AGENT RYAN: On Friday. Did he unzip his pants or did

1 you unzip his pants?

2 MR: He did.

3 AGENT RYAN: He did. What did he tell you? Did he say

4 anything to you when he did that?

5 MR: That (inaudible), and my mom said he would tell or

6 it's lying, and I said the truth, and he -- how could he -- how

7 could he -- my mom trusted my dad before, but now he doesn't --

8 my mom doesn't because he did that. Now he -- she just leaves.

9 AGENT RYAN: How did that make you feel when he did

10 that?

11 MR: Really angry.

12 AGENT RYAN: Really angry, okay. When he unzipped his

13 pants and took his tito out, did he tel you what to do?

14 MR: (No verbal response).

15 AGENT RYAN: No?

16 MR: Yes.

17 AGENT RYAN: Can you tell me about that? What happened?

18 When he took his tito out, tell me what happened.

19 MR: He said to not tell anybody, and he said not to

20 bite his tito.

21 AGENT RYAN: So he told you not to tell anybody, and he

22 told you not to bite his tito?

23 MR: (No verbal response).

24 AGENT RYAN: Okay, then what happened then?

25 MR: He said to chupe it.

1 AGENT RYAN: He said to what?
2 MR: Chupe it.
3 AGENT RYAN: Chupe it? Okay.
4 MR. DRECHSEL: We need some translation on that.
5 COURT INTERPRETER: To suck.
6 COURT INTERPRETER: To suck?
7 AGENT RYAN: What does that mean?
8 MR: Suck like a (inaudible).
9 AGENT RYAN: Like a popsicle, okay. Then what did he
10 do next?
11 MR: He shut the door, and my mom was downstairs for a
12 little. Shut the door. So my dad found something, and he told
13 my mom he was -- that's how it was with (inaudible) went to the
14 bathroom, and he told her (inaudible). I told her -- I told
15 her everything. Then she told me to stay (inaudible).
16 AGENT RYAN: Okay. When your mom saw, was his tito
17 outside of his pants or inside?
18 MR: Inside.
19 AGENT RYAN: Inside, okay. So can you tell me what
20 happened. You said that he told you to not tell anybody, and
21 he told you to not bite his tito, okay. What happened next?
22 COURT INTERPRETER: Your Honor, I need to talk to the
23 interpreter just for a second here at sidebar.
24 THE COURT: Okay.
25 (Court interpreters confer off the record)

1 COURT INTERPRETER: Okay, we just wanted to verify that
2 the interpretation was correct (inaudible).

3 THE COURT: Okay.

4 MR: My mom called my uncle to get us, and I was in
5 the car. My sister -- my little sister rode with my mom, and
6 I told my mom to hurry up, because I needed to go. I need to
7 go, and he told my mom that to stay. That my mom (inaudible).

8 AGENT RYAN: Okay.

9 COURT INTERPRETER: She made her decision.

10 MR: (Inaudible) she almost tell them to put my stuff
11 down, and he -- she didn't. She said I could go, and we got
12 (inaudible).

13 AGENT RYAN: You told me that he put his tito in your
14 mouth more than one time. Can you describe to me again what
15 happened?

16 MR: He put his tito in my butt, and --

17 AGENT RYAN: Tell me more about that.

18 MR: -- and that hurted so bad.

19 AGENT RYAN: It hurted so bad? Was -- when he put his
20 tito in your butt, was this the same time you explained to me
21 that he put his tito in your mouth?

22 MR: (No verbal response).

23 AGENT RYAN: It was the same time? Where were his
24 hands when he put his tito in your mouth?

25 MR: My head.

1 AGENT RYAN: Your head. Where at on your head?
2 MR: That hard.
3 AGENT RYAN: That hard, and where were you and your dad
4 when he put his tito in your butt?
5 MR: Laying down (inaudible).
6 AGENT RYAN: Laying, and he was laying, too?
7 MR: Uh-huh.
8 AGENT RYAN: Were you laying on the floor, on the bed
9 or somewhere else?
10 MR: On the bed.
11 AGENT RYAN: On the bed, okay. Did he put his tito in
12 your mouth first or in your butt first?
13 MR: First in my mouth and then my butt.
14 AGENT RYAN: First in your mouth and then in your butt.
15 You said that when he put his tito in your butt it hurt real
16 bad?
17 MR: Yeah, and I told my mom.
18 AGENT RYAN: You told your mom? Can you tell me, were
19 your pants on or off?
20 MR: On.
21 AGENT RYAN: On?
22 MR: Kind of a little bit off and the whole thing was
23 on.
24 AGENT RYAN: Okay, so the whole thing was on, but they
25 were kind of a little bit off?

1 MR: Uh-huh.

2 AGENT RYAN: Tell me more about that. What do you

3 mean?

4 MR: He took off a little bit.

5 AGENT RYAN: He took off a little bit?

6 MR: My pants out, and my -- so my pants was off.

7 AGENT RYAN: So did he -- what about your underwear?

8 MR: (Inaudible) take off.

9 AGENT RYAN: Your underwear was what?

10 MR: Off.

11 AGENT RYAN: Was it pulled up around your waist, or

12 were they pulled down?

13 MR: Pulled down with my pants.

14 AGENT RYAN: Same with your pants? Okay, and you said

15 that he put his tito in your mouth first, and then he put his

16 tito in your butt; and you said that he pulled your pants? Had

17 this ever happened before?

18 MR: No, whenever I --

19 AGENT RYAN: No?

20 MR: -- I was six.

21 AGENT RYAN: Oh, when you were six, okay. You said

22 that he put his tito in your mouth more than once. Has he put

23 his tito in your butt more than once? Remember just tell me

24 the truth.

25 MR: More.

1 AGENT RYAN: More than once. Can you tell me about
2 another time that it happened?

3 MR: When my (inaudible), he did it because my mom
4 worked, and he put his tito in my butt.

5 AGENT RYAN: He put his tito in your butt? Can you
6 tell me more about that. Where were you at when he did it?

7 MR: In the bed. In the bed.

8 AGENT RYAN: In the bed. Whose bed?

9 MR: My mom's.

10 AGENT RYAN: Your mom's bed. Is this a different time
11 than what you have already described to me? What I want to
12 know if there are other -- other times. I want to know if he
13 has done this other times. You have told me about one time,
14 when your mom saw, saw what happened. Has he done this to you
15 other times?

16 MR: (No verbal response).

17 AGENT RYAN: Yes? Can you describe to me when it was
18 and what happened?

19 MR: Uh-huh.

20 AGENT RYAN: Do you remember the first time that this
21 happened?

22 MR: (No verbal response).

23 AGENT RYAN: No? Tell me about another time that it
24 happened. Not the time -- the time you already described to me
25 but another time. Can you describe it to me?

1 MR: Uh-uh.

2 AGENT RYAN: When was it

3 MR. On Sunday.

4 AGENT RYAN: Tell me about -- about the time before,

5 what happened, the time before this.

6 MR: I don't know.

7 AGENT RYAN: You don't know?

8 MR: I forgot.

9 AGENT RYAN: You forgot. Okay, how about we take just a

10 real quick break, okay? Do you want me to get you your water?

11 Let me get you your water. I'm going to take a quick break and

12 then I'm going to be right back, okay? Hold on a second.

13 (Agent exits the room, then re-enters)

14 AGENT RYAN: Here's your water. Give me a moment,

15 okay? If you want to draw, you can.

16 (Agent exits the room, then enters)

17 MR. DRECHSEL: I'll submit for the Court that the break

18 that has started runs until the 1 p.m. -- let's see 1:06 and 20

19 seconds. So it's almost ten minutes where she's in the room

20 without an interviewer and no questions are asked or answered

21 given.

22 MR. SIDWELL: Yeah, fast-forward it.

23 THE COURT: Do you want to run it or do you want to

24 just fast forward through it?

25 MR. SIDWELL: Fast forward.

1 THE COURT: Okay.

2 MR. DRECHSEL: As long as we can see it in quicker
3 time, I guess.

4 THE COURT: We'll just fast-forward through the --

5 MR. SIDWELL: What was the minute?

6 MR. DRECHSEL: It goes to 1:06 roughly 20. So if we
7 stopped at 1:06. Oh, I was wrong, 1:04. I apologize. He may
8 come in, but he doesn't start the interview again until 1:06, I
9 apologize.

10 COURT INTERPRETER: I imagine you want me to play it?

11 THE COURT: Yeah, I do. Go back to where -- all right,
12 there we go. It's 1:04 now.

13 MR. DRECHSEL: Yeah, I apologize.

14 COURT INTERPRETER: It's a bit unclear on the term he
15 used. I don't know if he's saying, "That doesn't look like
16 it," or "That doesn't look very good."

17 COURT INTERPRETER: Or "It doesn't work."

18 COURT INTERPRETER: Or "It doesn't work."

19 AGENT RYAN: What's happening?

20 MR: It doesn't work.

21 AGENT RYAN: Neither one? Neither one of these work?
22 I wonder if we can get a different one. Wow, that's dry, isn't
23 it. It's dry. They're both dry. Should I see if I can get
24 some more? Let me see if I can get some more, okay? Hold on a
25 second.

1 (Agent exits, then re-enters the room)
2 MR. DRECHSEL: Fast forward to 1:06.
3 COURT INTERPRETER: But it goes on. There's still
4 (inaudible).
5 MR. DRECHSEL: Oh, okay.
6 AGENT RYAN: Let's see, look what I have. I have four.
7 Which color do you like? The black one? Yes. The green one?
8 What color is this?
9 MR: Brown.
10 AGENT RYAN: Brown; and this one?
11 MR: Yellow.
12 AGENT RYAN: Yellow; and this one?
13 MR: Green?
14 AGENT RYAN: Black.
15 AGENT RYAN: Black. Very good. See if some of these
16 work.
17 MR: It works very good.
18 AGENT RYAN: I have some more questions. We have been
19 talking about when your daddy, your dad, put his tito in your
20 mouth.
21 COURT INTERPRETER: This is where the ar -- the word is
22 "su" about the testimony that was made, which is a little bit
23 ambiguous. Need more clarification? Okay.
24 AGENT RYAN: Did this happen at any time in another
25 house?

1 MR: Just in the house.

2 AGENT RYAN: Just in that house, okay. Did it happen
3 again in another room?

4 MR: (No verbal response).

5 AGENT RYAN: No? Only in the room of your mom and dad?

6 MR: It was in two houses.

7 AGENT RYAN: It was in two houses. Can you tell me
8 about the other house?

9 MR: The other house was older.

10 AGENT RYAN: It was old.

11 MR: It had a lot of spider webs, and it was so really
12 old, and (inaudible) on Wednesdays when my mom worked, he did
13 the same thing.

14 AGENT RYAN: Okay, did he do the same thing in the
15 house with the spider webs?

16 MR: (No verbal response).

17 AGENT RYAN: He did?

18 MR: Uh-huh.

19 AGENT RYAN: Can you tell me about that?

20 MR: It happened the same thing as the other house.

21 AGENT RYAN: It happened the same thing as the other
22 house?

23 MR: Yeah.

24 AGENT RYAN: In what room?

25 MR: I had my own bed, but in my old house with spider

1 webs, me and my mom and my dad and my sisters shared all the --
2 the whole room, and it was dark. He did it in our room.

3 AGENT RYAN: Okay, so he did it in your room, and you
4 said that you shared the room with who else?

5 MR: My mom -- no, it's their room, but there wasn't
6 room -- we shared the room.

7 AGENT RYAN: Okay, can you tell me about that time when
8 that happened?

9 MR: When my mom worked, every single morning when she
10 goes, he (inaudible).

11 AGENT RYAN: Okay, I want you to tell me about one time
12 specifically. Can you tell me about one time that it happened
13 in that house?

14 MR: The first time was he put his tito in my butt, and
15 the second time was he put his tito in my mouth.

16 AGENT RYAN: Okay, so let's talk about the first time.
17 You said the first time he put the tito in your butt, and this
18 was in the old house; is that correct?

19 MR: (No verbal response).

20 AGENT RYAN: Okay, where were you at in the house?

21 MR: My mom's room.

22 AGENT RYAN: Your mom's room?

23 MR: Wait, our room.

24 AGENT RYAN: Your room, because everyone shared the
25 room?

1 MR: (No verbal response).
2 AGENT RYAN: Okay, can you tell me about that?
3 MR: Just when my mom goes he did that, and I didn't
4 want to. He did it, but I didn't want him to do it.
5 AGENT RYAN: Okay.
6 MR: (Inaudible).
7 AGENT RYAN: Can you tell me, was that in the morning
8 or evening?
9 MR: In the morning.
10 AGENT RYAN: Okay, and what did you have on; what were
11 you wearing when he did it?
12 MR: A shirt, pants, my underwear, and socks.
13 AGENT RYAN: And him, what did he have on?
14 MR: His clothes.
15 AGENT RYAN: His clothes? What was he wearing?
16 MR: His shirt, his pants, his -- no, I don't know --
17 his socks.
18 AGENT RYAN: His socks, okay. Were your pants up or
19 down when -- when he did it?
20 MR: A little bit down.
21 AGENT RYAN: A little down? Who -- who put them down?
22 MR: My dad.
23 AGENT RYAN: Your pa?
24 MR: My papa.
25 AGENT RYAN: Your papa, okay, and what happened after;

1 what happened then?

2 MR: He laid down --

3 COURT INTERPRETER: Let me replay that just real quick.

4 MR. DRECHSEL: Okay.

5 COURT INTERPRETER: Going to play one more time, your

6 Honor.

7 THE COURT: Okay.

8 MR: He took -- he put his tito out. He put his tito

9 out of his pants --

10 AGENT RYAN: Yes.

11 MR: -- and then with his hand took out his tito, and

12 he put it in (inaudible).

13 AGENT RYAN: Did he say anything when he did this?

14 MR: (No verbal response).

15 AGENT RYAN: Where were his hands when he did this?

16 MR: In his tito.

17 AGENT RYAN: On his tito. Has he put something in your

18 butt, something else in your butt? Has he ever put anything

19 else in your butt besides his tito?

20 MR: (No verbal response).

21 AGENT RYAN: What?

22 MR: His (inaudible).

23 AGENT RYAN: Okay, tell me about that.

24 MR: When he put it -- he put it all the way where it

25 hurt, where we poop, and it hurted really bad, and he said not

1 to yell because (inaudible).

2 AGENT RYAN: Okay, was this at the old house with the
3 spider webs or the new house?

4 MR: The old.

5 AGENT RYAN: The old house. Can you tell me more about
6 that? What else happened?

7 MR: He put his finger (inaudible) moved back.

8 AGENT RYAN: Has he ever touched you with any other
9 parts of his body? Do you understand the question? Yes?
10 Okay. So then he has not touched you with other parts of his
11 body?

12 MR: (Inaudible).

13 AGENT RYAN: Okay, okay, has he ever had you touch him?

14 MR: (No verbal response).

15 AGENT RYAN: Tell me about that.

16 MR: He made me touch his tito (inaudible), and I don't
17 because (inaudible).

18 AGENT RYAN: Can you tell me what does he do when he
19 makes you touch his tito?

20 MR: I don't do nothing. He just sees the TV.

21 AGENT RYAN: He what?

22 MR: He sees the TV.

23 AGENT RYAN: He sees the TV. Okay, what's on the TV?

24 MR: Football.

25 AGENT RYAN: Football, okay. What does he make you

1 touch his tito with?
2 MR: My hand.
3 AGENT RYAN: Your hand; and how does he -- okay tell me
4 more about that. How did he want you to touch his tito with
5 your hand?
6 MR: (Inaudible).
7 AGENT RYAN: Does he tell you that?
8 MR: (No verbal response).
9 AGENT RYAN: Can you tell me about one time that he
10 \had you touch his tito with your hand? Can you tell me what
11 happened and where you were?
12 MR: At the old house (inaudible).
13 AGENT RYAN: Your old house?
14 MR: With my hand.
15 AGENT RYAN: Were his pants on or off?
16 MR: On.
17 AGENT RYAN: On. Was his zipper up or down?
18 MR: Up.
19 AGENT RYAN: How did you -- did you touch his tito over
20 the clothes or under the clothes?
21 MR: Under.
22 AGENT RYAN: Under. Has this ever happened with anyone
23 else?
24 MR: (No verbal response).
25 AGENT RYAN: No? All right, did he make you -- you

1 said that he made you put his tito in your mouth in the old
2 house.

3 MR: Uh-huh.

4 AGENT RYAN: Yeah? Can you tell me a little more about
5 that?

6 MR: He told me not to tell anybody. He won't let me
7 tell (inaudible) -- told me to not tell anybody, and he -- he--

8 AGENT RYAN: Where in that old house; what room?

9 MR: My room.

10 AGENT RYAN: Your room. Is that the same room that you
11 shared with your mom and dad?

12 MR: Yeah.

13 AGENT RYAN: And your sisters, okay. Where were you at
14 in your room?

15 MR: In my bed that he told me to (inaudible) in my
16 mom's bed.

17 AGENT RYAN: Okay, and where was he?

18 MR: My mom's bed.

19 AGENT RYAN: Okay, so you were in your bed, but he told
20 you to go into his mom's -- into your mom's bed, and that's
21 where he was?

22 MR: (No verbal response).

23 AGENT RYAN: Okay, was he under the covers or on top of
24 the covers?

25 MR: On top. What?

1 AGENT RYAN: The covers. You know, the sheets and the
2 blanket that you cover yourself with? The sheet, was it under
3 or was it over?
4 MR: Under.
5 AGENT RYAN: Under? Can you describe to me what
6 happened?
7 MR: He cover me.
8 AGENT RYAN: He covered you?
9 MR: He covered me with -- with -- with his sheets of
10 my mom.
11 AGENT RYAN: What happened after?
12 MR: (No verbal response).
13 AGENT RYAN: When he called you to come to the bed of
14 your mom, what happened?
15 MR: Your mom?
16 AGENT RYAN: I meant your mom. I'm sorry, my Spanish
17 is not perfect. So then you were in your bed, and he called
18 you to come to the bed of your mom, and he was in that bed,
19 right? Okay, what happened after? Next, what happened next?
20 MR: What happened next? The last thing?
21 AGENT RYAN: The next.
22 MR: Oh, he told me to put his hand in -- my hand on
23 his tito.
24 AGENT RYAN: Okay, and then what happened?
25 MR: I didn't want to, but he told me to.

