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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PATRICK M. METER, P.J., and DAVID H. SAWYER and THOMAS C. CARMERON, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court Docket No. 159384

vs.

DANIEL RAY BEAN,

Defendant-Appellee.

_____/

Michigan Court of Appeals No. 342953
14th Judicial Circuit Court No. 17-000174-FC

PLAINTIFF–APPELLANT'S APPENDIX

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

V

DANIEL BEAN,
Defendant.
_____/

HON. TIMOTHY G. HICKS

File No. 17-0174-FC

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OPINION AND ORDER REGARDING FEBRUARY 20 MOTIONS

INTRODUCTION

The court heard several motions, under somewhat confusing circumstances, on February 20. The court made some findings, and has since entered one order, but took other matters under advisement.

The court enters this opinion and order to resolve the remaining issues. Because trial is near, this order is somewhat shorter than it might otherwise be, given the significant issues involved.

1. Defendant's Motion to Quash/Dismiss, and Prosecutor's Motion Regarding Incest Issue.

The court has combined these two motions into one discussion and decision. This judge's work has been greatly assisted by the District Judge's excellent analysis of these issues.

Defendant's alleged conduct, in isolation, is arguably grounds for a charge of

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Criminal Sexual Conduct in the third degree ("CSC 3"). The prosecutor has charged it as Criminal Sexual Conduct **first** degree (CSC 1), citing two aggravating factors. First, that the defendant and victim are within the fourth degree of consanguinity. Second, that this criminal sexual act occurred while defendant was committing "another" felony. The alleged "other" felony is alleged to be Child Abuse, second degree. He needs to prove only one of the two aggravating circumstances.

In his brief and at oral argument, the prosecutor intimated that he might be moving to amend the information in either of two ways. However, he said that the amendment would only seek to add counts; it would not attempt to amend the "other" felony to something else. He also agreed that he would have to prove the predicate child abuse charge beyond a reasonable doubt.

Consanguinity/Incest

The applicable statute, MCL 750.520b(1)(b)(ii), criminalizes this activity when a defendant is related to his victim, "by blood or affinity," to the 4th degree. The parties ask the court to rule on the applicable definition of "affinity," because there are conflicting cases.

The prosecutor's brief identifies two lines of cases. The first line starts over a century ago with *Bliss v Caille Bros,* 149 Mich 601; 113 NW2d 317 (1907). *Bliss* was recently cited with approval in *People v Zajaczkowski,* 493 Mich 6; 825 NW2d 554 (2012) and, more recently, in the civil case of *Lewis v Farmers Ins Exch,* 315 Mich App 202, 888 NW2d 916 (2016). The later cases approved the *Bliss* definition of the issue, although the *Zajaczkowski* court specifically declined to address the affinity question, focusing only on the "blood" relationship.

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People v Armstrong, 212 Mich App at 121, 123-126; 536 NW2d 789 (2012) suggests a different approach and questions the continued vitality of *Bliss.* It contains some cogent observations about the dynamics of blended families and the real- world issues incumbent in imposing legal distinctions ("step" uncles versus "regular" uncles, etc.) upon family units. The issue for this judge is whether *Armstrong* or the other cases control. This judge thinks the *Bliss* line controls for these reasons.

Bliss was a civil case involving two wives who were second cousins. The *Bliss* court held that a wife is related to her husband's **blood** relatives, but not to his (essentially) in-laws. The court concluded that each wife was related to the other sister's **husband** by affinity, but that this created no affinity between the two husbands themselves.

This paradigm fits this case. The victim's biological mother (Tabatha) is married to Joe. Joe is the victim's step-father. Joe's sister Amy is married to Daniel, the defendant in this case. Thus, Tabatha is related to her husband's sister, Amy, but not to Amy's husband, the defendant. Accordingly, Tabatha's daughter, the victim, cannot be related to the defendant by affinity when her mother is not.

Lewis, the latest of these four cases, tactfully rejected the *Armstrong* analysis at 315 Mich App 213: "However, based on our Supreme Court's more recent opinion in *Zajaczkowski* and its reliance on *Bliss*, we conclude that this Court's expanded definition of affinity in *Armstrong* is not controlling in this case."

Both the *Armstrong* court and the District Court, in its analysis, have articulated good reasons for its holding, and maybe *Bliss* needs another look since it just celebrated its 110th birthday, but this judge does not, given the Supreme Court's *Bliss* decision and *Lewis's* subsequent comments about *Armstrong,* see that it has the discretion to hold any

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other way. Accordingly, the court grants the motion to quash the information as to the affinity theory.

The "Other" Felony

This judge has located no cases, and the parties have cited none, which are squarely on point with these facts.

In *People v Robideau*, 419 Mich 458, 469; 355 NW2d 492 (1984), the Michigan Supreme Court said:

> In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy -- protection against cumulative punishments -- is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, (internal citation omitted) the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent...

Were this the controlling decision, the court would grant defendant's motion. However, it is not controlling law, having been overruled in *People v Bobby Smith*, 478 Mich 292; 733 NW2d 351 (2007).

The Court, in *Bobby Smith*, addressed this particular type of Double Jeopardy issue- the "multiple punishments" prong. It eschewed the more flexible fact-based approach in *Robideau* (it overruled it) and affirmed the "bright-line" analysis handed down from the seminal case of *Blockburger v United States* 284 US 299; 52 S Ct 180;76 L Ed 306 (1932). Under the *Blockburger* analysis, the child abuse charge can be the "other" qualifying felony under (see MCL 750.520b(1)(c)) because it contains an element- causing serious mental harm or simply being likely to cause it- that the CSC 3 charge lacks.

Under the *Bobby Smith* decision, the court must deny the motion. However, in light of this case's likely appellate trajectory, the fact that this may be an issue of first

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impression, and the possibility that the court will see this in future cases, the court continues its analysis.

Much of the relevant discussion, in this judge's view, ignores or minimizes both the context and the practical consequences of this type of charging decision. Specifically:

Defendant's single alleged criminal act- penetrating the victim's private area with his hand- can thus be used by the prosecutor for **two** purposes. It can (1) establish the penetration for the sex crime, and then (2) elevate what would be a CSC 3 charge to a CSC 1 charge, increasing the penalties considerably.

Most of the analysis in the *Blockburger* line of cases considers a different issue- whether separate **convictions** can be maintained for the "other" crime- from what we have here. The issue here is whether the prosecutor can utilize the other (the predicate) crime to *elevate the penalty* on the charged crime. The Legislature has established a maximum of 15 years for the CSC 3 charge. If charged separately for Child Abuse, the defendant would confront a concurrent sentence with a maximum of 10 years pursuant to MCL 750.136b (4). This strategy, blending the two into the CSC 1 charge, allows the prosecutor to avoid that limitation.

This judge wonders whether this use of the statute is what the Legislature intended. In *People v Waltonen* 272 Mich App 678, 692; 728 NW2d 881 (2006), the Court of Appeals spoke to the Legislative rationale for the law relating to the other felony:

> The Legislature, however, did not attempt to narrowly define the coincidence or sequence of the sexual act and the other felony; rather it chose to address the increased risks to, and the debasing indignities inflicted upon, victims by the *combination of sexual offenses and other felonies* by treating the sexual acts as major offenses when they occur 'under circumstances involving the commission of any other felony.' (Italics added by this writer.)

This opinion should not be interpreted as minimizing the serious mental and physical

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injuries suffered by victims of sexual assaults, but it was Bean's **alleged sexual assault itself** which caused the likelihood of injury, not a *combination* of a sexual offense and another felony. Defendant, under this analysis, committed only one wrongful act, but faces an elevated penalty because of its effect, or even possible ("likely to cause") effect on the victim.

At oral argument, the court advanced a discussion about the jury instructions to be used because they often provide a useful outline for isolating the salient issues. Drafting appropriate and understandable jury instructions[1] would seem to be a challenge under these facts.

M Crim JI 20.1 is the instruction for CSC 1. Paragraph (3) asks the court to insert "one or more" of the alternatives, i.e., the aggravating circumstances. In this case, the court would insert the "other felony" instruction from M Crim JI 20.5, and then give the elements of the Child Abuse charge. That would be M Crim JI 17.20a, as the prosecutor informed the court.

But paragraph (4) in the standard instruction for Child Abuse 2d says that the defendant "...did an act likely to cause serious physical or mental harm to (the victim) **regardless of whether such harm resulted**." (bold added by this judge.) One of the expert witnesses, Emily Friberg, is expected to testify to that likelihood. That makes the jury's task even more confusing.

In other words, the predicate Child Abuse charge satisfies the *Blockburger* standard because it has another element that the primary charge lacks. But that

[1] There was some discussion, at oral argument, about which version of the child abuse instruction would be used. The prosecutor, the following day, told this judge that the correct instruction would be M Crim JI 17.20a. The court presumes that he so notified defense counsel.

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additional element is simply "the likelihood" that the victim will suffer serious mental harm. The defendant, then, faces the life maximum penalty if the prosecutor proves a likelihood of injury.

The court raises these issues. In the end, *Bobby Smith* is controlling and requires denying the motion on quash/dismiss on the "other felony" ground.

The court addresses the remaining issues.

2. Records/*Stanaway* Issue, Defense Motion for Funds to Hire Expert Witness

The prosecutor delivered the records Friday, and the court has examined them. During oral argument, this judge was concerned that testimony about "likely harm" would, given that the expert witness was also the victim's treating therapist, inevitably lead to a discussion about serious mental harm that *actually had occurred*. That, the court believed, made the counseling records relevant.

However, the statute makes the "actual" mental harm irrelevant. MCL 750.136b (3) says that crime is committed when a defendant "knowingly or intentionally commits an act **likely to cause** serious physical or mental harm to a child **regardless of whether harm results."** (Bold added by this judge.) Actual harm, by the terms of the statute, is not relevant and the prosecutor is not required to prove it.

This conclusion has these ramifications. First, the testimony of the prosecutor's expert witness, Friberg, will be limited to the hypothetical "likely" situation. Second, the defendant should be entitled to name an expert who will testify similarly. Third, he has articulated a valid reason for not naming one until now. Fourth, trial will have to be adjourned and, finally, the court will authorize $1500 for the defendant to retain such a witness. This is the total amount authorized, and the defendant will have to work within this limitation.

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3. Other Acts Evidence

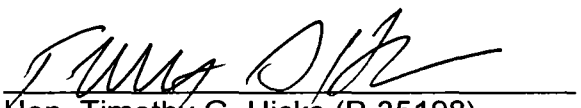
The prosecutor has submitted his notice of intent to introduce other acts evidence pursuant to MCL 768.27a and MRE 404(b). There were some procedural issues which prevented the court from hearing this on February 20. It appears the prosecutor will be submitting a brief. That is most helpful and, in fact, required by the relevant cases. See *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). See also *People v Emmanuel Moore*, unpublished *per curiam* opinion of the Michigan Court of Appeals, Docket No. 326222 (May 17, 2016).

CONCLUSION

The court grants the motion to quash/dismiss as to the affinity issue but denies it as to the "other felony" claim. The "other acts" issue remains for decision. This court will have to adjourn the March 12 trial to a date likely in early May. The court will not delay the trial indefinitely. If either of the parties seek interlocutory appeal, he (or they) will have to obtain a stay in this court. The court will grant a stay if the parties stipulate to that.

IT IS SO ORDERED.

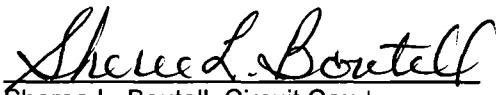
Dated: February 27, 2018



Hon. Timothy G. Hicks (P-35198)
Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that on this 27 day of February, 2018, I personally mailed copies of this Order to the parties above named at their respective addresses, by ordinary mail.



Sheree L. Boutell, Circuit Court
Legal & Scheduling Secretary

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STATE OF MICHIGAN

IN THE 60TH DISTRICT COURT FOR THE COUNTY OF MUSKEGON

PEOPLE OF THE STATE OF MICHIGAN D.C. 16-181535-FY

v C.C. 17-000174-FH

DANIEL BEAN

_____/

NANCY A. WATERS
MUSKEGON COUNTY CLERK
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PRELIMINARY EXAMINATION

VOLUME I

BEFORE THE HONORABLE RAYMOND J. KOSTRZEWA
District Court Judge
Muskegon, Michigan - July 20, 2017

APPEARANCES:

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1 Muskegon, Michigan
2 July 20, 2017 - 10:22 a.m.
3 (Court, Counsel and all parties present).
4 THE COURT: Before the Court is the People of the
5 State of Michigan versus Daniel Bean. The File Number is
6 16-181535-FY. This is the time and the date scheduled for a
7 preliminary examination on this matter.
8 And Mr. Matthew Roberts represents the People of the
9 State of Michigan, and representing Mr. Daniel Bean is Brian
10 Joseph ---- is it Prain?
11 MR. PRAIN: Right. That's correct, Your Honor.
12 THE COURT: Prain. Mr. Prain is present ----
13 MR. PRAIN: Good morning.
14 THE COURT: ---- representing Mr. Bean. Welcome, Mr.
15 Prain. What's your P number?
16 MR. PRAIN: 73944, Your Honor.
17 THE COURT: Thank you, very much. Is ---- are the
18 People of the State of Michigan ready to proceed?
19 MR. ROBERTS: We are, Your Honor. There's some
20 procedural history that we should probably recite briefly for
21 the Court, as well, but we are prepared to proceed.
22 THE COURT: All right. And is defense ready to
23 proceed?
24 MR. PRAIN: We are ready, Your Honor.
25 THE COURT: All right. Go ahead, Mr. Roberts.

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1 MR. ROBERTS: Your Honor, Mr. Bean was previously in
2 court and waived preliminary examination in January of this
3 year. That was waived at the time that he ---- at the time,
4 there was an agreement that he would retain the right to
5 remand this matter if a resolution could not be reached in
6 circuit court. This case was assigned to Judge Hicks in
7 circuit court and we were unable to reach a resolution of this
8 matter so this matter is now back before the court for
9 preliminary examination.
10 I did indicate at the time of the remand, so Mr.
11 Bean and Mr. Prain were advised, that my intention would be to
12 evaluate whether or not I would be increasing the charge here
13 from criminal sexual conduct to the third degree to criminal
14 sexual conduct first degree, and I would state it will be my
15 intention after testimony is taken today to amend the charge
16 to criminal sexual conduct first degree based on the age of
17 the victim and the relationship between the victim and the
18 defendant in this matter. And I think counsel was ---- is
19 aware that that was the at least stated possibility or
20 intention of our office at the time of the remand.
21 MR. PRAIN: Your Honor, yes, the record bears that
22 out in circuit court and I agree we are here on remand.
23 THE COURT: All right.
24 MR. PRAIN: And I'll address the issue of the first
25 degree motion for bind over as a mixed question of fact along

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1 with the conclusion.
2 THE COURT: Very well. Very well. Mr. Roberts, you
3 may proceed.
4 MR. ROBERTS: Your Honor, we are prepared to proceed.
5 I would just indicate that my understanding is that Mr. Prain
6 has subpoeaned a number of witnesses here. I would ask for
7 witness sequestration. I'm sure Mr. Prain is asking for
8 witness sequestration as well. My intention is to only call
9 the victim in this case and possibly the Trooper for some ----
10 maybe two quick questions.
11 THE COURT: All right. Well, it sounds like there's a
12 joint motion for sequestration.
13 MR. PRAIN: I would join in his motion, Your Honor.
14 THE COURT: All right. Well then I'm going to order
15 that all witnesses in this matter be sequestered. That means
16 that all witnesses must wait in the hallway and not discuss
17 the case with ----- amongst themselves or with anybody here in
18 the pendency of the matter here this morning or today as we
19 proceed. And that is a reciprocal order applying both to the
20 People's witnesses as well as to the witnesses that have been
21 subpoeaned or might testify on behalf of the defendant here.
22 MR. PRAIN: And, Your Honor ----
23 THE COURT: So if you need time to talk to your
24 witnesses, I'll give you a moment to give them the
25 sequestration instruction.

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1 MR. PRAIN: They're actually adverse witnesses, Your
2 Honor. I've never spoken to these people, we just subpoenaed
3 them. But with regard to the Trooper, I think we have Trooper
4 Zanthof. I can't quite see behind the pillar. I would only ask
5 if he's going to remain in the courtroom that he be the OIC at
6 trial. I don't believe there's another OIC in this case.
7 MR. ROBERTS: He's the only trooper so he would be.
8 MR. PRAIN: Okay. I didn't know if there was a
9 lieutenant assigned to the case or somebody who is the OIC but
10 I'm assuming there's no other OIC for the duration.
11 THE COURT: I have no idea who is the OIC. I'm not
12 even sure what an OIC is. I think it's an officer in charge.
13 MR. PRAIN: Officer in charge. Sorry, Your Honor.
14 THE COURT: Okay. That's all right.
15 MR. ROBERTS: It's Trooper Zanthof, so.
16 THE COURT: I have no authority to order who is the
17 OIC and who is not the OIC or who can appear as the OIC in
18 circuit court. I mean, I'm not going to go down that road at
19 all. But for today's purposes, the trooper as a representative
20 of the State of Michigan is allowed to remain in the
21 courtroom, so he's not subject to sequestration order if
22 that's what you're talking about.
23 MR. PRAIN: Correct.
24 THE COURT: All right. I think that deals with the
25 matter then, Mr. Prain.

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1 MR. PRAIN: That does, Your Honor.
2 THE COURT: All right. Mr. Roberts, you may proceed.
3 MR. ROBERTS: Thank you. Call Alexis Kersting.
4 THE BAILIFF: Raise your right hand, please. In the
5 matter now pending, do you solemnly swear or affirm the
6 testimony you're about to give will be the truth, the whole
7 truth and nothing but the truth, so help you God?
8 THE WITNESS: Yes.
9 THE BAILIFF: Have a seat in the black chair. State
10 your name please.
11 THE WITNESS: Alexis Kersting.
12 THE COURT: Can you spell your first and last name,
13 please, Ms. Kersting?
14 THE WITNESS: A-L-E-X-I-S. K-E-R-S-T-I-N-G.
15 THE COURT: Thank you.
16 ALEXIS KERSTING
17 Called by the People at 10:27 a.m., testified:
18 DIRECT EXAMINATION
19 BY MR. ROBERTS:
20 Q Alexis, can you tell the Court your date of birth, please?
21 A March 18th, 2001.
22 Q Alexis, I'm going to direct your attention back to last
23 September, September of 2016. How old were you back in
24 September, 2016?
25 A 15.

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1 Q And you just turned 16 this March, is that right?
2 A Yes.
3 Q Now back in September, September, 2016, do you recall a time
4 where you went to ---- you and some of your siblings went to
5 stay with a relative here?
6 A Yes.
7 Q And who was that relative?
8 A My uncle on my step-dad's side.
9 Q Your uncle on your step-dad's side?
10 A It was my step-dad's sister's husband.
11 Q So your ---- you have a step-dad, is that right?
12 A Yes.
13 Q And this individual with whom you went to stay is the sister
14 and the husband of that sister on your step-dad's side, is
15 that right?
16 A Yes.
17 Q And this individual that you've referred to is an uncle, or
18 you call him uncle?
19 A Not anymore.
20 Q Prior to this occasion?
21 A Yes.
22 Q All right. And do you recall where this house was that you
23 went to stay with him?
24 A It was in Holton somewhere.
25 Q Do you remember ---- I said that it was September. Do you

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1 remember what date it was in September?
2 A I'm pretty sure it was September 4th.
3 Q What day of the week was it, if you remember, that you went
4 over to the house?
5 A I don't remember.
6 Q And did you go over to the house during the day? At night
7 time? When did you go over?
8 A We went over during the day.
9 Q And what was the plan in going over to the house?
10 A Well, we were helping them move some of their things from
11 their old house to their new house.
12 Q So this was a new house that they were moving to?
13 A Yes.
14 Q And who went over to the house with you?
15 A It was my two brothers and my mom and my step-dad.
16 Q And how old are your two brothers?
17 A My little brother ---- my ---- one of 'em is 15 and one of 'em
18 is 11.
19 Q And you say your mom and your step-dad went as well?
20 A Yes.
21 Q Did your mom and step-dad stay the entire time?
22 A No.
23 Q Did they leave at some point?
24 A Yeah.
25 Q When did they leave?

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1 A I'm not sure when they left.
2 Q Day time? Evening time?
3 A It was in the evening.
4 Q Did you go with them or did you stay at the house?
5 A I stayed at the house.
6 Q Was it your ----- was it agreed upon or was there some type of
7 plan then for you to spend the night at the house?
8 A Yeah, we were going to spend the night.
9 Q And who else was going to spend the night at the house?
10 A Me and my two brothers.
11 Q So you and your two brothers ended up staying the night at the
12 house?
13 A Yes.
14 Q And who else ---- after your mom and your step-dad left, who
15 else was at the house?
16 A It was my aunt, uncle, and three of my cousins and my two
17 brothers.
18 Q And your uncle, is he in the courtroom right now ----
19 A Yes.
20 Q Can you point to him and tell us what he's wearing right now?
21 A He's wearing a blue suit. Over there (witness indicating by
22 pointing to defendant).
23 MR. ROBERTS: I'd ask that the record reflect that
24 the witness has identified the defendant, Your Honor.
25 THE COURT: She said a blue suit. It's a little more

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1 specific, Ms. Kersting.
2 THE COURT: He's ---- I can't really see him very
3 well. He has blue eyes and like blonde -----
4 THE COURT: Does he have a jacket or no jacket on?
5 THE WITNESS: I ----- umm,no.
6 THE COURT: Well, if you ---- you can move. You can
7 move. I mean, if you need to be able to see better just move a
8 little bit.
9 THE WITNESS: He has a tie with like different shades
10 of blue on it.
11 THE COURT: All right. The record will reflect that
12 she has identified the defendant.
13 MR. ROBERTS: Thank you.
14 THE COURT: Thank you.
15 BY MR. ROBERTS:
16 Q So Alexis, I want to move to the evening time around bedtime
17 that evening. Do you recall falling asleep?
18 A Yes.
19 Q And where did you fall asleep in that house?
20 A There was like a mini couch with two cushions right next to
21 the TV.
22 Q Were you on that couch?
23 A Yes. I fell asleep on the couch.
24 Q Do you remember what you were wearing?
25 A I was wearing shorts and a sweatshirt.

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Q And did you have underwear ---- underwear and a bra on underneath that?
A Yes.
Q Did you have any type of bedding or sheet or anything on the couch?
A I had my blanket.
Q You said this was in like a ---- it's like a family room area of the house?
A Yes.
Q And who else, if anybody else was in the family room when you were falling asleep?
A It ---- across from me there was a couch with two of my littler cousins and my littler brother. And then on, like, the other side of the room was my other cousin and my other brother.
Q And when you say on the other side of the room, was there some construction going on at the time or something?
A Yeah, they were like putting up ---- well, they were working on putting up a wall for, like to make extra rooms.
Q And this was ----- was it your older brother that was in ---- or of your brothers, the older of the two brothers was in the ---- in that room but there wasn't actually a wall yet?
A Yes.
Q And he was also with another one of your cousins?
A Yeah.

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1 Q All right. Where was your uncle when you started to fall
2 asleep?
3 A He was sitting at the end of the couch that I was sleeping on.
4 Q And did you actually fall asleep?
5 A Yes.
6 Q And do you recall waking up?
7 A Yes.
8 Q And why did you wake up?
9 A Because I felt someone touching me.
10 Q Who was that person that was touching you?
11 A It was Dan.
12 Q Your uncle?
13 A Yes.
14 Q And when you say he was touching you. What part of his body
15 was he doing the touching?
16 A His hand.
17 Q And where was he touching you at the time you woke up?
18 A At the time I woke up, he was touching my legs.
19 Q And did he touch any other part of your body after you were
20 awake?
21 A Yes.
22 Q What other part of your body did he touch?
23 A He touched my chest area and around my vagina.
24 Q Let's talk about your chest area for just a second. Did he
25 touch that before he touched your vagina or after? Do you

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1 remember?
2 A He was touching both at the same time.
3 Q And was he using his hands for touching both of those parts of
4 your body?
5 A Yes.
6 Q And when he was touching your chest area, was that on top of
7 the clothes or underneath the clothes?
8 A Underneath.
9 Q And what about ---- you said you were wearing a bra. Was that
10 on top of the bra or underneath?
11 A Underneath.
12 Q And you said he was touching your vagina as well. Was that on
13 top of the clothes or underneath the clothes?
14 A Also underneath.
15 Q Same question for your underwear.
16 A Yes.
17 Q Was it underneath your underwear?
18 A Underneath, yeah.
19 Q So was it his bare skin on your skin?
20 A You mean ----
21 Q Do you understand that question? Do you know what I mean?
22 A It was his hand on my bare skin.
23 Q Okay. And you said that he was touching your vagina. Was
24 there ever a point where any part of his hand or his fingers
25 went inside the lips of your vagina?

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1 A Yes.
2 Q And all this was taking place on that couch?
3 A Yes.
4 Q Did you say anything to him while this was going on?
5 A No.
6 Q Did you call out or try to get anyone else's attention while
7 this was happening?
8 A No.
9 Q Why not?
10 A I was scared.
11 Q Was there a point in time when this ended up stopping?
12 A Yeah.
13 Q What happened when it stopped?
14 A I heard him tell the kids that they needed to go to bed so he
15 had took his ---- he took my two cousins upstairs to tuck them
16 in.
17 Q And what did you do after he took them upstairs and tucked
18 them in?
19 A I laid on the couch for like ten, twenty minutes thinking
20 about what to do and then I decided to call my mom.
21 Q And how did you try to call your mom?
22 A My phone, but I saw that it didn't have service where I was so
23 I snuck out of the house and went ---- I walked down the road
24 a little bit and then I called her.
25 Q Do you remember what time of day or night it was when you

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1 called her?
2 A It was like 1:00 a.m.
3 Q And had you spoken ---- did you speak to anyone else before
4 talking to your mom when you called her?
5 A No.
6 Q You didn't try to stop and talk to anybody else in the house
7 before you left?
8 A No.
9 Q And did the police officers come out to the house?
10 A Yes.
11 Q And did your mom and step-dad come out to the house as well?
12 A Yeah.
13 MR. ROBERTS: No further questions right now. Mr.
14 Prain may have some questions for you.
15 MR. PRAIN: Thank you.
16 CROSS EXAMINATION
17 BY MR. PRAIN:
18 Q Morning.
19 A Morning.
20 Q My name is Brian. I represent Dan in this case, Dan Bean.
21 A Okay.
22 Q And you and I have never spoke before, is that correct?
23 A Yeah.
24 Q Okay. We've never even met before, true?
25 A Yeah.

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1 Q You call Dan as being your uncle but you guys didn't typically
2 call him that, isn't that right?
3 A I ---- I call him Dan.
4 Q You call him Dan. You guys don't refer to him as Uncle Dan,
5 just Dan, right?
6 A Yeah.
7 Q And what it is is that your mother's name is Tabatha, correct?
8 A Yes.
9 Q And Tabatha is married to your step-dad Joe, right?
10 A Yes.
11 Q And Joe is not your biological father, though, correct?
12 A Correct.
13 Q Joe has a sister named Amy, correct?
14 A Yeah.
15 Q And that sister Amy is Dan's wife, right?
16 A Yeah.
17 Q And they have some kids together, too, correct?
18 A Yeah.
19 Q So there's no blood relationship between you and Dan, right?
20 A Yeah.
21 Q Or you ---- is there or no?
22 A There is not.
23 Q Okay. Is there any blood relationship between you and your
24 step-dad Joe?
25 A No.

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1 Q Is there any blood relationship between you and Joe's sister
2 Amy?
3 A No.
4 Q Okay. Or any of their children?
5 A No.
6 Q All right. This day, do you actually remember that the day in
7 which you went to help Dan and Amy move was a Sunday?
8 A I don't remember that.
9 Q Do you remember it being the day before Labor Day?
10 A I don't remember.
11 Q Right before going back to school?
12 A Yeah, I remember it was before school.
13 Q Okay. Before school started, right?
14 A Yeah.
15 Q And you guys were also over there the day before, you and your
16 step-dad Joe, correct?
17 A I don't remember that.
18 Q No? You don't remember Joe calling Dan and Amy and saying,
19 "Hey, can we come over," you and him?
20 A No.
21 Q No? But when you were moving this was when they were moving
22 from Simonelli to Maple Island, correct?
23 A Yeah.
24 Q And this was a house they lived at before, correct?
25 A Where? What house?

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1 Q The new house that they were moving to?
2 A Yes.
3 Q It was actually an old house that they lived in?
4 A Yeah.
5 Q So this house was a place that you were already familiar with,
6 is that true?
7 A Yeah.
8 Q Okay. So you helped the family move, right?
9 A Yeah.
10 Q Odds and ends at that point, right?
11 A Yes.
12 Q And then you guys left for dinner. When I say "you guys," I
13 mean you and your immediate family, right?
14 A Yeah.
15 Q You guys went and had steaks, right?
16 A Yeah.
17 Q And during that dinner, you and your brothers ---- first of
18 all, your brother, you have ----- the oldest brother is Zane,
19 is that correct?
20 A Yeah.
21 Q And he's 15?
22 A Correct.
23 Q And there is Jayse, who's 11, right?
24 A Yeah.
25 Q And your whole family went out when you're eating steaks and

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1 you and your brothers decided to spend the night at Dan's
2 house, correct?
3 A Yeah.
4 Q And Joe called and asked if that was okay, right?
5 A Yeah.
6 Q And you wanted to spend the night at Dan's house, right?
7 A Yeah, I did.
8 Q So it wasn't like Dan was inviting you guys over, asking you
9 guys to stay, you and your brothers said, "I want to stay,"
10 correct?
11 A Correct.
12 Q And if you had not wanted to stay at Dan's house you would
13 have been free to say, "Look, I don't feel like going. I want
14 to go home with mom and dad," right?
15 A Yeah.
16 Q And that would have been okay?
17 A Um hum.
18 Q Correct?
19 A Yes.
20 Q And that's not what happened?
21 A No ---- wait. Can you ----
22 Q Did you ----- you didn't have any ---- when your brothers and
23 you wanted to go over and spend the night, you didn't have any
24 problem with going over there, correct?
25 A Yeah.

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1 Q You didn't, did you?
2 A No.
3 Q Okay. And so you remember being outside for the bonfire first,
4 right?
5 A Yes.
6 Q Okay. And you guys were ---- the bonfire is going and that's
7 part of the reason that you guys wanted to go over there,
8 right?
9 A Yes.
10 Q And you and your brothers and some of the other kids started
11 little fires in other places. Do you remember that?
12 A No, I don't remember that.
13 Q You don't remember people take and move burning embers and
14 logs from the fire and starting fires in other places in the
15 back yard?
16 A No.
17 Q Do you remember Dan getting mad and yelling at you guys?
18 A No.
19 Q No? Okay. At some point, though, it starts to get dark and
20 you guys go inside?
21 A Yeah.
22 Q And you go to the basement?
23 A Yes.
24 Q And you start playing hide and seek?
25 A Um hum. Yes.

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1 Q Can you tell us who all was playing hide and seek?
2 A It was me, my two brothers and all three of my cousins.
3 Q And when you say "all three of your cousins," you're talking
4 about Riley, right?
5 A Yeah.
6 Q That's Dan son from a previous marriage, right?
7 A Yes.
8 Q He's about ---- what is he? 12 or something like that? He's
9 the oldest of their kids?
10 A Well, they also have a daughter.
11 Q Angel, right?
12 A Yeah.
13 Q But Angel wasn't there?
14 A No.
15 Q Just Riley was the oldest for their kids there, right?
16 A Yeah.
17 Q And then there was Rowan, right?
18 A Yeah.
19 Q And Rowan was about six years old?
20 A Yeah.
21 Q And then there's the little girl, Alyssa, correct?
22 A Yeah.
23 Q Is there anybody that was playing hide and seek that we didn't
24 name?
25 A No.

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1 Q Okay. At some point you remember ---- and by the way, you guys
2 were playing hide and seek down the basement, correct?
3 A Yeah.
4 Q The basement is also the first floor, right?
5 A Correct.
6 Q It's what you call a walk-out, correct?
7 A Yeah.
8 Q Because it has ---- it's the basement, it's like you're going
9 down into the basement but it also has french doors that open
10 up that go to the outside ----
11 A Yeah.
12 Q ---- right?
13 A Yes.
14 Q Doors with windows in it, correct?
15 A Correct.
16 Q And once you're inside the basement there is ---- I want to
17 talk about what the basement looks like for a second. There is
18 a main light by the stairway going down to the basement,
19 correct?
20 A I'm not sure.
21 Q All right. Do you remember if any lights were on at all?
22 A I remem ---- I think ----
23 Q All right. If I showed you a picture of a basement stairway,
24 do you think you could tell us if that was the one?
25 A Yeah.

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1 Q All right.
2 MR. PRAIN: May I approach, Your Honor?
3 THE COURT: Yes, you may.
4 MR. PRAIN: Thank you.
5 BY MR. PRAIN:
6 Q All right, I'm going to show you what we -----
7 MR. PRAIN: Do we do defense one, two, three or A, B,
8 C?
9 THE COURT: A, B, C. I would prefer defense exhibits
10 to be identified by the alphabet and People's exhibits to be
11 identified numerically.
12 MR. PRAIN: Yes, sir.
13 (At 10:44 a.m., Defense proposed Exhibit A,
14 photograph, and proposed Exhibit B, photograph, were marked).
15 BY MR. PRAIN:
16 Q Okay. Now, Alexis, I'm going to show you what I have had
17 marked here as Defense proposed Exhibit A. Do you see this
18 picture?
19 A Yes.
20 Q All right. And what do you see in this picture?
21 A I see stairs and at the bottom there's a couch with ---- I
22 think that's where Alyssa was on it.
23 Q All right. Do you recognize where this is?
24 A Yes.
25 Q Is that the stairway going down to the basement where you guys

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1 were playing hide and seek?
2 A Yes, it is.
3 Q Okay. And is this a fair and accurate depiction of the way it
4 looked that night?
5 A Yeah.
6 Q All right.
7 MR. PRAIN: Your Honor, I'd move for admission of
8 Defense A.
9 MR. ROBERTS: No objection.
10 THE COURT: Okay, there being no objection,
11 Defendant's Exhibit A will be received.
12 MR. PRAIN: Thank you, Your Honor.
13 (At 10:45 a.m., Defense Exhibit A, photograph, was
14 received into evidence).
15 BY MR. PRAIN:
16 Q Now I want to show you what I've got marked here as proposed
17 Exhibit B. Do you also recognize this in this photo?
18 A Yes.
19 Q What's in that photo?
20 A There's a TV with the same couch across from it. And behind it
21 is like, like a table or bar type thing and then next to it is
22 where the rooms are supposed to be built.
23 Q Okay. And is that also the downstairs room where you guys were
24 playing hide and seek that night?
25 A Yeah.

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1 Q So this is like ---- is it fair to say that Exhibit A that you
2 looked at is what it looks like if you're going down the
3 stairway and then when you get downstairs that's what we're
4 looking at in Exhibit B?
5 A Yes.
6 Q So Exhibit B is the bottom of the stairs?
7 A Yes.
8 Q And is that a fair and accurate depiction of the way things
9 looked that night?
10 A Yeah.
11 Q All right. And was the TV there? Is that ----
12 A Yes, it was.
13 Q I'm sorry, I kind of cut you off your answer. Was the TV right
14 there?
15 A Yes, it was.
16 Q And was this couch right here?
17 A Yes.
18 Q Okay. And does that appear to be a fair and accurate depiction
19 of the basement that evening?
20 A Yes, it is.
21 Q Okay. Thank you.
22 MR. PRAIN: I'd move for it's admission, also.
23 Defendant's B.
24 MR. ROBERTS: No objection.
25 THE COURT: There being no objection to Defendant's

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1 Exhibit B, that will likely ---- likewise be received into
2 evidence).
3 MR. PRAIN: Thank you.
4 (At 10:46 a.m., Defendant's Exhibit B, photograph,
5 was received into evidence).
6 BY MR. PRAIN:
7 Q All right, in Exhibit A and B you saw a light on by the
8 stairway, correct?
9 A Correct.
10 Q That light was on that night, right?
11 A Yes.
12 Q Okay. And there's some couches down there. We talked about the
13 one couch. Is there another couch?
14 A Yes, there is.
15 Q Okay. Where's the other couch in relation to the couch that we
16 see in Exhibit B?
17 A It ----
18 Q I can show you Exhibit B if you need to see it. I know we took
19 it away from you.
20 A It was on the right of, like the right side of the TV.
21 Q It's on the right side of the TV. So if we're looking at
22 Exhibit B here, which I'm showing you this for the record,
23 it's next to the TV. Is it kind of where my pen is pointing?
24 A No. It's on the other side.
25 Q It's on the other side. So if you're standing ---- if you're

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1 looking directly at the TV, the other couch is on your right
2 hand side?
3 A Yes.
4 Q Fair statement? Okay, thank you.
5 MR. PRAIN: Here you go, Judge. Sorry.
6 (Defense Exhibits A and B were returned to Judge).
7 BY MR. PRAIN:
8 Q When everybody starts playing hide and seek, you said that all
9 the kids were playing, including you, right?
10 A Yes.
11 Q At some point do you remember somebody asking Dan to play hide
12 and seek?
13 A No. I just remember him just playing along.
14 Q Okay. And he does ---- he goes ahead and he plays hide and
15 seek for awhile, right?
16 A Yes.
17 Q Everybody keeps playing for awhile, true?
18 A Yes.
19 Q And then there comes a point when you go to a couch, right?
20 A Yeah.
21 Q Which of the two couches that we talked about do you go to?
22 A I go to the black one on the right of the TV.
23 Q Okay. Is that the same size couch or a different size couch
24 than the other one?
25 A It's a different size.

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1 Q Is it bigger or smaller?
2 A Smaller.
3 Q Can we call it the small couch?
4 A Yes.
5 Q All right. How many people would sit on this small couch? How
6 many cushions does it have?
7 A It has two.
8 Q Okay. And when you go on that couch ---- by the way, I should
9 have asked this, but when you're sitting in that couch is it
10 facing directly toward the other couch? You said it was across
11 from it?
12 A Yes.
13 Q Okay. So if you're sitting on the little couch you're looking
14 right at the people who are in the big couch, correct?
15 A Correct.
16 Q And the people in the big couch are looking right at the
17 people in the little couch?
18 A Yes.
19 Q Okay. And they're maybe four or five apart?
20 A Yeah.
21 Q Fair?
22 A (Witness nodded head).
23 Q Okay. And the TV was on?
24 A Yes, it was.
25 Q When you go and sit on the couch, is your head ---- how is

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1 your body positioned when you ----- when you go to the couch?
2 A I was laying on the couch so my head was like on the side
3 where the TV was and my feet was on the other side of the end
4 of the couch.
5 Q Okay. So your feet are more toward the stairway?
6 A Yes.
7 Q Are you the only person on the couch?
8 A Yes.
9 Q How many couches of the two couches were you actually on that
10 night?
11 A I was only on that one.
12 Q Okay. How many couches were you on with Dan that night?
13 A One.
14 Q And just the little couch, right?
15 A Yes.
16 Q Okay. So you go and you lay down on the little couch with your
17 head by the TV, and do you fall asleep?
18 A Yes, I do.
19 Q Do you fall asleep ---- at some point you say that Dan comes
20 and sits on the couch, right?
21 A Yeah.
22 Q And when you say he sits on the couch, is that a correct
23 statement to say that he's sitting and you're laying, right?
24 A Can you repeat that?
25 Q Yes. Well, let me ask a better question for you. When you're

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1 on the couch you're laying down first alone, correct?
2 A Yeah.
3 Q And then you say at some point Dan comes over and he comes to
4 the couch, is that right?
5 A Yes.
6 Q When Dan comes to the couch, are you awake or are you asleep?
7 A I was awake.
8 Q Okay. So you're awake, you and Dan are on the couch. You said
9 that you were laying. Do you move at all when he gets on the
10 couch?
11 A He moves my legs and like puts them on top of his lap.
12 Q He puts them ----- so he sits down on the couch and he lifts
13 up your legs?
14 A Yes.
15 Q Okay. And you said he put your legs on his lap?
16 A Yes.
17 Q And why ---- do you have any idea why he was sitting there or
18 what he was doing?
19 A He and a few of the other kids, I'm not sure which ones, they
20 were still playing hide and seek and ----
21 Q They were still what?
22 A They were playing hide ---- they were still playing hide and
23 go seek and I guess that was his hiding spot.
24 Q So you think he was trying to hide there?
25 A Yes.

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Q Okay. Not a very good hiding spot, though, for a full sized person?
A Yeah.
Q But the hide and seek was still going on around you, correct?
A Yeah.
Q At the time when you and Dan ----- when you say that you're on the couch and he's on the couch also, do you know where everybody else was at?
A I know Alyssa, Rowan, and my little brother Jayse were on the couch right across from me.
Q Okay. So they're looking right at you guys, correct?
A At the TV.
Q At the TV?
A Yes.
Q They were playing a movie, right?
A Yes.
Q Little Mermaid?
A Yeah.
Q And do you know where Riley and Zane are at?
A I think they ---- no, I don't remember.
Q Do you think maybe they were still playing hide and seek?
A They were either playing hide and go seek or messing around in the other, like, part of the room.
Q But you couldn't see them?
A No.

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1 Q They could be upstairs?
2 A No, cuz I could hear them.
3 Q Okay. You could hear them but you couldn't see them, but the
4 other three little kids are on the couch?
5 A Yes.
6 Q Okay. And is it then after that that you say that you fell
7 asleep?
8 A Yeah.
9 Q Okay. Do you remember ----- do you not remember you ever
10 sitting on the big couch on one end and then Dan sitting on
11 ---- the same big couch on the other side with Alyssa on his
12 lap?
13 A No, I don't remember that.
14 Q You don't remember Dan sitting on the same couch as you, which
15 was the big couch, when Rowan was sitting down by his side?
16 A No.
17 Q You don't remember Dan getting up and going over to the little
18 couch?
19 A I ---- I remember him going to the couch, yes.
20 Q Okay. Do you remember Dan getting up from the big couch, going
21 over to the little couch before you even got there?
22 A No.
23 Q Okay. Do you remember a time ---- do you remember any time on
24 either couch where Alyssa comes and pushes Rowan off of Dan's
25 lap and sits down?

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1 A No, I don't remember that.
2 Q Okay. So it's your testimony that you came to this couch -----
3 excuse me, that Dan came to the couch where you were at, not
4 the other way around, correct?
5 A Yeah.
6 Q And no matter what anybody says that's the way that you
7 remember it, true?
8 A Yes.
9 Q Okay. So you claim then that he had put your ---- and we're
10 going back to when he's got ---- your legs are above his, all
11 right?
12 A Yes.
13 Q Then you fall asleep, correct?
14 A Yeah.
15 Q How long do you think you were asleep for?
16 A Approximately like ten minutes.
17 Q Okay. And you then claim that you woke up to Dan touching you?
18 A Yes.
19 Q Is that what woke you up or did you wake up for something
20 else?
21 A That is what woke me up.
22 Q Okay. Now let's see if I got this right here. The first place
23 that Dan touches you is where?
24 A My legs.
25 Q When you say your legs, do you mean both of them?

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1 A Yes.
2 Q And is he using his hands?
3 A Yes.
4 Q Is it one hand or both hands?
5 A I don't remember.
6 Q Okay. Were your eyes open or closed?
7 A They were closed.
8 Q So you didn't open up your eyes at that ---- did you open up
9 your eyes at any time during this whole event?
10 A Yes.
11 Q Okay. But you remember ---- you have said to people before
12 that you ---- that he thought you were sleeping?
13 A Yes.
14 Q But you did open up your eyes at some point, right?
15 A Yes.
16 Q Was it ---- at what point do you open up your eyes?
17 A I don't remember.
18 Q Okay. Well, do you remember ---- you're able to remember that
19 you opened your eyes. What did you see when you opened your
20 eyes?
21 A I just seen like the TV light flashing on the three little
22 ones on the couch.
23 Q But you don't look at Dan?
24 A No.
25 Q But he's touching you?

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1 A Yes.
2 Q Okay. After you say that he touches your legs the next place
3 that he touches was where? And I'm sorry because I know Mr.
4 Roberts asked you this but I want to make sure that we've got
5 it clear here.
6 A My vagina area and my chest area.
7 Q Okay. And your chest area. And you didn't remember which was
8 first?
9 A No.
10 Q Okay. Did at any time that Dan was touching your legs, when
11 he's touching your legs is his hands above your clothing or
12 under your clothing?
13 A Under.
14 Q Okay. You were wearing shorts?
15 A Yes.
16 Q Pink, correct?
17 A Correct.
18 Q You had underwear on too, right?
19 A Yes.
20 Q And you also had spandex on, is that true?
21 A I don't remember.
22 Q Do you remember telling people before that you were wearing
23 spandex under your shorts but above your underwear?
24 A I don't remember.
25 Q Is it possible that you were?

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1 A Yes, it's possible.
2 Q Did you change your clothes at some point that night?
3 A Yeah.
4 Q Okay. And what did you change from? What were you wearing
5 before?
6 A I was wearing sweatpants. I changed from sweatpants to my
7 shorts.
8 Q To your shorts?
9 A Yes.
10 Q Okay. Do you own spandex that you sometimes wear under your
11 shorts but above your underwear?
12 A Yes.
13 Q Okay. And what are they? Are they like spandex type leggings,
14 I guess you call them or ----
15 A They're ---- can you repeat that?
16 Q Are they like ---- when I say ---- when we talk about the
17 spandex that you have that you sometimes wear under your
18 shorts but above your underwear, are they like leggings or are
19 they spandex shorts? What exactly are they?
20 A They're like shorts, yes.
21 Q Like longer shorts than the shorts you have on over them,
22 right?
23 A No, they're shorter.
24 Q Okay. So then you have three layers of clothing on, correct?
25 A Yes.

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1 Q And when he's touching your legs his hand is underneath all
2 three layers?
3 A Yes.
4 Q Okay. Both of his hands or one hand?
5 A I don't remember.
6 Q And when ---- the next thing you say is that he touches your
7 vagina area, correct?
8 A Yes.
9 Q Was ---- when you say that that happens, is it one hand or
10 both hands? Do you know?
11 A It was one.
12 Q Was what hand? Was it his right hand or his left hand?
13 A I don't recall.
14 Q Can you picture it and try to give us which you think it might
15 be?
16 A I don't remember.
17 Q Okay. But you're sure it was one hand?
18 A Yes.
19 Q And is that happening over your clothes or under your clothes?
20 A Under my clothes.
21 Q Is it under your ---- all three layers of your clothes or
22 however many layers?
23 A Yes.
24 Q I believe you told Mr. Roberts it was his skin touching your
25 skin, correct?

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A Yes.
Q Okay. And this is all happening on the couch across from where the other three little kids are watching Little Mermaid?
A Yes.
Q Four to five feet away, correct?
A Yes.
Q Now you remember ---- you've told your story in this case to a number of different people throughout the months that have gone by, is that a fair statement?
A Yes.
Q The first people that you told were ----- you called your mom, right?
A Yes.
Q Well, let me go through. You had ---- after Dan left, you said he told all the kids, "time for you to go to bed," right?
A Yes.
Q Takes Rowan and Alyssa, his two little kids upstairs, correct?
A Correct.
Q And all the other kids go upstairs, right?
A No. Only Rowan and Alyssa go upstairs.
Q Only Rowan and Alyssa go upstairs. So who's still downstairs when Rowan, Dan and Alyssa go upstairs?
A My two brothers and Riley are still downstairs.
Q Your two brothers, Jayse, Zane and Riley are still there, correct?

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1 A Yes.
2 Q Okay. Is there any time ---- you left the basement eventually,
3 right?
4 A Yes.
5 Q Is there any time in the basement that you're alone?
6 A No.
7 Q Did you try to call your mom while you were in the basement?
8 A I checked for service, but.
9 Q Okay. Did you have your cell phone with you the whole time?
10 A It was like ---- it was setting on the ground charging.
11 Q It was near you?
12 A Yes.
13 Q So it was within your reach, correct?
14 A Yes.
15 Q And you looked at it and it said no service, right?
16 A Yes.
17 Q So you go upstairs, correct?
18 A No.
19 Q Where did you go?
20 A I go out of the front doors.
21 Q And when you say the front doors, are we talking about the
22 french doors that are downstairs?
23 A Yes.
24 Q With the window and the blinds, right?
25 A Yes.

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1 Q So you ---- you walk outside. As you're walking out that door,
2 where is Riley and Zane and ---- I keep forgetting names here.
3 A Jayse.
4 Q And Jayse. The three that you said were still down the
5 basement.
6 A Jayse was on the couch across from the TV and Riley and Zane
7 were laying on the floor like where the other rooms are
8 supposed to be built.
9 Q Okay.
10 A Like in a sleeping bag or blankets or something.
11 Q You actually saw them laying there?
12 A Yes.
13 Q But you walked past them, correct?
14 A Yeah.
15 Q You walk out the door, right?
16 A Yeah.
17 Q It's around 1:00 a.m. or after, correct?
18 A Correct.
19 Q Riley and Zane are awake, correct?
20 A Yes.
21 Q They don't say anything to you?
22 A No.
23 Q You don't say anything to them?
24 A No.
25 Q Even though Dan and everybody else was already gone, correct?

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1 A Correct.
2 Q You go outside and you ---- you have you phone, right?
3 A Yes.
4 Q You see at some point that you have service, correct?
5 A Correct.
6 Q And when you see that you have service, what do you do?
7 A I called my mom.
8 Q Okay. And she answers?
9 A Yes.
10 Q First time?
11 A Yes.
12 Q By the way, where were your mom and Joe that night?
13 A They were at my house.
14 Q Okay. Isn't it true that your mom and Joe went out
15 socializing and drinking that night?
16 A I don't believe so.
17 Q Do you remember seeing your mom's Facebook post from that
18 night?
19 A No.
20 Q You didn't look at her Facebook at all?
21 A No.
22 Q You don't remember communicating with her from Facebook or
23 social media?
24 A No.
25 Q Okay. You're ---- as far as you're concerned, you think that

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1 they went home?
2 A Yes.
3 Q The whole time?
4 A Yes.
5 Q And you're ---- you call your mother and you know ----- I
6 think you told Mr. Roberts it was about 1:00 a.m. when you
7 called your mom?
8 A Yes.
9 Q She picks up the phone, right?
10 A Yes.
11 Q And you're in an excited state right then, right?
12 A Yes.
13 Q Excited because of what just happened to you, correct?
14 A Yes.
15 Q And you tell her about the things that are making you in that
16 excited state?
17 A Yes.
18 Q And what do you tell your mom?
19 A I told her that Dan touched me.
20 Q Okay. What else did you say to her?
21 A I just kept repeating it because I was freaking out.
22 Q Okay. So the first person that you tell is your mom and your
23 words to her are "Dan touched me?"
24 A Yes.
25 Q Okay. You figured that she knew what you meant?

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1 A Yes.
2 Q And she becomes excited, right?
3 A Yes.
4 Q And she's upset, true?
5 A True.
6 Q And what did she tell you that she's going to do?
7 A She's going to come pick me up.
8 Q Okay.
9 A Me and my brothers.
10 Q Did she tell you that she's going to call the police?
11 A No.
12 Q All right. She tells you to go back to the house, right?
13 A Yeah.
14 Q And you do go back to the house?
15 A Yes, I do.
16 Q When the police ----- who got there first, your parents ----
17 and when I say your parents, I mean your mom and your
18 step-father Joe or did the police come first?
19 A My mom and step-dad.
20 Q They pull up in the truck, right?
21 A The ----
22 Q Or their vehicle, I'm sorry. They pull up in their vehicle out
23 on Maple Island, right?
24 A Yeah.
25 Q And you get in, correct?

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1 A Yes.
2 Q With your brothers ---- with your two brothers, correct?
3 A Yeah.
4 Q The three of you sit in the back seat, right?
5 A Yes.
6 Q And your mom Tabatha and Joe, sometimes they're in the car and
7 sometimes they go stand outside, but everybody's waiting by
8 the car, right?
9 A Yeah.
10 Q And during that time you guys discuss what had just happened,
11 right?
12 A We ----- we didn't really discuss it.
13 Q Okay. When you say you didn't really discuss it, do you think
14 that Zane and Jayse, if you know, had any idea why all of a
15 sudden you guys were going to spend the night but now mom and
16 dad are there to pick everybody up?
17 A No, they didn't know what was going on.
18 Q They had no idea what was going on?
19 A No.
20 Q All right. Nobody asked any questions?
21 A No.
22 Q They just got in the car?
23 A Yes.
24 Q So you didn't tell your story to anybody at that point, right?
25 A Yeah.

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1 Q Do you know how Zane and Jayse knew to get out of the house
2 and get in the car?
3 A I told them to wake up because they were coming to pick us up.
4 Q Okay. So after you go outside and you call your mom you go
5 back in the house, correct?
6 A Correct.
7 Q Because your mom told you to go back in the house?
8 A Yes.
9 Q Okay. Your mom tells you to go back to the house where to go?
10 A Yes.
11 Q The whole time when you went back to the house Dan was inside
12 of the house, correct?
13 A Correct.
14 Q You remember when you're waiting for the police ----- you knew
15 the police were coming, right?
16 A I would ---- I didn't know.
17 Q Okay. What were you guys ---- did you have any idea of what
18 you guys were waiting for when all three of you were in the
19 back of the car and you guys were parked out by the road?
20 A Yeah, when they picked us up they told us that the police was
21 coming.
22 Q So you did know that the police were coming, right?
23 A Yeah.
24 Q Okay. Now during that time a couple of people come out from
25 the house, right?

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1 A I don't remember.
2 Q Do you remember Dan coming out of the house and going to talk
3 to Joe, right?
4 A Yes.
5 Q Dan comes out of the house, he goes up to Joe and says,
6 "What's going on," correct?
7 A I don't remember what he said.
8 Q Joe didn't want to talk to him, do you remember that?
9 A Yeah.
10 Q And he told him, "It's none of your business," right?
11 A Yes.
12 Q And Dan went back to the house, correct?
13 A Correct.
14 Q He sat on the porch?
15 A I'm not sure where he went.
16 Q Okay. Amy came out also, right?
17 A I don't remember.
18 Q You don't remember Amy coming out ---- your Aunt Amy coming
19 out and trying to talk to ---- or not your aunt, but Amy
20 coming out and trying to talk to Joe?
21 A No, I don't remember that.
22 Q Okay. The ---- you remember the police coming?
23 A Yes.
24 Q There was two police officers, right?
25 A I believe so.

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1 Q Okay. They came in one car, right?
2 A Yes.
3 Q And one of them spoke to you, correct?
4 A No.
5 Q You don't remember speaking to a police officer?
6 A My mom ---- well, my mom spoke to them.
7 Q Okay. Do you recognize the police officer in court here today?
8 A Yes.
9 Q All right. And could you point to that person and tell us what
10 he's wearing?
11 A He's wearing, like a plaid, blue and white shirt with a gray
12 and dark blue tie.
13 MR. PRAIN: Your Honor, may the record reflect
14 identification?
15 THE COURT: It's looks like she's identifying the
16 Trooper to me.
17 MR. PRAIN: Yes, sir.
18 BY MR. PRAIN:
19 Q Now that Trooper or any other police officer never talked to
20 you at the roadside?
21 A No, not that I remember.
22 Q Okay. So you don't remember giving your story to that person
23 if that happened?
24 A No.
25 Q But they set up an interview for you and they told you you're

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1 going to go and speak to a lady at a place called Child Abuse
2 Council, right?
3 A Yes.
4 Q And you went there on September 26th, right?
5 A I don't remember what day it was.
6 Q It's a couple weeks later, right?
7 A Yes.
8 Q And you went there in the day time and you went in a little
9 room and talked to a lady name Diane?
10 A Yes.
11 Q Do you remember that?
12 A Yes.
13 Q Do you remember Diane well?
14 A Yeah, I remember her.
15 Q And she asked you some questions about your life and your
16 biography and your school and things, correct?
17 A Yeah.
18 Q And then she asked you some questions about telling the truth
19 and she said, "I'm a person who talks to teenagers about
20 places on their body and things like that," right?
21 A Yes.
22 Q She asked you if you know why you're here?
23 A Yes.
24 Q And you told her?
25 A I told her, yes, I did.