1 AGENT RYAN: Then what happened after that? MR, you're
2 not in trouble, okay? I know some things have happened, and
3 they're not necessarily good, but you're not in trouble. So
4 you can tell me. You can tell me what happened, okay? So
5 he ask -- he told you to put his hand on your tito and what
6 happened next?

7 MR: I didn't want to.

8 AGENT RYAN: Okay.

9 MR: He told me to; but I didn't want to (inaudible)
10 tell me nothing. He told me to push down a little bit on my
11 hands.

12 AGENT RYAN: Okay.

13 MR: I didn't want to, but he told me, and (inaudible).

14 AGENT RYAN: What else?

15 MR: (No verbal response).

16 AGENT RYAN: You can say it in Spanish if you like.
17 Okay, let's do this. I'm going to show you some pictures. My
18 Spanish, yeah, my Spanish, as you know, is not perfect. Okay,
19 I want to clear up some things. When he -- when he put his
20 tito in your butt, were you in the bed or somewhere else?

21 MR: On the bed.

22 AGENT RYAN: What position were you in?

23 MR: I wanted to stay in my bed, but I couldn't stay.

24 AGENT RYAN: What?

25 MR: I couldn't stay in my bed.

1 AGENT RYAN: But you were in the bed of him and your
2 mom?
3 MR: In my bed. I was asleep, and he woke me up, and
4 asked me to go --
5 AGENT RYAN: You were asleep, and he woke you up?
6 MR: To go to the bed, my mom's bed.
7 AGENT RYAN: When he put his tito in your butt, were
8 you standing, kneeling or lying down?
9 MR: Lying down.
10 AGENT RYAN: And he was -- what was his position,
11 standing?
12 MR: He was lying down. I can pick up the marker.
13 AGENT RYAN: What?
14 MR: I can pick up the marker.
15 AGENT RYAN: You can pick up the marker. Wow.
16 MR: (Inaudible).
17 AGENT RYAN: That's okay. Oh, that moves, huh? MR,
18 has your dad ever touched you anywhere else?
19 MR: (No verbal response).
20 AGENT RYAN: Where?
21 MR: (No verbal response).
22 AGENT RYAN: You're looking down. Can you tell me
23 where he touched you?
24 MR: (No verbal response).
25 AGENT RYAN: It's okay. You use your own words; or if

1 you need to point and show me, you can do that, too.

2 MR: Right there.

3 AGENT RYAN: Right there?

4 MR: Yes.

5 AGENT RYAN: What do you call that?

6 MR: I don't know.

7 AGENT RYAN: Okay, when did he do that? Has he done it

8 one time or more than one time?

9 MR: One time.

10 AGENT RYAN: One time? Can you tell me about that one

11 time?

12 MR: (Inaudible) something, and he woke me up, and then

13 I was awake, and I was in my bed. He told me to stay. I didn't

14 want to, and he told me I can't tell. It happened when he put

15 it in my butt, and he was -- he put his tito in my butt. He

16 put it in and --

17 AGENT RYAN: He put it? What did he put?

18 MR: His tito.

19 AGENT RYAN: His tito. Where did he put his tito?

20 MR: Where I pee.

21 AGENT RYAN: Where you pee, okay. Was this in the old

22 house or the new house?

23 MR: Old.

24 AGENT RYAN: This was the old house, okay. Has that

25 happened more than one time that he put his tito where you

1 peed?

2 MR: More.

3 AGENT RYAN: More? Okay, tel me about the time that it

4 happened in the old house.

5 MR: (Inaudible).

6 AGENT RYAN: Where were you at?

7 MR: In bed.

8 AGENT RYAN: Okay, can you tell me more about that?

9 MR: Can I go to the bathroom?

10 AGENT RYAN: Okay, you need to go potty? Okay, let me

11 show you where the potty is.

12 (MR and Agent Ryan exit room, then re-enter)

13 AGENT RYAN: Hello. Right in here, kiddo. You know,

14 we're almost done. I have a few more questions, okay? You

15 told me that he put his tito where you pee, okay, and that

16 happened in the old house, okay? Did it happen any other time

17 at the other house, or no?

18 MR: (No verbal response).

19 AGENT RYAN: No? Okay, now I want to show you some

20 pictures, okay? So like I told you before, my Spanish is not

21 perfect, so I would like to clarify some of the words that you

22 have told me, okay? I'm going to show you two pictures of a

23 girl and a boy, naked. What I would like you to do is to tell

24 me what are the body parts. Can you do that for me? Okay. I

25 need my pen.

1 COURT INTERPRETER: So just to make some interpretation
2 clarification, then, he's using the word used in Spain for a
3 pen; and in her culture (Spanish word) refers to an otter pop.
4 So that's why she's correcting him and telling him, "That is
5 not an otter pop," and he says, "I call this -- what do you
6 call this?" "I call it a (Spanish word)."

7 AGENT RYAN: In Spanish what do you call it?

8 MR: I don't know.

9 AGENT RYAN: I call it -- the abbreviated word in
10 Spanish -- (Spanish word), which is the word for pen; but you
11 say "pen," huh, in English? Yes, okay. Is this a boy or a
12 girl?

13 MR: A boy.

14 AGENT RYAN: I need my glasses. Boy or girl?

15 MR: Girl.

16 AGENT RYAN: Girl, okay. I want you to tell me what
17 are some of the body parts, okay? What is this?

18 MR: Head.

19 AGENT RYAN: Head.

20 MR: (Inaudible).

21 AGENT RYAN: Do you? I think we need to do that, huh?

22 MR: (Inaudible).

23 AGENT RYAN: Oh, not going to fall now.

24 MR: You can keep them together.

25 AGENT RYAN: Do what?

1 MR: Like this like that. You could do (inaudible).
2 AGENT RYAN: You can, can't you? That's pretty cool.
3 So you said this was the head. We're not going to use that
4 one. That one looks like it's almost dead. What's this?
5 MR: Boobies.
6 AGENT RYAN: Boobies, okay. What's that?
7 MR: Bellybutton.
8 AGENT RYAN: Bellybutton. Not a lot of room there, is
9 there? What is this?
10 MR: Hand.
11 AGENT RYAN: Hand. (Spanish word) is also.
12 MR: Hand.
13 AGENT RYAN: All right, what's this?
14 MR: Tito.
15 AGENT RYAN: Tito. Okay, what are these?
16 MR: Knees. This is butt.
17 AGENT RYAN: What is butt? That's the butt?
18 MR: Uh-huh.
19 AGENT RYAN: We'll circle that, and we're going to put
20 "butt."
21 MR: Uh-huh.
22 AGENT RYAN: What are these?
23 MR: Feet.
24 AGENT RYAN: Feet, good. What's this right here?
25 MR: Back.

1 AGENT RYAN: Back. Good job. Okay, now we're going to
2 describe the girl. What are these?
3 MR: Eyes.
4 AGENT RYAN: Eyes.
5 MR: Mouth.
6 AGENT RYAN: Where's the mouth?
7 MR: Right there.
8 AGENT RYAN: Is that the mouth? That one right there?
9 MR: Uh-huh.
10 AGENT RYAN: All right, okay.
11 MR: Boobies.
12 AGENT RYAN: Where's boobies?
13 MR: Right there.
14 AGENT RYAN: That's a booby right there?
15 MR: Bellybutton.
16 AGENT RYAN: Bellybutton. Is that the same? On the
17 boy and girl it's the same?
18 MR: Yes.
19 AGENT RYAN: Okay, what's this?
20 MR: Seed.
21 AGENT RYAN: What is it?
22 MR: Seed.
23 AGENT RYAN: Seed? Okay.
24 MR: Feet.
25 AGENT RYAN: Where's the feet, down there?

1 MR: Hand.
2 AGENT RYAN: Are you just too smart?
3 MR: Hand.
4 AGENT RYAN: These are the hands?
5 MR: Butt, back.
6 AGENT RYAN: Where's that -- where's the butt? That's
7 the butt for the girl? Okay. Let me ask you this. Earlier
8 you said that he puts his tito where you pee. Where do you
9 pee?
10 MR: (No verbal response).
11 AGENT RYAN: That's -- is that the seed? Okay, so you
12 pee out of your seed? Okay, good. Now, what I want you to do,
13 I want you -- do you like orange? Yeah, do you want to use the
14 orange one?
15 MR: Green.
16 AGENT RYAN: Green? Okay, I want you to show me, mark
17 on there where your poppy put his tito on you.
18 MR: Right there.
19 AGENT RYAN: Okay, anywhere else?
20 MR: This.
21 AGENT RYAN: Okay, anywhere else?
22 MR: This spot.
23 AGENT RYAN: That's where he put it? Okay, did he ever
24 -- and you said he made you touch him, right?
25 MR: Uh-huh.

1 AGENT RYAN: Where did he make you touch him at?
2 MR: Like this.
3 AGENT RYAN: Okay, anywhere else?
4 MR: Uh-uh.
5 AGENT RYAN: When you touched him, you touched him on
6 his tito with what? What part of your body did you touch him
7 with?
8 MR: Hand, like this.
9 AGENT RYAN: Those hands, okay.
10 (Recording turned off)
11 THE COURT: All right, Mr. Drechsel, is that all the
12 presentation you're going to use for that DVD?
13 MR. DRECHSEL: Can we approach for a second.
14 THE COURT: Yes.
15 (Discussion at the bench off the record)
16 THE COURT: Okay, just a point of clarification. The
17 interview ended quite abruptly there. I ordered that it end
18 there because that was all the relevant information that you
19 needed to receive, okay?
20 MR. DRECHSEL: Your Honor, if I can recall Special
21 Agent Dave Ryan for must maybe a handful of questions.
22 THE COURT: Okay. Agent Ryan, I'll remind you you're
23 still under oath.
24 THE WITNESS: There's notes on the podium here. Who's
25 are these?

Addendum D

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

ABELARDO CRUZ,

Defendant.

Case No. 131800746

Motion Hearing
Electronically Recorded on
May 7, 2014

BEFORE: THE HONORABLE CLARK A. MCCLELLAN
Eighth District Court Judge

APPEARANCES

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1 video to be allowed at all, if the Court decides there's not
2 good cause or that one of the elements of the rule are not met,
3 then we don't need to talk about other contents in the video
4 and we just move forward with the trial; but if the Court
5 determines that there is good cause and that those other
6 factors are met and that the video, at least a portion of
7 the video will be played, then we talk specifically about
8 the defendant's objections to whatever portions of the video
9 he finds objectionable. That's my thought.

10 THE COURT: That goes with half of what your motion was.

11 MR. DRECHSEL: Well, I think the --

12 THE COURT: The other half of your motion was the
13 closed circuit use of the testimony.

14 MR. DRECHSEL: Correct, and there's actually three
15 parts of it. Part is to use the CJC video, part is to have
16 the child witness testify and have that recorded and then play
17 that recording.

18 THE COURT: Well, that's an alternative to --

19 MR. DRECHSEL: The other -- right, the other is
20 testifying by closed circuit.

21 THE COURT: Okay, that's true, and I didn't make that
22 distinction.

23 MR. DRECHSEL: So ideally for the State's purposes, and
24 I think the reason this rule exists in the Criminal Rules of
25 Procedure anyway is the State would like to use the CJC video.

1 In the event that we're not permitted to do so by the Court, we
2 would then request that the child be allowed to testify outside
3 the presence of a jury, either by pre-recording, through cross
4 examination or live testimony, but closed circuit.

5 THE COURT: Well, and I see another distinction that is
6 I think different from that. The video may come -- may or may
7 not come in of its own. The defendant always has -- assuming
8 that I would let that in, the defendant always has the opport-
9 unity to cross examine. So --

10 MR. DRECHSEL: Correct.

11 THE COURT: So I've got to deal with both of those
12 issues eventually if the defense intends to cross examine the
13 alleged victim. So --

14 MR. DRECHSEL: I agree with that.

15 THE COURT: -- Mr. Sidwell, I haven't heard from you
16 yet.

17 MR. SIDWELL: When we objected, we had two parts to it.
18 The first part is we object to the video and I'm going to tell
19 you why. In analyzing the rule, I believe there's actually
20 three parts to the rule. The first part is by definition it
21 has to be a case that involves some kind of abuse, sexual or
22 physical, and the child -- the witness that's going to test --
23 because the rule, the way I read it, is not just for victims.
24 It can be for any child -- anybody that's under 14. So by
25 definition it has to be a sexual abuse case, a physical abuse

1 case, and the witness that you want to have testify has to be
2 under 14. I don't think that's a problem.

3 THE COURT: I don't think anybody will agree that
4 that's -- the rule reads that way.

5 MR. SIDWELL: Right. The next part, though, is the
6 part that I don't think the State's done. If you read the rule
7 it doesn't say go to the next -- the eight steps. It says now
8 you have to show some kind of good cause as to why you either
9 have to have the video or something else. Then if you show the
10 good cause, then you go to the next part that Mr. Drechsel's
11 done.

12 THE COURT: Let me ask Mr. Drechsel if he believes that
13 that's how the rule's framed.

14 MR. DRECHSEL: I believe I am required -- or the Court
15 is required to find good cause; and that good cause needs to
16 be shown. I'm the proponent of the motion and the video, so I
17 would need to show some good cause.

18 THE COURT: I think you're -- I disagree with your
19 analysis.

20 MR. DRECHSEL: I appreciate that.

21 THE COURT: Let me direct you to State vs. Nguyen,
22 N-g-u-y-e-n, 293 P3d. 236.

23 MR. SIDWELL: Okay, say that again, I'm sorry.

24 THE COURT: State vs. Nguyen --

25 MR. SIDWELL: Yeah, but just --

1 THE COURT: -- N-g --

2 MR. SIDWELL: -- no, I don't need that part, just the--

3 THE COURT: -- you don't need that? Just need the
4 numbers? It's 293 P3d. 236. That's a 2012 case out of the
5 Supreme Court, and the issue was this very issue, I think, if
6 I'm reading this right.

7 The Court took certiorari of a Court of Appeals
8 decision where they affirmed -- the Court of Appeals affirmed
9 the trial Court's ruling that the State was not require -- was
10 not required to make a separate showing of good cause to admit
11 the alleged victim's recorded statements under Rule 15.5 of the
12 Utah Rules of Criminal Procedure. The Court held -- that was
13 what the Appellate Court held.

14 The Supreme Court on certiorari agreed with the Court
15 of Appeals and the trial Court Judge, "We hold that a separate
16 showing of good cause to admit a recorded statement is not
17 required under Rule 15.5. Rather, good cause is established
18 when the District Court considers all the factors in the rule
19 and determines that the recorded statement is accurate, reli-
20 able and trustworthy, and that the admission of the recorded
21 statement is in the interest of justice."

22 That's the very -- I believe as I asked -- that was
23 the very issue that I asked you to articulate to me, and I
24 believe that that's been answered a year and a (inaudible) ago
25 by the Supreme Court.

1 MR. SIDWELL: So I'm fine. If that's -- our Appellate
2 Courts, they don't always read the same language we do. So if
3 they interpret something then I'm more than willing to say
4 that's the law.

5 THE COURT: Okay.

6 MR. SIDWELL: But that-- if they just want -- I do want
7 to set this apart. This is not the first time an Appellate
8 Court just ignored the language and interpreted it different.
9 So if it's just admissible to say that this is a sexual assault
10 case, the person's under eight years old --

11 THE COURT: And the other requirements of the statute--

12 MR. SIDWELL: -- and then leave the other eight --

13 THE COURT: -- have been met --

14 MR. SIDWELL: -- that's fine. Then let's -- let's just
15 go back and do the rule better so that we all understand the
16 same English and get rid of the good cause showing.

17 THE COURT: Well, or the all -- I guess the other part
18 is we could all read the opinions and decide what they mean,
19 but that is what it is.

20 MR. SIDWELL: So I will withdraw my motion with regard
21 to that if there's a case. I --

22 THE COURT: Well, I want you to -- I believe -- I came
23 convinced today that this did away with the requirement of a
24 good cause showing except to meet the requirements of 15.5.

25 MR. SIDWELL: Well, what you're saying, except for the

1 eight (inaudible).

2 THE COURT: That's right.

3 MR. SIDWELL: I don't have a problem with --

4 THE COURT: So let's go through the elements of 15.5
5 and see --

6 MR. SIDWELL: I'll stipulate to those.

7 THE COURT: You'll stipulate, except I don't think
8 you're going to stipulate to the last finding --

9 MR. SIDWELL: Okay.

10 THE COURT: -- which is, I have to make a finding that
11 the recorded statement is reliable and trustworthy, and that
12 admission of the recorded statement is in the interest of
13 justice.

14 MR. SIDWELL: Yeah, but I don't -- here's what I'm --
15 what we're talking about goes to my next part. Just because --
16 and I make this argument all the time. Just because we're
17 going to admit a video of something doesn't mean that every
18 single thing in it is admissible.

19 THE COURT: Goes out -- goes without saying.

20 MR. SIDWELL: Right, okay.

21 THE COURT: I'm with you on that, and I don't think
22 Mr. Drechsel is -- from what I've heard in other hearings on
23 this, he understood that there may be particular parts of the
24 recorded statement that may be the subject of an objection
25 because there's some other reason not to admit it because it's

1 based on hearsay or improper question or whatever purpose or
2 whatever thing that may have occurred in that interview.

3 MR. SIDWELL: Okay.

4 THE COURT: So what I anticipated and what I thought
5 Counsel told me they were going to do is they would try -- they
6 would go through the statement to identify specific parts that
7 there were concerns about --

8 MR. SIDWELL: I'm prepared to do that.

9 THE COURT: -- so that they could make a decision on
10 whether or not there was a stipulation to those parts or not.
11 Then I was going to make rulings on those specific parts.

12 MR. SIDWELL: Okay, I have -- I've written -- I've gone
13 through the transcript of the preliminary hearing.

14 THE COURT: Have you talked to Mr. Drechsel?

15 MR. SIDWELL: I've not talked to Mr. Drechsel.

16 THE COURT: Okay, that's what I think I want to have
17 happen before I make any rulings, because you two may be on
18 agreement on many or most or all of these areas, and it's
19 kind of a waste of everybody's time for me to say, "Here's the
20 objectionable one," and Mr. Drechsel goes, "Yeah, you're right,
21 I don't have a problem with that."

22 So in the -- for efficiency purposes I'm going to
23 ask you all to see if you can do that. If you can do that in
24 the next hour and ten minutes, that's good, because I have a
25 5 o'clock thing I have to get to. If you can't get to that,

1 Mr. Drechsel needs to be there, too. It's one of those things
2 that we can't push off. It's drug Court graduation and that's
3 -- I can't do that. He can't do that.

4 I need to make some other findings --

5 MR. SIDWELL: Okay.

6 THE COURT: -- before -- before I get there. So let
7 me get to the Rule 15.5 of the Criminal Procedures. Okay, so
8 the first one -- and I'm looking at 15.5(a)(1). The child is
9 available to testify and to be cross examined at trial.

10 Mr. Drechsel has represented in his motion that that
11 is true; that the child will be available to be cross -- to
12 testify and to be cross examined; is that true, Mr. Drechsel?

13 MR. DRECHSEL: Yes.

14 THE COURT: Okay, so that is met. At the time of the
15 recording no attorney for either party is in the presence --
16 the child's presence when the statement is recorded. I've seen
17 the video twice. No attorney was present. That's stipulated
18 by Mr. Sidwell. The recording is visual and oral -- I don't
19 even know what that --

20 MR. DRECHSEL: Audio.

21 THE COURT: Audio. That's a word that isn't very clear
22 -- and is recorded on film. Clearly that's the case. So that's
23 stipulated; is that true, Mr. Sidwell?

24 MR. SIDWELL: Yes.

25 MR. DRECHSEL: I'd say, though, it's recorded on

1 electronic means, but yeah.

2 THE COURT: Not film or video, or it is another
3 electronic means?

4 MR. DRECHSEL: It's electronic, yeah.

5 THE COURT: The recording is accurate and has not been
6 altered. Have you listened -- have you seen the video?

7 MR. SIDWELL: I've seen it.

8 THE COURT: Do you believe that it is accurate and not
9 altered?

10 MR. SIDWELL: I have no reason to believe that it's
11 been altered.

12 THE COURT: So you will stipulate to that?

13 MR. SIDWELL: Yeah.

14 THE COURT: Without any foundation? I mean, we could
15 bring a witness in that will testify on that, but you're --
16 if you'll stipulate, I won't need to.

17 MR. SIDWELL: I'll stipulate.

18 THE COURT: Okay, each voice in the recording is
19 identified. It's clear during that that you can hear the --
20 Agent Ryan, who's the police officer, and the child. That's
21 stipulated; is that true?

22 MR. SIDWELL: Yes.

23 THE COURT: Six, the person conducting the interview is
24 present at the proceeding. Now, that's not -- that would mean
25 that Agent Ryan must be present and available to testify; is --

1 MR. DRECHSEL: He will be.

2 THE COURT: Okay, so that's met. Then seven, the
3 defendant and his attorney are provided an opportunity to
4 view the recording before it's shown to the Court or jury.
5 That's happened.

6 MR. SIDWELL: We've both seen it.

7 THE COURT: Then eight, the Court views the recording
8 before it's shown to the jury and determines it is sufficiently
9 reliable and trustworthy, and the evidence -- and that the
10 interest of justice will best be served by admission of the
11 statement into evidence. Now, that's the findings that I need
12 to make after I've reviewed that. So I'm prepared to make
13 those findings after I made that review of that.

14 I've viewed this twice now. I saw it at the prelim
15 and I saw it again last night. I reviewed it, the whole thing,
16 and I will make some findings as to sufficient, reliable and
17 trustworthy and in the interest of justice.

18 I'll indicate that the child victim, alleged victim
19 was six years old. She was an engaging child. She spoke
20 English and Spanish. She said she preferred to have the
21 interview in Spanish, but she used English as much as she
22 did Spanish.

23 Just for the record, I reviewed the transcript of the
24 written -- of the child's testimony at the preliminary hearing.
25 I listened to the videotape -- or the video yesterday. I did

1 not review the written translation. I speak Spanish, and I
2 don't know that I -- I probably should have reviewed it, but
3 I understood every word that she said. Her Spanish was --
4 Mr. Ryan's Spanish was very good, but it wasn't as a native
5 speaker. It was somewhat less than a native speaker, although
6 he's very fluent, don't get me wrong, but his level -- his use
7 of words was such that I understood every word he used, and I
8 understood every word that the child used.

9 So I didn't use the benefit of the transcription of
10 her and his conversation that occurred in Spanish. I listened
11 on my own and heard that. So I don't know that I'm interjecting
12 myself any more than I -- I guess I could have read it, but
13 it would have offered me nothing because I heard it in both
14 languages and it was clear to me. So any -- but just so the
15 record's clear what I did.

16 He went through with the child the importance of
17 telling the truth and the importance of not answering or
18 guessing or speculating when she didn't know the answer.
19 The child was clear that she understood that if she didn't
20 know something, she was supposed to say, "I don't know." He
21 used the example of, you know, if I said, "The name of your dog
22 was this," and the name of the dog was actually something else
23 -- or she didn't know the name of the dog, she was supposed to
24 say, you know, "How would you answer?" and she said, "I don't
25 know the name of the dog."

1 It was clear that she understood that she wasn't to
2 interject her thoughts if she didn't know the answer. She's
3 a first grader. She likes to play. There were lots of
4 discussion about playing in there and what she liked to play.
5 He went through some basic things to understand, you know, who
6 her family was and all of those things.

7 He told her that she could say good or bad things, and
8 the child seemed to be clear and understood that she was to --
9 she was free to have any discussion that she wanted. She was
10 free to correct him if he was incorrect. I will note that
11 after he started questioning her, his questions were open-
12 ended. There were some closed-ended questions where there
13 was some clarification where he tried to summarize or recap,
14 but it was only after the child had made statements, and he
15 didn't plant anything in the child's mind that I was aware of
16 or concerned about. Seemed to me he -- and when he did things,
17 he did things in the alternative. "Were you kneeling or were
18 you laying or some other form on the floor or on the bed?"
19 He always left it open without a suggestion of how she was
20 supposed to respond.

21 He asked her why did she think she was there? She
22 indicated she was there because her ex-dad had done something
23 bad. He didn't -- didn't ask her anything open-end -- that was
24 -- it was open-ended. That was the purpose. Then he asked her
25 what that was; and she described a number of situations where

1 there had been alleged sexual activity involving the child. He
2 didn't suggest how that was to occur or what had occurred. He
3 didn't put words in her mouth.

4 She on her own came up with several different alleged
5 activities that were the basis for the charges involving the
6 defendant putting -- having her put his penis in her mouth, the
7 defendant putting his penis in her but, as she called it, and
8 the defendant putting his penis in her "semia," as she called
9 it, or her vaginal area as she identified it later.

10 She was consistent throughout that these events
11 occurred in a way that I believe showed me that there was
12 internal consistency in her statements. There were never any
13 inconsistent or contrary things. There were some things that
14 need clarified.

15 MR. SIDWELL: Can I say this. I'm not sure that you
16 need to make all these temporary findings, because I don't
17 agree with half the things you're saying.

18 THE COURT: Well, you don't have to agree with anything
19 I'm saying.

20 MR. SIDWELL: I don't, but what I'm saying --

21 THE COURT: Mr. Sidwell, let me make my findings.

22 MR. SIDWELL: Let me ask -- but I don't think you have
23 to be that detailed about -- because you're almost saying that
24 in the long run it's going to be the jury that decides if
25 there's something inconsistent. So I think all you need to

1 determine -- I don't think you need to get into that.

2 THE COURT: Okay, I am giving you the basis for what
3 -- how I make a determination that I believe that this evidence
4 is reliable. I'm not saying that this is how the jury has to
5 perceive it at all. I, for a fact, don't believe that they
6 have to perceive it this way. I have to make an initial
7 finding that it's reliable, that it's trustworthy, and that
8 it's in the interest of justice.

9 MR. SIDWELL: Well, I guess I'm just trying to make it
10 easy on you, because if you're going to say that there was no
11 inconsistencies then I'll just file a motion that I don't --
12 that I disagree with your findings, because I do think there
13 was inconsistencies; but I don't think that you need to go
14 there to be able to make it admissible. Does that make sense?

15 THE COURT: I understand what you're saying. I'm trying
16 to protect my record on appeal --

17 MR. SIDWELL: Okay.

18 THE COURT: -- so that some other attorney that's doing
19 -- that may --

20 MR. SIDWELL: To appeal --

21 THE COURT: -- do an appeal may say --

22 MR. SIDWELL: -- you're right.

23 THE COURT: -- that I skipped steps along a way.

24 MR. SIDWELL: Okay.

25 THE COURT: I don't believe that -- if there were

1 inconsistencies, they were of a minor nature and of a kind that
2 a six-year-old child may well do, because there -- clearly
3 there were some confusion in some areas that were not without
4 some cloud or area of inquiry -- additional inquiry. I acknow-
5 ledge that; but for purposes of the reliability analysis, the
6 inconsistencies weren't of a nature that I believe undermines
7 the reliability of them.

8 I will tell you, I'm making these findings also
9 because this was the kind of finding that was made in the case
10 of -- okay, State of Utah vs. --

11 MR. SIDWELL: While the Court's looking, there is case
12 law that says that just concluding that it's reliable, in the
13 interest of justice, and trustworthy is not sufficient set of
14 findings to allow -- to justify the admission of the video.

15 THE COURT: Yeah, I know.

16 MR. SIDWELL: It's too conclusory.

17 THE COURT: Too conclusory. I understand, and that's
18 -- I was looking at a case, State vs. Seal, 53 P2d. 862, where
19 the Court went through some of these kind of analysis. So
20 that's another reason that I'm making the findings I'm making.

21 I find that the child's testimony was linear and
22 logical in that it made some sense that some of the words that
23 she was using about the conduct I don't believe that without
24 some kind of experience like this that a child would be able to
25 formulate the words that she used, including she indicated that

1 the defendant told her not to tell anyone about the activity
2 that had occurred. He had told her not to bite his penis, but
3 rather to suck his penis like a popsicle.

4 Some of the linear things that came in a logical
5 sequence was how her pants and underwear were pulled down
6 partially when some of these events occurred, which would be
7 consistent with how it would reasonably or one would expect it
8 would happen in the way that she described.

9 I also believe that her testimony was is that at least
10 one of these events occurred within a short period of time of
11 the time that she gave the interview. That goes to the trust-
12 worthiness and the reliability that it was closer in time than
13 what we would get after sometime later, and it also goes to the
14 point that it would be in the interest of justice that that
15 testimony would be heard by the jury from the video because it
16 was closer in time and likely more reflective of what was in
17 the child's mind.

18 That is some of the analysis that Justice Parish used
19 in the Nguyen -- the policy in the Nguyen case that supported
20 the reason that we didn't need to make a finding of good cause
21 in addition to the eight factors, is that there's a strong
22 public policy in the State to allow children to not be trauma-
23 tized by a sec -- by additional inquiry into the allegations or
24 the events; and also because it's more likely that we will get
25 better information from a child witness from the interview than

1 we would in a Court setting. That was a policy reason advocated
2 by -- or identified by Justice Parish.

3 I'll note the child did not appear to make grandiose
4 or exaggerated or very bizarre or estranged statements of what
5 the facts -- she believed the facts were. There are some cases
6 where the victim or alleged victim would make some statements
7 that are so difficult in the common sense to believe or under-
8 stand, that Courts have found that those were not reliable.
9 She didn't make any statements like that.

10 I didn't find any indication that there was any
11 coaching or attempts to have the child repeat things from
12 any other source. I didn't get any sense of that. So on
13 that basis I believe her testimony is sufficiently reliable
14 and trustworthy.

15 I believe it's in the interest of justice for the
16 policy reasons that were identified by Justice Parish. I do
17 not believe it's in the interest of child -- alleged child
18 victims to be subjected to additional examination, or as the
19 least amount of reasonable examination that's possible, as well
20 as I believe that the potential to receive better information
21 from the child will be provided through the video than through
22 direct examination later sometime later after the fact than in
23 a setting that is likely to be more difficult, traumatic and
24 stressful for the child.

25 So those are my findings as to why -- and I will tell

1 you that in the Nguyen case the Court took the position that
2 children under 14 in Utah -- I took it if the eight steps are
3 met, the video is always admissible when the vic -- when the
4 witness is under 14. That's the policy of the State by statute
5 and by the Court's interpretation, okay? That's my finding.

6 Now, that doesn't foreclose the rest of the inquiry,
7 which is there may be individual portions of the recording that
8 are not admissible for an evidentiary reason; and then that
9 doesn't go to the next step which is Mr. Cruz is entitled to
10 cross examine this witness, and is this cross examination going
11 to be in front of the jury with everybody present, or is it
12 going to be recorded prior with Counsel doing a recorded con --
13 cross examination, or is there going to be some closed circuit.

14 MR. SIDWELL: I don't --

15 THE COURT: Let me frame that issue for you. I think
16 you need to read State vs. Henriod, 131 P3d. 232, 131 P2d. 232,
17 because that's what frames this issue. That's the --

18 MR. DRECHSEL: P2d. or P3d?

19 THE COURT: P3d.

20 MR. SIDWELL: About whether it's going to be closed
21 circuit or not?

22 THE COURT: Yeah.

23 MR. SIDWELL: Okay, let me just tell you what my issues
24 are.

25 MR. DRECHSEL: What was the final -- 131 P3d. --

1 THE COURT: 232.

2 MR. DRECHSEL: Thank you.

3 THE COURT: A 2006 case.

4 MR. SIDWELL: You know I like to say things that get me
5 in trouble. So now it's going to be for you. I probably say
6 more than I should. Let me tell you, I don't really care about
7 the video coming in, and I don't care whether it's close or in
8 Court. So I'm not going to object to that. What --

9 THE COURT: Okay, well, then that may make this easy.

10 MR. SIDWELL: That makes it easy. I think -- I'm going
11 to tell you the issues that I'm concerned with, and -- but here
12 is the part that I'm going to say more not for you, you have to
13 follow precedence.

14 What I am bothered by is when the Supreme Court says
15 that they're -- and they write -- this is for their benefit,
16 because this will go up on appeal and they can read it -- is
17 that when they write articles that they're not activist --
18 they're not activist judges, the rest of the bar, we just --
19 we just ignore them because they are activist judges, because
20 they're the ones that made the rules. They made Rule 15.5. I
21 don't care whether we just admit it or not; but when the rule
22 clearly says, "This and this and this," when all of a sudden
23 they decide they don't want that rule anymore, and they just
24 cross out "good cause," then that's what makes them activist
25 Judges.

1 Now, clearly they make the law and you follow the
2 precedent, and I think it's great that you do. So that is the
3 rule. I don't care if it comes in or not. What I'm saying is
4 that when we as us little lowly attorneys down here, when we
5 read a rule, and usually because when we appeal other things
6 and the Court says no, it says "and then you have to do it,"
7 then we think that means "Yeah, and there has to be good cause
8 and this."

9 They had the choice to make the rule in the first
10 place. They did it. Clearly they didn't make very good
11 language in there because they're the ones that added "and
12 for good cause." They could have easily just said, "If you're
13 14 and it's a sex case and you meet these other criteria, no
14 problem."

15 THE COURT: Well, and your --

16 MR. SIDWELL: So that's my only --

17 THE COURT: -- your argument is obviously consistent
18 with what the defendant in the Nguyen case argued.

19 MR. SIDWELL: I don't care about that. Fine, it comes
20 in, but here's what I do care about.

21 THE COURT: Okay.

22 MR. SIDWELL: Here's what I -- and I've got this up,
23 and I'm actually taking this up in appeal in another case.
24 What I am concerned about is that I haven't seen this from
25 Mr. Drechsel, but I want to stop it before we get there, is

1 that they -- what will happen is that they'll have the person
2 testify, say everything they want to say -- well, I'll give you
3 the exact thing.

4 They'll call the victim witness, the first witness.
5 She comes in Court. She testifies. She testifies for an hour.
6 She says everything, and then at the end of their case in chief
7 they just play the video. They'll say exactly the same thing
8 that she just testified to, and they'll say, "Well, it comes in
9 because the rule allows it."

10 My argument is you only get one shot, though. If you
11 play the video, you can't put the victim up there and ask her
12 all the things that you already got in the video, because the
13 video's your one shot. The rule doesn't allow you to get two
14 shots at the apple to have the jury testify twice -- to let the
15 victim testify twice; once at the beginning of your case and
16 once at the end.

17 So I have no problem with the video coming in, and as
18 long as we don't put the victim on except for on I get to cross
19 examine on the things that were already covered in the direct
20 part of it. My scope -- he plays the video. My scope of cross
21 is to what was in the direct; but what I don't want to see
22 happening is Mr. Drechsel playing the video, and then having
23 the little girl in his case in chief picked to say everything
24 she just said in the video. So that's my first point. I'm not
25 sure that he's trying to do that, but --

1 MR. DRECHSEL: I would never --

2 MR. SIDWELL: It shouldn't --

3 MR. DRECHSEL: Mr. Sidwell has the advantage of having
4 had a trial with me on similar issues -- what was that five,
5 six months ago -- and I would approach it the same way.

6 MR. SIDWELL: Yeah.

7 MR. DRECHSEL: I would put the video on, and then I
8 would just ask the young lady, "Were you in that video? Did
9 you tell the truth?" Then I would -- just to adopt those
10 statements in front of the jury. Then it's cross examination.