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1 Q Okay. And you said, "Because Dan assaulted me."
2 A Yes.
3 Q And she wanted to know what happened, correct?
4 A Yeah.
5 Q And you went through the story with her, right?
6 A Yes.
7 Q And the first time you told the story to her she just kind of
8 let you talk and go through it on your own without asking any
9 questions?
10 A Well, she asked me ---- like, I didn't explain it very well so
11 she asked a few questions.
12 Q And when you say you didn't explain it very well, why do you
13 say that?
14 A I didn't really go into that much detail.
15 Q Okay. But you do remember there was a couple ---- first you
16 went through it on your own where you just kind of gave a
17 narrative and she sat and listened ----
18 A Yeah.
19 Q ---- correct?
20 A Yes.
21 Q Then you went through the story again and you told it to her a
22 second time and that's when she really started to ask some
23 questions, true?
24 A I only told it to her once.
25 Q You only told her the story once, right?

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1 A Yes.
2 Q So if Diane Adams, the lady that you spoke to, remembers you
3 telling it to her two times, that's not right?
4 A Yeah.
5 Q Because it was only one time?
6 A That I remember, yes.
7 Q Okay. That you ---- when you say that you remember, is it
8 possible you told her two times?
9 A I'm pretty sure I only told it to her once.
10 Q Okay. All right. And when you talked to Diane the very first
11 time ---- well, strike that. When you were speaking to Diane,
12 she wanted to ----- she asked you to tell her as much detail
13 as you possibly could, correct?
14 A I'm not sure.
15 Q All right. But she ---- she asked you a lot of questions about
16 the details?
17 A Yes.
18 Q All right. And you thought every time she asked you a question
19 about what happened you pictured it in your mind, thought
20 about it, and you gave her the best answer you could?
21 A Yes.
22 Q And you told her the truth, right?
23 A Yes.
24 Q All of the truth, yes?
25 A Correct.

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1 Q Okay. And one of the things that she asked you was some of
2 the same questions that Mr. Roberts and I asked you today. She
3 wanted to know the order and sequence of the different times
4 that you say that Dan touched you, correct?
5 A Yes.
6 Q And you told Diane that first he touched your legs, right?
7 A Yes.
8 Q And you told her that he touched around your vagina area but
9 not in your actual vagina. Do you remember telling her that?
10 A Yes.
11 Q Okay. And then after that you said that ----- she asked you
12 how long he did that for, right?
13 A Yeah.
14 Q How long did he do that for?
15 A Like, about ten minutes.
16 Q Okay. And then you said after that you said that he touched
17 your breast, right?
18 A Yes.
19 Q Do you remember telling Diana that he touched your breast
20 after he touched your vagina area?
21 A I don't remember cuz he did it -----
22 Q Okay. But you told Diana about Dan saying everybody go to bed,
23 right?
24 A Yes.
25 Q And then leaving, correct?

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1 A Correct.
2 Q Now you told Diane ----- you never told Diane that he ----
3 well, what you said was he touched the area around your vagina
4 "but not my actual vagina," right?
5 A Yes.
6 Q Okay. And that was true, correct?
7 A True.
8 Q And that's different than what you said today, correct?
9 A No.
10 Q It's not different?
11 A No.
12 Q You told Diane the same things that you're telling the court
13 today?
14 A Yes.
15 Q Okay. At no time in your conversation ---- well, strike that.
16 Do you remember there was a point in your conversation with
17 Diane where she was asking you where the other kids were,
18 correct?
19 A Yes.
20 Q And you told her the same thing that you told the court today,
21 that the other children were directly across on the couch with
22 the TV on, right?
23 A Correct.
24 Q And the stairway light on, correct?
25 A Yes.

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1 Q And she was a little surprised by that. Do you remember her
2 reaction?
3 A No.
4 Q Okay. Well, she asked you ---- she said, "Well, how could it
5 be that nobody saw what happened," right?
6 A I don't remember.
7 Q You don't remember Diane asking how ----- do you remember her
8 asking you, "Did anybody else see what happened?"
9 A I don't remember her asking me that.
10 Q Okay. You remember that ---- if you know ---- did you talk to
11 Diane about a blanket?
12 A Yeah.
13 Q You told Diane about the blanket, correct?
14 A Yes.
15 Q You told her ----- do you remember telling Diane about the
16 blanket where she specifically asked, "How is it that nobody
17 else saw this happening?
18 MR. ROBERTS: Well, Your Honor ----
19 MR. PRAIN: I withdraw that. That was a bad question.
20 I mis-stated it.
21 MR. ROBERTS: Well, I'm going to object to hearsay at
22 this point. I've let a little bit of this go. I understand
23 that there might be some issues with some prior inconsistent
24 statements, but we're clearly into hearsay and I don't know
25 ------ I'm not even certain what Mr. Prain is referring to at

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1 this point. If he's looking at the same police report
2 I'm looking at, I don't know where this question is coming
3 from.
4 THE COURT: Well, it sounds like he was asking for
5 Diane Adams' statement to me.
6 MR. PRAIN: Only notes there. Only if they give
7 context to what her answer was. It is along the lines of
8 impeachment or actually refreshing recollection if you want to
9 count that, but ----
10 THE COURT: Sure. And I guess I'm going to ---- I'm
11 going to overrule the objection. If it's in the context of an
12 attempt to impeach the witness with a prior inconsistent
13 statement, the statement of the questioner would be admissible
14 to give context to the witness's answer, for certain.
15 But, Mr. Prain, I guess this line of questioning is
16 certainly relevant in a trial setting ----
17 MR. PRAIN: Sure.
18 THE COURT: ---- but this is a preliminary
19 examination.
20 MR. PRAIN: I'll wrap it up with one question, Judge.
21 THE COURT: And so I just would ask you how much
22 cross exam do you want. I'm going to give you leeway to cross
23 exam. I've given, you know, 45 minutes of cross examination.
24 But this is a preliminary examination, not a trial. We don't
25 have a jury here.

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1 So, go ahead.
2 MR. PRAIN: I understand.
3 THE COURT: And for ---- for the record, I'm
4 overruling the objection, but I just want to caution you that
5 we are at a preliminary examination, not a trial.
6 MR. PRAIN: Understood. I understand your point,
7 Judge.
8 THE COURT: All right.
9 MR. PRAIN: And I'm going to wrap it up in one
10 question.
11 BY MR. PRAIN:
12 Q You didn't bring up the topic of a blanket to Diane Adams
13 until she specifically asked you, "Did anyone else see this?"
14 That's when you ---- that's the first time you ever said
15 anything about an alleged blanket, correct?
16 A I don't remember.
17 Q Okay. But this blanket, you called it "my blanket," your
18 blanket, correct?
19 A Yes.
20 Q Can you describe this blanket for us?
21 A It was, like a magenta color and it was like plaid with
22 magenta, black and white.
23 Q And do you know where this blanket is today?
24 A I left it at their house.
25 Q Okay. Did anybody ever go back and look for it?

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1 A I don't ---- I don't ---- I don't think so.
2 Q You have no idea where it is?
3 A No.
4 Q And to your knowledge, no police officer or anybody ever asked
5 "Can somebody go get this blanket," right?
6 A Can you repeat that?
7 Q Did anybody, to your knowledge, did the police or anybody ever
8 ask to get that blanket as evidence?
9 A I don't remember.
10 Q Okay. Fair enough. And then finally, Diane Adams, one of the
11 things she wanted to know was, was there other times that Dan
12 touched you, right?
13 A Yes.
14 Q Okay. And you ---- when she asked you that question you
15 understood that to mean not just on this particular day but
16 other days, too, right?
17 A Yes.
18 Q And you thought hard about that, correct?
19 A Yeah.
20 Q And you gave her a couple of examples you thought that he had
21 crossed the line, right?
22 A Yeah.
23 Q But at no point did you say anything about an incident that
24 occurred with a bon ---- while you guys were outside earlier
25 that evening, right?

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1 A Can you -----
2 Q Well, let me withdraw the question. I'm sorry. You never told
3 ----- when Diane Adams asked you to think of all the different
4 times when you say that Dan touched you, you never said
5 anything about Dan drying his hands on your shirt, right?
6 A No.
7 Q In fact, you've never said that at all, have you?
8 A No, I haven't.
9 Q So that didn't happen, did it?
10 A Not that I remember.
11 Q All right. Have you ever heard anything about that before?
12 A No.
13 Q At any time while you claim that Dan was touching you,
14 touching you on any of your private parts of your body, are
15 you saying anything to anyone?
16 A No.
17 Q You're not saying to Dan even, "Hey, what are you doing," or
18 anything like that?
19 A No.
20 Q Okay. And during the entire time it's directly across from the
21 couch with the other children, correct?
22 A Yes.
23 Q From start to finish, right?
24 A Yes.
25 Q You're not yelling and screaming, correct?

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1 A Correct.
2 Q Not getting up or trying to move away, right?
3 A Yeah.
4 Q You've also said that he was trying to move your legs, right?
5 A Correct.
6 Q You claim that he was moving your legs to get to you easier,
7 is that true?
8 A Yes.
9 Q And during that time, even though your legs are moving ----
10 well, can you tell us real quick, how ---- how were your legs
11 moving?
12 A I don't ---- I don't remember.
13 Q Okay. But you do remember saying he was moving your legs to
14 get to you easier, right?
15 A Yes.
16 Q But you're unable to tell us today how he was moving your
17 legs, right?
18 A He was, like ----- he was, like, repositioning them. So, like,
19 he was like moving them so his hand can get, like, to me
20 easier.
21 Q Okay. When you say he was repositioning them, is there any
22 description you can give the court as to how he was
23 repositioning them?
24 A Like, they were just ---- like, they were just like laying
25 straight and he just kept moving them up, and like so he can

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1 move his hands more.
2 Q When you say he's moving them up, can you give us any better
3 description of what you mean by that?
4 A Umm, like, he just kept like lifting them.
5 Q Both of them?
6 A Yes.
7 Q At the same time?
8 A Yeah.
9 Q Okay. By grabbing ---- where is his ----- where is he touching
10 your legs in order to lift them up?
11 A Just like around my legs. I'm not sure where.
12 Q Okay. Is there anything else that you remember about him
13 moving ----- any other specifics that you remember about when
14 you claim that he was moving your legs?
15 A No.
16 Q All right. Well, at no time did Dan ever tell all the kids to
17 go upstairs or create any opportunity to be alone with you in
18 the basement, correct?
19 A Correct.
20 Q You were never alone with him in the basement?
21 A Yeah.
22 Q Let me ask a better question. You ---- the truth is you were
23 never alone with Dan in the basement, there was always at
24 least one or two other people there at all times, correct?
25 A Yes.

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1 Q He never said, "Everybody go upstairs," and then try to touch
2 you afterwards, correct?
3 A Correct.
4 Q He never shut the stairway light off, right?
5 A I don't remember.
6 Q He never turned the TV off in order to touch you and him make
7 it less lit up down there, right?
8 A Right.
9 Q Okay. All ---- at all times the TV was on?
10 A Yes.
11 Q And he never at any point said to you anything like, "This is
12 going to be our secret," right?
13 A I don't remember.
14 Q Okay. If you ---- if that had happened that would be something
15 pretty important, right?
16 A Yes.
17 Q You would have told Diane Adams about that, correct?
18 A Yes.
19 Q He never said, "I'm going to do this to you." He never
20 threatened you or anybody else if you told what you claim
21 happened, correct?
22 A Correct.
23 Q All right. Do you remember, did the police ever talk to Dan?
24 A I don't remember.
25 Q Did the police ----- any police officer, to your knowledge,

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1 ever go to your brothers and say, "Hey, what did you guys
2 see?"
3 A Yes.
4 Q When did that happen?
5 A I don't remember when it happened.
6 THE COURT: No, Mr. Prain, I'm going to object here.
7 What an officer did with another witness is really ----- and I
8 hate to interrupt, but it is not relevant -----
9 MR. PRAIN: I understand.
10 THE COURT: ---- for a preliminary examination.
11 MR. PRAIN: I understand.
12 THE COURT: I mean, it just isn't, and so I'm going
13 to ask you to move on to any relevant matter for preliminary
14 examination.
15 BY MR. PRAIN:
16 Q One of the final things I'm going to ask you, Alexis, is that
17 throughout this case ----- well, when you went to talk to
18 Diane, for example, she wanted to know if anybody else was
19 claiming that Dan had done anything to them, right?
20 A Yes.
21 Q And one of the people that you alleged had told you that Dan
22 had touched them was Madison, right?
23 A No.
24 Q You don't remember telling Diane, "Madison and I had a
25 conversation where Madison told me that he touched her?"

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A No.
Q You never said that?
A No.
Q And you're sure?
A Yes.
Q So that conversation never happened, correct?
A Correct.

MR. PRAIN: Your Honor, that's all I have.

THE COURT: All right. Thank you. Any redirect, Mr. Roberts?

MR. ROBERTS: Just a couple of quick.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. ROBERTS:

Q Alexis, Mr. Prain was asking you about your conversation with Diane Adams and whether or not you told the story and your testimony was that you didn't give her much detail when you told the story, is that right?
A Yes.
Q Did you give her more detail as she was asking you questions?
A Yes.
Q So in your mind are you telling the story twice or are you just telling the story once with more detail?
A Once with more detail.
Q All right. And specifically, Mr. Prain was asking you about

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1 whether or not ----- your first initial statement was that he
2 was touching you just around the area of your vagina but not
3 your actual vagina. Do you remember that?
4 A Yes.
5 Q Do you remember whether you told Diane Adams that he touched
6 you inside your vagina as well?
7 A I don't remember.
8 Q All right. Would it refresh your recollection to look back at
9 the report Diane had about your interview if you looked at
10 that report?
11 A Yes.
12 Q Okay. If you'll just take a moment and then just review the
13 following part of this paragraph here. And don't say anything,
14 just let us know when you've had a chance to read that. Okay?
15 (Prosecutor Roberts provided report to witness).
16 A (Witness reviewed report).
17 Q You've had an opportunity to review that?
18 A Yes.
19 Q And do you remember now whether or not you said anything to
20 Diane about him actually touching inside the lips of your
21 vagina?
22 A Yes.
23 Q Did you tell her that?
24 A Yes.
25 MR. ROBERTS: I have no further questions.

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1 THE COURT: All right. Anything further, Mr. Roberts?
2 MR. ROBERTS: No.
3 THE COURT: All right. May the witness stand down and
4 be excused?
5 MR. ROBERTS: Yes.
6 THE COURT: All right.
7 MR. PRAIN: I don't get ---- is there any chance I
8 could get a couple follow-up questions?
9 THE COURT: No.
10 MR. PRAIN: Very briefly.
11 THE COURT: No. No, you had an hour of cross
12 examination.
13 MR. PRAIN: No, I understand. Just a couple of things
14 I wanted to clarify for the probable cause.
15 THE COURT: Well, go ahead. I'll let you.
16 MR. PRAIN: Okay. Thanks, Your Honor. And it goes
17 ---- it goes to the penetration aspect.
18 THE COURT: Okay.
19 RECROSS EXAMINATION
20 BY MR. PRAIN:
21 Q Alexis, Mr. Roberts ---- sorry ---- was just asking you when
22 ---- how he refreshed your recollection with that report,
23 correct?
24 A Yes.
25 Q And you got a chance to read what it actually said there?

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1 A Yes.
2 Q Okay. And what that says, I think ---- and I don't know
3 exactly what part you looked at so you might have to correct
4 me. But what you did say to her, according to this report, is
5 Alexis was asked to clarify where he rubbed her. You just read
6 that, right?
7 A Yes.
8 Q Okay. And do you remember Diane asking that question?
9 A Yes.
10 Q And according to this report which refreshed your
11 recollection, the answer that it has was, "I don't know how to
12 explain it," was part of it, correct?
13 A Yes.
14 Q And you also read where you said, "Not actually my vagina, but
15 near it and in between," right?
16 A Correct.
17 Q But you used the words, "Not my actual vagina," correct?
18 A Correct.
19 Q And nowhere do you use the word lips or labia or anything like
20 that, correct?
21 A Correct.
22 Q And you were unable to remember that until Mr. Roberts
23 refreshed your recollection with this document, correct?
24 A Yes.
25 Q As far as you're concerned, is this document an accurate

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1 recitation of how that part of the conversation went?
2 A Yes.
3 Q So you agree with it a hundred percent?
4 A Yeah.
5 Q Is there anything important missing?
6 A Not that I can think of.
7 Q All right.
8 MR. PRAIN: Thank you, Ma'am.
9 THE COURT: All right. Any redirect?
10 MR. ROBERTS: No.
11 THE COURT: All right. May the witness be excused and
12 can she stand down, Mr. Roberts?
13 MR. ROBERTS: Yes.
14 THE COURT: All right. And Mr. Prain, may the witness
15 be excused and she can stand down?
16 MR. PRAIN: Yes, Your Honor.
17 THE COURT: All right. Thank you very much, Ma'am.
18 You are excused.
19 (At 11:24 a.m., the witness was excused).
20 MR. ROBERTS: Your Honor, the only other testimony I
21 would intend to offer would be call the trooper just briefly
22 to establish venue and the location of this offense. If we
23 have a stipulation to that then I can do it without calling
24 the trooper, otherwise I can call the trooper for those.
25 MR. PRAIN: Your Honor, you know, I would normally

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1 stipulate to that but my client lives so close to the County
2 line that we actually had an issue at one point that we
3 discussed of what county he really lives in, so I'm not going
4 to ----- I don't want to concede that right now. Otherwise I
5 would.
6 THE COURT: All right.
7 MR. ROBERTS: Call Trooper Zanthof.
8 THE BAILIFF: Raise your right hand. In the matter
9 now pending, do you solemnly swear or affirm the testimony
10 you're about to give will be the truth, the whole truth and
11 nothing but the truth, so help you God?
12 THE WITNESS: Yes, sir.
13 THE BAILIFF: Please have a seat in the black chair.
14 State your name and for the record, spell your last name.
15 THE WITNESS: My name is Lucas Zanthof. My last name
16 is spelled Z-A-N-T-H-O-F. I'm a trooper for the Michigan State
17 Police.
18 TROOPER LUCAS ZANTHOF
19 Called by the People at 11:24 p.m., testified:
20 DIRECT EXAMINATION
21 BY MR. ROBERTS:
22 Q Trooper, I want to direct your attention back to last
23 September, specifically the early morning hours of September
24 5th of 2016. Were you working in your capacity as a trooper
25 for the Michigan State Police at that time?

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1 A Yes, I was.
2 Q And around 2:30 or so in the morning, were you dispatched to a
3 report of a CSC or some type of inappropriate touching?
4 A Yes, sir.
5 Q And were you dispatched to the location where that touching
6 was supposed to have taken place?
7 A Yes, sir.
8 Q And what was that location?
9 A That was 7319 North Maple Island Road.
10 Q And is that in the Township of Holton?
11 A It sure is.
12 Q And is that in the County of Muskegon?
13 A Yes, sir.
14 Q Are you certain it's in the County of Muskegon?
15 A Yes, sir.
16 Q Okay. And this was ---- and you went to that location?
17 A I did.
18 Q And did you make contact with some of the individuals that
19 have been referenced in the testimony here today?
20 A Yes, sir.
21 Q Specifically, the parents of Alexis Kersting?
22 A The mother and the step-father, yes.
23 Q Right. And that contact was at that ---- or at or near that
24 location, 7139 Maple Island Road?
25 A Across the street from it.

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1 MR. ROBERTS: Thank you. Nothing further.
2 THE COURT: Cross.
3 MR. PRAIN: Thank you, Your Honor.
4 CROSS EXAMINATION
5 BY MR. PRAIN:
6 Q Good morning again, Trooper Zanthof.
7 A Good morning.
8 Q Welcome. And you and I just met for the first time today,
9 right?
10 A Yes, sir.
11 Q Okay. When you say that you're certain that it's in the County
12 of Muskegon, the Maple Island address that we've been talking
13 about, what is that certainty based on?
14 A Based on the four years that I've patrolled Muskegon County, I
15 know that on the west side of Maple Island Road is Muskegon
16 County, on the other side is Newaygo County.
17 Q When you say that you know that, how do you know that? Where
18 does that come from?
19 A My knowledge of my patrol area.
20 Q Okay. When you say your knowledge, what's the source of your
21 knowledge?
22 A Based on maps and my field training in the area.
23 Q So you've actually looked at maps and determined from a map
24 that that's definitely Muskegon County?
25 A Yes, sir.

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1 Q Okay. And you say your field experience was the other thing?
2 A Yes, sir.
3 Q Okay. When you say your field experience, what exactly does
4 that mean?
5 A I work in Muskegon County predominately. I do not respond to
6 calls in Newaygo County. If the incident takes place in
7 Newaygo County, I don't respond there.
8 Q Okay. And how is it determined where the, I guess ---- isn't
9 that ---- it's dispatched to a certain 911 if it's in either
10 respective county, I guess?
11 A More or less, yes.
12 Q Okay. Is it ever possible that a 911 dispatch could go to
13 Muskegon County dispatch when it's actually when ---- when the
14 site of something happening is in Newaygo County?
15 Typically, it's routed through a different dispatch center if
16 they determine that the venue is in a different location.
17 Q Okay. Is it possible that that could happen, though, what
18 I've described, that you've got ----
19 A Yes.
20 Q Okay. And in this case it would depend on where somebody
21 called from, too. I mean, if you're going ---- if you cross a
22 ---- if there's a line here and Muskegon County is over here
23 and Newaygo County is over here, we've got a question of, A,
24 where did the person call from, correct?
25 A Correct.

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1 Q And that may determine what dispatch it'd go to, right?
2 A Correct.
3 Q And but that doesn't necessarily mean that that's the county
4 that something allegedly happened in, correct?
5 A Correct.
6 Q All right.
7 MR. PRAIN: Your Honor, that's all the questions that
8 I have. But I was going to call the Trooper Zanthof as my only
9 witness myself. So should I continue with that at this point
10 or let the prosecutor rest or ----
11 MR. ROBERTS: I'll leave it to the Court. I guess, I
12 don't -----
13 THE COURT: Well, if you've got questions for Trooper
14 Zanthof, you might as well ask them. He's under oath in front
15 of your right now.
16 MR. PRAIN: That's what I was thinking.
17 MR. ROBERTS: It seems silly to have him sit down and
18 then get back up again, so.
19 THE COURT: Right. I'm not going to go through those
20 gymnastics.
21 All right, go ahead.
22 MR. PRAIN: All right.
23 DIRECT EXAMINATION
24 BY MR. PRAIN:
25 Q And then I have some questions of my own, as you've just

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1 heard. You are the officer that's in charge of this case,
2 correct?
3 A Yes, sir.
4 Q There's nobody above you or of a higher ranking that is taking
5 precedence over you in this case, true?
6 A I'm supervised by superior officers, however, there's nobody
7 taking precedent or investigating this independently from me.
8 Q Okay. If anything, they're simply your supervisors and they
9 really don't have any personal knowledge about your
10 investigation, correct?
11 A I wouldn't say they don't have any personal knowledge of it,
12 no.
13 Q Well, if they have knowledge about it, it came through you,
14 correct?
15 A Yes, sir.
16 Q You did all the leg work?
17 A Yes, sir.
18 Q And talked to all the witnesses, right?
19 A I did not interview Alexis, directly. That was done by the
20 Child Abuse Council.
21 Q Okay. You've heard her testimony today, right?
22 A Yes, sir.
23 Q You heard her say that she never spoke to you or at least she
24 doesn't recall, correct?
25 A She did ---- she did say that, yes.

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1 Q Okay. But you actually did talk to her, right?
2 A Just briefly, yes.
3 Q Okay. And what was ---- and when you say you talked to her
4 just briefly, what was the nature of that conversation?
5 A Mostly just to establish whether or not she needed any medical
6 treatment that night.
7 Q Okay. So even though there was this story about an alleged
8 criminal sexual conduct and you've got the girl right there,
9 you didn't think to talk to her and ask her what happened?
10 A No, sir. Typically, we don't do that for minors. We'll
11 schedule a ---- schedule a meeting with the Child Abuse
12 Council.
13 Q Okay. So you were relying entirely on what you were told by
14 either Tabatha, her mother, or the step-father Joe, correct?
15 A At that time, yes.
16 Q All right. It was early in the morning when you got
17 dispatched. You were, I take it, out on road patrol?
18 A Yes, sir.
19 Q And somebody comes over the radio and says, "We have an
20 alleged CSC over on Maple Island, right"?
21 A I don't remember how it was dispatched. From time to time
22 they can dispatch us electronically.
23 Q But you drove to the scene, right?
24 A Yes, sir.
25 Q And with you did you have another trooper?

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1 A I did.
2 Q Do you recall having a phone call during that drive over there
3 with somebody?
4 A I believe I spoke with Tabatha on the way there.
5 Q Okay. But you're driving there, you're talking to her on the
6 phone, right?
7 A Yes, sir.
8 Q And she was excited, correct?
9 A Yes, sir.
10 Q Appeared to be ---- or sounded upset as far as you could tell,
11 right?
12 A Yes, sir.
13 Q And what did she tell you is the reason that you guys were
14 coming?
15 A I don't recall exactly what she said, sir. I'd have to check
16 my report to refresh my memory.
17 Q Do you know if this call originated with a 911 call?
18 A I do not know, sir.
19 Q Okay. Would it be usual practice in this county in your
20 experience of keeping a record of 911 calls so that they could
21 be produced and listened to, perhaps even as evidence?
22 A I know that they do record the 911 calls.
23 Q It's the law, isn't it?
24 A I believe so.
25 Q Okay. And you know ---- you wrote a report in this case as

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1 well, correct?
2 A Yes, sir.
3 Q And you wrote that report fairly and completely and
4 accurately, true?
5 A Yes, sir.
6 Q Because you know you're going to have to rely on it later,
7 yes?
8 A Yes, sir.
9 Q You even read your report before your testimony today, right?
10 A Yes, sir.
11 Q And it refreshed your memory with what you testified?
12 A Yes, sir. I would like to add that this case took place quite
13 awhile ago, so.
14 Q Fair enough. And that's why it's especially important to write
15 a full and accurate and complete report, correct?
16 A Yes, sir.
17 Q Especially when it comes to when you're documenting what a
18 witness told you, correct?
19 A Yes, sir.
20 Q Especially if you're not taking --- written witness
21 statements or documenting their conversation in any other
22 way, correct?
23 A Yes, sir.
24 Q When you arrived, are you switching on your microphone when
25 you go and talk to these people?

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1 A I do not. Well, I have an in-car camera, I guess. I did not
2 activate it.
3 Q You did not activate it?
4 A I did not.
5 Q Okay. What's the purpose of having that equipment?
6 A Typically, it's to record my interactions with the public. Our
7 cameras come on when we activate our lights and siren. That's
8 typically when they turn on.
9 Q Have you ever seen ----- you do have a microphone on your
10 body, correct?
11 A I do.
12 Q And you had it that night, correct?
13 A Yes, sir.
14 Q And you chose not to turn it on, right?
15 A Yes, sir.
16 Q And you have heard recordings from those microphones be played
17 in court as evidence, right?
18 A Yes, sir.
19 Q You've had them requested by the prosecutor's office before.
20 They've said to you produce the recordings so that we can play
21 it in court, right?
22 A Yes, sir.
23 Q You've seen people get convicted based on what's on those
24 recordings, correct?
25 A I've never seen it in a courtroom, necessarily, but ----

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1 Q You know that that could happen, right?
2 A I'm aware that it can, yes.
3 Q All right. And you know ---- you've had training, I take it,
4 on criminal sexual conduct and evidence gathering ---- well,
5 let's start with evidence gathering. You've had training on
6 that through MCOLS correct?
7 A Yes, sir.
8 Q And MCOLS is the Michigan Correlation on Law Enforcement
9 Standards, right?
10 A Yes, sir.
11 Q There are standard classes that every police officer takes, is
12 that true?
13 A Yes, sir.
14 Q And does this sound familiar to you, a class called Crime
15 Scene Processing?
16 A I mean, the title of the class sounds like something that
17 would be in the academy, yes, sir.
18 Q Okay. Did you take that class?
19 A Michigan State Police runs their own academy. We are trained
20 in crime scene investigation, including evidence collection. I
21 do not remember what the specific name of the class was.
22 Q Fair enough. But it addresses DNA evidence, correct?
23 A Yes, sir.
24 Q And they talk about a concept in those classes called
25 epithelial cells, correct?