11 THE COURT: Okay, before -- okay, so the video -- I've
12 made my ruling on the video.

13 MR. SIDWELL: I agree.

14 THE COURT: You've made your record on what your
15 concerns were.

16 MR. SIDWELL: Then the other --

17 THE COURT: Now the next quest -- and I'm not ruling
18 one way or another. Nobody's asked me to rule and I wouldn't
19 rule about the issue that you just raised, about putting the
20 child on and then having the video also, because that's really
21 not before me right now, and --

22 MR. SIDWELL: You're right. So I will object at the
23 time that it happens.

24 THE COURT: -- you would object and I would rule at
25 that time. I'm not telling you how I would rule or not,

1 because I haven't thought about it enough. Haven't looked at
2 the rule enough, but we'll get to that if we get to that. The
3 other issue is I do need to know how Mr. Drechsel wants to do
4 the cross examination of the child or the examination of the
5 child. He says he doesn't want to do it in the presence of the
6 defendant.

7 MR. SIDWELL: I don't object to that. If we -- if he
8 wants to have a closed circuit TV and we go in another place
9 and I ask him questions, I'm not objecting to that.

10 THE COURT: Then I -- then I don't need to make all
11 of the other findings --

12 MR. SIDWELL: Correct.

13 THE COURT: -- but I was going to need to have an
14 evidentiary hearing on those issues. If you're saying you
15 don't want an evidentiary hearing, that makes it easy for me.

16 MR. SIDWELL: No, I don't -- I don't think it gets at
17 the truth to make her -- either whether she's in the Court or
18 whatever. She's still subject to cross examination.

19 THE COURT: So how do you want to do it?

20 MR. DRECHSEL: I think I would prefer to have the -- I
21 think it would prefer to have the cross examination take place
22 outside the presence of the jury, unless --

23 THE COURT: In a video -- a live video feed?

24 MR. DRECHSEL: I think a live is better. I think it's
25 more responsive to the issues that develop at trial.

1 THE COURT: I agree that that would -- I would much pre
2 -- myself, I think that that would give us a better inquiry
3 than to try to anticipate what might come out in the trial --

4 MR. SIDWELL: Yeah, I'm going to object if you do it
5 that way, because --

6 THE COURT: That clearly is a different issue, and he's
7 not -- he proposed it that way, and I'm just trying to narrow
8 where he is. You're saying a live video feed?

9 MR. DRECHSEL: In the alternative, yeah.

10 THE COURT: Typically what we would do is we would --
11 and I don't know, I hadn't thought about --

12 MR. DRECHSEL: It's very easy to set up.

13 THE COURT: Well, I don't know if we put the child in
14 the back room or the defendant in the back room.

15 MR. DRECHSEL: Typically we put the child in the -- in
16 there.

17 MR. SIDWELL: I think it's usually easier to just put
18 the child in a separate room, and usually you and me and --

19 THE COURT: Mr. Drechsel.

20 MR. SIDWELL: -- Mr. Drechsel with the child, and then
21 everybody else would still be in here and they'd be watching
22 it.

23 THE COURT: Is that how you anticipate it, Mr. Drechsel?

24 MR. DRECHSEL: Yes, although there may be room, and I
25 think there is room in the statute for an uninvolved victim

1 advocate or victim support person to be in the room as well. I
2 believe under the law there is.

3 THE COURT: There's probably a statute or a case that
4 deals with that. You'll figure that out or ask me to decide
5 that.

6 MR. SIDWELL: The only -- and I can tell you where my
7 objections come to with this whole process is that -- and it's
8 the same with what I'm going to object to. I don't -- what I
9 don't like them doing is bringing in a little dog for the jury,
10 and having the little girl pet the dog.

11 It's this whole -- most of the things that I object to
12 in the thing is going to be things where they're just talking
13 about "How -- what do you like to play?" and we don't allow
14 that with other witnesses. You're not going to let me put
15 my client on and say, "Okay, Mr. Cruz, tell us about what you
16 like to do in your spare time and how you like to play with
17 other people." All that does -- it's not relevant. It's just
18 building a bond between a witness and the jury. So that's
19 going to be something I --

20 THE COURT: That will be the subject of --

21 MR. SIDWELL: Yeah, our conversations.

22 THE COURT: -- your discussions amongst yourselves, and
23 then I'll make rulings on --

24 MR. DRECHSEL: That's true, although I can say right
25 now that it's part of the protocol. It's part of the interview

1 and protocol that is evidence based, practice based, studied,
2 peer reviewed. Part of the protocol is building the rapport so
3 that you can see that the child can accurately report about
4 things, anything, not just sexual abuse.

5 THE COURT: Okay.

6 MR. DRECHSEL: So --

7 THE COURT: I'll deal with that when there's a real
8 controversy in front of me after you two --

9 MR. SIDWELL: Okay.

10 THE COURT: -- identify what it is that you can't agree
11 on.

12 MR. SIDWELL: Let me just -- I'll just tell you what
13 the other issue is, is because when they do the interview, they
14 will just ask the -- even when the child tells them about an
15 incident, they'll keep repeat -- even the interviewer will
16 repeat it.

17 So, for example, in this case the issue that I guess
18 everybody wants to hear is that "he had me put his penis in
19 my mouth." Well, clearly she can testify to that, but does
20 she get to say it and does the interviewer get to repeat it
21 20 times? Because if we were in a regular Court, usually what
22 an attorney would say is "asked and answered." Most Judges
23 sustain that -- well, I won't get into that, but that's where
24 we're going is just --

25 THE COURT: Well --

1 MR. SIDWELL: -- just the repetitiveness of the same
2 thing is what I objected --

3 THE COURT: When there's a transcript in front of me,
4 where you guys have agreed to some things and disagreed to some
5 things, it will clarify as much as it's going to clarify what
6 I think is a fair presentation of the testimony through the
7 video, and what the law allows and does not allow. For me to
8 speculate beyond that at this point doesn't make any sense.

9 So I think we've narrowed the issues tremendously here
10 today. I've ruled on the video. You have stipulated to the
11 out-of-Court testimony of the child under the circumstances
12 of -- as we have described. So I don't have to make those
13 findings; and now the only thing I need to do is make findings
14 on specific objections to parts of the video. It would probably
15 be helpful to --

16 MR. SIDWELL: I've already told you what the two areas
17 are, and I'll just talk to --

18 THE COURT: Well, and you're going to talk to --

19 MR. SIDWELL: -- (inaudible) about it.

20 THE COURT: -- Mr. Drechsel, then; but it would be
21 helpful for somebody to memorialize what my ruling is, and I
22 would prefer one of you to do that rather than me.

23 MR. SIDWELL: Well, since he won, he can do it.

24 MR. DRECHSEL: I took notes on all your findings. Do
25 you want the findings to be memorialized?

Addendum E

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

ALBERADO CRUZ,

Defendant.

Volume II

Case No. 131800746

Jury Trial
Electronically Recorded on
September 30, 2014

BEFORE: THE HONORABLE CLARK A. MCCLELLAN
Eighth District Court Judge

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1 taller. Thank you. Okay, Mr. Drechsel, go ahead.

2 MR. DRECHSEL: Thank you.

3 MR,

4 having been first duly sworn,

5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. DRECHSEL:

8 Q. Can you tell everyone here what your name is.

9 A. MR.

10 Q. What's your last name?

11 A. MR.

12 Q. MR, how old are you?

13 A. Seven.

14 Q. MR, I want to ask you some questions about some things
15 that may have happened to you; is that okay?

16 A. (No verbal response).

17 Q. Do you remember a time when you lived in Vernal?

18 A. (No verbal response).

19 Q. Was there a time when you moved from Vernal to Salt
20 Lake City?

21 A. (No verbal response).

22 Q. After you moved to Salt Lake City do you remember
23 speaking with some police officers about some things that had
24 happened to you?

25 A. Uh-uh.

1 Q. You don't remember? Do you remember ever speaking
2 with a man where they were making a movie, a recording, a video
3 of you?

4 A. Yes.

5 Q. When you spoke with the man, did you tell him the
6 truth?

7 A. Yes.

8 Q. Was there anything that you told him that wasn't true?

9 A. No.

10 MR. DRECHSEL: That's all the questions I have for you,
11 MR.

12 THE COURT: Okay.

13 MR. DRECHSEL: Bryan may have a few questions to ask
14 you. He's wearing the gray suit with the pink tie.

15 THE COURT: Okay, MR, just sit right there. He'll ask
16 you some questions, okay?

17 All right, Mr. Sidwell, whenever you're ready.

18 CROSS EXAMINATION

19 BY MR. SIDWELL:

20 Q. Okay, did anybody tell you what my name was?

21 A. (No verbal response).

22 Q. No?

23 THE COURT: Okay, MR, I'm going to describe what you're
24 doing. You shook your head no. Can you say "no" or "yes" when
25 it's -- when you're going to -- when you are asked a question,

1 if you would, okay?

2 THE WITNESS: Uh-huh.

3 THE COURT: I'll try to remind you, okay? Will you do
4 that?

5 THE WITNESS: (No verbal response).

6 THE COURT: Will you answer out loud?

7 THE WITNESS: Yes.

8 THE COURT: Thank you. That's what I needed.

9 Q. BY MR. SIDWELL: Okay, so nobody told you my name,
10 right?

11 A. No.

12 Q. No? Did they tell you that I was going to talk to
13 you?

14 A. Yes.

15 Q. Okay, my name is Bryan Sidwell, okay? Did they tell
16 you anything about what I was going to talk to you about?

17 A. No.

18 Q. Okay, you've never met me before, have you?

19 A. No.

20 Q. Okay, so the first thing I want to do is I want to
21 identify some of the people that you may already know, okay?
22 Have you seen this person before?

23 A. Yes.

24 Q. Okay, you've talked to him before?

25 A. I don't remember.

1 Q. Okay, what about do you remember this gentleman over
2 here?
3 A. Yes.
4 Q. Okay, you've talked to him before?
5 A. I don't remember.
6 Q. Okay, let me ask you a quick -- do you know what a
7 babysitter is?
8 A. Yes.
9 Q. What's a babysitter?
10 A. They take care of kids.
11 Q. Okay, do you remember when you lived in Vernal?
12 A. Not a lot.
13 Q. Not a lot. You've lived at Vern -- in Vernal at one
14 point, right?
15 A. Uh-huh.
16 Q. Yeah, is that "yes"?
17 A. Yes.
18 Q. Okay, and during that time did you have a babysitter
19 sometimes?
20 A. I don't remember.
21 Q. You don't remember. If I told you the name Marylou,
22 does that sound familiar?
23 A. Yes.
24 Q. Is that "yes"? Okay, sometimes when your -- did your
25 mother work sometimes?

1 A. Yes.

2 Q. Yes. When your mother worked, you went to Marylou's
3 house right?

4 A. Yes.

5 Q. She watched you, right?

6 A. Yes.

7 Q. Every time your mother worked, Marylou watched you,
8 right?

9 A. Yes.

10 Q. Now, at the time that your mother worked, did she also
11 live with another -- a man? Do you remember his name; or do
12 you remember living with a man?

13 A. I don't remember.

14 Q. You don't remember. Okay, I'm going to ask -- I'm
15 going to have you look -- I've asked you to look around to see
16 if you've known some different people. Do you know this person
17 right here?

18 A. Yes.

19 Q. Okay, did that -- did that man live with your mother
20 when she was working?

21 A. Yes.

22 Q. Okay, and when your mother was working, Marylou
23 watched you, not him, right?

24 A. Yes.

25 Q. Marylou has a child. Do you remember the child?

1 A. Yes.

2 Q. Do you remember the child's name?

3 A. William.

4 Q. William. When Marylou watched you, she also watched

5 your other sisters, right?

6 A. Yes.

7 Q. You have two sisters?

8 A. Yes.

9 Q. What's their names?

10 A. LR and AR.

11 Q. Okay, now if I asked you, do you know what a month is?

12 A. Yes.

13 Q. Okay, so if I said, what month is it, what month would

14 it be?

15 A. (No verbal response).

16 Q. If you don't know it's all right to say, "I don't

17 know."

18 A. I don't know.

19 Q. Okay, if there's something you don't know, it's all

20 right to just say, "I don't know," okay?

21 A. Okay.

22 Q. Do you know what last month was?

23 A. August.

24 Q. Okay, now if I ask you any question that you want to

25 respond in Spanish just go ahead, okay? Okay, do you know what

1 next month will be?

2 A. No.

3 Q. Okay, now have you talked with your mother about
4 coming today?

5 A. Yes.

6 Q. You talked -- has she gone over with you what you're
7 going to say?

8 A. No.

9 Q. No? Do you know why we're here?

10 A. No.

11 Q. No? Did they -- did anybody tell you -- what did they
12 tell you why you were coming?

13 A. I don't know.

14 MR. SIDWELL: Okay, I don't have any other questions.

15 THE COURT: Okay, Mr. Drechsel, do you have any other
16 questions for MR?

17 MR. DRECHSEL: No, your Honor.

18 THE COURT: Thank you very much, MR. You can go down
19 now and walk right out that door if you want, okay? Thank you.

20 Okay, do we have any other witnesses? Well, I told
21 you we weren't going to have anymore witnesses; and it's barely
22 after 5. We are right on schedule. So we're going to take a
23 break for the evening, okay? I'm going to ask you to leave
24 your papers face down. I'm going to ask you not to talk about
25 the case with your family or your friends or people that you

Addendum F

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

ABELARDO CRUZ,

Defendant.

(Volume IV)

Case No. 131800746

Jury Trial
Electronically Recorded on
October 2, 2014

BEFORE: THE HONORABLE CLARK A. MCCLELLAN
Eighth District Court Judge

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1 affect it at all. She just felt she had a responsibility to
2 tell us that she recognized the individual named Juan. Now,
3 does that concern anybody?

4 MR. DRECHSEL: The State has no problem with her
5 remaining on the jury.

6 MR. SIDWELL: No.

7 THE COURT: Okay, let's stand and bring back the jury.
8 Are you all ready to go on closings?

9 MR. DRECHSEL: Yes.

10 THE COURT: All right.

11 (Jury enters the courtroom)

12 THE COURT: All right, go ahead and have a seat. All
13 right, we've now had the instructions. Counsel, are you ready
14 to do your closing argument?

15 MR. DRECHSEL: Yes, your Honor.

16 THE COURT: Mr. Drechsel, you can go first.

17 MR. DRECHSEL: Thank you. What I've found over the
18 years is that if I have notes (inaudible) memorizing closing
19 argument, I get it done quicker, because I hit the points that
20 I thought were important enough to write down and I don't just
21 ramble on. So I hope you'll bear with me (inaudible).

22 I want to talk about a few areas of the trial. You've
23 spent the last three days and then part of this morning hearing
24 evidence in the case, and much of that evidence revolved around
25 questions. What questions were asked; how the questions were

1 asked; who asked the questions; what did the person intend by
2 asking the questions; and did the question that was asked have
3 any influence on the person giving the answer? There was a lot
4 of evidence about that.

5 You heard lawyers asking questions in the way that
6 lawyers are trained to do, which actually the way the lawyers
7 ask questions, myself and Mr. Sidwell, is at odds with the way
8 that law enforcement officers are trained to ask questions.
9 They testified that they ask questions in an open-ended manner
10 that's designed to elicit narrative responses. "Tell me about
11 this." "Tell me more about this." "Describe everything from
12 when this began to when this ended."

13 This is the guideline that law enforcement has been
14 trained to use in talking to children. You may have noticed
15 that as attorneys we like to ask questions that end in "yes"
16 and "no," and "is that right?" So you have to weigh as a jury
17 the way that the attorneys are able to develop evidence through
18 witnesses on the stand, and the way that law enforcement is
19 able to develop the evidence in the case by using protocols
20 and methods and guidelines that are designed to give somebody
21 that's experienced something an opportunity to talk about that.

22 You never saw any of the officers cut MR off and
23 insist on a "yes" or "no" answer. "No, that's not -- I don't
24 want you to tell me in detail. Just 'yes' or 'no.'" They ask
25 some "yes" or "no" questions, and then always follow up with

1 "Tell me about it."

2 You've heard about questions that were asked by a
3 mother, a concerned mother, Yanet, who had learned unexpectedly
4 it appears, "out of the blue" might be the right way of saying
5 it, on November 9th that she opened that bedroom door and
6 learned -- or was concerned about something, and then learned
7 in the bathroom from MR that Abelardo had put his tito in MR's
8 mouth.

9 A mother who hears these sorts of things from a
10 child, you would expect to ask questions of the child, and not
11 quarantine the child and not go to a handbook of instructions
12 on how can I ask questions to this child in a way that won't
13 be contaminated; but the questions that MR was asked by her
14 mother were questions, as Yanet testified, "What happened?"
15 and suggestively, "What did your dad do?" which doesn't suggest
16 good or bad, except maybe the tone that it's delivered. "What
17 did your dad do?" "He gave me the cookies." "What did your
18 dad do?" "He put his tito in my mouth." Both good and bad
19 responses can be delivered to the question.

20 So a lot about questions. It would be concerning if
21 Yanet, in hearing this from MR, hadn't asked MR questions.
22 "Oh, okay. I don't need to know any more about that." A
23 concerned mother asked questions. You will recall, though,
24 that Mr. Sidwell had his calendar here on the board and Yanet
25 was standing here in front of you, and Mr. Sidwell said, "And

1 you asked questions to," or "you talked with," or you -- I
2 can't remember. He said "interrogated" a few times; but "You
3 asked questions, you interviewed MR on Sunday?" She said,
4 "Correct?" "And you interviewed her on Monday?" "Correct."
5 "Tuesday?" "Correct." "Wednesday?" "Correct." "Thursday?"
6 "Correct." "Friday" "Correct." "Saturday?" "No."

7 What happened on Friday? Her brother had come to get
8 her. Yanet didn't need to ask questions on Saturday, because
9 the decision that she was trying to make as to whether these
10 things were true, whether she should change her life, leave
11 everything that she knows, her home, based upon something that
12 her daughter had told her. Major life decisions. Leaving
13 the man that she loves. No money, no car, no job where she's
14 going. A room to stay in with family. So she asks those
15 questions on Sunday and Monday and Tuesday and Wednesday to
16 make sure that the decision that she's making is the right
17 decision, based upon what her daughter had told her.

18 I want to talk a little bit now about answers that
19 were given to questions. I want to talk a little bit about
20 MR's answers to questions. I want to talk a little bit about
21 MR's answers to the questions. She used the word "tito,"
22 and in fact we heard about that again this morning, where she
23 learned that, how it was used within the family.

24 That Abelardo never used that word. So if Abelardo
25 didn't use that word, he wouldn't have said, "Put my tito in

1 your mouth," because that's not a word he used. That was her
2 word. If he had said the word that he uses for "tito," I don't
3 know what that is, but whatever he uses, wouldn't she have
4 said, "He told me --" and used the word that he used? But she
5 used her word for what had happened.

6 She talked about "semia," meaning -- referring to her
7 vagina, where she pees. She talked about the word (inaudible),
8 to suck like a popsicle. I imagine adults don't speak to each
9 other in that way. I want you to (inaudible) this like a
10 popsicle.

11 She used the word "smooth." How did he want you to
12 touch his penis when they were watching football (inaudible).
13 She said "smooth." At that time her answer was not his pants
14 were unzipped and open and down in the same way that the
15 earlier answer had been in the bedroom, but it was that the
16 pants were zipped up and her hand was down inside his pants;
17 different conduct, different time, different experience, not
18 the same answer regurgitated again and again and again, and to
19 not bite his tito.

20 Some of the answers that were given in the trial are
21 not ideal; and as a prosecutor I worry about answers that
22 create problems for a case, but I also worry when there are
23 answers -- when there are no -- when every answer is perfect,
24 when there are no not ideal answers. I worry because if I'm
25 going to make a story up that's not true, that's false, it's

1 going to sound really perfect, because why would I make up a
2 story that has problems with it?

3 Some of the non-ideal answers are that Yanet testifies
4 that she and Abelardo have been sexual with each other while
5 the girls were in the room. That she was certain that MR was
6 sleeping, because MR snores while she sleeps; but it's not
7 ideal. It's not ideal at all. I think it lends credibility
8 in your ability to believe that Yanet is telling you the truth.
9 If she was not telling you the truth about things as they
10 happened, then that would be a very important thing to not
11 tell the truth about, because as any adult knows, that creates
12 problems. I think she's being honest with you, for that reason.

13 We know from the answers that were given that Abelardo
14 and Yanet are willing to engage in normal sex and oral sex and
15 anal sex; and there are some people, who just because of what
16 they believe, for moral reasons, for I don't like that reasons,
17 whatever it is, will not engage in certain types of sexual
18 activity, but Abelardo and Yanet, you heard, would engage in
19 those activities.

20 If MR had said to you, "He put his tito in my butt,"
21 or "He put his tito in my mouth," but the testimony is that
22 Abelardo would never do something like that, if Yanet testified
23 "I wanted to do those things and he didn't want me to do those
24 things;" but that's not the case. We know that he engaged in
25 those activities, which are not illegal when they're done with

1 another consenting adult.

2 We know from the answers that were given to the
3 questions that Abelardo and MR looked surprised after Yanet
4 opened the door, but before she asked, "What's going on?" or
5 "What are you doing?" That's why she asked, "What's going
6 on? What are you doing?" because of the way they looked, and
7 because of the pants open that she'd never seen before. That
8 that was not customary; that that was out of the ordinary.

9 We know from Yanet that when they went to the bathroom,
10 she and MR, that MR said nothing, nothing, but was shaking was
11 the word I believe Yanet used, and that Yanet had to reassure
12 her daughter that she was not in trouble, "I'm not going to hit
13 you. I love you. I'm your mother;" and it was at that time
14 that MR was able to say, "Dad put his tito in my mouth." That
15 was her words to Yanet, not Yanet's words to MR. Yanet provided
16 an opportunity to say what happened, but didn't tell her what
17 happened.

18 I want to talk a little bit about motives. Law
19 enforcement's motive in conducting interviews from Detective
20 Lewis is to be thorough. They have a job to do, responsibility,
21 a professional obligation. These matters are serious, and
22 legitimate questions were left behind after the first interview
23 was done, questions that in Detective Lewis' professional
24 judgment needed to be answered, and a second interview was
25 done. Does law enforcement want these things to be true? Does

1 law enforcement want a child to have been sexually abused?
2 They want to do their job well, and make sure they understand
3 what has happened to a child.

4 I want you to think about Yanet's motives for this to
5 be true. She loves Abelardo. She proved that because she was
6 sexual with Abelardo after these things happened. In fact, she
7 was sexual with Abelardo after she had left Vernal. She loves
8 this man. She took MR to the doctor, in her word, paraphrasing,
9 to get a medical exam because she wanted it to not be true, or
10 wanted it to show evidence that in fact Abelardo is innocent.
11 She testified that she had never thought about leaving Abelardo
12 they didn't fight, and her entire life changed as a result of
13 that.

14 I want to talk about MR's motives. There was no
15 evidence at all that MR had a contentious relationship with
16 Abelardo, that she disliked Abelardo, that she was unhappy in
17 the home. There was some evidence that she was concerned about
18 who she would stay with when her mom would go to work; but MR
19 thought that she was in trouble. She wondered if she was in
20 trouble before she told her mom in the bathroom that something
21 had happened, because she had to be reassured, "You are not in
22 trouble." Then MR could speak.

23 After she spoke, a week later, the police come to her
24 new home after she moved away from her home in Vernal. The
25 police come to her new home, pick her up and take her to a

1 place, and interview her alone in the room, and she can't talk
2 to the first interviewer, Sergeant Bigelow. Part of that's a
3 language barrier, but if you'll recall from the video of that
4 recorded interview, she starts to cry in the beginning, says,
5 "Am I going to jail?" Her motives -- her motives for this to
6 not be true are hard for me to see from the evidence.

7 I want to talk about the interviewers and the inter-
8 views. The evidence is that nobody spoke with MR during the
9 breaks about what to say, before the interviews about what to
10 say, after the interviews about what to say. Yanet testified
11 to that, Sergeant Bigelow testified to that, Agent Boss testi-
12 fied to that, Agent Ryan testified to that.

13 In the interviews you'll note that MR does not say,
14 "On June 12th this happened." "On July 3rd this happened." In
15 fact, it was 11:45 p.m. on July 3rd. Why is that? Dr. Gregory
16 explained to you that children are not good, at six years old,
17 about reporting durations of time, sequences of time, dates.
18 In fact, even Yanet struggled with dates, right? Dates on when
19 her child was born. Dates are hard for adults sometimes, and
20 harder for children sometimes.

21 You'll note in the charges that have been filed and
22 in the instructions on each element for the charge that it's a
23 date range, that on or between these dates, a date roughly that
24 corresponds to when the family moved to Vernal to live with
25 Abelardo, and a date on -- starting then, and on a date ending

1 when they left Vernal, because children don't sit down at
2 six years old and write in a journal, "Today I was sexually
3 abused." At six years old they don't do that. So there's a
4 date range.

5 When Yanet struggled with dates, I do have to say,
6 she didn't struggle remembering that the child was born. She
7 didn't struggle remembering that she moved from Vernal. She
8 didn't struggle remembering that she worked at the quarry. We
9 remember events that happen to us much better than when they
10 happened to us. That something happened is easy to remember.
11 When that thing happened, not so much.

12 Interestingly, sexually abusing a child is illegal
13 every day. It's illegal in morning and in the evening. It's
14 illegal always. So the dates aren't even an element of the
15 offense. Yes, we put a date range on for each charge, and we
16 say that on or between these dates this happened, so that we
17 have some notice about what we're talking about; but the State
18 is not obligated to prove beyond a reasonable doubt that sex
19 abuse occurred on this date. The fact that it occurred is what
20 the State has to prove beyond a reasonable doubt.

21 I want to talk a little bit about the interview at the
22 South Valley CJC. Sergeant Bigelow's conducting of the inter-
23 view was characterized, I believe, by "Tell me," "Tell me,"
24 "Tell me," "Tell me," "Tell me," "Tell me," "Tell
25 me," and at a certain point I imagine that many of you thought

1 maybe there's a different question you could ask besides "Tell
2 me."

3 It is not within our human nature to ask questions
4 like that, and you can see that Sergeant Bigelow is not capable
5 of talking well with MR. She talks about some things that
6 happened, that "My dad did something bad. We moved here, but
7 I wanted to get out. He put his hand on the door." Forty-
8 three minutes Sergeant Bigelow spoke with MR, and then they
9 ended the interview, and a three-minute break. I don't -- I
10 don't think Sergeant Bigelow intended to go back in, or have
11 MR brought back in by anyone else. The interview was over at
12 forty-three minutes.

13 But because Detective Boss has Spanish language
14 speaking skills, he observed what he had, as he testified to,
15 observed before with people who are bilingual, and that is
16 that there's a possibility this is a language barrier issue.
17 In fact, MR told you through the video, she explained to
18 Detective Boss, this is -- he says, "Is this why you couldn't
19 talk to the other man, because of the language?" and she said,
20 "Yes." Detective Boss was not in that room with MR for more
21 than a minute before she was able to explain in Spanish that
22 her dad had put his tito in her mouth.

23 She corrected the interviewers. She was not a parrot
24 saying, "Yes, yes, yes, yes, yes." She corrected Sergeant
25 Bigelow when he provided the outline for the guideline of the

1 interview, as it's directed to do in the interview by the
2 interviewer. She corrected Sergeant Bigelow about being sad
3 about school, because he believed that she was sad that she
4 had to go to school; and she corrected him and said that she
5 was sad that she wasn't going to school. Remember, she wasn't
6 going to school because she had moved way from Vernal because
7 of these things.

8 She corrected him on her name. She corrected him on
9 Abelardo's name. She explained what she meant by "tito" as
10 nuts; and this is clearly her own word, because if an adult
11 coached a child about a penis in a mouth, they would not say
12 "nuts." This is clearly her understanding of what happened at
13 six years old.

14 She said, "I don't understand" when she didn't under-
15 stand. In Vernal she corrected Special Agent Ryan as part of
16 the guideline, "What's the name of my dog?" and she said, "I
17 don't know." He said, "That's right, because you don't know."
18 She corrected herself when she overstated her older sister,
19 CR's age. I guess that's a half-sister, stepsister. Her
20 biological father's other daughter from another mother. I
21 don't know what that family relationship is. She said, "A
22 thousand years," and when she was challenged on that by the
23 officer and he said, "A thousand years?" and she says, "No,"
24 because she knows that's not right.

25 That's consistent with what Dr. Gregory told you about

1 dates for children and durations of time. She knew that this
2 sister was older. She says, "No" numerous times to Special
3 Agent Ryan. She never reported at any time in any of the
4 interviews any abuse that occurred other than when she was
5 living here in Vernal, sharing a room with Abelardo.

6 I want to talk a little bit about the medical exam.
7 If these things weren't true or if Yanet didn't believe these
8 were true, that there was some ulterior motive here, some bias,
9 then once you need Vernal you don't need to get a medical exam
10 because your mission is accomplish. She had not called the
11 police. Yanet never called the police. She wasn't building a
12 case against anybody. She took her daughter to get a medical
13 exam because she was legitimately concerned for her daughter
14 based on what her daughter had told her.

15 Why would MR be worried about it? You'll remember
16 that Dr. Laskey specifically said she explained to MR that
17 she was normal, because she knew that MR was concerned about
18 whether or not something was wrong with her as a result of what
19 had happened to her.

20 The medical evidence is not conclusive, and Dr. Laskey
21 explained that. A normal exam with no evidence of injury in
22 fact does not indicate scientifically or medically whether she
23 did or did not. In fact, Dr. Laskey says that in cases where
24 we know that abuse happened, whether it is documented either
25 through pornographic evidence that was generated as a result of

1 that or admitted cases where somebody says, "Yes, I did these
2 things," or (inaudible), even in those cases it's 5 percent of
3 the time where there is evidence of injury of the abuse, even
4 when we know it happened. There's a value to a child who has
5 alleged abuses occur because they wonder if they're okay. So
6 a normal finding is good for MR because she knows that she's
7 normal and okay.

8 I have to go through the elements instructions with
9 you because it is my job, and it is perhaps boring to you. It's
10 so important. The State's obligation is to prove beyond a
11 reasonable doubt each one of these elements; and if the State
12 has failed to prove even one of the elements, or one of the
13 alternatives when they are listed in the alternative beyond a
14 reasonable doubt, you have to find the defendant not guilty.
15 He is innocent until you are convinced beyond a reasonable
16 doubt that the evidence shows his guilt for each element of
17 the offense.

18 So we've written these out, starting in instruction
19 No. 26. You'll note again -- you'll note in instruction 26
20 that this relates to Count I, and each of the instructions
21 that follows is the next count, II, III, IV. Talking about
22 26, you'll see that it's a date range "on or about March of
23 2012, and ending through November of 2013." Again, those dates
24 directly correlating to when the family moved to Vernal to be
25 with Abelardo and when they left Vernal. Those dates are not

1 elements of the offense.

2 The elements are that a particular individual, in this
3 case Abelardo Cruz, the defendant, intentionally or knowingly
4 or recklessly -- and those are defined in instructions 35, 36
5 and 37, and that's to his conduct. Before I continue I want to
6 explain that we can intend to do things. I can intend to act,
7 right? I can intend to open a door. I intended that; or I can
8 intend to cause a result to happen. I can intend to hurt some-
9 one, I can intend to break someone. It's not that intended the
10 action, but I intended the result. We talk about conduct and
11 results.

12 In this case we have both. We have intentionally,
13 knowingly or recklessly engaging in a conduct; and in element
14 No. 4 we have intending to cause a result of some sort. The
15 result intention is defined in instruction No. 34. So intent-
16 ional in element No. 2 is as to his conduct, instruction 35;
17 but intent for element four is to the result, which is instruc-
18 tion No. 34.

19 So he has to intentionally or knowingly or recklessly
20 do one of the following four things. Touch the anus or the
21 buttocks or the genitals of the child, or touch the breast of
22 any female child, otherwise take indecent liberties with the
23 child, or cause the child to take indecent liberties with him,
24 and to do those actions, to engage in that conduct to cause a
25 certain result, intending to cause a result. It's one of two

1 things. To cause substantial emotional and bodily pain to any
2 person, or to arouse or gratify the sexual desire of a person.

3 Because Count I and Count V are the same charge,
4 they're both sexual abuse of a child, there's an additional
5 thing you must consider. That is that Count I has to be a
6 different event than Count V. You can't convict somebody
7 twice for doing something once. Does that make sense? So
8 that's really important. There's two counts of that; Count I
9 and Count V.

10 There's four counts of sodomy upon a child and the
11 first one of those is Count II, and I just want to walk you
12 through the elements again on those. Again, the date range,
13 again, not an element of the offense, but that the defendant,
14 a specific person, Abelardo Cruz, intentionally or knowingly or
15 recklessly acted, all right, engage in some conduct. What is
16 that conduct? Engaged in any sexual act upon or with a child
17 child who is under the age of fourteen, involving the genitals
18 or the anus of the defendant or the child, either one of their
19 genitals or anus, and involving the mouth or the anus of either
20 of those two people.

21 Again, in this case this has to be separate conduct
22 from what is charged in Counts III, Count VI and Count VII.
23 You can't convict somebody four times for doing something one
24 time. So each time, each count has to be a separate event.
25 Does it have to be on a separate date? No, but it has to be a

1 distinctive separate event. So this involves the mouth or anus
2 of any person. So if on a particular day the defendant put his
3 genitals in MR's mouth, and then put his genitals in MR's anus,
4 those are two separate crimes because they are two separate
5 acts that he engaged in, two separate instances of conduct,
6 two separate charges, two separate convictions. There are
7 four counts of that, and I'm not going to go through each one
8 because it's the same for each, except for that it has to be
9 different conduct the others.

10 Instruction No. 29, again, the date range; again,
11 the date not being an element of the offense, but that the
12 defendant Abelardo Cruz intentionally, knowingly or recklessly
13 did something. This is conduct again. This is instructions
14 35, 36 and 37, about intending to do something, or knowingly
15 doing something, or recklessly doing something. Had sexual
16 intercourse with a child who was under the age of 14.

17 Then finally, because we've already talked about the
18 other counts, and they're similar to what we've already talked
19 about, the last charge, Count VIII, it's instruction No. 33,
20 aggravated kidnaping. This is like Counts I and Count V. It
21 has two different kinds of intending or mental state. It has
22 intending to do something, or knowingly doing something, or
23 recklessly doing something, and intending to cause a certain
24 result, intending for something to happen.

25 So in element No. 2, it says-- and I said "recklessly."

1 I apologize, take that out -- intentionally doing something
2 or knowingly doing something; and we'll talk about what that
3 "doing" is; and element six, intending to cause a result when
4 I do that, intending for something to happen when I do that.

5 So the defendant, again, a date range, but the date's
6 not the element of the offense. The defendant intentionally
7 or knowingly, without the authority involved, and against the
8 will of the victim, does one of two things intentionally or
9 knowingly. Detains or restrains the victim for any substantial
10 period of time, or detains or restrains the victim in circum-
11 stances exposing the victim to the risk of bodily injury.

12 I want to talk a little bit about that for a moment,
13 because it's the State's position that when you detain somebody
14 in order to sexually abuse them, any amount of time is a sub-
15 stantial period of time. It is for you to judge as the jury
16 whether you believe that to be true, that any amount of time
17 is substantial when it is the amount of time that you're using
18 to sexually abuse a child; or exposing the victim to risk of
19 bodily injury. Sexual conduct between an adult man and a six-
20 year-old child exposes that child to risk of bodily injury.