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1 A I do not recall, sir, exactly what the name of the cell is.
2 Q All right. Have you ever received training about the transfer
3 of skin cells and how that can be used as DNA evidence?
4 A Yes, sir.
5 Q Okay. And so you know that when a person touches an object or
6 another person that there could be a transfer of skin cells
7 that can bend the testicle, true?
8 A Yes, sir.
9 Q All right. And that's also true of clothing, too, correct?
10 A Yes, sir.
11 Q In other words, if a person touches another person's clothing,
12 that may leave behind skin cells that could be detected during
13 an examination, sent to the State lab and tested to see if
14 that person's DNA is there, true?
15 A Yes, sir.
16 Q All right. Also, you're familiar with the term Sane
17 examination, I take it, correct?
18 A Yes, sir.
19 Q And Sane stands for sexual assault nurse examiner?
20 A Yes, sir.
21 Q It is a medical forensic exam on an alleged victim of a sexual
22 assault, true?
23 A Yes, sir.
24 Q Was one done in this case?
25 A No, sir.

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1 Q Was one requested in this case?
2 A No, sir.
3 Q When you're at the scene ---- now you know as through your
4 training and experience that as times go by evidence such as
5 skin cell evidence, DNA evidence, would tend to fade over
6 time, correct?
7 A Yes, sir.
8 Q The chance of recovering it as time goes on lessens, it
9 doesn't get better, right?
10 A Yes, sir.
11 Q And you knew that at the scene that night, true?
12 A Yes, sir.
13 Q You knew that Alexis was claiming that Mr. Bean touched her,
14 right?
15 A Yes, sir.
16 Q You did not request a Sane examination?
17 A No, sir.
18 Q Okay. Did you ever ask ----- do you remember of asking Alexis
19 Kersting, "Will you go to the hospital?"
20 A I do not recall specifically what I asked her, sir.
21 Q Okay. Would it refresh your memory if you took a look at your
22 report?
23 A Yes, I have it here if you ----
24 MR. ROBERTS: Your Honor, with all due respect, I'm
25 going to object at this point as to the fact that this is a

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1 preliminary examination, a probable cause determination. I
2 understand what Mr. Prain is trying to do here, to highlight
3 things that the trooper may or may not have done in the course
4 of his investigation, but I don't understand what the
5 relevance is based on those questions as it relates to the
6 determination the Court has to make today as to whether or not
7 there's probable cause. So, Your Honor, I'm objecting to the
8 relevance of this line of questioning as it relates to a
9 probable cause standard.
10 THE COURT: Mr. ----
11 MR. PRAIN: Your Honor, the trooper has acknowledged.
12 I didn't mean to interrupt you, I'm sorry. But the trooper has
13 acknowledged that he knows about this type of evidence, that
14 it could be relevant under the circumstances that I've
15 described, that he does not recall whether he requested the
16 examination. That's certainly relevant as to evidence or lack
17 of evidence. And he said that it would refresh his memory if
18 he took a brief look at his police report as to whether he was
19 asked to take ---- had asked the complainant to take a Sane
20 examination. My offer of proof is is that she was asked to go
21 to the hospital and she said, "I want to go home," instead.
22 THE COURT: Go ahead and ask him that. But whether
23 that's hearsay or not, I don't know. But look it, Mr. Prain,
24 this really is a preliminary examination. I can tell you are
25 infinitely prepared.

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1 MR. PRAIN: Okay.
2 THE COURT: And you're doing a fantastic job in terms
3 of your effectiveness. But really, this is a preliminary
4 examination and I think the Trooper said she wasn't ---- she
5 didn't undergo a Sane examination. I know what that is. I know
6 the relevance. I know the significance of that.
7 MR. PRAIN: All right.
8 THE COURT: And you've established that she didn't
9 ----
10 MR. PRAIN: So the point has been made.
11 THE COURT: ---- she didn't go to the hospital and a
12 nurse didn't examine her and there was no forensic evidence
13 seized that night. That's what I get from that.
14 MR. PRAIN: The point was made then.
15 THE COURT: Yes. Yup.
16 MR. PRAIN: I understand. I'll move on.
17 THE COURT: Yes.
18 MR. PRAIN: And I'm almost finished.
19 THE COURT: Okay.
20 BY MR. PRAIN:
21 Q Okay. So she did have a Sane examination at a later date,
22 correct?
23 A Yes, sir.
24 Q And when you spoke ---- did you speak to my client Amy's wife
25 ----- my client Dan's wife, Amy? Excuse me.

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1 Q Briefly.
2 Q All right. She came up and talked to you, right?
3 A Yes, sir.
4 Q Did you interview her about the circumstances?
5 A Yes, sir.
6 Q Do you remember Mr. Bean, my client, sitting on the porch?
7 A I did not ---- I never saw him at the scene, sir.
8 Q Okay. Did you know if he was in the house?
9 A She said that he was in the house.
10 Q And when she said he was in the house ----
11 A Yes.
12 Q ---- did you ever go knock on the door and try to talk to him?
13 A I did not.
14 Q All right. Is it fair they had ---- I mean, if somebody's
15 accused of something maybe you ought to go talk to them so
16 that they can offer evidence of innocense or a perspective
17 that might change your view or change somebody's view along
18 the line?
19 A I opted to wait, sir.
20 Q Okay. Well, my question is, is it possible that that could
21 happen that somebody might be able to offer something -----
22 MR. ROBERTS: Your Honor, I'm ---- again, I'm going
23 to respectfully raise the same objection here. I understand
24 the trooper did or did not do certain things. But, again, I
25 don't see how that relates to the Court's determination at a

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1 probable cause hearing.
2 THE COURT: The question was, "Is it possible -----
3 and he didn't finish his question so I want to hear the end of
4 the question.
5 MR. PRAIN: Your Honor, I'll withdraw the question. I
6 have a different one.
7 BY MR. PRAIN:
8 Q If you talk to a suspect and they confess, assuming no
9 Constitutional Rights violation have occurred, your case is
10 pretty much wrapped up, right?
11 A Not necessarily, sir.
12 Q Okay. Well, it's pretty close to wrapped up at that point if
13 somebody confesses, right?
14 A It's an important piece of it, however, it is not close to
15 wrapped up in a criminal sexual conduct investigation.
16 Q All right. Now you understood the house that you were at to be
17 the scene of the alleged crime, correct?
18 A Yes, sir.
19 Q Did you ever make any attempt to view the scene of the alleged
20 crime?
21 A I did respond to Daniel's house one time.
22 Q No, I'm asking on this night, on this night that you
23 responded, did you ever think since you were talking to his
24 wife Amy did you ever say, "May I go inside the house and
25 inspect this place to see what it looks like?"

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1 A On that night I did not.
2 Q Okay. You were not interested at that time at what the
3 lighting conditions would have been or the layout of the
4 furniture or anything?
5 A What do you mean when you say I was not interested?
6 Q Well, were you interested?
7 A I was, sir.
8 Q You were interested but you elected not to ask, correct?
9 A At that time I was waiting for a Child Abuse Council
10 investigation.
11 Q You knew that they had just moved in, correct?
12 A I do not recall my knowledge of their residency at the time.
13 Q You don't remember Joe and Tabatha telling you when you had
14 that phone conversation, "We were helping them move. They just
15 moved in?"
16 MR. ROBERTS: Your Honor, we're into hearsay issues
17 now. And, again, -----
18 THE COURT: Sustained. It's hearsay.
19 MR. PRAIN: Well, the relevancy ----
20 THE COURT: What Joe or Tabatha said to him is
21 clearly hearsay. Sustained.
22 MR. PRAIN: Understood.
23 BY MR. PRAIN:
24 Q Well, is it fair to say that if you knew the people had just
25 moved in, is it fair to say that items of furniture and other

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1 things might be moved around by the time you get another
2 chance to take a look?
3 A If I had known that. I don't know what my ---- my
4 recollection. I do not know what my understanding of their
5 residency was when I responded to the scene.
6 Q All right. But the question is, if people had just moved in
7 somewhere it's a fair assumption that things might not be in
8 the same place or condition if you come back later, correct?
9 A Yes, it is.
10 Q Thank you. Did anyone ever take any photographs at the scene
11 of this alleged crime?
12 A No, sir.
13 Q Did anybody ever talk to ----- you heard in Alexis's testimony
14 a list of other people who were present in the very room that
15 this is alleged to have happened in, correct?
16 A Yes, sir.
17 Q To your knowledge, did you or any other officer ever make any
18 attempt to interview those kids?
19 A I interviewed ---- I did have interviews, follow-up interviews
20 with at least Zane. I would have to refer to my report to look
21 to see what other contacts I had.
22 Q Okay. So you remember an interview with Zane, right?
23 A Yes, sir.
24 Q At a later date, correct?
25 A Yes, sir.

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1 Q But you don't specifically remember talking to any of the
2 other kids, correct?
3 A No, sir.
4 Q And you ----- the place you would look ---- I'm not going to
5 ask you to do it right now, but the place that you would look
6 if you wanted to remember if you talked to somebody else would
7 be your report, correct?
8 A Yes, sir.
9 Q Because when you're doing an investigation you supplement and
10 add to your report every time you do something important,
11 right?
12 A Every time I do something important I do a supplement. If
13 there are minor updates in the case I would update it in my
14 case review notes.
15 Q Okay. So you would do a supplemental report or addition to
16 your report at least every time you talk to a witness,
17 correct?
18 A Yes, sir.
19 Q Okay. When you did interview Zane, how did it get to be that
20 you were interviewing him? Because that was quite a bit later,
21 right?
22 MR. ROBERTS: Well, Your Honor, again, what does this
23 have to do with probable cause?
24 MR. PRAIN: Well, I'll lay a little foundation. I'll
25 withdraw that question so we can see what this is about.

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1 Your Honor, first ----
2 THE COURT: I'll overrule the objection. I'm giving
3 you great latitude here, Mr. Prain, but I am going to start
4 reining this in in terms of what is relevant for today's
5 purpose, and I've said that a couple times now.
6 MR. PRAIN: Right.
7 THE COURT: I get what ----- you are laying a
8 tremendous bit of ground work for trial here, but that's not
9 what we're about.
10 MR. PRAIN: I understand.
11 THE COURT: This is a probable cause hearing.
12 MR. PRAIN: I understand.
13 THE COURT: And this is not a discovery hearing, this
14 is not a trial prep hearing, this is a probable cause hearing.
15 So with that in mind, go ahead.
16 MR. PRAIN: Understood.
17 BY MR. PRAIN:
18 Q Now if one of the things that's important ---- and this is the
19 last thing that I'm going to ask you about, Trooper. But when
20 you're evaluating the credibility of people one thing that's
21 important is how well their story matches with other people
22 who were present, correct?
23 A Yes, sir.
24 Q You heard Alexis Kersting testify today that Dan Bean never
25 put his hands on her shirt to dry his hands, right?

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1 A I heard her testify that, yes.
2 Q Yes. But when you went to talk to Zane that's what it was all
3 about, right?
4 A Zane ----
5 MR. ROBERTS: Well, Your Honor, we're ---- there's no
6 way he can ask this question without getting into hearsay with
7 what Zane said. More to the point, what this officer's
8 determination about credibility and those types of things,
9 with all due respect to the officer, that's not the officer's
10 call to make here. It's important in his investigation, but
11 ultimately he decided to turn his report over to our office to
12 determine whether or not charges would be issued. So, we're
13 going to get into hearsay issues and, again, what relevance is
14 it as to what his investigate ---- what his comments were or
15 his interview of Zane was about as it relates to probable
16 cause here today?
17 MR. PRAIN: Your Honor, it's a present sense
18 impression. I saw ----- under 803 (1), "I observed this."
19 That's what Zane would be saying. Plus it's also really not
20 hearsay because what I'm concerned with is the officer's
21 impressions. So it's not offered for the truth of the matter
22 asserted, it's offered what his impression was.
23 THE COURT: So the officer's impression is relevant
24 how?
25 MR. PRAIN: It's relevant because he sought charges

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1 against my client for criminal sexual conduct when there's
2 completely conflicting stories between two different people.
3 MR. ROBERTS: Well ----
4 THE COURT: I'm ---- nope, nope, nope. I'm good.
5 That's irrelevant to me what the officer's impression was
6 whether there's a conflicting story or not. And why he sought
7 charges, that is not relevant to me at all. I'm sustaining the
8 objection.
9 MR. PRAIN: Okay.
10 BY MR. PRAIN:
11 Q Is it fair to say, Trooper, that in this case we have zero
12 evidence of the accusation itself?
13 MR. ROBERTS: Well, Your Honor ----
14 THE COURT: I'm going to stop it right there because
15 the law in Michigan, it provides that a jury could convict
16 based only on the victim's testimony.
17 MR. PRAIN: I understand.
18 THE COURT: And so that question's not relevant at
19 all.
20 MR. PRAIN: Okay.
21 THE COURT: So I'm going to interject and say that
22 that question has no relevance to me at all. I'm going to
23 follow the law in Michigan. The law in Michigan says that a
24 jury at a ---- at a hearing upon which there's a standard of
25 beyond a reasonable doubt could convict based solely on the

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1 victim's testimony.
2 MR. PRAIN: Yes, and ----
3 THE COURT: You know that.
4 MR. PRAIN: And I do know that ----
5 THE COURT: So ----
6 MR. PRAIN: That's jury instruction 2.25. But my
7 point is, even though that might sustain -----
8 THE COURT: Very impressive.
9 MR. PRAIN: That may sustain a conviction, my only
10 point was is that it should still be taken into consideration.
11 But I understand, Your Honor, and I don't have any other
12 questions for the trooper.
13 THE COURT: All right.
14 MR. PRAIN: Thank you.
15 THE COURT: You're welcome. Any redirect?
16 MR. ROBERTS: No, Your Honor.
17 THE COURT: All right. May the Trooper stand down?
18 MR. ROBERTS: Well, Your Honor, I'm sorry. There is
19 one thing I just wanted to get into.
20 THE COURT: Go ahead.
21 MR. ROBERTS: Just briefly.
22 CROSS EXAMINATION
23 BY MR. ROBERTS:
24 Q Trooper, you indicated that your ---- at least in this case,
25 that your practice would be to not get an interview with the

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1 victim, a minor victim, at the time the incident is alleged to
2 have occurred, is that correct?
3 A Yes, sir.
4 Q And what would the practice then be if that's the case?
5 A To refer them to the Child Abuse Council for people that are
6 forensically certified to interview children.
7 Q All right. And Mr. Prain asked you whether or not there was a
8 Sane exam that was conducted at a later date of the victim in
9 this case. Do you know whether or not if a Sane exam by a Sane
10 nurse, a sexual assault nurse, exam ever took place?
11 A I do not know if there was a Sane exam. However, I do know
12 that there was a medical exam conducted.
13 Q All right. And was that in conjunction with the interview that
14 took place at the Child Abuse Council?
15 A Yes, sir.
16 Q All right.
17 MR. ROBERTS: Thank you.
18 MR. PRAIN: Just very briefly.
19 REDIRECT EXAMINATION
20 BY MR. PRAIN
21 Q You were present at the Child Abuse Council interview,
22 correct?
23 A I was in a separate room.
24 Q But you were watching through closed circuit television, I
25 take it?

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1 A Yes, I was.
2 Q All right. So you heard everything that she said during that,
3 correct?
4 A Yes, sir.
5 Q And you also received a copy of Diane Adams' report, true?
6 A Yes, sir.
7 Q When you say you're not sure, when you told Mr. Roberts you're
8 not sure if she had a Sane examination but she did have a
9 medical examination, that was after the Child Abuse Council
10 interview, correct?
11 A Yes, sir.
12 Q As a matter of fact, it was suggested by you at the Child
13 Abuse Council interview when you talked to Tabatha and Joe,
14 correct?
15 A What was suggested?
16 Q The examination that she had that you're referring to?
17 A I guess I'm not sure what question you're asking.
18 Q Bad question. At the end of the Child Abuse Council interview,
19 you talked to Tabatha and Joe, correct?
20 A Yes, sir.
21 Q And you ---- the topic came up of her having a medical exam,
22 right?
23 A Yes, sir.
24 Q And then she thereafter had a medical exam, correct?
25 A Yes, sir.

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1 Q But you said it's not ---- you're not ---- it wasn't the Sane
2 exam but some other kind of medical exam?
3 A I don't know what the specifics of the exam were, sir.
4 Q But you asked for it?
5 A I asked for it in conjunction with the Child Abuse Council
6 investigators as well.
7 Q Well, when you were asking for it what did you have in mind?
8 MR. ROBERTS: Your Honor, I ---- what is the
9 relevance of what the trooper had in mind?
10 MR. PRAIN: Well, he brought it up on his redirect
11 examination.
12 MR. ROBERTS: I'm clarifying a question that Mr.
13 Prain asked if there was a Sane exam done. I wasn't aware that
14 there was a Sane exam done, that's why I asked the trooper the
15 clarification question and not the reason he asked for it or
16 ----- we're so far off the probable cause determination here,
17 it's ----
18 THE COURT: So the relevance of the reason for the
19 Sane is?
20 MR. PRAIN: Well, I'm trying to distinguish whether
21 she had a Sane ----- because either one of a couple things
22 happened. Either she had a Sane examination and we don't have
23 the report or we don't know what happened to that, which is
24 relevant for probable cause if she had an exam and the report
25 just disappeared. I mean, a lack of that would be evidence.

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1 Or number two, she had some other kind of medical exam that's
2 not a Sane, and I'm trying to determine which one of those
3 things happened and exactly what the difference is.
4 THE COURT: Go ahead.
5 MR. PRAIN: All right.
6 BY MR. PRAIN:
7 Q Trooper, when you say that you're not sure if it was a Sane
8 examination but it was a medical examination, are there two
9 kinds?
10 A There are many different types of examinations.
11 Q Okay. Was the examination ---- was your understanding of the
12 examination that she had, whatever it was, was for forensic
13 purposes? In other words, it could be used as evidence in
14 court or was it for her medical treatment?
15 A I believed it to be for medical treatment, however, I
16 understand that the results of that could also have
17 evidentiary value.
18 Q All right.
19 MR. PRAIN: Thank you. No other questions.
20 MR. ROBERTS: No redirect.
21 THE COURT: All right. And I have no questions,
22 Trooper. You can stand down.
23 (At 11:49 a.m., the witness was excused).
24 MR. ROBERTS: Nothing further, Your Honor. Well, it's
25 actually ---- we're into Mr. Prain's ----

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1 THE COURT: Sure. So the People have rested.
2 MR. ROBERTS: We've already rested. Yes.
3 THE COURT: All right.
4 MR. PRAIN: Your Honor, we'd rest also.
5 THE COURT: All right.
6 MR. ROBERTS: The People move for bind over, Your
7 Honor, on the, as I indicated at the outset, the amended
8 charge of criminal sexual conduct in the first degree based
9 first on the age of the victim being 15 at the time of this
10 incident. And secondly, in that the victim and the defendant
11 in this case are related by blood or affinity to the fourth
12 degree. The testimony here is that this is an uncle through a
13 step ---- a step ---- a step-father, but that does satisfy the
14 rules of affinity as it relates to step-parents to the third
15 degree and this is ---- the statute allows it up to the fourth
16 degree, which is one level beyond. Fourth degree, for example,
17 would be great great-grandparents, great aunt or uncle, first
18 cousins, grand nephew or niece. So this being an uncle, albeit
19 through a step-father, I think it does still satisfy the
20 requirements for affinity, not blood, obviously, for criminal
21 sexual conduct first degree.
22 MR. PRAIN: Your Honor, with regard to the motion to
23 bind over for third degree, which requires penetration, what I
24 think that we have a real problem with here is some things
25 that she said before. She says to Diane Adams and acknowledges

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1 that this report is correct. After she actually had a chance
2 to refresh her recollection, she says, "He didn't touch my
3 actual vagina. He touched ----
4 THE COURT: Well, but ---- But, Mr. Prain, we're
5 talking about a 15 year old girl, right?
6 MR. PRAIN: We are.
7 THE COURT: All right. And you may have a distinct
8 appreciation for the difference between a labia majora, the
9 labia minor, the vaginal canal, and all the intricacies of our
10 anatomy, she may not have that, you know, biological
11 knowledge. What I heard today on the stand was that he was in
12 between her lips, right, of her vagina?
13 MR. PRAIN: That's what she testified to here.
14 THE COURT: All right. Now go ahead. Now I want you
15 to know in that backdrop, in that setting, I'm evaluating the
16 context of what you say.
17 MR. PRAIN: I understand. And I would ask the Court
18 to find that not credible in light of the statement that she
19 gave, "Not my actual vagina." I don't know how ----- even if
20 we're not getting particular about ----- and I really don't
21 have a whole lot of knowledge about anatomy, Your Honor, but
22 whether we're getting into that or not, I don't see how she
23 can say, "Not my actual vagina, but around it."
24 THE COURT: Well, the labia majora would be, in many
25 peoples' minds, around her vaginal canal, but not down into

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1 the canal, right? That ----- and realize that what we're
2 dealing with is not the word vagina in the statute. Sexual
3 penetration is defined under 750.520(a), subsection r, as
4 meaning sexual intercourse, cunnilingus, fellatio, anal
5 intercourse or any other intrusion, however slight, of any
6 part of a person's body or of any object into the genital or
7 anal opening of another person's body, but emission of semen
8 is not required. So when they talk about genital opening,
9 that's a much broader term than vagina.
10 MR. PRAIN: Well, I think that most people would
11 interpret opening to be the actual vagina, and she's saying
12 that's ----
13 THE COURT: Well, but that's not what the law in
14 Michigan.
15 MR. PRAIN: ---- the area around it. Well ----
16 THE COURT: It's a breaking of any plane of the labia
17 majora. That's penetration as defined by the Court of Appeals,
18 not by me.
19 MR. PRAIN: Well, Your Honor, based on my argument, I
20 would ask the Court to bind over only on a fourth degree
21 criminal sexual charge ---- conduct charge, if anything.
22 The bigger question that I want to address is the
23 prosecutor's motion for bind over on first degree. And I want
24 to refer the Court ---- because really what they're asking you
25 to do here, I think, is make a decision of first impression.

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1 You would be expanding the law if you granted Mr. Roberts'
2 motion to bind over on first degree. The Michigan Supreme
3 Court has decided a case of *People versus Zajaczkowski*. I'm
4 going to spell this. People versus Z as in Zebra, A-J, as in
5 Jack, A-C-K ---- excuse me, Z as in Zebra, K-O-W-S-K-I. I have
6 the Supreme Court Smith opinion here, I do not have the
7 recorder, but this is docket number 143736, decided December
8 19th of 2012. What that case was about, Your Honor, and I can
9 submit this opinion to the Court for the record.
10 THE COURT: That's a 2012 case. Is that a published
11 opinion?
12 MR. PRAIN: Yes, it is a published opinion.
13 THE COURT: So you don't have a cite from a 2012
14 case?
15 MR. PRAIN: No. What I have is I have the actual
16 opinion, opinion itself, and I can provide that to the Court.
17 This is just ----
18 THE COURT: If you have a cite, I'll take it. I can
19 find it by the docket number, though, as well.
20 MR. PRAIN: And I can ---- I can get it to you, and
21 I'm sorry about that. But this was a case where a person pled
22 to criminal sexual conduct in the first degree. He pled
23 conditionally on the grounds that he could later challenge on
24 appeal his conviction for first degree criminal sexual conduct
25 because they had a question of whether or not the law would

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1 even allow for this. What you had was the defendant's name was
2 Jason and his parents were Walter and ---- I forget the
3 mother's name. Walter and the mother ---- his parents
4 divorced. The father remarried a different woman and had a
5 child. That child was the victim of the criminal sexual
6 conduct. They later found out that Walter was not the father
7 of the defendant, so there was no blood relationship at all
8 between -----
9 THE COURT: So what I hear you telling me is at the
10 time of the event there was no blood relationship.
11 MR. PRAIN: No blood relationship.
12 THE COURT: And the affinity had been broken by
13 divorce.
14 MR. PRAIN: That is correct, and ----
15 THE COURT: All right, I got it.
16 MR. PRAIN: ---- and the prosecution tried ---- yes.
17 The prosecution, in order to establish affinity, tried to rely
18 on the presumption of legitimacy in the civil divorce judgment
19 and the Court ---- the Supreme Court said, "Nah, that doesn't
20 even work." But here's what's important from this case, you've
21 got two types of relationships.
22 THE COURT: Well, I want to draw a distinction. I
23 haven't even read this case. I'll read it.
24 MR. PRAIN: Sure.
25 THE COURT: But here there ---- in terms of affinity,

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1 which is what Mr. Roberts is relying on, there is an affinity
2 here by marriage. Their marriage does in fact exist between
3 Tabatha and Joe.
4 MR. PRAIN: Right.
5 THE COURT: And Amy and the defendant, correct?
6 MR. PRAIN: That is right.
7 THE COURT: All right. So there is an existing
8 matrimonial bond between the people that we're talking about.
9 MR. PRAIN: There's a matrimonial bond. I'm about to
10 argue that it's not an affinity. But you are correct about the
11 facts, yes.
12 THE COURT: All right.
13 MR. PRAIN: We have to know what the blood
14 relationship is and what that means because that is part of
15 the definition of affinity. There's either a relation by
16 blood or by affinity. The Court in this case said that
17 relation by blood means having a common ancestor. These people
18 have ---- my client and the young lady here have no common
19 ancestor. Affinity is a relationship by marriage. But in order
20 for there to be affinity, what it says the definition of
21 affinity is the relation existing in consequence of marriage
22 between each of the married persons and the blood relatives of
23 the other. And the degrees of affinity are computed the same
24 way as those as consanguinity or kindred.
25 THE COURT: Well, that's *People verus Denmark*, 74

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1 Mich App 402.
2 MR. PRAIN: Correct.
3 THE COURT: I've got that in front of me.
4 MR. PRAIN: Now, it says a husband ---- it goes on to
5 say a husband is related by affinity to all the blood
6 relatives of his wife. And the wife is related by affinity to
7 all the blood relatives of the husband. So what you have here
8 is you have the ----
9 THE COURT: Is that the *Denmark* case?
10 MR. PRAIN: This is actually out of ---- the Court
11 defined ---- let's see, this is 16 ---- No. I'm having a
12 difficult time here. This is quoted right here ---- but of
13 course when I look and try to see what ----
14 THE COURT: Well, quoting from what case? Is that the
15 *Zajaczkowski* case?
16 MR. PRAIN: No, that's a quotation from *Bliss versus*
17 *Calille Brothers Company*, 149 Mich 601.
18 THE COURT: Yeah, but that's within another case?
19 MR. PRAIN: It's within another case, but they're
20 ---- they are ----
21 THE COURT: What is the case that they're reading
22 from? Right now I've got the opinion right in front of me.
23 MR. PRAIN: Yes.
24 THE COURT: What's the name of that?
25 MR. PRAIN: The case I'm reading is the *Zajaczkowski*

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1 case.

2 THE COURT: All right. All right, all right.

3 MR. PRAIN: Which cites *Bliss verus Calille* ---- I

4 think it's ---- *C-A-I-L-L-E Brothers Company*, 149 Mich 601

5 from 1907. They quote this case. And I think the key sentence

6 here is what I was reading. A husband is related by affinity

7 to all the blood relatives of his wife. And the wife is

8 related by affinity to all the blood relatives of the husband.