21 So intending to do or knowingly doing one of those two
22 things, and cause one of four results; acting with the intent,
23 intending to cause one of these four results to facilitate or
24 allow the commission of a felony, right? To make that possible,
25 to facilitate a commission of a felony; to delay or hinder the

1 discovery of, or the reporting of a felony; to inflict bodily
2 injury on a victim; or to commit a sexual offense, including
3 sexual offenses that have been charged in this case. Sexual
4 abuse of a child, sodomy on a child, or rape of a child.

5 It is intent in detaining her or restraining her
6 without the authority of the law and against her will, was so
7 that he could commit a sexual offense, then -- and you believe
8 all of those things beyond a reasonable doubt, then you should
9 find him guilty. MR says to -- even to Sergeant Bigelow, who
10 had the hardest time connecting with MR, and speaking with her
11 and getting information back, even to him she was able to say,
12 "I wanted to get out. He wouldn't let me out. I didn't want
13 to be there. He put his hand on the door." "I wanted to get
14 down. Didn't let me out. Put his tito in my mouth."

15 We've talked just a little bit about elements -- or
16 instructions 34, 35, 36. These are the definitions of what
17 it means to act with intent, to act intentionally, to act
18 knowingly, and to act recklessly. It's very, very important
19 that you apply those definitions to the right elements in each
20 count because it's not illegal to do certain things recklessly.
21 For instance, aggravated kidnaping, if I act recklessly, if
22 I act with a conscious disregard that something will happen,
23 I'm aware of it but I consciously disregard it, that's not
24 illegal. I can't recklessly aggravated kidnap somebody. I
25 have to intend it, or I have to know that I'm doing it. So

1 it's very important, very, very important that you look to
2 those definitions and apply the appropriate things.

3 A child is any person under the age of fourteen,
4 and MR is today seven years old, and at the time she moved to
5 Vernal was five years old. So she's always been a child under
6 the age of fourteen. Sex abuse of a child is aggravated if
7 certain things are happening at the same time, or they're
8 happening by a particular person.

9 In instruction 41 it explains that if a person makes
10 friends with the victim for the purpose of committing the
11 offense; if the offense was committed by a person who is in a
12 position of authority, and by reason of that position is able
13 to exercise undue influence over the victim; or if the accused,
14 that would be the defendant, Mr. Cruz, in this case, causes the
15 penetration however slight of MR's genital or anal opening with
16 any other part of the human body other than the genitals or
17 mouth.

18 If the State has proven beyond a reasonable doubt any
19 of those three options, then the special verdict form should be
20 filled out that reflects that, by checking the box on any of
21 these proven beyond a reasonable doubt. We know from MR that
22 she testified that he put his finger in her butt. That would
23 be the penetration however slight of the anal opening of the
24 child with any other part of the human body besides genitals or
25 mouth. Finger is not genitals or mouth.

1 A "position of authority" is defined, for sexual abuse
2 of a child, to be aggravated as a person who is in a position
3 of special trust, because of that position can exercise undue
4 influence. This includes a foster parent. We don't have a
5 foster parent here. A babysitter. We do have somebody Abelardo
6 is watching MR at certain times. A natural parent. A step-
7 parent. They were never married, but in those positions. An
8 adoptive parent. A legal guardian or an adult co-habitant of
9 the parent. That is exactly what Abelardo Cruz was to Yanet,
10 adult co-habitant. Maybe common law married. I don't know.
11 Certainly in a position of special trust; and that you should
12 find beyond a reasonable doubt that he was in that sort of a
13 position.

14 Two more instructions, and then I will wind up.
15 Instruction No. 42 says that in certain offenses -- in this
16 case, sodomy on a child, sex abuse of a child, or aggravated
17 sexual abuse of a child -- any touching, even if it had been
18 done through the clothing would be sufficient to constitute
19 that element of those offenses. Here we know that the touching,
20 from the testimony that has been given, was not through the
21 clothing, but even if it had been through the clothing it would
22 have been illegal as sodomy upon a child, sex abuse of a child
23 or aggravated sex abuse of a child. The evidence in this case
24 is that it went further than just through clothing or over
25 clothing.

1 In any prosecution for rape of s child, any sexual
2 penetration, however slight, is sufficient to prove that
3 element of the offense. So if you believe when she says
4 that he put his tito where she pees, and that that would
5 have caused penetration, however slight, then that is rape
6 of a child if you believe that beyond a reasonable doubt.

7 Those are the elements, and those are the other
8 instructions that I wanted to review with you. Finally I
9 want to say this. I want to say as you've watched these
10 videos, nearly two-and-a-half hours of the interviews with
11 MR, that you do not have to go to such great lengths to get
12 information from a child who has been improperly influenced,
13 because a child who has been improperly influenced just says
14 what they've been influenced to say. You just say it.

15 So maybe the officers influenced her in the way that
16 they conducted the interviews; but to make these things up, for
17 her to make these things up to satisfy the officer's influence,
18 their insistence that something must have happened to you, "You
19 must tell us something. Tell us something," for her to have
20 made these things up to satisfy that sort of an influence, as
21 her suggestive bias, would mean that she, at six years old,
22 would have to know that an adult man would have any reason or
23 desire to put his tito in her butt, where she poops.

24 It's one thing for an adult man to want to do that
25 with an adult woman, but she would have to know that he would

1 have any desire to do it with her, a six-year-old girl. She
2 would have to know that an adult man would have any reason to
3 put his tito where she pees, and that it would be something
4 that she doesn't want to have happen. If she had seen adults
5 doing these things, it would be that the adults are wanting
6 these things to happen. She would have to know that she would
7 not want those to happen.

8 She would have to know that it would be something that
9 should make her feel angry, something that she wants to get
10 away from, something that she could be in trouble for doing,
11 something that hurt so bad. For her to make these things up at
12 six years old, and to satisfy some influence that the officers
13 had upon her, she would have to know these things at six years
14 old to tell them what she actually told them; and she would
15 have to know that these things should only take place when her
16 mother is not present.

17 Her mom testified that she and Abelardo were sexual
18 when MR was sleeping. Her mom was present for those things.
19 MR would have to know, if she's making these things up, that
20 when it happens with MR it is just her and dad and no one
21 else, or no other adult. Think about that for a moment, if
22 you would. If she was just reporting what she had seen her
23 mother and Abelardo do, it would be that Mom was present.
24 That it was a good thing. That it didn't hurt. That no one
25 would be in trouble for doing it. That it's not something you

1 feel you need to get away from, and that it feels good to do
2 those things, as opposed to it hurting. Isn't that the case?

3 The reality is the defendant did these things to MR.
4 The reality is that she didn't want to do these things, or
5 have these things done to her. The reality is that she wanted
6 to get out, leave. The reality is that she felt she would be
7 in trouble. The reality is that these things hurt her. I'm
8 asking you to find the defendant guilty.

9 THE COURT: Thank you, Mr. Drechsel. Mr. Sidwell.

10 MR. DRECHSEL: Your Honor, is it okay if I relocate
11 just so that I can kind of follow along?

12 THE COURT: Sure.

13 MR. DRECHSEL: I'll just --

14 THE COURT: I'm not sure where you're going to go.

15 MR. DRECHSEL: -- to the -- to maybe the corner over
16 here of the gallery.

17 MR. SIDWELL: Actually what I could do, is I could move
18 it like this. It would make it --

19 MR. DRECHSEL: Oh, oh, yeah. Thanks.

20 THE COURT: That's a good idea. Mr. Sidwell, let me
21 just ask you to do one -- move it just --

22 MR. SIDWELL: You want to see the board, huh?

23 THE COURT: Well, I just want to be able to see the
24 jurors. That's perfect. Thank you.

25 MR. SIDWELL: Okay, I'm in an uncomfortable stage in

1 life. I'm at the stage where I never had glasses and so I don't
2 like wearing them; and I can't see anything on a piece of paper
3 unless I look through them. So I'm going to be switching back
4 and forth.

5 The other thing that I want to do to start this is I
6 want to -- I want to ask you to do something, and I want to --
7 I'll tell you about this case, or what type this case is first.
8 I've done quite a few trials, and when we select jurors, one of
9 the things that we do when we're selecting them is I like to
10 see what the jurors response is when the charges are read.

11 There's no other charge -- I've done murder cases --
12 and the response that we get from jurors when we say it's a
13 sexual assault case is different than any other case. I wish
14 you could see the expressions on your face. The reason why I
15 tell you that is because all of us, myself included, when we
16 hear child molestation, sexual assault, the natural thing is
17 to just become closed.

18 So I'm going to ask two things from you. I just want
19 two things. First thing, there's -- we keep telling you not
20 to make up your mind, but it's impossible for you not to have
21 started to make your mind up. We ask people to do things that
22 we don't do. So there's no question you've already formed
23 ideas, you've already got a sense of what's going on.

24 The problem with being the defendant, is you can see
25 is the State puts all their case on first, and the State gets

1 to speak first, and the State gets to speak last. So the first
2 thing that I'm going to ask of you is even when -- that you've
3 started forming opinions, do one thing for me. Just at least
4 listen to what I have to say. Just think, okay, no matter what
5 I think about this case, let me just give him an opportunity at
6 this point to say something to me.

7 The second thing that I'm going to ask you to do is
8 this. If I say something that's reasonable to you, when you go
9 back in to deliberate, I just want you to consider it. On the
10 other side of that, I want you to do this. If I say something
11 that's not reasonable, disregard it. I'm not here to try to
12 say, you know, everything's in our favor. There's not anything
13 bad for us. Just -- I'm not here to exaggerate to you or any-
14 thing. I just want you to listen to what I have to say; and if
15 it's reasonable, consider it.

16 So the first thing I want to talk about, and I wish
17 it didn't have to be like this, but this case is a little bit
18 complicated because we have a lot of counts. There's one
19 count, and I don't think -- or really doesn't go along with
20 what the storyline is.

21 For example, if the prosecutor charged my client
22 with jaywalking along with all these other counts, I'd have
23 to address the jaywalking, even though the story didn't go
24 along with it. So there's one of the counts I want to address
25 first, right off the bat and get it out of the way. Then I

1 want to talk about what we've been listening to because I guess
2 in my way this is somewhat of an exaggeration, so here where
3 I'm trying to be exaggerating so you get my point.

4 I consider it like jaywalking, something that the
5 prosecutor -- and I'm going to point this out to you, said in
6 his own words, is trying to stretch the law. It's instruction
7 33. One of -- so I'm going to turn to that in a minute, but
8 instruction 14 tells you this; and I want you to -- as we look
9 at instruction 14, the last sentence -- and let me say this to
10 you. If I say anything to you factually or legally -- well,
11 factually first. If I say something that you didn't see in
12 the evidence, ignore it.

13 I'm not trying to be tricky or anything. I'm trying
14 to talk to you about what I think I remembered as we went
15 through the trial. Your obligation as a juror is that what
16 I'm telling you right now is not evidence. I'm trying to take
17 the evidence and put some meaning to it. Likewise, if I say
18 something about the law that's not in the instructions, ignore
19 it. So that's the standard.

20 Turning back to No. 33. It's aggravated kidnaping.
21 One of the things that the prosecutor said was that "It's our
22 position as the State --" and this is the part where I'm saying
23 I'd like to see this in the instructions -- "that anytime that
24 somebody detains anybody at all to commit a crime, then that's
25 unlawful." I want to -- I want to talk to you specifically

1 about element No. 3, and I want you to use some common sense
2 with this. It says -- we don't really define this to you. We
3 don't say -- we don't tell you what it means without authority
4 of the law. So I'm going to give you some examples quickly.
5 Let me set this down.

6 Okay, what is "authority of law"? Can I -- can I
7 detain my children? Can I keep my children -- if my child
8 does something wrong, can I say, "Go up to your room;" and if
9 I keep them there for an hour, that's -- that's a lot longer
10 than a minute or two minutes or whatever. Can I do that?
11 Absolutely I can, because I have authority of law. Parents
12 can detain their children all they want.

13 What about if this police -- what if I said something
14 and the Judge got mad, and he has the authority to do this,
15 too, authority of law, to the bailiff and say, "Bailiff, go get
16 Mr. Sidwell and put him in handcuffs," I would be detained; and
17 they could detain me probably for days. Is that unlawful? No,
18 because they have authority of law. Authority of law is when
19 you have the permission already to do it, then you can detain
20 them all you want.

21 One of the things that the State is asking you to say
22 that was detaining is that the parent, for one -- for the other
23 charges they want you to treat him as the step-parent. So if
24 he's the step-parent, he can most certainly shut the door; and
25 for whatever reason. We don't know why exactly he shut the

1 door. He's implying that he wanted to shut the door on the
2 girl because he wanted to sexually assault her; but the law
3 here -- you haven't been said -- it doesn't say anything --
4 and you look in all these instructions you want and you try
5 to find anyplace that says, "Okay, the parent loses their
6 authority of law if they try and do something unlawful to
7 their child." It's not going to say that in any of the
8 instructions.

9 So what I'm submitting to you, they haven't presented
10 any law or any facts that would indicate -- because they have
11 to prove all these elements by -- beyond a reasonable doubt.
12 It says right here, "You find beyond a reasonable doubt each
13 of the following elements." One of the elements is three,
14 "without authority of law." What facts or law have they
15 presented that would say that a parent -- that a parent loses
16 their authority, whether the parent was trying to commit a
17 crime on them or not.

18 There's nothing in there that indicates that, or for
19 any period of time, or for the thing that I'm -- and I'm going
20 -- I'm sorry if I mis-phrased Mr. Drechsel, because I might
21 have. Tried to write it down word-for-word, but he said,
22 "It's the State's position that anytime -- that any period
23 of time that you delay -- detain someone to commit a crime,
24 it's unlawful." You read the instruction. Does it ever say
25 anything in here that says anytime that you delay or detain

1 somebody for any period of time to commit a crime, it's
2 unlawful?

3 He even said it in his own words, "It's the State's
4 position." Remember instruction 14? The law is not what the
5 State's position is. It's what you have in here. So that's
6 all I'm going to say about that instruction. I want to talk
7 about the case in general, back to really have a lot of facts
8 on other things.

9 The first thing that I want to do, is I want to go
10 through -- and I told you something at the opening statement
11 that was wrong. I made it -- I saw you all write it, and
12 I said on November 16th, that on a Saturday, that they went
13 upstairs. That's wrong. Sometimes it happens. What happens
14 as an attorney, we testify to -- or we tell you in the opening
15 what we think the evidence is. It ended up being that it was
16 on November 9th. The reason why that confusion -- let me just
17 explain that confusion.

18 Remember I had her step down? She had actually
19 testified about two different dates, and I was relying on
20 her preliminary hearing when I was thinking this had occurred
21 on the 16th. It's not really an issue, and this is the time
22 line, and I want to go through it with you about what happened,
23 and then talk about why.

24 So she went -- she went upstairs, remember? When she
25 went upstairs -- let me back up. He went upstairs, because

1 she testified that it was normally he always took his clothes
2 off; and that when she was downstairs, she could hear the kids
3 laughing. So she went upstairs and the only thing that she
4 saw was his pants unzipped. Then she -- then it's her, she
5 testified herself, she's speculating that something's going
6 wrong, which is strange to me, and maybe it's strange that
7 everybody has gotten undressed at some point, and everybody's
8 had their kids walk in at some point. That's not a strange
9 occurrence.

10 What -- she thinks that's strange, but she doesn't
11 think it's strange, but she doesn't think it's strange to have
12 sexual activity in a room with her kid -- children, without
13 anything to block them. So that's kind of -- that's kind of
14 a weird situation. Then her testimony was that she took the
15 child into the bedroom and they had a discussion about what
16 occurred. I'm going to -- as I talk about this, I'm going to
17 give you more questions than answers. I'm not here to tell you
18 the answers. I'm going to tell you the questions. It's your
19 job to come up with the answer to this. That's what you do.
20 So I want to come back to that.

21 Then she testified that -- I had her point to every
22 day, every single one of the days that she talked about the
23 subject. Well, one thing that we don't know, we -- she's
24 testified how long she thinks it occurred, but what we don't
25 know is exactly what each interview was infer -- each interview

1 or communication with the child was about. We don't know how
2 long each one of them lasted; and those are things that we're
3 never going to know. It's never recorded. The prosecutor's
4 right. She's not trained. So -- and she's not supposed to
5 be, necessarily -- or not even necessarily. Why would she be
6 trained?

7 Then what happened on the 18th, she went to the doctor.
8 I thought the doctor said a lot. I really -- one of the things
9 that the doctor said was -- and this is her own word. I wrote
10 it down and I asked her when I cross examined her. I said,
11 "You used the word 'contaminated.'" She says, "I didn't
12 want to talk to her or interview her, because I didn't want
13 to contaminate her."

14 What does that mean? How could she contaminate her?
15 How could the doctor contaminate her? By asking her questions
16 about what happened, what does that mean that you can contami-
17 nate somebody. You mean if I ask you something, that that
18 would automatically make you to lie? That doesn't make any
19 sense. Come back to what that means I a minute.

20 Then they took him to the police on the 19th. This
21 is what the police talked about. He said you have to have --
22 the first police officer, Officer Bigelow. Now, most of the
23 witnesses are saying all the same things as to some of these
24 issues, even the Judge, why -- or not -- the doctor. Why
25 don't you talk to the children? Because you don't want to

1 contaminate them.

2 Officer Bigelow said, "You have to have specialized
3 training for children." Why would he say that? That's the
4 question. Why would they say, "You have to question children
5 different than an adult?" Why would they say, "Don't put
6 anything into the story?" Why would that even matter? Who
7 cares? What -- why would he say -- he said, "Don't ask "yes"
8 or "no" questions. Why would he say that? Why say, "Don't ask
9 'yes' or 'no' questions"? What does that have anything to do
10 with what -- the answer we're going to get? Why would he say,
11 'It's difficult for adults to ask questions in a correct way?
12 Why would he say, "It takes months to master the questioning
13 method"? Now, this is more about him.