9 So there has to be a blood relationship in order for there to

10 be affinity. What you have here is you have Tabatha, who is

11 the mother of the young lady here today, Alexis. Tabatha is

12 married to Joe. Joe has no blood relation to Alexis. That is

13 not his daughter.

14 THE COURT: But he is related by affinity to her.

15 MR. PRAIN: He is related by affinity to her because

16 that is Tabatha's blood relative, correct.

17 THE COURT: Exactly.

18 MR. PRAIN: Now, what you have ---- what it says here

19 is that a husband is related by affinity to all the blood

20 relatives of his wife. And a wife is related by affinity ----

21 a wife is related by affinity to all the blood relatives of

22 the husband.

23 THE COURT: Okay, so ----

24 MR. PRAIN: So, there's nothing ----

25 THE COURT: So stop for a second. So ---- and I've

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1 got the family tree right out in front of me. I've got the
2 victim in this case is the biological daughter of Tabatha.
3 MR. PRAIN: Correct.
4 THE COURT: Who is married to Joe.
5 MR. PRAIN: Correct.
6 THE COURT: Which she would clearly be a relative of
7 Joe's by affinity.
8 MR. PRAIN: She ---- I'm not going to concede that,
9 but I see the point. I think that's probably correct.
10 THE COURT: Okay.
11 MR. PRAIN: I think that's probably ----
12 THE COURT: And then ---- and then Amy is a blood
13 relative of Joe. That's his sister.
14 MR. PRAIN: Yes. Correct.
15 THE COURT: All right. And then Amy is married to the
16 defendant.
17 MR. PRAIN: That is correct. So Amy is the only
18 person that has a blood ---- that is a blood relative of Joe.
19 Amy would be the only person who is related by affinity to
20 Alexis, but not Dan.
21 THE COURT: So ---- So stop for a second. So if Amy
22 had been the perpetrator of the events, clearly we'd be in
23 affinity.
24 MR. PRAIN: Exactly. There would be no question.
25 THE COURT: And you're saying her husband, with a

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1 matrimonial bond, is not in the affinity relationship?
2 MR. PRAIN: Because ----- yes, because he is not a
3 blood relative of husband Joe. Correct.
4 THE COURT: Okay. So it would have to be Joe's
5 brother or son or ----
6 MR. PRAIN: Sister ----
7 THE COURT: ----- some progeny -----
8 MR. PRAIN: Or sister.
9 THE COURT: ---- of Joe or sister. Exactly.
10 MR. PRAIN: Somebody that ---- and to put it more
11 clearly, somebody that Joe has a common ancestor with. Dan and
12 Joe would have to have a common ancestor. They do not.
13 THE COURT: All right. All right, well I'm going to
14 read that case. It's noon. We'll be back at 1:30.
15 MR. PRAIN: Thank you for that, Your Honor.
16 THE COURT: Yes. And if there's anything you have
17 between now and then, particularly from Mr. Roberts, he just
18 got that case read to him.
19 MR. ROBERTS: Right.
20 THE COURT: If there's anything that you have, please
21 bring it to me. I'm also going to review *People versus Denmark*
22 at 75 Mich App 402. It cites and quotes the Bliss versus
23 *Calille* ---- That's K ----- or excuse me, *C-A-I-L-L-E Brothers*
24 *Company* at 149 Michigan 601. That's the 1907 case cited by Mr.
25 Prain. That's also cited in the *Denmark* case. That gives us

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1 the definition.
2 MR. ROBERTS: Okay.
3 THE COURT: So if you have anything on that ----
4 MR. ROBERTS: Yup.
5 THE COURT: ---- then we will ---- I'll hear that as
6 well. It will give you a chance to ----
7 MR. ROBERTS: Yes.
8 THE COURT: ---- respond to that, Mr. Roberts. Now is
9 there any business that we can take care of? This was the 9:30
10 prelim. We'll reconvene at 1:30. Maybe it ---- it may take me
11 a little longer to review this so we'll just see where we go
12 this afternoon.
13 (At 12:02 p.m., proceedings recessed).
14 (Proceedings resumed at 2:00 p.m.).
15 THE COURT: We're back on the record in People of the
16 State of Michigan versus Daniel Ray Bean. The File Number is
17 16-181535-FY. We had a preliminary examination this morning
18 and took testimony from two witnesses. Both parties rested and
19 Mr. Prain made a legal argument to the Court regarding
20 affinity and whether or not that legal relationship exists in
21 this case. And I've had a chance to review the Michigan Model
22 Criminal Jury Instructions. I've had a chance to look at the
23 Table of Consanguinity. I've had a chance to read People
24 versus Denmark at 74 Mich 402, and the case cited by Mr.
25 Prain, *People versus Zajaczkowski*, that's Z-A-J-A-C-Z-K-O-W-S-

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1 K-I. That's at 493 Michigan, case 6. And so based upon my
2 reading of *Zajaczkowski*, I'm finding it really doesn't have
3 much applicability in this case. The case was limited to an
4 analysis of whether there was a blood relationship between the
5 alleged victim and the perpetrator. The People of the State of
6 Michigan, once the matter got to the Supreme Court, conceded
7 that there was no relationship by affinity or relationship by
8 marriage. And the way I looked at that is the family tree in
9 *Zajaczkowski* was that the defendant's mother and the victim's
10 father at one time were married but divorced in 1979. The
11 victim wasn't even born until 1982 in *Zajaczkowski* so the
12 divorce was long, long water under the bridge, we'll say, when
13 the victim was born. So it wasn't ---- there was not a
14 relationship by affinity certainly when the allegation of
15 criminal sexual conduct took place, so *Zajaczkowski* doesn't
16 have much applicability in this ---- in this arena, other than
17 the fact that it gives us the definition of affinity as argued
18 by Mr. Prain. And that definition of affinity is on page 13
19 and 14 of the case law citing the *Bliss* case. I think what
20 has more ----- more pertinence in this case is *People versus*
21 *Denmark*. And then I am also interested in this *People versus*
22 *Armstrong* case cited by Mr. Roberts in chambers. We had a
23 brief in chambers discussion before I came on the record. And
24 really the substance of that discussion was I think we need to
25 write briefs on this.

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1 Was that ---- is that a fair assessment of the in
2 chambers discussion, Mr. Prain?
3 MR. PRAIN: Yes, it is, Your Honor.
4 THE COURT: And Mr. Roberts?
5 MR. ROBERTS: Yes.
6 THE COURT: All right. And so Mr. Roberts brought up
7 *People v Armstrong*, at 212 Mich App 121, a 1995 case,
8 regarding the ----- the Court of Appeals position on affinity
9 as it relates to step-brothers and step-sisters. And I find
10 that to be a more pertinent analysis here. So I'd like a
11 chance to read that case.
12 And we've all been kind of working on this all
13 morning and I think the most prudent course here this
14 afternoon now is to give both sides a chance to brief this, to
15 write this, and present that argument to the Court in writing
16 and then we'll make a decision going from there. So I'm
17 proposing that we adjourn the matter pending the receipt of
18 those briefs until August 10 of 2017. That gives both sides
19 three weeks from today. Briefs are due on August 4. I think
20 it's the Friday preceding. That gives me a chance to read
21 them over the week-end and during the week. Yes, August 4 is a
22 Friday. The briefs are due August 4, 2017. We'll reconvene
23 here in Court on August 10, 2017 at ----
24 THE COURT TO COURT RECORDER MCGORAN: What time are
25 we going to meet?

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1 COURT RECORDER MCGORAN: Judge, let's do 1:30.
2 THE COURT: At 1:30 in the afternoon, August 10,
3 2017. 1:30 in the afternoon. That gives me a chance to read
4 *Armstrong*. It gives both sides, you know, fair opportunity to
5 present their legal position. And I would suspect that this
6 issue is going to be litigated again in circuit court, so
7 everybody's going to have to write a brief for the circuit
8 court judge anyway, so I might as well benefit from that work
9 down here in district court as well.
10 And I appreciate everybody's patience today and I
11 appreciate your willingness to write those briefs, so.
12 Anything else for the record? Just one moment,
13 please.
14 COURT RECORDER MCGORAN: Judge, do you think the
15 morning would be better or does afternoon work?
16 THE COURT: No. No, I think that probably is better.
17 Mr. Prain is coming from Livonia. I think 1:30 probably works
18 better than say 9:00 or 9:30, right?
19 MR. PRAIN: Yeah. And I made a mistake, too. I was
20 just looking at my calendar. I have ---- it turns out at 8:30
21 I've got to be with Judge Beal in Midland circuit that
22 morning. But that gives me enough time to get here.
23 THE COURT: Are you sure?
24 MR. PRAIN: I'm ----
25 THE COURT: It will be a couple hours.

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MR. PRAIN: Yeah, he ---- whenever I go there, Your Honor, I get there on time and they get us in and out and so that shouldn't be a problem.

THE COURT: Good for them.

MR. PRAIN: Yeah. They're efficient, I know.

THE COURT: Good for them.

MR. PRAIN: And thank you for your time today, too. I appreciate it.

THE COURT: You're welcome.

MR. PRAIN: Thank you, Judge.

THE COURT: You're welcome.

(At 2:06 p.m., proceedings concluded).

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STATE OF MICHIGAN

ss

COUNTY OF MUSKEGON

I, Sally A. Johnson-McGoran, do hereby certify that I am a Certified Court Recorder for the 60th District Court of Muskegon County, that the foregoing transcript of record is a full, true and correct copy of the proceedings had at the time and place and in the matter hereinbefore set forth, as recorded and transcribed by me.

Sally A. Johnson-McGoran, CER 3460

DATE: November 27, 2017

2017-000174-FH
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STATE OF MICHIGAN

IN THE 60TH DISTRICT COURT FOR THE COUNTY OF MUSKEGON

PEOPLE OF THE STATE OF MICHIGAN D.C. 16-181535-FY

v C.C. 17-000174-FH

DANIEL BEAN

_____/

PRELIMINARY EXAMINATION

VOLUME II

BEFORE THE HONORABLE RAYMOND J. KOSTRZEWA
District Court Judge
Muskegon, Michigan - August 10, 2017

2017 NOV 30 P 2: 13
NANCY A. WATERS
MUSKEGON COUNTY CLERK
FILED

APPEARANCES:

For the People:
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For the Defendant:
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Transcribed and:
Recorded by:
SALLY A. JOHNSON-MCGORAN CER 3460

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3 WITNESSES:

4 None

5 EXHIBITS:

6 None

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1 Muskegon, Michigan
2 August 10, 2017 - 1:48 p.m.
3 (Court, Counsel and all parties present).
4 THE COURT: Before the Court is the People of
5 the State of Michigan versus Daniel Bean. File Number is
6 16-181535-FY.
7 And this is the time and the date set for the Court
8 to articulate an opinion on the record based upon some briefs
9 that were filed on an issue that was brought up at a
10 preliminary examination that was held on July 20th of 2017.
11 I am in receipt of both the Prosecution's Memorandum
12 of Law, as well as the Defendant's brief. I've reviewed both
13 of those.
14 Mr. Maat?
15 MR. MAAT: Well, I'm in the unenviable position of
16 saying that I'm not so sure we got this issue right in our
17 ---- in our brief to the Court. And I ---- And I don't want to
18 create any unfair surprise to the defense, but I've read our
19 brief having just had a chance to review it moments before I
20 walked in here. The lawyer assigned this case called in sick,
21 unfortunately, so it was given to me and I see here we're
22 essentially conceding the affinity issue in our Memorandum of
23 Law. I know this Court's vast experience in this area and I
24 will absolutely defer to the Court's decision making ability
25 in this regard, but I think our analysis is wrong and I think

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1 the affinity issue is still very much in play here.
2 Now if the defense relied on our brief, to say I'm
3 not prepared to argue that today, I'm not going to oppose
4 their reasonable request to further research this. We'll
5 withdraw this brief and file a brief consistent with my
6 interpretation or we'll argue it right now, either one.
7 And I see that we also raised an additional issue
8 that I don't know was even raised at the time of the
9 preliminary examination that essentially we have a felony ----
10 a separate felony being committed at the time of the sexual
11 assault, which would create a new reason why CSC 1 is on the
12 table. And I recognize that they may have been surprised by
13 that issue.
14 So I am ---- I'm prepared to do whatever the Court
15 wants to in terms of arguing this affinity issue. I just want
16 the Court to understand that I'll be arguing against our
17 written position and proceed with any other argument the Court
18 wants today.
19 MR. PRAIN: Well, Your Honor, I might be the only
20 person here that's in a little bit less enviable position
21 because I've kind of let go, as my brief said, on the issue of
22 affinity. I kept it in there because ---- I had an opinion I
23 had written because I just ---- I mean one reason was I wanted
24 the Court to see that I actually put in the work on it and
25 then at the last minute the issue switched and while I wasn't

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1 going to throw up my hands and argue against them letting go
2 of the affinity issue, I immediately turned my attention to
3 the child abuse issue, which is what I came here prepared to
4 argue today and I have some case law and things relative to
5 that. If we're reverting to the affinity issue and/or both of
6 them, I haven't looked at the affinity issue since the second
7 or the third, which was the day that, you know, our briefs
8 were due. So I ---- when Mr. Maat says that they're re-raising
9 the affinity issue and disagreeing with their prior position
10 to let that issue go, I guess I kind of need to know on what
11 grounds. Is there something new that ---- that they have
12 looked into or ---- in order to argue it or in order for me to
13 know whether my brief is sufficient at this point or not, I
14 kind of need to know the reason for that. And it's my
15 understanding that he just got the file and may not be in a
16 position to say so.
17 MR. MAAT: I can. I did just get the file. But I've
18 had just enough time to map out what I think the law is in
19 this regard as it relates to these facts, and I will state to
20 the Court what my position is.
21 I think we cited the right law which says the
22 definition of affinity. Basically if you're married to
23 somebody you become related to them in the same way as if
24 you're blood relatives. But what we conceded that I think is a
25 mistake is the idea that there are two marriages here that I

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1 think create the affinity. And if we look at it from the
2 victim's stand point ---- I did a little diagram here, which I
3 think is always helpful in these affinity cases. The victim
4 has a biological mother who is obviously ---- she's related to
5 by blood. And a biological father who has been deceased for
6 some time, which she's also related by blood. When the
7 victim's step-dad marries her mom, for purposes of the CSC
8 statute, he becomes related to the victim as her father by
9 affinity. Now the father has a sister. The step-dad, who I'm
10 going to just simply refer to legally speaking as the father,
11 has a sister. This sister is an aunt by marriage to the victim
12 by affinity. Her husband is related to that victim through her
13 marriage of him, also by affinity, and becomes the victim's
14 uncle. That's just operation of two marriages and I think we
15 stop short by saying, we're not going to consider the marriage
16 between step-dad and bio mom of the victim and we should have,
17 realizing that each marriage created a new network of
18 affinity, therefore the defendant is an uncle of the victim,
19 legally speaking, because he's related through marriage, two
20 marriages in fact, and as a result he is related to her within
21 the third degree of consanguinity, which the Court knows of
22 the chart here is if we look at the chart, which is 20.4,
23 uncles and aunts are within the third degree. That's our
24 argument.
25 MR. PRAIN: Your Honor, the part of that argument

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1 that's missing is the part that deals with what the definition
2 of a blood relationship is. There has to be a relationship
3 between the two people at issue, in this case Dan Bean and
4 Alexis Kersting, the alleged victim in this case, by somebody
5 related by blood. And here's the way that I stated it in my
6 brief. I think this is the best way to say it. In the case at
7 bar, the marriages at issue are the marriage between Dan and
8 Amy. That's one marriage. And the marriage between Tabatha,
9 which is the alleged victim's biological mother, and Joe, who
10 is Amy's brother, but not Alexis's father. Not Alexis's blood
11 relative by any means. That's where the problem starts. There
12 is an affinity relationship between Dan, the husband, and any
13 blood relatives of Amy. Because Alexis Kersting is not a blood
14 relative of Amy -----
15 THE COURT: Well, I'm going to stop you right there.
16 So ---- we did this the other way. Mr. Maat wasn't here for
17 the original preliminary examination but we kind of worked it
18 in the reverse of what you just said, Mr. Prain, on the
19 record. But what you're saying to me then is obviously your
20 client's name is Mr. Bean and Mr. Bean's sister ----
21 MR. PRAIN: No.
22 THE COURT: I'm sorry, your client's wife's name is
23 Amy.
24 MR. PRAIN: Correct.
25 THE COURT: And they certainly are married. There's a

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1 matrimonial bond there, as I said before, right?
2 MR. PRAIN: Yes.
3 THE COURT: So your client would be certainly related
4 by affinity to any of Amy's ----
5 MR. PRAIN: Blood relatives.
6 THE COURT: Progeny.
7 MR. PRAIN: No, her blood relatives.
8 THE COURT: Well, okay her blood relatives.
9 MR. PRAIN: They have to share ----- meaning they
10 have to share a common ancestor.
11 THE COURT: Yes.
12 MR. PRAIN: They don't share a common ancestor.
13 THE COURT: But certainly by affinity your client
14 would be related by affinity to ----- to Joe.
15 MR. PRAIN: No.
16 THE COURT: The step-father.
17 MR. PRAIN: Well ----
18 THE COURT: You're saying no?
19 MR. PRAIN: And ---- I'm sorry. He would ----- he
20 would be related by affinity to Joe and any of Joe's
21 biological children, Amy's mother, Amy's father.
22 THE COURT: Yeah, of course.
23 MR. PRAIN: Yes.
24 THE COURT: But I'm talking about going the next step
25 over to ---- to Amy's brother. He's ---- he's related by

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1 affinity to ----
2 MR. PRAIN: Yes.
3 THE COURT: To Amy's brother.
4 MR. PRAIN: Yes. That's what I have stated on -----
5 THE COURT: Certainly.
6 MR. PRAIN: ----- page 4, and I agree.
7 THE COURT: Yes, exactly. And he would be then
8 related by affinity to Tabatha, the wife of Joe.
9 MR. PRAIN: No.
10 THE COURT: No? You're saying that ----- that because
11 they're not blood relatives he's not related by affinity to
12 the wife of Joe?
13 MR. PRAIN: Because we ----
14 THE COURT: I disagree with you there.
15 MR. PRAIN: And I ----
16 THE COURT: But anyway, what ----- I want to clarify
17 a couple of issues for today because everybody's on unequal
18 footing here, including me. Because I frankly stopped all
19 research on the issue of affinity when I received the People's
20 Memorandum of Law. If they were abandoning that issue, whether
21 I agreed with it or not, it wasn't right for the Court to make
22 a decision on. And if they weren't proceeding on a legal
23 theory under these facts then I'm not going to rule on it. It
24 would be inappropriate for me to rule on the issue of affinity
25 if they were withdrawing that as a viable theory, so I stopped

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1 looking at that, I think as Mr. Prain did. But just for the
2 sake of goodwill, I think he included his argument here
3 because he wanted to show the Court, "Hey, I really did the
4 work." I got that, and I appreciate that.
5 MR. PRAIN: And I appreciate you ----
6 THE COURT: Yeah, yeah. I read it, but I just ----
7 honestly, I read it as an aside because the issue was
8 withdrawn. I was not going to make a legal ruling on it.
9 That's the only appropriate judicial course at that point if
10 it was being withdrawn. And I started to focus on the issue of
11 a felony ----- excuse me, a CSC 1 during the course of any
12 other felony. I started looking at that issue. And frankly,
13 I'm ---- was ready to move forward on that issue.
14 And ----- and Mr. Maat, representing the People
15 here today, I can only say that you have the right to change
16 your legal theories. And I was going to point Mr. Prain in
17 response to one of his arguments, particularly on page 7 and 8
18 of his brief, really to summarize, and I'm not going to ----
19 I'll just paraphrase it. You were saying that once the
20 prosecutor's closed their proofs at prelim and there's been a
21 motion to bind over stated on the record that the prosecutor
22 somehow is locked into that legal theory for that remainder of
23 the case. I firmly disagree with that and I think Michigan
24 Court Rule 6.112 (h) allows the prosecutor to amend the
25 information, not even a warrant and complaint, but an

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1 information alleging a felony before, during,or after trial.
2 We're at prelim stage. They can amend their legal theories as
3 long as there's no prejudice, right? And I was going to take
4 care of that by re-opening the proofs and letting you cross
5 examine the witness and let them develop whatever proofs they
6 need or think they can put on the record to sustain a bind
7 over. So I was going to try and preserve your right to
8 confront the witness on the legal issue that would be
9 pertinent then in front of the Court. But they can amend their
10 legal theory before, during, or after trial. So I firmly
11 disagree with that on they can't amend after the close of
12 proofs of prelim. They certainly can. And it's often done in
13 circuit court by way of Goeke motions and things like that.
14 That's well after prelim.
15 MR. PRAIN: It's a question of undue surprise. I
16 understand Goeke, yes.
17 THE COURT: And I was going to try to remedy that by
18 allowing them to re-open their proofs on the issue of
19 authority and on the issue of serious physical or mental harm,
20 and those issues that become pertinent when they start citing
21 the child abuse second degree statute. That's 750.136 (b). So
22 that's where I was at today. I'm a little bit disadvantaged
23 because I kind of abandoned the affinity issue. So what I
24 would allow is for us to reconvene here, let the prosecutor
25 articulate their position. I think they have on the record,

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1 and give you, Mr. Prain, an opportunity to if you wanted to
2 brief that issue more or just argue it today. But ---- but I
3 think that what Mr. Maat is saying is he's not relying on any
4 other cases other than *Zajaczkowski* and *Bliss*, but what I
5 think he ---- I think he's disagreeing with his colleagues
6 saying that *Zajaczkowski* and *Bliss* stand for the proposition
7 that this is a relationship of affinity.
8 MR. MAAT: Right. That's well stated. That's our
9 position.
10 MR. PRAIN: Yeah, and that's ---- well ----
11 THE COURT: All right, so let's ---- let's fall back
12 here. I get your argument that you're saying there's no
13 affinity. Let's set that aside for a moment. Knowing what I
14 was going to do now on the issue of child abuse second degree
15 being the other felony to support a bind over on criminal
16 sexual conduct in the first degree under 750.520(b)(1)(c),
17 what's your position on that, Mr. Maat?
18 MR. MAAT: Well, I think the Court's right, that the
19 record would have to be developed and two pieces of evidence
20 would have to be considered by the Court. Whether or not the
21 victim has suffered mental harm. That would be incumbent upon
22 the child abuse, and I'm here to tell the Court ----
23 THE COURT: Well, hang on a second, Mr. Maat. The
24 definition of child abuse second degree as posited by Mr.
25 Roberts in the brief is under 750.136(b)----(3)(b) is what he

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1 articulates. And that says a person is guilty of child abuse
2 in the second degree if any of the following apply; b) the
3 person knowingly or intentionally commits an act likely to
4 cause serious physical or mental harm to the child, regardless
5 of whether harm results.
6 Go ahead.
7 MR. MAAT: So the point is, I think the Court would
8 have to hear evidence as to whether or not the victim was in
9 fact emotionally harmed or placed in a position of likely to
10 be emotionally harmed.
11 THE COURT: Right.
12 MR. MAAT: And to do that, I would probably need to
13 have a counselor to talk about if there has been emotional
14 harm what it is. That would clearly establish it. Or if there
15 hasn't been emotional harm, the likelihood of that, and I ----
16 or I could perhaps even have the mother testify to that, but
17 I'll have to acknowledge that's probably based on some
18 hearsay.
19 THE COURT: Well, I don't know about that. I would
20 need ---- I mean, I'd be looking for evidence on the record to
21 substantiate that Daniel Bean is a person as defined under 156
22 (b)(1)(d). Person meaning a child's parent or guardian, or any
23 other person who cares for ----
24 MR. MAAT: Right, that's the second part.
25 THE COURT: ---- has custody of, or authority over a

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1 child regardless of the length of time that the child is cared
2 for, in the custody of, or subject to the authority of that
3 person.
4 MR. MAAT: Right. That's the second portion.
5 THE COURT: Yes.
6 MR. MAAT: So we'd have to prove that he's a person
7 who has care or supervision of this child ----
8 THE COURT: Yes.
9 MR. MAAT: ---- for whatever period of time, and that
10 she was put in a potentiality of serious emotional harm or
11 actually experienced emotional harm, either one. In order to
12 do that, I am going to have to present evidence as it relates
13 to what supervision authority did the defendant have over the
14 victim at the time that this happened. Now again, I guess I
15 can have the victim's mom testify as to who she thought was in
16 charge or perhaps even the defendant's wife, but she's
17 probably got some spousal privilege there, although there's a
18 child abuse as well, so.
19 THE COURT: Right.
20 MR. MAAT: The point that I'm making is, I don't know
21 what the facts have been developed at the prelim as to the
22 defendant's supervision of the victim on the time that this
23 occurred. I think ----
24 THE COURT: I can tell you ----
25 MR. MAAT: ---- she was spending the night.

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1 THE COURT: ---- I looked at the notes, my notes
2 from the prelim. And Ms. Kersting testified that she stayed at
3 the defendant's house. She was going to spend the night at the
4 defendant's house with her brother and her cousins.
5 MR. MAAT: All right. Well, given that testimony, it
6 sounds like the only responsible adults in the home based upon
7 the testimony are the defendant and his wife. And so I think
8 perhaps there is enough factual basis to say that the uncle
9 and the aunt are the supervisors of the kids in that house at
10 that time. To the extent the Court needs to develop that
11 further, I'll present additional evidence that they were the
12 only adults in the house and they were watching the kids.
13 THE COURT: Okay. I ---- I think Mr. Prain is right,
14 he has the right to cross examine on those issues.
15 MR. MAAT: I agree. I agree.
16 THE COURT: And ---
17 MR. PRAIN: We didn't have the motive to do that
18 before because it wasn't the variable being charged.
19 MR. MAAT: Yeah, I understand. I agree. But the point
20 that I'm making to the Court is I'm not in a position to
21 provide that ---- those facts and testimony today as it
22 relates to the victim's potentiality from serious mental harm
23 or the defendant's supervision along with his wife of the
24 children. So if there's a ----- if there's a desire to cross
25 examine on those issues, I'm going to suggest that an

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1 additional evidentiary hearing is going to be necessary if the
2 Court rules against us on the affinity issue.
3 THE COURT: Well, let me ask you this. Are you
4 moving forward ---- you're obviously moving forward on the
5 affinity issue.
6 MR. MAAT: Right.
7 THE COURT: Are you also moving forward simultaneous
8 on the alternative theory of this being a CSC 1 in -----
9 MR. MAAT: Based upon the felony.
10 THE COURT: ---- committed during the course of any
11 other felony?
12 MR. MAAT: Well, Judge, here's what I'll do for
13 judicial economy purposes. If the Court rules that affinity
14 is a basis for a CSC 1, I feel no reason to litigate a second
15 alternative theory because that can be added or changed at any
16 time between ----- between now and trial. The Court doesn't
17 have to agree or rule on each theory of ours, only that one
18 would support the charge. So if the Court makes an affinity
19 determination that is in our favor then there's no reason for
20 to develop the record at prelim stage. If, on the other hand,
21 the Court believes that affinity is not present in this case
22 then I would ask the Court to supplement the record for the
23 Court to make a finding of fact whether or not this
24 alternative theory would support a bind over on CSC 1. And in
25 some respects, even if the Court recognizes ---- as the Court

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1 knows, the question here is is there an offense that's been
2 committed at a probable cause standard that would indicate
3 that it's outside the jurisdiction of the Court. And if the
4 Court even bound it over on CSC 3, frankly, there would be no
5 reason why we couldn't Goeke it up to a CSC 1 on either one of
6 these theories, no matter what. So, you know, I'm happy to
7 give the defense an opportunity to examine these issues, but
8 in some respects ---- and if the Court wants to bind over on
9 CSC 3 with the evidence it has now, I just want to make it
10 clear, we're not abandoning the affinity issue. And I don't
11 want to be precluded from raising that issue up in circuit
12 court.
13 THE COURT: Can I speak to both lawyers in chambers,
14 please?
15 (Proceedings recessed at 2:10 p.m.).
16 (Proceedings resumed at 2:23 p.m.).
17 THE COURT: Okay, so the record should reflect that I
18 had invited both attorneys into chambers and my reason for
19 that was just to discuss procedurally this, that the matter
20 had been bound over to circuit court on a waiver previously.
21 It was remanded to this Court to hold a preliminary
22 examination and decide legal issues, and what I wanted to
23 avoid was the possibility of having the case re-bound over to
24 circuit court with unfinished issues that could be resolved in
25 district court to obviate the necessity of a future remand

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1 again. And I think both lawyers are cognizant of that and
2 they're both wanting to avoid that as well and I think that
3 summarizes the basis of our discussion in chambers.
4 In addition to that, we discussed the fact that Mr.
5 Maat was going to proceed in district court then on both the
6 theories of affinity and the CSC 1 based upon the act of
7 penetration occurring during the course of any other felony.
8 Is that right, Mr. Maat?
9 MR. MAAT: Yes.
10 THE COURT: All right. And I think if we do that in
11 district court and proceed to litigate both of those potential
12 prosecution theories that in the event that the case is bound
13 over that will obviate not all possibility but most
14 possibilities to have it remanded again.
15 Agree, Mr. Maat?
16 MR. MAAT: Yes, I do, Judge.
17 THE COURT: And, Mr. Prain?
18 MR. PRAIN: Agree, Your Honor.
19 THE COURT: All right. So what we're going to do
20 today is adjourn the matter until August 31, at 10:00 a.m.
21 August 31, 2017 at 10:00 a.m. And I will allow Mr. Maat; one,
22 to amend the complaint to allege both the theory of affinity
23 and the theory of CSC first degree based on the commission of
24 a sexual penetration during the course of any other felony.
25 I'm allowing that amendment to happen. But I'm also granting

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1 Mr. Prain's request then to have evidence presented on those
2 ---- the new theory and allowing cross on that issue. I
3 believe that the right of confrontation will be recognized.
4 Okay, anything else, Mr. Maat?
5 MR. MAAT: No, thank you, Judge.
6 THE COURT: Anything else, Mr. Prain?
7 MR. PRAIN: No. Thank you, Your Honor. No, we're all
8 set, Your Honor.
9 THE COURT: All right. And Mr. Maat, my understanding
10 is you will be submitting a brief on either or both issues?
11 MR. MAAT: Yes. A brief that will include the law
12 that we've already articulated and probably nothing more than
13 just argument and the facts. But then we'll also be filing an
14 amended complaint. The Court doesn't have anything from us at
15 this point?
16 THE COURT: No.
17 MR. MAAT: Okay. Yes, then we will be presenting the
18 two witnesses at that next hearing.
19 MR. PRAIN: Your Honor, for service in filing the
20 briefs can we stipulate to doing that by e-mail for the -----
21 THE COURT: Yes.
22 MR. PRAIN: ----- ease of everybody?
23 THE COURT: That works fine. I'll accept the
24 electronic filing.
25 MR. PRAIN: Great. Thank you.