14 One of the things -- and let's -- I'm going to talk to
15 you about each one a little bit, but the way he did it, he was
16 more serious and structured. As you learn through the process
17 -- and we'll talk about this more -- it's supposed to be some-
18 what serious. Now, let's -- let's all be honest. Officer
19 Bigelow was probably not the friendliest guy. So one of the
20 things that we can look at at the interview is maybe she didn't
21 reveal very much because he was maybe a little bit too strict.
22 I'm going to talk about this in a minute.

23 There has to be a certain structure to it, because
24 that's also part of getting a correct answer out of -- out of
25 the child, okay? He was professional. This is one of the

1 things he said, and now we're starting to answer maybe some
2 of the questions about why, why -- how can you -- about why
3 contaminate, about why this? He said, "If done improper the
4 child's response may be -- may not be trustworthy." He set
5 boundaries with the child, and then he said, "Don't give any-
6 thing not given first." Why would he say that? Why would he
7 say, "I'm looking for a sterile response." So that's the
8 first officer.

9 So from that, what -- so what have we learned so far?
10 From the doctor we've learned it must be a big deal not to even
11 talk to another (inaudible), because you can contaminate them;
12 and there must be some kind of structure. Hew as so concerned
13 about doing it the right way, he even read it from the book.

14 Now, I would -- I want to give this to the prosecutor,
15 because he's going to probably say, "Well, maybe one of the
16 responses is because that person was just so strict, it was
17 just hard for the kids to respond." That's a legitimate
18 question; but there needs to be some structure to it. That's
19 -- that's what helps make sure that there's not a contamination
20 or that you're getting the right response.

21 Then after -- that was in English. Then they had to
22 -- I want to call it a "break," because there's always a break
23 in the interview. The interview was over, but then they had
24 another officer come in, Officer Boss. What did he tell us?
25 He said, "You have to ask open-ended questions." Why open-

1 ended questions? What does it have anything to do with whether
2 we're getting the truth, or whether we're getting honesty or
3 reality out of somebody.

4 We gave an example. We wrote it on the board, "What
5 are you wearing?" That's open ended. You can't answer that
6 with a "yes" or "no." "What are you wearing?" "No." You
7 can't say, "What are you wearing?" "Yes." See, it's open
8 ended. It's not leading.

9 Then we gave an example of a leading question. A
10 leading question is a question -- oh, and he said this. I
11 asked him, "What's a leading question?" "A leading question
12 is a question that suggests the answer." Gave me an example,
13 "Are you wearing a red shirt?" You can answer that with a
14 "yes" or you can answer it with a "no," and you've already
15 suggested what a response could be. A red shirt. So that's
16 leading. We gave examples of that.

17 Mr. Drechsel -- this -- Mr. Drechsel addressed this.
18 So I want to talk a little bit about the concept of asking
19 leading questions in the Court. This is my pet peeve. I will
20 -- okay, I'm not going to say what my -- we have different
21 rules in Court. We ask leading. In fact, most of the questions
22 that you heard in this trial were leading, from both of us,
23 okay? So I'll just briefly tell you about that.

24 Usually if it's a witness that you call, you're not
25 supposed to ask leading questions. You're supposed to ask

1 open-ended questions, like you can say, "What's your name?" or
2 "Where did you live?" or for example, I asked a lady today,
3 "Where did the word 'tito' come from?" She can't answer that
4 "yes" or "no." "Where did the word 'tito' come from?" No?
5 That's -- she has to give a response.

6 Most of the time we don't care. Of it's not an
7 important issue, there's no reason -- and the Court has the
8 rules for this. The Court has discretion to allow any leading
9 questions that the Judge finds appropriate. There's now que --
10 there's no reason to object to leading questions when we're
11 just talking about background. Usually where we would object
12 is when we get to the important issue, and that the attorney
13 tries to lead him -- the witness through it.

14 We have -- we have different rules, even at Court
15 versus adults versus children. The reason why I can -- you
16 can ask m leading question at cross examination, as you've
17 noticed, most of the witness, even when they're trying to be
18 honest and stuff, they usually tend to one side or the other.
19 So it would be more difficult for the person -- the attorney
20 that they're opposed to, to -- would -- to get out the truth,
21 because they wouldn't be willing to just be open with us. So
22 we get to ask more directed questions at them. That's probably
23 a longer explanation than I needed to give.

24 But he said, "You need special training for inter-
25 viewing children; and this is -- we're starting to get some

1 of the answers to the questions that I'm asking. Children --
2 okay, "We need special training for interviewing children so
3 as not to put ideas in their head." Okay, so now there's --
4 there's two things so far that have given us answers. One --
5 the one officer said to make it trustworthy; and also so that
6 we're not putting ideas in their head.

7 The second officer was a professional, and the one
8 thing that he had that Officer Bigelow maybe didn't have is
9 he was more friendly to the child. So maybe that en -- maybe
10 that was the encouragement. Now, I want to bring up this
11 issue, they're going to say that it was English. Going to
12 talk about the third interviewer in a minute. English, I
13 submit to you is a non issue. In the third interview, every
14 time the interviewer tried to make it in Spanish, the child
15 kept changing it to English. Most of the important part of the
16 interview was all in Spanish, but when she went to the doctor
17 it was mainly in English. She'd go back and forth. So I would
18 submit that the language is probably not necessarily the reason
19 -- the reason why witness disclosures or not.

20 The third interview. This is the one, and I'll be up
21 front with you, that I think is -- that I'm going to submit is
22 troublesome. Once again, if I say something reasonable based
23 on what we've learned, please consider it. If I say something
24 that's not reasonable, just say, "Well, he's full of crud."

25 So we've learned from this, is that there's protocols.

1 Every single officer testified to that. Officer Bigelow,
2 Officer Boss, and Officer Ryan. Then Dr. Vicky Gregory also
3 said, 'Yeah, there's protocols.' Even the other doctor, she
4 said "Well, I'm not trained in how to interview." So there
5 must be something to this, right? Why do we keep saying?

6 So the first thing that he -- the first thing that
7 we talked about in this is Shawn Lewis got on the stand, and
8 said, "Well, I'm really the officer in charge. This officer
9 here, Officer -- Agent -- Special Agent Ryan is really not the
10 person that conducts these, and he was there for the language.
11 He admitted, "I've had some training, but I haven't done very
12 many. Maybe one every three months."

13 Then he got up there and almost fifth or sixth
14 question, after we'd had all this protocol, he said, "Well,
15 yeah, and I guess I really didn't follow the protocol that
16 well, because I'm too friendly." He tried to underplay that,
17 because what would -- what would we first think about being
18 friendly? No big deal, right? But really it is somewhat of a
19 big deal, because it's about setting boundaries about what's
20 going to be appropriate during the interview.

21 Now, this is going to be something that I anticipate
22 -- I can't speak after the prosecutor, so I'm going to antici-
23 pate what he's going to say about his. I think he's going to
24 say -- I'm going to tell you that I thought he was extremely
25 silly, and that he played -- I mean, he got -- when he got out

1 the -- I mean by his tone and everything; and maybe I'm
2 misjudging it, because I've been accused of being the most
3 serious person there ever was. So maybe it's just me, but I
4 want you to think about this.

5 He would say things like -- it's his tone. I can't
6 even force myself to do it -- "Okay, I got four colors, right?
7 What color's this, and what's that?" It's your tone that also
8 makes it. When she -- he asked her things like, "How old's
9 your friend?" and she said, "A thousand years old." Well, we
10 all know that's not right;" and he said, "No." I mean, it's
11 your tone. It's the way you do it. You're setting something
12 to a child, you're setting the parameters.

13 If you're fun, that's an encouragement to the child
14 to give you a response that maybe isn't truthful. So when she
15 answered untruthfully that it's a thousand years, and he did
16 it in a playful tone, that encourages the child to say other
17 playful things or other things that aren't right, because she
18 thinks she's going to get a response of playful.

19 Kids think -- it's very difficult for a child to
20 understand the difference between lie and teasing. "Oh, I'm
21 teasing." He admitted that he did not ask the questions in
22 the right form, okay? He asked leading questions. I wrote
23 this down, and we all know this. I wrote it word-for-word.
24 I wrote it for when I was going to stand up here right now.

25 The other officer -- we all talked about what leading

1 questions are. It's questions that suggest the answer. Officer
2 -- Detective Boss told us what it was. A leading question
3 is a suggestive an -- question. It's a question that already
4 suggests what the answer you want.

5 What did Agent Ryan say a leading question is? So --
6 and you can look -- oh, I guess you can't. Go from your own
7 memory if you don't agree with this. A leading question, a
8 question used to elicit information from the interviewee that
9 was not brought up by the interviewee. Absolutely not. That's
10 exactly what you don't want. You don't want to elicit informa-
11 tion that was not brought up by them. You don't use suggestive
12 answers to get information that wasn't brought up by them. That
13 is exactly what you shouldn't do.

14 You shouldn't introduce new information. He did both
15 of those, and you're going to have the video and you can look
16 at this. If you don't remember, but he took a break. Right
17 after the break he came in and he asked these questions. This
18 one right here, "Did this happen at another time in another
19 house?" There had never, ever, ever been anything brought up
20 about another house until Off -- Special Agent Ryan came in and
21 introduced that concept.

22 You can watch the video, and initially the child said,
23 "No." Then she changed her mind, which is going to bring up
24 -- which brings up another issue between this video and the
25 others. You can go and watch them. This is not necessarily a

1 requirement, but I submit to you it should be. In the first
2 video you could see the interviewer completely all the time,
3 and you could see the interviewee all the time.

4 In the interview with Special Agent Ryan, you cannot
5 see him at all. You do not know what nonverbal clues he is
6 making to make the child maybe change her mind. Remember, we
7 already know he's being fun with the child. He's making faces
8 throughout the whole thing. We don't know what kind of faces.

9 Now, once again, I'm inferring some of that because
10 -- by the tone of -- I could hear the tone of his voice; and
11 usually when you say, "No," then that changes your face. So
12 what facial cues did he give, or other nonverbal cues that
13 made her change from saying, "No," to all of a sudden some-
14 thing happened in another house.

15 Then he went on, and almost every question after that
16 was leading, which is the def -- by definition is what suggest
17 -- you're suggesting the answer. Here's some of the things he
18 said right after that. "Has he put something in your butt?"
19 "Has he touched you with any other part of his body?" "Has
20 he -- has he ever had you touch him?" There had not been any
21 of those things talked about by the girl until he led her with
22 leading questions and suggested new things at every single part
23 of that interview. So those are the three interviews.

24 Then we had Dr. Gregory. Now, let's be honest about
25 her. That was not the greatest witness either for the defense

1 side, but she still had some things that were important to say.
2 One of the things that she said that none of these other guys
3 could, because once again we're on -- I'm not trying to say
4 that these guys are dishonest or anything. This is not about
5 lying; but nobody likes to be attacked. They're not -- none
6 of them are likely to go through their interviews and say,
7 "You did this wrong," or "You did this wrong," or "You did
8 this wrong."

9 What's the reason -- this is the question I keep
10 asking. Why do we keep saying it's such a big deal that all
11 of these things are going to be done in the right way? Well,
12 there's two things that I would submit that is the reason why
13 we're doing this. One, is either you're going to encourage --
14 you could encourage the child to lie; or you could encourage
15 the child to give -- to a false belief.

16 Now, in this case I'm not suggesting at all that the
17 child lie. So I want to talk about what a false belief is a
18 little bit. That's how you can contain -- when the doctor
19 said, "I may contaminate her," what's she talking about? It's
20 not that "I'm going to talk to her all of a sudden and it's
21 going to make her lie." It's going to make that she may have
22 a false belief, if you don't question her right.

23 When these guys are saying, "I'm asking leading
24 questions," I don't think they mean that "Oh, by asking the
25 leading question I'm going to make her lie." It's that you're

1 going to create a false belief in the child. So you've heard a
2 lot about that, but you probably aren't -- you may not have a
3 good conceptual ideal in your mind what we're talking about.
4 So I've got one person's name to understand what we're talking
5 about, because we all do it to our children.

6 Santa Clause. Santa Clause is a false belief. We tell
7 our children there is this guy that's going to come dressed
8 in red with a beard, and he's going to give you presents. The
9 younger the child, the more likely they are to believe us.
10 When the child says to somebody else, "Santa Clause brought me
11 toys," that child's not lying. We're not trying to say that
12 MR's lying. It's not a lie. It's because if you suggest some-
13 thing to someone enough, or in an appropriate-- or in a certain
14 way, they will believe something that never existed.

15 What Dr. Gregory was saying, and Mr. Drechsel brought
16 this up most certainly, not every child's the same. That's
17 what we don't know. Some are more suggestible than others.
18 Just because you lead one child, doesn't mean you're going to
19 create a false memory. I'm not here to tell you that just
20 because these officers asked one leading question or ten
21 leading questions, they created a false memory or a false
22 belief, because each person's individual and we don't know
23 how much it takes for each person.

24 That's why the doctor's being careful, because she
25 doesn't want to contaminate her, because we don't know what it

1 would take for MR. I mean, we may be able to go through the
2 whole thing the way we did it, and it wouldn't affect MR at
3 all; but it may. That's why we're being careful.

4 The other thing that -- just lost my train of thought.
5 Should have just kept going, huh? Okay, so one of the things
6 that is important that I think everybody would agree on,
7 though, clearly a little bit of questioning is not going to
8 affect somebody, but the more extensive it is, the more it is.
9 Even Mr. Drechsel brought this up that even in the case that
10 Dr. Gregory was talking about, sometimes it may take a lot of
11 it. Just like Santa Clause. We don't -- we don't convince our
12 kids in one time that there's a Santa Clause. It's usually
13 over a period of time, and also the age of the person.

14 So the thing that we don't know, that becomes the
15 issue, and this is one of the things that Dr. Gregory testified
16 to that Mr. Drechsel didn't even bring up the study on, is
17 where there was a videotape done of parents. They knew what
18 the -- they knew exactly what was going on, because it was
19 videotaped. They saw -- the child did an activity, and then
20 the parents interviewed them. Then they -- the parent had to
21 state what had happened, or what the child had actually told
22 them, and they interviewed it -- or yeah, they videoed it.

23 We know that parents are not good at rely-- at telling
24 what had happened. One of the things that I tried to do to
25 point this out to you was when I went through all of the cross

1 examination things that I did with Yanet. It really doesn't
2 matter that she got the dates wrong. That she testified one
3 time at the preliminary hearing that this doctor's appointment
4 occurred on the 11th, and another time she testified that it
5 occurred on the 18th. The point that I brought that up was not
6 that she was lying, but that she couldn't re -- it's difficult
7 to remember things in the order of things.

8 When we asked her about her work, I didn't do the thing
9 about the work to try to say, "She's lying to you. Disbelieve
10 her." It's not about lying; it's about the ability to remember
11 things properly. The same with when she can't even remember
12 her own child's birthday. I mean, that was -- that's great.
13 We sat there for fifteen minutes and she just flip-flopped back
14 and forth. How come on simple things like that it's difficult
15 for her to remember, but now ten months later, "Well, I know
16 exactly that she's the one that revealed it to me. I'm not
17 the one that brought up the word 'tito' to her," even though
18 they're the only ones practically that only use that word.

19 That's what is the question. Did -- the question
20 is, did that questioning by the mother every day affect -- did
21 that create a false belief, like you would with Santa Clause.
22 That's the question. The issue's going to be -- because I
23 don't have to prove that beyond a reasonable doubt. It's going
24 to be the State has to prove it to you beyond a reasonable
25 doubt, that based on the facts that occurred, that there's no

1 way that that could have been a false belief by the child, and
2 by the questioning process that that created a false belief in
3 the child. They're the ones that are going to have to prove
4 that in the end.

5 Well, let me just say a couple of last things here.
6 This is going to be more about questions to you that I believe
7 create reasonable doubt. Let me just -- so let me just briefly
8 say about reasonable doubt. The State has to prove every single
9 thing about beyond a reasonable doubt. I don't have to prove to
10 you that there was a false belief. They have to prove beyond a
11 reasonable doubt that there wasn't. Do you understand how that
12 works? They have to prove beyond reasonable doubt, beyond any
13 reasonable doubt that this -- that there was a false belief.

14 What helps support reasonable doubt that there is?
15 Because every witness, including the experts, the State's
16 witnesses say, "Well, we have to follow protocol. We have
17 to follow that protocol so we don't get a false belief." I
18 submit to you, you're going to be the final Judge of this, did
19 that last interview follow protocol. If it didn't, isn't that
20 reasonable doubt as to the things she's saying?

21 Second of all, even if the -- last inter -- even if
22 all the interviews were done completely right, isn't there
23 reasonable doubt that the mother put those false beliefs in
24 the child on those six days that she was interviewing her.
25 That's going to be the decision you have to make, not me.

1 I'm asking the question.

2 The other thing -- and I'm not saying that this is one
3 of the main factors here. I haven't raised it, but one of the
4 things that raises a concern to me as to reasonable doubt is
5 what's happening with the mother. Mr. Drechsel brought this up
6 so I want to address the issue. He's the one that raised the
7 issue that the mother kept going back between two different
8 guys.

9 I'm not saying that the mother has a motive to lie
10 or anything, but I can see motives in this for her to do it.
11 That's because she keeps going back between the two guys. She
12 testified that even when she was seven to eight months pregnant
13 with Abelardo's child, she went back to her former boyfriend
14 and lived with him. That was about six months prior to the
15 time that this happened when she went into the room.

16 Then after -- they brought this up, not me. Then
17 after the incident of when the alledged incident occurred on
18 the 9th, the mother just kept sleeping with him. Then they
19 left, and then after a month or so she got back with him again
20 in the motel, with the kids. Had sex with him right there in
21 front of all the kids again.