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1 MR. MAAT: Thank you, Judge.
2 THE COURT: You're welcome. Thank you.
3 MR. PRAIN: Thank you, Your Honor.
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5 (At 2:27 p.m., proceedings concluded).
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1 STATE OF MICHIGAN
2 ss
3 COUNTY OF MUSKEGON
4 I, Sally A. Johnson-McGoran, do hereby certify that I am a
5 Certified Court Recorder for the 60th District Court of
6 Muskegon County, that the foregoing transcript of record is a
7 full, true and correct copy of the proceedings had at the
8 time and place and in the matter hereinbefore set forth, as
9 recorded and transcribed by me.
10
11
12
13 Sally A Johnson McGoran
14 Sally A. Johnson-McGoran, CER 3460
15 DATE: November 27, 2017
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1 STATE OF MICHIGAN

2 IN THE 60TH DISTRICT COURT FOR THE COUNTY OF MUSKEGON

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4 PEOPLE OF THE STATE OF MICHIGAN D.C. 16-181535-FY

5 v C.C. 17-000174-FH

6 DANIEL BEAN

7 _____/

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9 PRELIMINARY EXAMINATION

10 VOLUME III

11 BEFORE THE HONORABLE RAYMOND J. KOSTRZEWA
District Court Judge
12 Muskegon, Michigan - August 31, 2017

13

14 APPEARANCES:

15 For the People: MR. TIMOTHY M . MAAT P-48691
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EXHIBITS:

None

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1 Muskegon, Michigan
2 August 31, 2017 - 10:31 a.m.
3 (Court, Counsel and all parties present).
4 THE COURT: Okay, we are on the record in the People
5 of the State of Michigan versus Daniel Bean. The File Number
6 is 16-181535-FY, and this is a adjourned date. We've
7 previously convened here and took testimony and subsequent to
8 that we took some argument on the record regarding motions
9 brought by the prosecutor and by Mr. Bean's attorney, Mr.
10 Brian Prain. And we adjourned to today's date for a couple
11 purposes. One, as I understand it, so that attorneys could
12 submit supplemental briefs of which they both have done and I
13 appreciate both briefs and I thank you for your diligence.
14 And I think Mr. Maat had intended or was
15 contemplating supplementing the record.
16 MR. MAAT: Yes. I'm amenable to proceeding however
17 the Court would like, but what I'm going to recommend is this,
18 that we ---- we finish the argument and decision as it relates
19 to the affinity basis. If the Court binds over, there would
20 be no desire on my part ---- on that theory, there's no desire
21 on my part to supplement the record regarding our other theory
22 of the child abuse. If, however, the Court denies our request
23 and sides with the defense in its ruling then I would like to
24 present testimony as it would support the child abuse aspect
25 if the Court determines as a legal matter that if the facts

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1 support it it would be a basis for bind over. To that extent,
2 I have two proffers. One is the ---- a counselor who would
3 establishe that it is likely to cause serious mental harm to a
4 child in this scenario, assuming that she was sexually
5 assaulted. And testimony from the victim's mother that would
6 establish that the defendant, along with his wife, were the
7 people who were in a position of care and supervision of the
8 child at the time that occurred. Two elements that I think
9 require some factual development on the record if we get
10 there. So I'm suggesting we do this in three stages. Stage
11 one, rule on the affinity. Stage two, rule as a legal matter
12 that if the facts support a child abuse, a predicate felony,
13 we then would proceed to stage three, which is the development
14 of the factual record.
15 THE COURT: All right.
16 MR. PRAIN: Your Honor, my ---- my position on that.
17 What they're saying is they want you to rule on the affinity
18 and if you rule against us then I assume they're dismissing or
19 giving up the argument as to child abuse and this other
20 related felony argument because if that's the case and if this
21 case goes forward without an opportunity to cross examine on
22 those facts today, which would be our first opportunity, then
23 we'd be denied confrontation. So that makes maybe some sense
24 if they're totally getting rid of the child abuse aspect out
25 of the picture.

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1 MR. MAAT: Which I would not ----
2 MR. PRAIN: Because otherwise we'd have to remand.
3 MR. MAAT: No. This ---- this is our position. We
4 would not be giving up alternative theories. That's not the
5 issue here. The defendant doesn't have a Constitutional Right
6 to confrontation at a preliminary examination, that happens at
7 trial. That's number one.
8 Number two, alternative theories can be projected at
9 the source of trial that had nothing to do with the prelim.
10 The question here for the prelim is whether or not the Court
11 has a probable cause to believe that a crime was committed and
12 that the defendant committed a crime. It doesn't have to rule
13 on each and every theory. The Court can choose one theory, the
14 circuit court can choose another, and they can have multiple
15 theories developed. The question is whether or not there's an
16 offense that's been committed here that doesn't come within
17 the jurisdiction of district court, not every ---- each and
18 every theory. So for record purposes, it's our position that
19 if the Court binds over on affinity, there's no need and I
20 have no desire to present testimony on the ---- on the
21 underlying felony theory, but we're not waiving that right,
22 whatsoever, and would be arguing it up in circuit court and
23 they can have the right to confront their accusers at the time
24 of trial.
25 MR. PRAIN: Judge, the right to confrontation

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1 absolutely applies at every stage of a criminal proceeding
2 where evidence is put on. So we do have the right to
3 confrontation at the preliminary exam and I don't know why
4 they were saying ---- they weren't saying that last time
5 because we all agreed that we were going to expand the record
6 as to the second theory that they've brought up now. So what's
7 really happening here is they're saying they want to put
8 influence on the Court to bind over on affinity so that we can
9 avoid having any further testimony on anything. And then they
10 want to bring up this other theory later on in circuit court
11 and deny him his right to confrontation.
12 THE COURT: All right. Mr. Maat, do you have the
13 witnesses here that ----
14 MR. MAAT: Yes.
15 THE COURT: Okay. I'm going to ask that if you're
16 going to ask me to consider any theory under criminal sexual
17 conduct in the first degree predicated on the commission or
18 the act ---- let me get the numbers right. Under
19 750.520(b)(1)(c),) and that the sexual penetration occurred
20 under circumstances involving the condition of any other
21 felony that you put evidence on the record. And here's why,
22 because if I even consider that and make comment on it without
23 evidence in front of me, I'd be outside ------ you know,
24 practicing judicial restraint. If I don't have evidence in
25 front of me, I'm not going to consider it. If I have evidence

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1 in front of me, I can make legal findings and factual
2 findings.
3 MR. MAAT: Agree. I'm not asking the Court to bind
4 over on the underlying felony basis unless the Court decides
5 that the affinity basis is not legally sustainable.
6 THE COURT: Well, here's what I can foresee happening
7 is in the event that I said there's affinity and we did not
8 take proofs on the other issue it goes upstairs and a circuit
9 judge or a Court of Appeals judge or a Supreme Court panel
10 might say, "Judge Kostrzewa, you were wrong on this." And now
11 I have no authority other than a remand to come back down here
12 and start again on your alternative theory of ----
13 MR. MAAT: I'm persuaded, Judge. I agree. That makes
14 sense. I think the likelihood of you being overturned is
15 remote, but the possibility exits and therefore I'll present
16 the evidence I have today on that theory as well.
17 THE COURT: All right. So ----
18 MR. MAAT: So with the Court's permission, I'll just
19 call my first witness.
20 THE COURT: Very well. Is the defense ready to
21 proceed?
22 MR. PRAIN: We are, Your Honor. Thank you.
23 THE COURT: Yes.
24 MR. MAAT: Call Emily Friberg to the stand.
25 THE BAILIFF: Raise your right hand, please. In the

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1 matter now pending, do you solemnly swear or affirm the
2 testimony you're about to give will be the truth, the whole
3 truth and nothing but the truth, so help you God?
4 THE WITNESS: Yes.
5 THE BAILIFF: Please have a seat in the black chair.
6 State your name and spell your name for the record.
7 THE WITNESS: Emily Friberg. E-M-I-L-Y.
8 F-R-I-B-E-R-G.
9 EMILY FRIBERG
10 Called by the People at 10:39 a.m., testified:
11 DIRECT EXAMINATION
12 BY MR. MAAT:
13 Q Ms. Friberg, how are you employed?
14 A I work at the Child Abuse Council.
15 Q How long have you worked at the Child Abuse Council?
16 A A little over two years.
17 Q In what capacity?
18 A I am a forensic interviewer and child therapist.
19 Q So the record is clear regarding your educational experience,
20 what have ---- what education have you received as it relates
21 to child sexual abuse?
22 A I have a bachelors and master's degree in social work.
23 Q And that comes from accredited colleges and -----
24 A Yes. Grand Valley State University.
25 Q All right. And so you have a master's, you said?

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1 A Yes.
2 Q Now since you've graduated from or received your master's
3 degree, have you received any certifications or training
4 beyond the formal education in a college, let's say.
5 A I am certified in trauma focused cognitive behavioral therapy
6 and I also ----
7 Q How do you get certified?
8 A There's a two day training that you attend. Prior to that,
9 there's a 10 hour Webinar that you complete. Then you take
10 three children through the model and also attend consultation
11 groups. I believe that's one hour a month for about a year.
12 And then you have to apply to take the test showing that
13 you've completed all those things and then actually take the
14 test and pass.
15 Q You also ---- you indicated that in regards to your employment
16 at the Child Abuse Council, you really have two major
17 functions. One is forensic interviewer and the other one is a
18 child counselor, is that correct?
19 A Yes.
20 Q Can you give us an idea of how many clients that you have in
21 terms of a counseling therapeutic relationship at a given
22 time?
23 A I have about 20 kids on my caseload at a time.
24 Q At a time?
25 A Yeah.

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1 Q And you indicated previously that you've worked at Child Abuse
2 Council for two years?
3 A Yes.
4 Q Can you give us at least a ballpark estimate of how many
5 children you have counseled and provide therapy to in a
6 therapeutic relationship?
7 A I would say around a hundred.
8 Q All right. Based upon your education ---- well, let me ask you
9 this question. In addition to your certification, in addition
10 to your degrees and in addition to your employment, do you do
11 anything else to keep up on the literature as it relates to
12 child sexual abuse trauma and emotional harm or studies or the
13 literature in that regard?
14 A Yes.
15 Q What do you do in that regard?
16 A I attend conferences, Webinars, different trainings, as well
17 as review articles that I find relevant to those topics.
18 Q All right.
19 MR. MAAT: Your Honor, at this time I would ask that
20 Ms. Friberg be recognized an expert in the field of child
21 sexual abuse trauma.
22 MR. PRAIN: Well, specifically ---- I understand the
23 field, but to offer testimony as to what, and then I'd ask for
24 an opportunity to voir dire.
25 MR. MAAT: The question is to offer as to what?

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1 MR. PRAIN: Correct. I need to know what opinion ----
2 what exactly she's going to testify to so that I can ask
3 questions during voir dire to help me ---- excuse me, to help
4 me to determine whether she has ---- whether we have an
5 objection to the relevant field.
6 MR. MAAT: The ---- I understand. Her expert
7 testimony will be offered on the element as it relates to
8 child abuse two in regards to the serious mental harm.
9 Regarding injury that a person who knowingly and intentionally
10 commits an act to likely cause serious mental harm to a child,
11 regardless of whether harm results.
12 MR. PRAIN: May I voir dire, Your Honor?
13 THE COURT: You may.
14 VOIR DIRE
15 BY MR. PRAIN:
16 Q All right, good morning, Ma'am.
17 A Good morning.
18 Q You and I have never spoke before, correct?
19 A Correct.
20 Q And you work for Child Abuse Council of Muskegon County, I
21 understand, correct?
22 A Yes.
23 Q And you've been there how long?
24 A About two years.
25 Q All right. And in that two years you've served in two

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1 capacities you told the prosecutor as a forensic interviewer,
2 correct?
3 A Yes.
4 Q And what a forensic interviewer is is somebody that's trained
5 in the forensic interview protocol of children, correct?
6 A Yes.
7 Q And that's set up by the Department of Human Services?
8 A I am not sure. It's the State of Michigan protocol that we
9 use.
10 Q You don't know who sets up the protocol?
11 A There is a task force that created the protocol and it was, I
12 believe a wide variety of people that got together to create
13 the protocol.
14 Q I take it Michigan does have an established forensic interview
15 protocol?
16 A Yes.
17 MR. PRAIN: Your Honor, I forgot to ask, I do ask for
18 sequestration. I know I forgot to bring that up but anybody
19 who may testify in this case at any point, we'd ask for them
20 to step out.
21 MR. MAAT: Right.
22 MR. PRAIN: And I'm noting for the record that there
23 are two witnesses leaving the courtroom right now. May we
24 have them identified ----
25 MR. MAAT: One witness, one victim ----

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1 THE COURT: Now just a second. Hold on a second. Come
2 on back in, ladies.
3 What is your name, Ma'am?
4 MS. WESLEY: Tabatha Wesley.
5 THE COURT: Tabatha Wesley. And the other person is
6 the ----- I'm familiar with her. She ---- she works for the
7 prosecutor's office and the victim witness unit. And I don't
8 believe she's going to be called as a witness. Is that right,
9 Mr. Maat?
10 MR. MAAT: No.
11 THE COURT: So the other potential witness is Tabatha
12 Wesley. Is that right?
13 MR. MAAT: Yes.
14 THE COURT: All right. So I'm granting the defense
15 request to have witnesses sequestered. So if you could wait in
16 the hallway. Don't discuss your testimony with any other
17 witness during the pendency of the case here this afternoon.
18 Thank you. Or this morning.
19 (Courtroom was sequestered).
20 THE COURT: Go ahead, Mr. Prain.
21 MR. PRAIN: Thank you for that, Your Honor.
22 VOIR DIRE RESUMED
23 BY MR. PRAIN:
24 Q I was asking you, Michigan does have an established ----
25 MR. PRAIN: May we have the gentleman in the back

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1 identify himself.
2 THE COURT: No, no, no.
3 MR. PRAIN: I believe he's a witness in the case, so.
4 THE COURT: Absolutely not, no.
5 MR. PRAIN: He ----
6 THE COURT: Absolutely not. This is a public
7 courtroom.
8 MR. PRAIN: That's a witness in our case, Your Honor.
9 THE COURT: Well, a witness for who?
10 MR. PRAIN: A res gestae witness. He was at the scene
11 when this was reported. He was interviewed by police. If the
12 prosecution doesn't call him at trial, we will certainly call
13 him. That's Mr. Joseph Wesley.
14 THE COURT: All right. Mr. Wesley.
15 MR. WESLEY: Your Honor, I was not ----
16 THE COURT: No, no, no, no, no. No, no. And I'm not
17 going to have a circus break out here. No, I will not, Sir.
18 MR. WESLEY: Could I ---- could I ----
19 THE COURT: No.
20 MR. MAAT: If I could have just a moment.
21 MR. WESLEY: No, that's okay. That's okay. I
22 understand ---- I understand that a whole courtroom could be
23 filled with (continued with indiscernible comments).
24 (Mr. Wesley walked out of courtroom).
25 THE COURT: All right, specifically it looks like

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1 that individual had excused himself from the courtroom. I
2 wasn't -----
3 MR. MAAT: I know.
4 THE COURT: ---- prepared to excuse him. I just
5 didn't want voices from the gallery speaking up, unidentified
6 people standing up in the courtroom just speaking when they
7 want. That's not the way things go. So to maintain order, I
8 was instructing that individual just to not speak up from the
9 gallery. I was going to let Mr. Maat comment on it. I had not
10 got to the point of whether I would rule that that witness
11 should be sequestered. He removed himself from the courtroom
12 voluntarily.
13 So let's proceed.
14 MR. PRAIN: Thank you, Judge.
15 VOIR DIRE RESUMED
16 BY MR. PRAIN:
17 Q As you were asked, Michigan does have an established protocol
18 for the forensic interview of children, correct?
19 A Yes.
20 Q And it's in writing, yes?
21 A Yes.
22 Q And you receive a copy of it in writing, correct?
23 A Yes.
24 Q Part of your training?
25 A Yes.

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1 Q And as that relates to the aspect of your training and
2 experience that's for forensic interviewing but you said that
3 you're also a child counselor, correct?
4 A Yes.
5 Q Now did you begin counseling children as soon as you began
6 working for the Child Abuse Council?
7 A Yes.
8 Q All right. So right as soon as you started they had you
9 counseling children, correct?
10 A Yes.
11 Q Were you working under the supervision of anybody else?
12 A Yes. I have a supervisor at the center.
13 Q Okay. And who is that person?
14 A Diane Adams.
15 Q All right. Is Diane Adams kind of the head person there?
16 A She is now. At the time that I started, there was some
17 transition going on as to who the director of the Children's
18 Advocacy Center was where I'm employed.
19 Q All right. And when you began working there and you start
20 doing the child counseling, how does that work? Do they assign
21 you one child and say counsel this child or is it a group
22 setting? When you're actually in your ---- serving your
23 counseling function, what does that look like?
24 A I do individual counseling with children and I have also run
25 groups at times.

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1 Q Okay. How many children do you counsel, maybe say a week?
2 A Very difficult to say ----
3 Q Sure.
4 A ---- since I do interviewing and counseling. I have about 20
5 children on my caseload at a time, and I see ----- most of
6 them I see about every other week.
7 Q All right.
8 A So it'd be maybe approximately 10 children a week.
9 Q And do you see them one at a time?
10 A Yes.
11 Q Okay. And how old are these kids? Are they like little kids or
12 are ----
13 A I've done all the way from four up until eighteen.
14 Q Okay. And is there a particular age range amongst those
15 children that you're more geared towards? Are most of those
16 younger like the four or are more of them more like eighteen?
17 A I would say it's all varied and I serve all of the age ranges.
18 I'd say it's a pretty good mix.
19 Q Okay. And partly as a child counselor do you deal with issues
20 that only relate to alleged sexual abuse or other things too?
21 A Primarily it's sexual abuse, but also other things if they
22 come up.
23 Q Okay. Does every person ---- what's the correct word for a
24 child receiving counseling? Is it a patient? Is that what you
25 guys call that?

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1 A I call them clients.
2 Q A client, okay.
3 A Um hum.
4 Q When a client comes to you at the Child Abuse Council, is it
5 always for reasons of sexual abuse?
6 A Yes, typically.
7 Q And then other issues may be revealed as that goes on,
8 correct?
9 A Yes.
10 Q Okay. Now so basically what happens is you sit down with them
11 and they tell you the things that they say have happened to
12 them, right?
13 A Yes.
14 Q And you listen and you observe what they have to say and make
15 evaluations, correct?
16 A I'm not sure what kinds of evaluations. My role is to help a
17 child process the things that have happened to them and help
18 them cope with that.
19 Q When you say process, could you tell the court so we know what
20 that means?
21 A When I say process I mean talk about their sexual views, the
22 events that occurred, how the child feels about it, what their
23 thoughts are. Just help them deal with those feelings and
24 thoughts related to that event.
25 Q Okay. Now so you may have a child who tells you X, Y, Z has

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1 happened to me, I've been sexually abused, and you take them
2 at their word, correct?
3 A Yes.
4 Q As a matter of fact, it's part of your practice that you
5 approach with the assumption that they're telling the truth,
6 correct?
7 MR. MAAT: Well, Your Honor, I object. This doesn't
8 go to qualifications.
9 MR. PRAIN: Well ----
10 MR. MAAT: As far as her experience and education as
11 it relates to her expert opinion.
12 MR. PRAIN: This wouldn't ---- I agree, this is not
13 foundational. In fact, -----
14 THE COURT: But, Mr. Prain, this is voir dire of the
15 witness in terms of Mr. Maat's request to have her treated as
16 an expert, so.
17 MR. PRAIN: Yes, I understand.
18 THE COURT: Confine your questions at this point to
19 whether she qualifies under 702 and 703 to offer some expert
20 testimony. You'll get to cross examine the witness.
21 MR. PRAIN: Yes, I ----
22 THE COURT: In due course.
23 MR. PRAIN: I realize that there's a difference
24 there.
25 BY MR. PRAIN:

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1 Q Okay, Ma'am, when you ---- I guess what I'm trying to get to
2 just to simplify it is you're being ---- you understand that
3 you've been brought here today to be qualified to tell the
4 judge what a victim of sexual abuse is likely to exhibit in
5 their behavior. Is that your understanding?
6 A Yes.
7 Q Okay. And when you do that, in order to be qualified to give
8 that type of an opinion, to be clear, you're relying on what
9 the child tells you, right?
10 A I'm sorry, could you repeat that?
11 Q You're relying on what they tell you, correct?
12 A As I'm?
13 Q About what they say happened, right?
14 A Yes.
15 Q You've never witnessed any of the actual acts to verify
16 whether or not they really happened, correct?
17 A No, I was not a witness to any events.
18 Q All right. And you're certainly familiar with the concept then
19 of people being falsely accused, correct?
20 A Yes.
21 Q But it's not your function to assess whether somebody's
22 telling the truth, you simply counsel them, correct?
23 A Yes.
24 Q Okay. So when you watch a person and they tell you, "I'm
25 feeling depressed, I'm feeling sad," that's some of the things

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1 that they say, correct?
2 A Yes.
3 Q And they say, "That that's because I was sexually abused".
4 When you hear that, you're making the assumption that that is
5 in fact the cause of it, correct?
6 A Yes, if that's what ----
7 Q You don't question ----
8 A ---- they tell me.
9 Q I'm sorry, I interrupted your answer.
10 A I said, "Yes, if that's what they tell me."
11 Q And you don't question that, correct?
12 A There are ---- there's a certain way that a lot of children
13 who are sexually abused act, so ----
14 Q My question is you don't question them, correct?
15 MR. MAAT: Your Honor, I ---- again, I just object. I
16 don't think that this goes to her qualifications, her expert
17 testimony, in terms of how she processes the therapeutic
18 relationship or what her expectations are. This is, you know,
19 fodder for cross examination, but it's not as it relates to
20 qualifications.
21 MR. PRAIN: Well, Your Honor, if somebody's going to
22 render an opinion that people who have suffered in particular
23 that exhibit this condition in order for her to render an
24 opinion they have to establish that there's some link between
25 those things so we need to know in the voir dire process what

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1 that link is founded upon.
2 THE COURT: I have no idea what you just said, Mr.
3 Prain, honestly.
4 MR. PRAIN: Okay. Well, what I'm saying is that if
5 she's going to give an opinion that people who have been
6 through certain types of events will exhibit certain behaviors
7 that, you know, go to our jury instruction then we have to
8 know what she's relying on for that, and that's what I'm
9 asking her about.
10 THE COURT: Well, I'm going to sustain the objection.
11 And what we're talking about here is voir dire on the issue of
12 education, experience, that gives her some special knowledge
13 in this area to offer an expert opinion under 702 of the
14 Michigan Rules of Evidence, so any scientific, technical or
15 other specialized knowledge that makes her qualified. That's,
16 you know, training, experience, skills.
17 MR. PRAIN: Sure.
18 THE COURT: You know, that's what I'm looking for in
19 terms of your attack on this witness's ability to render that
20 opinion, so. I think you're cross examining right now.
21 MR. PRAIN: Okay.
22 THE COURT: It's valid cross, but not valid voir
23 dire, so I'm sustaining the objection.
24 MR. PRAIN: All right.
25 BY MR. PRAIN:

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1 Q You mentioned to us that you work under a supervisor. When you
2 meet with a child, is it just you and them?
3 A Myself and the child, yes.
4 Q Is there ever a supervisor there?
5 A No.
6 Q Has there ever been?
7 A No.
8 Q All right. Do you then produce notes then, I take it?
9 A Yes.
10 Q And those notes include your conclusions?
11 A My case notes are a summary of what I did with the child
12 during that session.
13 Q Okay. And would it include some of the observations that
14 you're going to tell the judge somebody may exhibit if they've
15 been a victim of sexual abuse?
16 A I'm not sure I understand that question.
17 Q Well, would you write down ---- you don't just write what
18 happened, you also write down this is how the person acted or
19 the behaviors that they exhibited, correct?
20 MR. MAAT: Your Honor, I object. The existence of
21 notes doesn't go to her qualifications. The existence, whether
22 they exist or they don't, doesn't go to her qualifications.
23 MR. PRAIN: Judge, it's ----
24 THE COURT: I'll ----
25 MR. PRAIN: ---- not just her qualifications go,

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1 though, it's the ---- it's her qualifications plus the type of
2 opinion that she's going to render.
3 THE COURT: Go ahead. I'll overrule the objection.
4 BY MR. PRAIN:
5 Q In your notes do you ---- do they contain your conclusions
6 about what are your observations about a person's behavior?
7 A They may, but they don't always.
8 Q Okay. They don't always?
9 A No.
10 Q And do you have to give those documents to somebody?
11 A No.
12 Q Do you make psychological ---- are you a psychiatrist?
13 A No, I'm a social worker.
14 Q You're not a psychologist, correct?
15 A Correct.
16 Q You are not qualified to prescribe medications to people,
17 right?
18 A Correct.
19 Q You're not proscribed to psychologically diagnose somebody
20 with a mental disease, correct?
21 A No.
22 Q You don't diagnose people with depression, anxiety, sleep
23 disorder, any of those things, right?
24 A I do not diagnose.
25 Q You're not ---- you don't use the DSM Diagnostic and

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1 Statistical Manual criteria to diagnose these people, correct?
2 A I do not diagnose.
3 Q If I were to ask you is a person ---- is a person that is a
4 professional, if somebody were to come to you and you're under
5 oath and they said, "Does a particular alleged victim of
6 sexual abuse exhibit depression or the lack of the ability to
7 recognize reality or a dissociative disorder," you wouldn't be
8 able to answer that question, correct?
9 A I could say that I ---- they appear to be depressed or they
10 have symptoms related to those, but I don't professionally
11 diagnose anybody.
12 Q Okay. It would take somebody who is a psychologist or
13 psychiatrist to do that, correct?
14 A I believe so.
15 Q Okay. So all you can say is what you observe through common
16 sense and experience and your experience on the job, correct?
17 A Yes.
18 MR. PRAIN: Judge, I object to her being qualified to
19 give these opinions because while she may have great
20 experience working with people, and it sounds like she's very
21 well qualified to do that, what we need here is testimony that
22 relates to things that essentially require a diagnosis. To say
23 that somebody is suffering from a mental condition, I think
24 requires somebody who's qualified for that and what we have
25 here is a person who may observe these things in the course of

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1 their ---- just like I may observe that a client's undergoing
2 psychological trauma or depression. I can say the same thing
3 for people that are accused of crimes that come into my
4 office, but that doesn't make me a professional. So I have to
5 object, I don't think they have met the standard.
6 THE COURT: All right. Well, I'm going to ---- Well,
7 Mr. Maat, he wants to ---- you look like you wanted to rise.
8 Go ahead, Mr. Maat.
9 MR. MAAT: I guess what I'll simply say is the
10 requirement here under the statute regarding her expertise is
11 not medical diagnosis. That's not the standard here. It's
12 mental harm. She's clearly qualified based upon her
13 certifications and training and I don't think you have to be
14 able to prescribe medication in order to identify mental harm.
15 That's all.
16 THE COURT: I don't have the cite in front of me but
17 I'm familiar with the case of *People versus Peterson*. And
18 *Peterson* dealt with a child sexual abuse case and in that case
19 it was basically I'm pretty sure a battle of the experts. One
20 of the experts in the case was Barbara Cross. She's a social
21 worker. She was accepted as an expert in the area of treatment
22 as a clinician of child sexual abuse victims and child sexual
23 abusers, if my memory serves me right. And she had a master's
24 in social work. I think that was the top end of her level of
25 education. She was accepted by the circuit court and the Court

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1 of Appeals as an expert in that area. Now *Peterson* limited
2 where she could go, and where an expert can go in terms of
3 testimony in the area, but if my memory is right she, meaning
4 Ms. Cross, in that Court of Appeals case was accepted as an
5 expert under 702. And, frankly, for the issue of ---- that is
6 before the Court, I don't think you would have to have an
7 expert to say a child suffers or could suffer mental harm from
8 this. I don't think it takes expert testimony to do that.
9 Somebody with some common sense and ability to observe can
10 give their impression if it's based upon personal knowledge.
11 But in this case ---- so I'm overruling the
12 objection and I will receive Ms. Frieberg's testimony under
13 702 of the Michigan Rules of Evidence as an exert in the area
14 of child sexual abuse and trauma. She's established that she's
15 been trained and certified in that area and has sufficient
16 experience in the area. She's now treating 20 children on her
17 caseload as a clinician. She's counseled over a hundred
18 children or around a hundred children and I find that her
19 continuing education at conferences and Webinars and article
20 reviews as she's testified makes her qualified to testify in
21 this area and that's under 702.
22 Objection's overruled. Go ahead, Mr. Maat.
23 MR. MAAT: Okay.
24 DIRECT EXAMINATION RESUMED
25 BY MR. MAAT:

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1 Q Ma'am, before this hearing I had an opportunity to explain to
2 you what the legal definition of a serious mental harm, is
3 that correct?
4 A Yes.
5 Q And I think I explained it to you or read it to you, right?
6 A Yes.
7 Q Okay. I would like your expert opinion as it relates to that
8 definition of serious mental harm, which means an injury to a
9 child's mental condition or welfare that is not necessarily
10 permanent but results in visibly demonstrable manifestations
11 of a substantial disorder of thought or mood which
12 significantly impairs judgment, behavior, capacity to
13 recognize reality or the ability to cope with the ordinary
14 demands of life.
15 MR. PRAIN: Your Honor, I believe I have to object to
16 that because you just ruled that expert opinion was not
17 necessary, so she -----
18 THE COURT: No, no. No, I said it wouldn't be
19 necessary if we had a lay witness here to offer an opinion if
20 there was personal knowledge.
21 MR. PRAIN: All right. So just to be clear, she has
22 been qualified as an expert then?
23 THE COURT: I spent some time about two minutes ago
24 articulating my reasons why I find that she's qualified under
25 Michigan Rule of Evidence 702, that's testimony of experts.

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1 MR. PRAIN: I just wanted to make sure because I ----
2 that's fine.
3 Thank you.
4 THE COURT: Yes.
5 BY MR. MAAT:
6 Q So, Ma'am, based upon your expertise and your understanding of
7 the law, my question is ---- and I'm going to use a
8 hypothetical now. Imagine that we have a 15 year old girl who
9 while sleeping in the home of a perpetrator is awakened by him
10 penetrating her vagina with his finger. This comes to her
11 unexpected, as a surprise while she's sleeping, but becomes
12 aware of it. Do you have an opinion, an expert opinion, as to
13 whether or not an incident like that under those circumstances
14 is likely to cause serious mental harm?
15 MR. PRAIN: Judge, I object to that. There's no
16 foundation to believe that she has ---- well, there may be but
17 it hasn't been laid, that she has expertise dealing with a
18 situation like that.
19 MR. MATT: It goes to weight, not ----
20 MR. PRAIN: Well, he's pulling out a hypothetical
21 just out of the blue which matches the allegation in this
22 case, but there's been no testimony that she's qualified to
23 give an opinion on those set of facts. There's got to be some
24 foundation there, Your Honor.
25 THE COURT: My belief is the foundation of the

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1 testimony Alexis Kersting that was previously admitted at a
2 prior hearing that outlines those facts and if Mr. Maat's
3 going to ask a hypothetical question it has to be based on
4 facts in evidence or conditionally relevant on future
5 admission of facts -----
6 MR. PRAIN: Well ---
7 THE COURT: ---- so I'm allow ----- go ahead. You
8 want to interrupt me, go ahead.
9 MR. PRAIN: No, I didn't mean to interrupt you,
10 Judge. But what I was ---- my point was, I understand that
11 those mirror the allegations in this case. What I was
12 objecting to was a lack of foundation for her to give an
13 opinion under that hypothetical. I understand that that's the
14 hypothetical.
15 THE COURT: All right. I'm finding the hypothetical
16 question in this case is appropriately asked and the witness
17 has been qualified in the area and I'm going to hear the ----
18 I'm going to hear her answer.
19 Overruled.
20 THE WITNESS: I believe that that could cause serious
21 harm to the child.
22 BY MR. MAAT:
23 Q Okay. That's your expert opinion?
24 A Yes.
25 Q That there's a substantial likelihood that it would cause

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1 serious mental harm?
2 A Yes.
3 Q Okay. Now based upon your experience and training, you've
4 indicated that you counsel kids in the teenage years, range,
5 correct?
6 A Yes.
7 Q And as a result, you've had a chance to talk to kids about how
8 they feel and what they think and how it affects their life
9 when circumstances put them ---- or when they're in a
10 situation where they're sexually assaulted, correct?
11 A Yes.
12 Q So what kinds of ---- what kinds of substantial or serious
13 mental harm could we expect to occur from a hypothetical like
14 I just described? What would be likely? What ---- what would
15 occur?
16 A A child could feel sad or scared about what happened. They
17 could have heightened anxiety about ---- because of what
18 happened. They could have ---- be anxious about a lot of
19 different things. We call that hyper-arousal.
20 Q It's called what? Hyper-arousal?
21 A Yes.
22 Q How does that manifest itself?
23 A The child is more ---- or the person could be more sensitive
24 to ---- more hyper-vigilant about their surroundings, things
25 that are happening, just people. Just an elevated sense of

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1 anxiety at all times.
2 Q What about a child's ability to relate with certain people?
3 The trust factor? Would it likely have an impact on their
4 ability to relate with people that they previously trusted?
5 A Yes, it could have an impact on that.
6 Q If in this scenario the person who sexually assaulted her was
7 a trusted, in her mind, family member, would that elevate the
8 risk of serious mental harm?
9 A It could.
10 Q In what ways?
11 A Since it was a person that the child trusted very closely and
12 very deeply, that could really kind of shake them and cause
13 them to have a hard time trusting other family members or
14 other close trusted people.
15 Q In regards to the ordinary demands of life for a teenager, is
16 there a likelihood that it would affect the relationships that
17 she has with other kids her own age?
18 A It could have that impact.
19 Q How so?
20 A Sometimes teenagers have a hard time. They tend to isolate
21 after situations like that. They might not want to hang out
22 with friends or go do things. They could just kind of keep to
23 themselves more.
24 Q What about later on in life? Is there a likelihood that an
25 incident like this could cause intimacy relationship issues or

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1 things like that, even years from now?
2 A It could, yes.
3 Q How so? What have you seen?
4 A Well, I haven't necessarily seen the impacts of children, you
5 know, long term having intimacy issues, but the research would
6 indicate that because it was a person that they trusted ----
7 MR. PRAIN: Your Honor, I object to hearsay.
8 BY MR. MAAT:
9 Q This is ---- the research that you're relying upon in regards
10 to your answer ---- your answer is relied upon the research
11 and the education you've received in this regard?
12 A Yes.
13 MR. MAAT: I don't think it's ---- I don't think
14 that's hearsay.
15 MR. PRAIN: Well, they can't just say the research.
16 We need to know what the research is and what the basis is
17 that ---- her expert opinion in that regard.
18 THE COURT: Well, I think that is for cross exam, so
19 I'm going to overrule the objection.
20 BY MR. MAAT:
21 Q So, Ma'am, up to this point you've been testifying right up
22 until I had this question about adult intimacy issues, whether
23 or not they would exist, likely exist, you've been testifying
24 regarding not only your education and the studies, but also
25 your personal experience which you've been able to witness in

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1 your counseling and therapeutic relationships, right?
2 A Yes.
3 Q Now this question you've indicated, and I'm assuming, number
4 one, because you don't ---- you don't counsel adults ----
5 A Correct.
6 Q ---- is that accurate?
7 A Correct.
8 Q So I understand you'd be qualifying your remarks in this
9 regard by saying, "I haven't personally witnessed this, but
10 I'm aware based upon my education ----
11 A Yes.
12 Q ---- that there can be intimacy problems?"
13 A Yes.
14 Q Okay. You made reference to the fact that a teenager in this
15 situation could likely expect anxiety and fear. How would that
16 manifest itself in a teenager's life? What would it look like?
17 A It could manifest itself in a lot of different ways. It could
18 be a fear of people, it could be a fear about what might
19 happen, it could be a fear of change in relationships. The
20 anxiety, like I mentioned earlier, could be around a variety
21 of different topics whether specific or just in general.
22 Q Kids who have suffered this kind of trauma, the trauma that
23 I have just described by way of hypothetical, have you seen
24 that exhibit itself in terms of disruption in sleeping
25 patterns?

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1 A Yes, it could.
2 Q In eating patterns?
3 A Yes.
4 MR. PRAIN: I'm going to object to speculation.
5 MR. MAAT: No, I'm asking ----
6 MR. PRAIN: How she knows ----
7 THE COURT: Hang on a second.
8 THE WITNESS: Yes.
9 THE COURT: Hang on a second. What's the objection
10 now?
11 MR. PRAIN: Objection as lack of foundation. It's
12 speculation. How would she know what they eat? He asked her
13 have you seen this disruptive sleep and what they eat. She
14 wouldn't know of those things and if she would there isn't any
15 foundation to believe so. That goes too far.
16 THE COURT: It goes to what?
17 MR. PRAIN: That goes too far, Your Honor.
18 THE COURT: All right. I'm going to sustain the
19 objection at this point.
20 Go ahead.
21 BY MR. MAAT:
22 Q Here's my question, you've been in counseling relationships
23 with kids who've been sexually assaulted while teenagers,
24 correct?
25 A Yes.

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1 Q And in regards to your relationship with those other kids,
2 have you seen or have you heard about kids who have difficulty
3 eating or sleeping?
4 A Yes.
5 Q That's not uncommon?
6 A No.
7 Q And you made reference to it can affect their performances at
8 school, and what's your opinion in that regard?
9 A They can have difficulty concentrating or paying attention in
10 their school work.
11 Q I want to ask you without breaching any confidentiality here,
12 all right, so I don't want you telling ---- disclose to me any
13 confidential relationship that you have with the victim in
14 this case, Alexis.
15 A Okay.
16 Q But has there been a counseling relationship between her and
17 you as a result of this alleged trauma?
18 A Yes.
19 Q And how long has that counseling relationship existed?
20 A Several months, I would say. I don't know exactly.
21 Q Okay.
22 MR. MAAT: That's all I have.
23 THE COURT: Now before we move on, I've got Mr. Kacel
24 here that's waiting for a plea.
25 So, Mr. Prain, I'm just going to interrupt these

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1 proceedings.

2 MR. PRAIN: Yes.

3 THE COURT: Take a plea so I can kind of accommodate

4 Mr. Kacel here because I think we'll be quite awhile, so I'm

5 going to do that.

6 (Proceedings recessed at 11:14 a.m., for Court to

7 attend to other matters).

8 (Proceedings resumed at 11:29 a.m.).

9 THE COURT: All right, we're back on the record in

10 People of the State of Michigan versus Daniel Bean, File 16-

11 181535-FY.

12 And I appreciate you lawyers letting me take a

13 couple of matters out of order.

14 But on the short recess I had a chance to get the

15 cite on *People versus Peterson* that I relied on earlier, and

16 that's *People v Peterson*, P-E-T-E-R-S-O-N at 450 Michigan

17 Reports 349, and particularly at page 359 it references the

18 expert testimony of Barbara Cross and how the Court allowed

19 that under 702 of the Michigan Rules of Evidence in a child

20 sexual assault case. So with that clarification on the record,

21 I believe that we were on cross. We had just completed cross

22 by Mr. Prain. Were you still on cross?

23 MR. PRAIN: We ----- Mr. Maat finished his direct and

24 we ----

25 THE COURT: All right, that's right. You did voir

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1 dire, Mr. Maat finished his direct and now it's cross.
2 Go ahead, Mr. Prain.
3 MR. PRAIN: All right, thank you, Your Honor.
4 THE COURT: You're welcome.
5 CROSS EXAMINATION
6 BY MR. PRAIN:
7 Q Ma'am, in this case when did you first become aware that you
8 were going to testify?
9 A You mean today?
10 Q Yes.
11 A Umm, I believe it may have been a few weeks ago.
12 Q Okay. So somebody from the prosecutor's office contacted you
13 and said, "Hey, we need you to come to court and testify about
14 some things with this case involving Alexis," right?
15 A I received a subpoena.
16 Q You received a subpoena. And was the subpoena your first
17 indication that you would be testifying?
18 A Yes.
19 Q And did you then contact somebody at the prosecutor's office
20 and speak to them about the case?
21 A Yes.
22 Q Who did you speak to?
23 A I believe the first person that I had talked to was Terri.
24 Q Okay. Is that a victim advocate?
25 A I'm not sure.

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1 Q All right. And did they explain to you what they wanted you to
2 testify to?
3 A She told me who the prosecutor was and she ---- I relayed my
4 question about what I would be testifying ---- testifying
5 about and she contacted me back with the response.
6 Q Do you know why you were the person selected to testify in
7 this case?
8 A I do not know for sure.
9 Q Okay. Are you the only person? You testified for the
10 prosecutor that you had a counseling relationship with Alexis
11 Kersting, is that correct?
12 A Yes.
13 Q Are you the only person at the Child Advocacy Center that has
14 a counseling relationship with her?
15 A Yes.
16 Q Okay. Not Diane Adams, right?
17 A Correct.
18 Q So you're her official counselor, to be clear?
19 A Yes.
20 Q Was there ever a plan that you were going to testify to
21 certain things about things Alexis told you?
22 A No, not to my knowledge.
23 Q Nobody had ever asked you to come to court and say, "You're
24 going to testify or we need you to testify about her behavior
25 and things that she's exhibited?"

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1 A I explain ---- I guess I'm not sure exactly. I want to make
2 sure that in my testimony I am not breaking any
3 confidentiality in my relationship with her, so I guess I'm
4 not sure about that.
5 Q But did anybody ask you to testify about things that she told
6 you or that you observed during the counseling sessions with
7 Alexis Kersting?
8 A I don't believe so.
9 Q Okay. You've talked about certain factors with the prosecutor
10 that ---- that a person who's been the victim of sexual abuse
11 would likely exhibit. Do you recall that testimony?
12 A Yes.
13 Q And amongst that list of factors you said that it may cause
14 ----- and I'm kind of paraphrasing, so you tell me if you
15 agree with these things or not. That it may cause a social
16 phobia, right?
17 A It may.
18 Q Anxiety about being around people, correct?
19 A Yes.
20 Q And you talked about depression?
21 A Yes.
22 Q That's one of the symptoms you would expect to see in sexual
23 abuse victims, correct?
24 A Well, every victim is different so I can't say for sure a
25 victim would display these symptoms.

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1 Q Let me ask you, would it be ---- would you believe it would be
2 likely to cause depression from your training and experience?
3 A Yes.
4 Q Would it be likely to cause ---- let me rephrase the question
5 so we're clear. Would someone who has experienced sexual
6 assault, would that be likely to cause them depression in your
7 training and experience?
8 A Yes.
9 Q Would sexual assault be likely to cause somebody anxiety?
10 A Yes.
11 Q Would it be likely to cause somebody a state of mind or social
12 phobia where they didn't want to go out?
13 A Yes.
14 Q Would it be likely to cause a situation where they didn't even
15 want to be around their friends?
16 A Yes.
17 Q Or they wouldn't be seen smiling as much?
18 A Yes.
19 Q Where they would appear ---- where they would show visible
20 signs of all the things that I've just asked you?
21 A They could show visible signs, not always.
22 Q Would you find that it would be likely that they would exhibit
23 physical ---- visible signs?
24 A In most cases I would say that.
25 Q Okay. You've talked about school. Would it be likely that

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1 they would experience problems in school?
2 A To some degree, yes.
3 Q Okay. Would it be likely ---- and incidentally, that could be
4 verified through school records and the courts, correct?
5 A It could be.
6 Q Now have you actually done that in your work?
7 A Have I done what?
8 Q Verified trouble in school.
9 A No.
10 Q Okay. So if a patient or a client comes to you and says, "I'm
11 experiencing trouble in school, my grades have gone down," do
12 you do anything to verify that?
13 A No.
14 Q Okay. If they tell that you that they're feeling depressed, is
15 there any ---- when somebody tells you, "I'm experiencing
16 depression, anxiety, any of the things that we've just talked
17 about, part of what you're relying on is what they tell you,
18 true?
19 A Yes.
20 Q What else do you rely on besides just what they tell you?
21 A I take information from their caregiver, if the caregiver has
22 any information. And also from what I'm observing or hearing
23 them talk about.
24 Q Okay. So you review, you do a review of relevant history. Is
25 that fair to say?

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1 A Yes.
2 Q Do you look at their medical record?
3 A No.
4 Q If they have seen a psychologist or psychiatrist, do you
5 request those records?
6 A In most cases they haven't, but if I found that relevant then
7 I would request that.
8 Q So if you have ---- if somebody says, "I'm experiencing these
9 problems," and you found any reason you could simply ask them,
10 "Hey, would you sign a waiver and allow me to see your
11 previous records?"
12 A I could do that, yes.
13 Q But you don't normally do that?
14 A If I find that relevant then I could.
15 Q Under what circumstances might you find that relevant?
16 A If I felt like that would be helpful information for my
17 treatment with the child.
18 Q Okay. Would you not agree that it's always helpful to know
19 somebody's history and their full history before treating
20 them?
21 A Yes.
22 Q That would always be helpful, right?
23 A Yes. If that information is available. Sometimes that's -----
24 they haven't been to a psychologist or psychiatrist. I would
25 say in most cases they haven't.

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1 Q But assuming they have and you had a choice you would always
2 want that information, correct?
3 A Yes.
4 Q And there is a procedure by which you can obtain it if they're
5 willing to give it, correct?
6 A Yes. I would have them sign a release.
7 Q For every provider that they've seen in the past, true?
8 A For the providers that I found would be relevant information.
9 I don't need all of their medical history or anything like
10 that.
11 Q But you would want their psychological history, correct?
12 A Yes, if there was a history of that.
13 Q Okay. You would want to know if there were, for example, other
14 alternate causes for the things that they say, right?
15 A Yes.
16 Q And what I meant just things that they say that they're
17 experiencing. So if somebody comes to you and says, "I"m
18 depressed as a result of being sexually assaulted or I'm
19 suffering anxiety," you would want to know if there is other
20 potential contributors for that, that symptom, is that true?
21 A The depression?
22 Q Any one.
23 A I guess I'm confused.
24 Q Well, if somebody says, "I was sexually assaulted and that's
25 why I'm depressed," now ---- I'll strike the question. If

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1 somebody says to you, "I was sexually assaulted and I
2 therefore am depressed," if you found out that there was
3 something else going on in their life that may be causing that
4 depression that would be what you'd consider to be relevant,
5 right?
6 A Yes.
7 Q Because everything that you do in your practice relies on the
8 truth of the person who is speaking to you, the client,
9 correct?
10 A Yes.
11 Q If, when you're reviewing the history of a client, if they
12 have lied about their history then that prevents your ability
13 to make an accurate assessment, true?
14 A Yes.
15 Q So, in other words, have you heard the phrase garbage
16 in/garbage out?
17 A I've heard it. I'm not sure what that would mean in this case.
18 Q You need to rely on accurate information and if the
19 information you're getting from your client is inaccurate then
20 the opinion that you give about what they're suffering as a
21 result of that is compromised, true?
22 A Yes.
23 Q Okay. For example, if a person says if they're asked, "Have
24 you been ---- have you been the victim of sexual assault in
25 the past other than the instance that we're here to talk

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1 about," and they say no but you later find out that there's
2 evidence that they have, would that tend to undermine your
3 trust and confidence in the things you observed from that
4 person and the things that they said?
5 A I guess that would depend on when the other incident occurred.
6 Q Well, if it's a simple question, "Has this happened in the
7 past," and they say no but you find out the answer is yes,
8 then you wouldn't trust that person as much anymore, right?
9 A I guess it depends on the circumstance for me. There's a lot
10 of variation in that.
11 Q It could cause you to trust them less, right?
12 A It could, yes.
13 Q Now along with the symptoms that you've described and these
14 behaviors that you've testified about today, if a person -----
15 when you told us that they may suffer from the depression and
16 anxiety, right?
17 A Yes.
18 Q Now if we see them, if they come to your office and they say,
19 "I'm depressed, I'm suffering anxiety," but then they're out
20 there and they show no signs of it to anybody else and they
21 appear to be completely happy that would be a cause for
22 concern, wouldn't it?
23 A Yes.
24 Q For example, if somebody tells you, "I'm so upset that I can't
25 even function in school," but yet they're in school every day,

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they're doing fine, or their grades haven't changed or their performance at school hasn't changed, that would be concerning to you, right?

A They could be experiencing those symptoms but still be doing well.

Q Well, if somebody tells you, "My grades have suffered," and then you find there's evidence that their grades have not suffered, that would be concerning to you, right?

A Yes.

Q If somebody tells you, "I can't work. I'm disabled, I can't work because of this trauma that I've suffered as a result of sexual abuse," but then you find out that they're working, that would be troubling to you, correct?

A I don't really deal with that because I'm working with children and most of the time they're not working.

Q Some of the people that you deal with are of working age, correct?

A Yes.

Q And if that was the case for somebody who you were dealing with that was of working age, that would be troubling to you, right?

A I suppose, yes.

Q You wouldn't trust that person as much, correct?

A It could affect my trust for them.

Q If a person tells you, "I'm so upset that I hardly ever smile

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1 anymore," but yet they are seen out in public with big huge
2 smiles hugging their friends and always appear to be having a
3 good time, that could shake your confidence in the things that
4 they tell you, couldn't it?
5 A I suppose that could.
6 Q Now you have ---- I was getting into this area and we kind
7 ----- we kind of stopped this before because we've gone over
8 your qualifications so much, but we talked about the concept
9 of false accusations, right?
10 A Yes.
11 Q And we talked about the fact that when you get a patient in
12 your practice, a client, you don't ---- part of your job isn't
13 to assess whether you think that they're telling the truth or
14 whether they're lying. That's not part of your job, is it?
15 A My job is to treat the child for the symptoms that they're
16 presenting with.
17 Q Okay. But my question is, you don't make an assessment whether
18 you think somebody's telling the truth or whether they're
19 lying, correct?
20 A I don't make an assessment, no.
21 Q So the assumption ---- another way to say that, I guess, is
22 the assumption is always that they're telling the truth,
23 correct?
24 A Yes, typically.
25 Q And you have heard, I take it, about cases of people that have

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1 falsely accused people of sexual assault in the past, correct?
2 A Yes.
3 Q You acknowledge that that does happen, correct?
4 A Yes.
5 Q And you acknowledge that there's many reasons that people
6 might do that, correct?
7 A Yes.
8 Q Such as revenge would be one of them. You've heard of that,
9 right?
10 A Yes.
11 Q And just mental problems on the part of the accuser, correct?
12 A Yes.
13 Q It could be anything, right?
14 A Yes.
15 Q Sometimes for no reason at all, right?
16 A Yes.
17 Q You've heard about people spending many years and decades in a
18 prison because of things like that, right?
19 A Yes.
20 Q And you know that in some of those cases the alleged victim
21 testified in court, correct?
22 A Yes.
23 MR. MAAT: Your Honor, this whole line of
24 questioning. It's just not relevant.
25 MR. PRAIN: I'll withdraw that question.

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1 THE COURT: How is this relevant about other cases
2 that aren't before the court?
3 MR. PRAIN: I'm going to ask ---- I withdraw that
4 question. We'll ask about other types of ----
5 THE COURT: All right. I'm going to sustain the
6 objection.
7 MR. PRAIN: All right.
8 BY MR. PRAIN:
9 Q Now when we hear about that, is it possible that a person that
10 is not telling the truth can exhibit these same behaviors that
11 you've testified to that you say are likely that ---- that
12 sexual abuse is likely to cause, is it possible that a person
13 can exhibit those exact same behaviors but yet be lying?
14 A I suppose that would be possible.
15 Q And you don't have a mechanism to distinguish between that and
16 the truth, correct?
17 A I am not sure what you mean by mechanism.
18 Q You simply take people at their word and you could ---- it
19 could be later found out that somebody made up a story, right?
20 A It could be found out.
21 Q Even somebody that you had treated and counseled with, right?
22 A Yes.
23 Q And so you could see a scenario where you're dealing with a
24 person, counseling them and they appear to you to be
25 depressed, upset, sad, all the things that you testified to

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1 and they could be completely lying about the whole thing.
2 You're open to that possibility, correct?
3 A That could happen, yes.
4 Q And that's not some ---- whether or not that's going on in any
5 particular case is not something you can testify to, right?
6 A Could you ask that question again?
7 Q If whether or not that's actually happening and it's happening
8 in any particular case is not something that you could
9 confidently testify to, right?
10 A Whether or not someone is lying in a certain case?
11 Q Yes.
12 A I can't know for sure.
13 Q Thank you. Ma'am, you had ---- the prosecutor, before you
14 testified today, he read you some definitions, right?
15 A Yes.
16 Q And did he show you them in writing?
17 A I don't know if I actually saw them, but he read them to me.
18 Q Is today the first time you've ever talked to Mr. Maat before?
19 A No.
20 Q Okay. You've talked to him previously, right?
21 A Yes.
22 Q On this case, right?
23 A Yes.
24 Q How many times?
25 A One time.