22 The question to me that just-- I don't know if there's
23 an answer or not, is if somebody had really molested your child
24 why do you keep getting back with them? Even after the fact
25 that -- Mr. Drechsel tried to make this big deal is "Well, the

1 reason she stayed with him here is she had nowhere to go."
2 She had nowhere to go. Yeah, she has somewhere to go, because
3 she's got the other guy. She keeps going back to him even when
4 she's pregnant with the other guy's child.

5 Even if she didn't have anywhere to go during this
6 week, she most certainly left, and there was no reason to even
7 see Abelardo again. I don't know -- I don't know how that
8 plays in. Just there's something weird about it. You don't
9 say that somebody's molested your child, and think they have,
10 then keep getting back with them and having sexual relations.
11 That's odd. So is it because she's doing that because she's
12 trying to play the guys against each other?

13 So really that's all I have, so let me just say this.
14 Really what this comes down to -- oh, one last thing I just
15 remembered. One of the things that Mr. Drechsel brought up is
16 that each one of these -- you have to consider each one of the
17 counts separately. So the last thing that I want to submit to
18 you is this also. Another question.

19 Okay, let's say that the child was correct. That
20 my client did put his -- I'll use "tito" in her mouth on that
21 first occasion. If you find that beyond a reasonable doubt,
22 the next question you're going to have to ask is what about all
23 the other times? And here's the question. Did the questioning
24 te way Special Agent Ryan did it, did he invoke the child to
25 say there was more times when there really wasn't?

1 So even if you find one time, you're going to have to
2 determine that did the way the officers do this interviewing
3 process, did that create the situation where the child started
4 responding to more times than it actually ever really occurred.
5 So that's really what you -- I guess there's three different
6 things you've got to do. I mentioned the first thing with the
7 kidnap. I consider that a different thing. Look at that. If
8 I said something reasonable about that, please consider it. Go
9 through the instructions.

10 The second thing. Did any of this even happen at
11 all? You have to decide whether the State has proved beyond a
12 reasonable doubt that there wasn't contamination, that there
13 wasn't -- why do all of these witnesses tell you that there's a
14 problem if you don't do it right? Did they prove to you beyond
15 a reasonable doubt that it was done correctly?

16 Then the third thing, even if you determine that one
17 of the times is right, you've got to decide beyond a reasonable
18 doubt if every other thing that the child said was done right,
19 or is there doubt as to they maybe influenced the child to say
20 more times than there really was. In the end I'm going to ask
21 you to just do whatever you think is reasonable based on what
22 we've told you. Thank you.

23 THE COURT: Thank you, Mr. Sidwell. Mr. Drechsel.

24 MR. DRECHSEL: (Inaudible) bailiff with this?

25 THE COURT: Yeah, Mr. Brown will move that, I'm sure.

1 MR. DRECHSEL: How long can lawyers talk? I get to
2 respond to a few things that Mr. Sidwell said. I'll try to
3 keep it brief. Mr. Sidwell talked about how without authority
4 of law, that a parent has the authority of law to say you can
5 go to your -- not you can go to your room, you will go to your
6 room, or that if he does something wrong in Court, that the
7 Judge can say, "Get Mr. Sidwell (inaudible)," because the law
8 authorizes those things.

9 The law does not authorize sex abuse of a child.
10 It does not authorize that. In fact, it prohibits it and
11 criminalizes it; and for people who are found guilty of it
12 beyond a reasonable doubt, punishes them for it. So the law
13 does not authorize that. That -- it happened (inaudible).

14 It is the State's position that a substantial period
15 of time in terms of sex abuse of a child is any period of time.
16 That's the State's position. This is closing argument. It's
17 my argument to you. The law has not spoken on that. Otherwise
18 we would have given you a definition for what is substantial in
19 the period of time. The law leaves that to you as jurors in
20 your experience and in your deliberations to consider what
21 "substantial" means.

22 In addition to that, you can detain a person for a
23 substantial period of time or detain them under circumstances
24 that expose a person to a risk of bodily injury. So even if
25 you don't believe that the amount of time it takes to sexually

1 abuse a child is substantial beyond a reasonable doubt, if you
2 do believe that detaining the person exposes them to risk of
3 bodily injury, that is an independent basis beyond a reasonable
4 doubt to convict a person for that element.

5 I feel somewhat badly, because we've talked about
6 Yanet having sex with Abelardo while the children were in the
7 room, but we have not talked about Abelardo having sex with
8 Yanet with the children in the room. That's a two-way street.
9 As I sat at Counsel table and I listened to both how I've
10 presented it and how Mr. Sidwell presented it, it's almost
11 like we assume it's Mom's responsibility alone not to engage
12 in those sorts of acts; but the reality is Abelardo Cruz was
13 engaging in the same sort of acts in front of the children, and
14 if you're going to penalize one, penalize both. Don't penalize
15 the child, though, if you believe the child is telling you the
16 truth about the sexual conduct that occurred between her, MR, a
17 six-year-old girl and Abelardo, an adult man.

18 Mr. Sidwell suggested that I haven't proven beyond
19 a reasonable doubt that the statements that MR made were not
20 contaminated. I will strongly suggest to you that "not contam-
21 inated" is not an element of the offense. We've been through
22 those; and it does not say that the statements supporting these
23 charges are not contaminated beyond a reasonable doubt. That's
24 not my burden.

25 It is your burden to weigh the credibility of the

1 witnesses who testified, including the CJC interview where MR
2 spoke about what she knows happened to her. If you believe
3 that that is contaminated in a way that you cannot find what
4 she said to be reliable, that you cannot believe her, and that
5 because you can't believe her there's not evidence to support
6 the elements of beyond a reasonable doubt, then the defendant's
7 not guilty. Absolutely; but I don't have to prove beyond a
8 reasonable doubt that they're not contaminated. You weigh
9 that, and you decide if you find her to be a reliable person
10 in reporting about these things.

11 Mr. Sidwell suggests that Dave Ryan encouraged silli-
12 ness and that he was silly with her. He talked about things
13 like "a thousand years;" and he said "A thousand years?" and
14 she said, "No," and he said, "No." Encouraged her to be silly
15 with markers, encouraged her to be silly about -- and spoke
16 with her about hide-and-seek and tic-tac-toe, and school and
17 phonics and math.

18 He also spoke with her about other silly names like
19 putting a tito in her mouth and putting a finger where she
20 poops? He was just as silly then as he was in talking to her
21 about a thousand years? In fact, the opposite. He was very
22 serious with her, very subdued, and very calm when he spoke
23 with her about those things. It's for you to review the
24 recording of that interview and decide if you agree with
25 that assessment that I've made. That he was not being silly

1 when things that aren't silly were being talked about.

2 Mr. Sidwell raises a really great example of how we
3 can lead children to believe in things that are false, in Santa
4 Clause. It's a great example in my mind, because Santa Clause
5 is something that we talk about children -- we talk to children
6 about from when they're little, right? As they get older,
7 "Santa Clause will come. We'll have a Christmas tree." What
8 will Santa Clause do? He won't sexually abuse you. He'll
9 bring you presents.

10 We talk to children about things that are good, and
11 they believe in Santa Clause, even though he's not real, but
12 that doesn't transfer across to believing things about sexual
13 abuse that occurred; and that I talked to you and you will
14 believe that these bad things happened. It's not a good
15 analogy. That's why I'm glad he brought it up, because it
16 shows you the difference between how we suggest things with
17 children; and I think it's a really great example.

18 I want to talk about Agent Ryan giving new information
19 to her in the interview. She had said -- or the question was
20 before they took their break, according to Agent Ryan, and this
21 is from translation, right?

22 AGENT RYAN: I want to know -- what I want
23 to know is if there are other times that this --
24 that he's done this. You told me about one time
25 when your mom saw what happened. Has he done

1 this to you on other occasions?

2 MR: Yes.

3 AGENT RYAN: Can you describe to me when it
4 was and what happened.

5 MR: Okay.

6 She says.

7 AGENT RYAN: Do you remember the first time
8 this happened?

9 MR: No.

10 AGENT RYAN: Okay, tell me about another
11 time it happened. Not about the time you already
12 described to me, but a different time it happened.
13 Can you describe that to me?

14 She says:

15 MR: I don't know.

16 AGENT RYAN: You don't know?

17 MR: I forgot.

18 AGENT RYAN: You forgot? Okay, let's take a
19 break.

20 All of these questions are another time, time, time;
21 and Dr. Gregory, the defense expert, testified to that children
22 at six years old aren't good at sequencing of time, durations
23 of time. So he comes back after the break, and instead of
24 asking about time, he asks:

25 AGENT RYAN: We've been talking about when

1 your dad -- your daddy put his weewee --

2 That was the interpreter's word.

3 AGENT RYAN: -- your tito in your mouth. Did
4 this ever happen in another house?

5 "Did this ever happen at another house?" Does that
6 suggest that it did happen at another house or that it did not
7 happen at another house? It is equally as likely for a person
8 to say "yes" or "no" to that question. "Did this ever happen
9 at another house?" "Yes."

10 In fact, she says, "No," right? But she also said
11 "no" to her mom in the bathroom before she told her mom that
12 he had put his tito in her mouth. So if we're going to take
13 her "no" as the beginning, the middle and the end of the story,
14 then take the first "no" in he hasn't done anything wrong to
15 her ever at all, because she said "no."

16 Then as it continues:

17 AGENT RYAN: Did that ever happen at another
18 house?

19 MR: No, just in the house.

20 AGENT RYAN: Just in that house? Okay. Did
21 it happen in another room?

22 MR: No.

23 AGENT RYAN: Only in the room of your mom and
24 dad?

25 MR: No.

1 She says, that --

2 MR: It was in two houses.

3 AGENT RYAN: It was in two houses? Can you
4 tell me about the other house?

5 MR: The other house was old. The other
6 house had spider webs.

7 He had accepted her answer of "no," and had moved onto
8 another question; and she brought him back to it, saying, "No,
9 it was two houses, and let me tell you about the two houses."
10 That's a very important thing, because in the way that these
11 charges have been presented to you, the structure of Dave
12 Ryan's interview gives you a helpful, I guess, roadmap for
13 how the charges fit with the conduct.

14 I have not explained that to you, but I'm going to
15 now, and that is that the charges are in reverse. They're in
16 chronological order, as far as I can tell. Nobody gets to pick
17 how the charges go except me. The case officer didn't come and
18 say, "Do it like this." MR didn't come to me and say, "Do it
19 like this. Charge this. Charge that. Put this one as Count
20 I, this one was Count III."

21 I reviewed this material and I put the charges in the
22 order that the State saw fit to do it; and I did it in a way
23 that is the opposite of the way that she talks about it in her
24 interview with Dave Ryan. See, she starts by talking about
25 Counts VI, VII and VIII. When you look at the charge with the

1 elements instruction that you have there for you, the date
2 range on those three charges is different than the date range
3 in the other counts. The date range there is from November 9th,
4 2013 to November 16th, 2013, that one week, what happened in
5 the new house.

6 Count VI, Count VII and Count VIII, in the video inter-
7 view, if you choose to review it, she begins talking about the
8 video is time stamped, the time of day is there. She begins
9 talking about that at 12:33. As she first talks about Count
10 VIII, "My dad put his hand on the door and he wouldn't let me
11 out." She then talks about Count VI and then she talks about
12 Count VII. All of that is between the times of 12:33 on the
13 video through 12:53.

14 Count V is at the 1:13 p.m. mark in the video. That
15 was a decision that I made. That was conduct that I identified
16 as fitting within what is illegal under the law and had charged
17 it as Count V, at 1:13 p.m. in the video. At 1:14 p.m. she
18 talks about Count I. That's what I correlated as Count I in
19 the charges.

20 At 1:17 p.m. and 30 seconds on the video, she starts
21 to talk about Counts II and III. She talks about his tito in
22 her mouth. That would be sodomy on a child if you believed
23 that happened beyond a reasonable doubt, and that he put his
24 tito in her butt. Those are Counts II and III.

25 Count IV she talks about at the 1:25 p.m. mark. Count

1 IV is, "Has your dad ever touched you anywhere else?" and she
2 nods, and she points down to her crotch, but she can't say the
3 word. He says, "It's okay, you can point. What do you call
4 that?" She can't say. He says -- she says, "It happened when
5 he put his tito in my butt. He put it in," and pauses, and he
6 says, "What did he put?" and she says, "His tito." "Where did
7 he put his tito?" "Where you pee," is what she says. That
8 would be Count IV on the rape of a child charge.

9 I encourage you to review all the evidence. I encourage
10 you to consider how reliable you find what has been said by
11 everyone that's spoken to you. I want to -- I want to end with
12 one other thing. I want to end with this idea that you don't
13 say that someone has molested your child and then keep having
14 sex with the guy. That's what Mr. Sidwell kind of talked about
15 that at the end. You don't say that, "and then keep having
16 sex."

17 I think that's the key point in this case. Yanet is
18 not the one saying that MR was molested and abused. MR is the
19 one saying that. MR is saying that she was sexually abused.
20 Yanet is in love with the guy that did it. I ask you to find
21 him guilty.

22 THE COURT: Thank you, Mr. Drechsel. Okay, who are my
23 bailiffs that are going to be watching this jury? I need you
24 all to take the oath of bailiffs.

25 COURT CLERK: You do solemnly swear that you will take

1 charge of this jury and take them to some private and conven-
2 ient place, where they may deliberate upon their verdict,
3 allowing no one to speak with them nor to do so yourself
4 unless ordered by the Court, and to return them into the Court
5 when they have reached a verdict or so -- or when so ordered,
6 so help you God?

7 COURT BAILIFF: Yeah.

8 THE COURT: All right, now you have all the evidence.
9 You have been instructed. Now it's going to be your time to go
10 and begin your deliberations. Before your deliberations I need
11 to know who Mr. Nemec and Ms. Wooley are. You two may -- you
12 may or may not have figured this out, are the alternates. You
13 are not going to participate in the deliberation, unless during
14 the deliberations someone gets ill or there's something arises
15 that causes them not to be able to participate.

16 Let me tell you that it's vital that you sat through
17 this experience. Many occasions we have used the alternates.
18 In fact, in any case that I've had that's lasted more than
19 three days, we've used an alternate. Today we haven't; but
20 you are still subject to the requirements that I've imposed on
21 all jurors, not to talk about this case until you have received
22 notice from us that the jury has reached a verdict, okay?

23 So I'm going to allow you to be excused. Not right
24 now, but I want to thank you for your service, and you're not
25 going to participate in the deliberations. The rest of you,

1 the other eight, are going to take with you the instructions
2 and the verdict forms. These are the original instructions.
3 You will use those.

4 I am going to allow you to take in your instructions
5 that you had while we read them, because I think you've made
6 notations on those; but at the end of this trial or end of
7 your deliberations, you are to bring back to me the jury
8 instructions and the verdict forms. I don't want you to give
9 me your notes, instructions. I don't want you -- I want you
10 to put those in a stack and not include those that you give
11 back to the bailiffs.

12 You're also going to receive both of the interviews
13 on the videos, and the exhibit that was presented as evidence.
14 I am also going to have the interpreter sworn, because one or
15 both of you may be asked to give interpretation in the jury
16 room. So I've made my own special oath for you, okay? If
17 you'll stand and raise your hand.

18 Do you swear to the interpret the videos, if asked,
19 and only give the interpretation of the language; do you swear
20 not to attempt to explain the evidence or to participate in
21 any way in the deliberations; do you swear not to act as an
22 advocate for either the State or the defendant, but rather only
23 to act as an interpreter?

24 COURT INTERPRETER: I do.

25 COURT INTERPRETER: Yes.

1 THE COURT: Okay, I'm not telling you you have to use
2 the interpreters, but if you choose to listen to the videos
3 and you want interpretation, you need to let us know; and the
4 interpreters can then go in and in -- only interpret. They
5 are not to do anything but interpret the language that's in
6 the videos.

7 The last thing I'm going to do is I'm going to collect
8 all of the cell phones of those folks that are going into the
9 jury room, because I don't want you to access your cell phones
10 to talk to the alternates, to talk to anybody else, or to use
11 it to look up anything. So I'm going to ask you to -- my
12 bailiffs to collect those for me. We'll give those back to
13 you. We're not trying to upgrade our phones. We're simply
14 going to prevent you from using them.

15 JURY MEMBER: Mine's in the jury room.

16 COURT BAILIFF: We'll collect those.

17 THE COURT: Okay, we'll get it -- if it's in the jury
18 room, we'll get it from you there.

19 MR. DRECHSEL: Your Honor, I'm sorry, before the jury
20 goes out, it was the State's understanding that the work
21 schedule was offered to refresh her recollection, but was not
22 admitted.

23 MR. SIDWELL: It's not admitted into evidence.

24 THE COURT: It's not admitted. Thank you, I appreciate
25 that. No. 3 -- Exhibit 3 was not --

INSTRUCTION NUMBER 55

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty to consult with one another and to deliberate. Your goal should be to reach an agreement if you can do so without surrendering your individual judgment. Each of you must decide the case for yourself, but do so only after impartially considering the evidence with your fellow jurors. Do not hesitate to reexamine your own views and change your position if you are convinced it is mistaken. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or just to return a verdict.

You are judges -- judges of the facts. Your sole interest is to determine the truth from the evidence in the case.

I now ask you to take the following two questions back with you into the jury room and discuss them as a group. I do not want any of you to indicate your answer now. Only answer after you have discussed it as a group.

Question One: Yes.

Have you reached a unanimous verdict on any of the Counts 1 through 8?

Question Two: No.

Is there any reasonable likelihood that continued deliberation will result in a unanimous verdict on any counts that you have not yet as a group been able to unanimously agree upon?

Addendum G

ABA Standard 15- 5.4. Length of deliberations; deadlocked jury*

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(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 himself or herself but only after an impartial consideration of the evidence with the other jurors;

(4) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

(5) that no juror should surrender his or her honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in section

(a). The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

**(c) - See ABA Jury Principle 15(C)(2) (recommending that a jury not be required to deliberate after normal working hours unless the court, after consultation with the parties and the jurors, determines that evening or weekend deliberations would not impose an undue hardship upon the jurors and are required in the interest of justice.).*