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1 Q Okay. Was it in person or over the telephone?
2 A Over the phone.
3 Q And did you tell him about how the treatment was going with
4 Alexis?
5 A We did not get into specifics about her treatment.
6 Q Okay. But did you talk about those same definitions that he
7 showed you?
8 A Yes.
9 Q So long before ---- was this like weeks ago?
10 A The telephone conversation?
11 Q Yes.
12 A I believe it was last week. And I don't know that he read the
13 definitions to me over the phone.
14 Q Okay. But before you took the stand, at any rate, you had an
15 opportunity to know exactly what things you were expected to
16 say a victim of sexual assault would exhibit, correct?
17 A I'm sorry, could you say that again?
18 Q You knew the exact words that were in the law that you were
19 expected to testify to, correct?
20 A The exact words in the law?
21 Q Correct.
22 A Yes, I heard him read that definition.
23 Q So it's not that the prosecutor just gave you a subpoena and
24 had you show up and then asked you out of the blue, "What type
25 of symptoms do these people exhibit," you knew what you were

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1 expected to say, correct?
2 A He didn't tell me specifically what symptoms to testify about.
3 Q Well, he read you ---- you do remember that he read something
4 that sounded like this, right? "By serious mental harm, I mean
5 injury to a child's mental condition that results in visible
6 signs." Do you remember that so far?
7 A Yes.
8 Q "Visible signs of impairment in the child's judgment." You
9 remember that, right?
10 A From the law that was read?
11 Q Yes.
12 A Yes.
13 Q You remember the word "behavior" from the words of law ----
14 the law that was read, correct?
15 A Yes.
16 Q And you remember "ability to recognize reality," correct?
17 A Yes.
18 Q And "the ability to cope with ordinary demands of life,"
19 right?
20 A Yes.
21 Q So instead of just putting you on the witness stand and
22 saying, "What symptoms do these people exhibit," you knew
23 which ones you were going to say ahead of time because it was
24 read to you, correct?
25 A He read that to me this morning, yes.

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1 Q And so you knew, correct?
2 A I knew about the law this morning, yes.
3 Q All right. Well, then ----- did you ever put anything in
4 writing for the prosecutor's office?
5 A In regards to this case?
6 Q Correct.
7 A No.
8 Q Have you provided them your resume or curriculum vitae?
9 A Not today.
10 Q At any time?
11 A Previously for other cases.
12 Q Okay. And do you know if Alexis attended, Alexis Kersting
13 attended the Child Abuse Council before August 10th, 2017?
14 A If she attended ---- I guess for what?
15 Q For anything.
16 A Anything. Before August 10th, 2017?
17 Q Yes.
18 A Yes.
19 Q Okay. Or in previous years. Do you know if she attended in
20 previous years at all?
21 A I don't remember exactly when she started attending. I don't
22 have that with me.
23 Q All right. But there would be records somewhere to support
24 that, correct?
25 A Yes. Of when she started attending?

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1 Q Yes. Sorry.
2 A Yes.
3 Q All right. Thank you.
4 MR. PRAIN: That's all I have, Judge.
5 THE COURT: Any redirect Mr. Maat?
6 MR. MAAT: No, Your Honor.
7 THE COURT: All right. And I have no questions. Thank
8 you very much for being here.
9 THE WITNESS: Thank you.
10 THE COURT: You can stand down. Is the witness
11 excused?
12 MR. MAAT: Yes.
13 THE COURT: Mr. Prain?
14 MR. PRAIN: Yes, Your Honor.
15 THE COURT: You are excused as a witness. Thank you
16 very much, Ma'am.
17 (At 11:49 a.m., the witness was excused).
18 MR. MAAT: Your Honor, I'd call Tabatha Wesley to the
19 stand.
20 THE BAILIFF: Raise your right hand. In the matter
21 now pending, do you solemnly swear or affirm the testimony
22 you're about to give will be the truth, the whole truth and
23 nothing but the truth, so help you God?
24 THE WITNESS: Yes.
25 THE BAILIFF: Please have a seat in the black chair.

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1 State your name and spell your name for the record.
2 THE WITNESS: Tabatha Wesley. T-A-B-A-T-H-A.
3 W-E-S-L-E-Y.
4 TABATHA WESLEY
5 Called by the People at 11:50 p.m., testified:
6 DIRECT EXAMINATION
7 BY MR. MAAT:
8 Q Ma'am, you are the mother of the victim in this case, Alexis
9 Kersting, is that correct?
10 A Yes.
11 Q On the night of September 5, of 2016, I would like you to
12 describe to the court what were the arrangements regarding the
13 care and supervision and control of your daughter Alexis, I
14 believe two other boys, too?
15 A Correct.
16 Q What ---- can you explain to the court, what were the
17 arrangements on that?
18 A The kids were to spend the night at their aunt and uncle's
19 house, Dan and Amy.
20 Q All right. And that includes Alexis?
21 A Yes.
22 Q So which ---- which adults were in control or in care? What
23 was the arrangement in terms of who was caring for your kids
24 at that time?
25 A Amy and Dan.

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1 Q They were the only adults that were in the home?
2 A Yes.
3 Q You were not?
4 A No.
5 Q All right. Did you then delegate your authority to them to
6 care for your kids while they ---- while they were spending
7 the night over at the house?
8 A Yes.
9 Q Beyond that night, I'd like you to describe to the court for
10 the record, if nothing else, what was the relationship between
11 your kids, Alexis in particular, and Daniel? Can you describe
12 that for the court?
13 A Dan's her uncle.
14 Q Is that how ----- and when you say, "Dan is her uncle," did he
15 act in that kind of capacity, family capacity?
16 A Yes.
17 Q What kinds of things would he do in terms of the relationship
18 as being an uncle? What kind of things would evidence that
19 relationship?
20 A We had family get togethers quite often. Personally, my
21 family, Joe and I and Amy and Dan were pretty close and our
22 kids were very close so any time the kids seen each other they
23 always wanted to spend the night with each other. It is ----
24 that's my brother-in-law, that's my sister-in-law.
25 Q Would you spend ---- would your family and his family spend

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1 holidays together?
2 A Yes.
3 Q Birthdays you celebrated together?
4 A Yes.
5 Q What would your kids refer to Daniel as?
6 A He was their uncle but they always called Amy and Dan, Meme
7 and Dan.
8 Q And Amy, they considered her to be their aunt?
9 A Yes.
10 Q And just so the record's clear, how long have you been married
11 to your current husband?
12 A It will be 12 years this September.
13 Q All right, 12 years. And has he been essentially raising with
14 you Alexis?
15 A Yes.
16 Q And do you know how long Mr. Bean has been married to his wife
17 Amy?
18 A I know that they had already had their two children together
19 before they were married. I can't say for sure what year it
20 was, but it had to have been at least four or five years.
21 Q All right. And do you know how long that they were a couple
22 living together as ----
23 A They've been a couple since I met my husband. They were
24 together, but they did have a period where they were separated
25 for a little while.

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1 Q I see.
2 A And then they were back together.
3 Q So you've essentially known the defendant and his now wife for
4 over a decade?
5 A Yeah, I would say so.
6 Q And ----- and for most of that time they were essentially
7 living as husband and wife but only became married in the last
8 four years?
9 A Correct.
10 Q Have your kids ever spent the night over there in this kind of
11 familial relationship you described before?
12 A All the time.
13 Q All the time.
14 A Yes.
15 Q Do they have children of their own?
16 A Amy and Dan?
17 Q Yes.
18 A Yes, they have two children together and Dan has two other
19 children from a previous relationship.
20 Q I see. Any of those kids ever spend the night with you guys as
21 uncle and aunt?
22 A All the time.
23 Q Okay. All the time, you said?
24 A Yup.
25 Q All right.

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1 MR. MAAT: That's all I have. Thank you.
2 MR. PRAIN: May I cross examine?
3 THE COURT: You may.
4 MR. PRAIN: Thank you, Your Honor.
5 CROSS EXAMINATION
6 BY MR. PRAIN:
7 Q Ma'am, you and I have never spoke before, correct?
8 A No.
9 Q You were, on the night of September, I think it was early
10 morning hours of September 5th is when this allegation came
11 about, correct?
12 A The early morning hours of the 5th ---- a Monday.
13 Q The morning, because it was Labor Day or something like that,
14 correct?
15 A It was like 2:00 o'clock in the morning, yes.
16 Q Okay. And you ---- and you're married to Joe, correct?
17 A Yes.
18 Q Joe is not Alexis's father, right?
19 A I'm sorry?
20 Q I'm sorry, Joe is not Alexis's biological father?
21 A Biologically, no.
22 Q All right. You guys were helping Dan and Amy move that day,
23 correct?
24 A On Sunday, yes.
25 Q Yes. The day leading up to it was Sunday.

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1 A Yes.
2 Q You guys were helping Dan and Amy move, correct?
3 A Yes.
4 Q And by the time you guys got over there they had a few odds
5 and ends in a trailer to move or something, right?
6 A Yeah, I believe so.
7 Q You brought all the kids with you, correct?
8 A Yes.
9 Q And at some point your family went out to dinner, correct?
10 A We helped Amy and Dan move their last little bit from their
11 old house to their new house. We looked around the house. They
12 were showing us things that needed to be fixed and what they
13 were working on. That's when Dan and Amy's daughter asked if
14 the kids ---- my kids could spend the night and we told them
15 that we had to run to my mother's house. We were going to get
16 dinner on the way and then we would get a bag together and
17 bring the kids back.
18 Q Okay. So you guys ---- did you and Joe and your children go to
19 dinner at some point, leave Dan and Amy's house and go to
20 dinner?
21 A We left Dan and Amy's house and went to dinner, yes.
22 Q Went to the Steak House, right?
23 A I don't recall for sure where it was.
24 Q And your kids asked to spend the night at Dan and Amy's house,
25 correct?

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1 A Dan and Amy's kids asked if my kids could spend the night over
2 there.
3 Q So if somebody testifies or said that it was actually your
4 kids who made the request to stay over there, they're wrong,
5 right?
6 A If somebody -----
7 MR. MAAT: Objection. Relevancy.
8 THE COURT: Okay. There's an objection as to
9 relevancy.
10 MR. PRAIN: Well, we're getting to how the
11 arrangements were made, so I'm trying to build a foundation
12 for that. If her recollection's a little shaky or conflicts
13 with another witness's testimony about how the arrangements
14 came about, I think that's relevant.
15 THE COURT: Well, it's marginally relevant, so I'll
16 overrule the objection.
17 Go ahead.
18 BY MR. PRAIN:
19 Q All right, if somebody says ---- do you remember the question?
20 A Repeat it, please.
21 Q Okay. If somebody says that it was actually your kids who
22 requested to spend the night at Dan and Amy's house, would
23 that be wrong?
24 A I can't say for sure.
25 Q Okay. Do you remember your husband Joe calling his sister Amy

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1 and asking for the kids to stay the night?
2 A No.
3 Q Okay. Is it that you don't remember that or are you sure that
4 didn't happen? Which?
5 A I don't recall that.
6 Q Okay. Is it possible?
7 A So I'm not sure if that happened. I'm not positive, no.
8 Q You would agree that how that came about would be part of the
9 arrangements that were made, right?
10 A I don't agree that that's how it was, but I'm not sure. I'm
11 not Joe.
12 Q Okay. So if somebody ---- somehow some arrangements were made
13 and you guys left there and brought your kids back to Dan and
14 Amy's, correct?
15 A Correct.
16 Q And then you and Joe left, right?
17 A Correct.
18 Q And you guys went out drinking, right?
19 A No.
20 MR. MAAT: Objection. Relevancy.
21 THE COURT: How is what they did when they left
22 relevant?
23 MR. PRAIN: For the reason that they're leaving them
24 there.
25 THE COURT: No.

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1 MR. PRAIN: ---- and what the supervision was.
2 THE COURT: Sustained. That's not relevant for
3 today's purpose.
4 MR. PRAIN: Okay.
5 BY MR. PRAIN:
6 Q When you ----- when you guys dropped off the kids at ---- when
7 you dropped off your children at Dan and Amy's, did you guys
8 go back inside?
9 A Into their house ----
10 Q Correct.
11 A ---- when we dropped them off?
12 Q Yes.
13 A No.
14 Q You just dropped them off and you and Joe left, right?
15 A They were sitting outside by a fire and they invited us to
16 stay and hang out by the fire and we told them that we wanted
17 to go home, so we left.
18 Q Okay. And after you left you have no idea what happened while
19 the kids were there, right?
20 A Correct.
21 Q And you don't know at what point Dan or Amy may have been
22 there or whether some ---- who was there or whether Dan may
23 have left, right?
24 A When I arrived after 2:00 a.m., Dan and Amy were at the house.
25 Q Right. But my question is during the time ----

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1 A In between that, no, I don't know.
2 Q Okay. During the time that you were gone, that you and Joe
3 were gone, you have no idea who was there or what they did
4 during any of that time, correct?
5 A Pers ---- correct.
6 Q But there are your children ---- your other children were
7 there, correct?
8 A My two sons and my daughter Alexis, yes.
9 Q Zane and Jayse, right?
10 A Yes.
11 Q And Alexis, correct?
12 A Yes.
13 Q They would be the people who would have a better idea of who
14 was in control of whether who was watching who, correct, than
15 you would?
16 A I don't understand the question.
17 Q Well, if we wanted to know what happened during the time that
18 you were gone the logical people to ask would be -----
19 A Dan and Amy.
20 Q Well, it would be Zane or Jayse or Alexis, right?
21 A Sure, you can ask children but you would probably want to ask
22 the adults in the house.
23 Q But you weren't in the house, right?
24 A I wasn't at the house so I'm saying probably the best people
25 to ask who was at the house would be the adults there which

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1 were Dan and Amy.
2 Q Okay. But you could also ask the children, too, and they would
3 have a better idea -----
4 A Sure, you can ask children.
5 Q ----- of what ---- than you would since you weren't there,
6 right?
7 A Yes.
8 Q You talked about the ----- you told the prosecutor about the
9 relationship between Dan and your kids. Now he's not related
10 in any way by blood to your children, correct?
11 A Correct.
12 Q Or to Joe, right?
13 A Correct.
14 Q And when you say that you have ---- you're basically members
15 of the same family, right?
16 A Correct.
17 Q And you see each other at family events, like holidays and
18 birthdays and things like that, right?
19 A Yes.
20 Q Along with many other people, true?
21 A Yes.
22 Q You guys have never ---- your family and Dan and Amy's family
23 have never gone on a trip together, right?
24 A We've planned trips together, but we didn't go through.
25 Q You've never gone on a vacation together, right?

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A No, we haven't been on vacation together.
Q You see Dan and Amy in the same capacity that you see many of the family, family members. Isn't that a fair statement?
A I would say we've seen them more often than the regular extended family members.
Q Okay. And why would that be?
A Like I said earlier, Dan and I, Amy and Joe were very close and so were our children.
Q All right. How often would you see them?
A Umm, I would say Amy and I talked on the phone at least a couple times a week. She would call me on her way to work. I would say we would probably see them at least once a month. And the kids often spent the night at each other's houses. What would happen is one week-end Amy and Dan would call and ask if the kids can come over and play. We would go over there, hang out, drop the kids off. The next day the kids didn't want to be apart from each other so all the kids would come to my house, so that gave Joe and I a night free and gave Amy and Dan a night free.
Q Okay. You guys ----
A We did this quite often.
Q All right. And you would talk to Amy frequently, right?
A Yes.
Q But you wouldn't ----
A And Dan.

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1 Q You wouldn't talk to Dan, though, you would talk to Amy,
2 right?
3 A And Dan. I talked to Dan quite often.
4 Q All right. So you would call him up just to talk like you
5 would with Amy?
6 A Yes.
7 Q All right. You have ---- you said that they spend the night
8 all the time, right, and this was a common thing?
9 A Yes, very frequently.
10 Q So throughout the past few years you didn't have any concerns
11 about letting your kids stay the night at Dan and Amy's house,
12 right?
13 A No.
14 Q You're a nurse, too, right?
15 A Yes.
16 Q As a mother and nurse if you had any reason to believe that
17 your kids were being sexually assaulted or sexually touched
18 over there, you wouldn't let them go back, right?
19 A That's why we're here today.
20 Q Is the answer yes?
21 A Yes.
22 Q Okay. You would not let them go back if you had any reason to
23 believe that nobody would be in suspicion of that, right?
24 A Excuse me. Correct.
25 Q And had you had the information that something had happened

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1 you would have went directly to the authorities, true?
2 A As I did, yes.
3 Q And the only reason that you say that this arrangement of
4 frequent staying at each other's houses is because you guys
5 felt a hundred percent completely safe having your kids over
6 at Dan and Amy's, right?
7 A Yes.
8 Q All right.
9 MR. PRAIN: Thank you. That's all the questions I
10 have.
11 MR. MAAT: Nothing further.
12 THE COURT: Mr. Matt?
13 MR. MAAT: Nothing.
14 THE COURT: I have one question, and it has to do
15 with your two younger boys. I believe that's Zane and is it
16 Jayse?
17 THE WITNESS: Jayse, yes.
18 THE COURT: How do you spell Zane's name?
19 THE WITNESS: Z-A-N-E.
20 THE COURT: Z-A-N-E. And how do you spell Jayse's
21 name?
22 THE WITNESS: J-A-Y-S-E.
23 THE COURT: J-A-Y-S-E. And ----
24 THE WITNESS: Amy actually named Jayse.
25 THE COURT: All right. Those two boys, are they ----

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they're your biological children?

THE WITNESS: Correct.

THE COURT: And are they children that you have in common with Joe?

THE WITNESS: Jayse is.

THE COURT: Jayse.

THE WITNESS: Alexis and Zane are from my previous relationship. Their father passed years ago and Jayse is our child together.

THE COURT: All right. So Jayse is the youngest then?

THE WITNESS: Yes.

THE COURT: Thank you. That's all I have.

Mr. Maat, any questions based upon my questions?

MR. MAAT: Yes, on your question. Based on your question.

REDIRECT EXAMINATION

BY MR. MAAT:

Q Tabatha, you were married to Joe you said and I want to make sure. I got the three children. Are there other children ----

A Yes.

Q ---- involved here?

A Yes.

Q So we've got ---- We've got Alexis.

A Alexis.

Q And Jayse. And ----

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1 A Zane.
2 Q Zane. What other children are there?
3 A Joe has a daughter from a previous relationship.
4 Q Okay.
5 A Madison.
6 Q All right. How old is Madison?
7 A She's 15.
8 Q Okay. Does she live with you or no?
9 A She does now.
10 Q She does now. Did she back then?
11 A No.
12 Q Okay. Any other children?
13 A Madison has an older sister, Jade.
14 Q All right.
15 A My husband is not her biological father but he's raised her
16 since she was an infant and we continue to be a part of her
17 life.
18 Q Okay. So as I understand your testimony, you and Joe have one
19 child in common.
20 A One child in common.
21 Q Through biology?
22 A Correct.
23 Q But you love them all the same.
24 A Exactly.
25 Q All right.

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1 MR. MAAT: That's all. Thank you.
2 THE COURT: All right. Anything just based on that
3 question -----
4 MR. PRAIN: Nothing, Your Honor.
5 THE COURT: ---- or my previous questions, Mr. Prain?
6 MR. PRAIN: No, Your Honor.
7 THE COURT: All right. Okay, you can stand down. Is
8 this witness excused, Mr. Maat?
9 MR. MAAT: Yes. Thank you.
10 THE COURT: Mr. Prain?
11 MR. PRAIN: Yes, Your Honor.
12 THE COURT: You are excused, Ma'am. Thank you very
13 much.
14 (At 12:07 p.m., the witness was excused).
15 THE COURT: All right. Mr. Maat.
16 MR. MAAT: Well, Your Honor, I have nothing further.
17 I would ---- I'd like to proceed to argument on bind over.
18 THE COURT: Well, Mr. Prain has the opportunity to
19 call witnesses if he wants to.
20 MR. PRAIN: One moment, Your Honor.
21 (Counsel and defendant conferred).
22 MR. PRAIN: No, Your Honor, we don't have any
23 witnesses.
24 THE COURT: All right. Okay, so I want to make sure
25 that I'm looking at the right complaint here. There was an

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1 amended complaint filed.
2 MR. PRAIN: If there is, I don't have a copy of it,
3 but I know what it would look like, so I'm not worried about
4 it.
5 THE COURT: Yeah, well let's get you a copy right
6 now.
7 MR. PRAIN: Sure. I think we've briefed it enough
8 that I can pretty much tell exactly what's on there.
9 (Copy of amended complaint was provided to counsel).
10 MR. PRAIN: Thank you for the copy.
11 THE COURT: Starting with the complaint's probably a
12 good spot.
13 MR. PRAIN: Yeah. Well, I've got ---- I've got all
14 the discovery. I knew ---- I know exactly what it would say,
15 but it's always a good cover sheet for your notebook.
16 THE COURT: The deputy is going to bring you a copy.
17 MR. PRAIN: Thank you.
18 THE COURT: So I'm working from an amended complaint
19 that was filed August 14, of 2017 and it charges the defendant
20 Daniel Bean with one count of criminal sexual conduct in the
21 first degree and it reads that on or about September 5 of
22 2015, in the township of Holton, County of Muskegon, State of
23 Michigan, at or near 7319 Maple Island Road that the defendant
24 did engage in sexual penetration; to wit, digital penetration
25 of the vagina with a 15 year old under the following

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1 circumstances; the defendant and the victim were related by
2 blood or affinity to the fourth degree and/or was committed
3 during the commission of the felony of child abuse in the
4 second degree, contrary to MCL 750.520(e). That's the
5 information and complaint that I'm working from or I should
6 say the warrant and complaint that I'm working from. And I
7 believe Mr. Prain has a copy of that and obviously it was
8 filed by the prosecutor's office.
9 Before I proceed any further, I have to ask Mr.
10 Prain a point of clarification on his brief.
11 MR. PRAIN: Sure.
12 THE COURT: And I've got a few briefs now that are
13 dancing around here.
14 MR. PRAIN: I've got them in order. If you needed one
15 real quick I can access it.
16 THE COURT: No, I think I have it. It's your most
17 recent brief that you filed electronically and which I
18 included in the file. And I presume Mr. Maat's got a copy of
19 that. I think your cover comments indicated that you copied
20 Mr. Maat in on that brief. Is that right?
21 MR. PRAIN: I sure did.
22 THE COURT: All right. What I'm looking at is really
23 the last ----- well, the last page, page 10, you put forward
24 an argument with respect to the second theory of criminal
25 sexual conduct in the first degree as articulated in that

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1 amended felony complaint regarding the commission of -----of
2 another felony, that being child abuse in the second degree.
3 And you equate this to how a felon in possession of a firearm
4 could not be charged with felony firearm. What ---- what's
5 the authority for that?
6 MR. PRAIN: You know, by the time I was getting -----
7 I was ready to submit that brief, I didn't have time to look
8 up that statute but I could get it. But I know for a fact that
9 you can't predicate a felony firearm charge on a felon in
10 possession. Now if the defendant is charged with say
11 felonious assault, felon in possession of felony firearm, you
12 can have those three together, which is common, but in that
13 case the felony firearm always has to be predicated on the
14 felonious assault.
15 THE COURT: You know, Mr. Prain, from my experience,
16 that is contrary to my understanding of the law. I would be
17 interested to see that law that says felon in possession of a
18 firearm cannot be used as a predicate felony for felony
19 firearm.
20 MR. PRAIN: I'll try to find that. I'm sorry I ----
21 THE COURT: I really ----
22 MR. PRAIN: ---- didn't read that more.
23 THE COURT: I think it's important because it's ----
24 if you're going to make that argument I want it backed up with
25 cases or statutes or some authority. That's a pretty

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1 significant argument to be made.
2 MR. PRAIN: Sure.
3 THE COURT: So I need to know that. That would be
4 contrary to what I understand the law is, but it may have
5 changed and I may not have read this, if there's some case
6 that says a felon in possession of a firearm cannot be used as
7 a predicate felony for felony firearm, I need to know that.
8 MR. PRAIN: You know, Judge, the reason I didn't cite
9 that is because I was rushing to get that out, to be honest
10 with you.
11 THE COURT: That's all right.
12 MR. PRAIN: And what happened was I had talked to a
13 number of people just theorizing about this and that fact
14 seemed to be one of those things that everybody seemed to
15 know. Kind of like how people ---- everybody just seems to
16 know that for HYTA the judge can approve it up to a certain
17 age without prosecutor approval and HYTA has to be a guilty
18 plea, but nobody ever ----
19 THE COURT: No, HYTA just changed and it expanded the
20 age ranges and ----
21 MR. PRAIN: Sure.
22 THE COURT: And so I need to know the law. Now look
23 it, if I was ---- if it was a technical argument I'm going to
24 go to the statute and read it.
25 MR. PRAIN: Sure.

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1 THE COURT: Because I know it just changed. And this
2 position of law, I really would like to see the basis for
3 that. So I'm going to tell you this, that I'm going to break
4 here. I have a judges meeting at noon and I'm 14 minutes late
5 for it. But this will give you some time to ----
6 MR. PRAIN: I'll check it out.
7 THE COURT: ---- to find that.
8 MR. PRAIN: Sure.
9 THE COURT: Because I think that's important. So I'm
10 going to reconvene here at 1:30 on ----- like I said, I've
11 tried to not interrupt cross exam and the presentation of
12 evidence but I have got to attend this meeting and so we'll
13 reconvene at 1:30. And in the meantime, I'd like to see that
14 law.
15 And, Mr. Maat, if he's right about that, I'd ask you
16 to ----
17 MR. MAAT: If he's right about that we're going to
18 have to overturn about three hundred convictions in the last
19 four years.
20 THE COURT: I frankly, just to be straight with you,
21 Mr. Prain, I think that it's allowable.
22 MR. MAAT: I think he's referring to CCW, and that's
23 statutory, not ----
24 MR. PRAIN: You know what, you might be right about
25 that. I might have put the wrong thing on there.

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1 THE COURT: Yeah. I know that you cannot predicate a
2 felony firearm on a carrying a concealed weapon by statute.
3 MR. MAAT: The statute, but not by double jeopardy.
4 THE COURT: But the felony firearm specifically
5 exempts the carrying a concealed weapon charge, but it does
6 not exempt felon in possession of a firearm.
7 MR. PRAIN: That ---- that may be. I think the same
8 logic would apply but if I was in error about that and I meant
9 to say CCW, I apologize. I didn't mean to mislead the Court.
10 But that's ---- I'll check it out, Judge.
11 THE COURT: All right.
12 MR. PRAIN: I'll figure it out.
13 THE COURT: All right.
14 (Proceedings recessed at 12:15 p.m.).
15 (Proceedings resumed at 1:38 p.m.).
16 THE COURT: All right, we are back on the record
17 in People of the State of Michigan versus Daniel Bean, File
18 16-181535-FY. And I believe we had left off this morning and I
19 just had one question on Mr. Prain's brief.
20 And anything else on that, Mr. Prain?
21 MR. PRAIN: Yes. I researched it, Your Honor. I was
22 mistaken and CCW is the predicate that should have been put in
23 there. I apologize for the mistake. If you'd like to hear, I'm
24 prepared to argue to you why the logic is the same. And in
25 looking at the statute, I noticed something else that was

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1 interesting, too. But it has to do with the fact that this is
2 a class of cases where it's the same conduct that's being
3 punished, charged, punished twice. That's the issue that
4 distinguishes this from all the other CSC 1 cases under
5 (b)(1)(c) that I have been able to locate. And I haven't seen
6 anything else different in the prosecution's briefs where
7 they're using this compounded predicate scenario as the
8 *Robideau* Court calls it.
9 THE COURT: All right. So I guess we'll start off
10 ---- we're at the argument portion.
11 And Mr. Maat?
12 MR. MAAT: Yes. Well, Judge, I ---- I'm going to be
13 pretty brief as it relates to the facts. The Court's heard the
14 testimony. I think all the elements that go under the sexual
15 penetration involving a minor child have clearly been proven
16 by probable cause standard.
17 I want to ---- and I'm not going to re-argue what
18 we've already written in terms of the affinity and the other
19 felony basis for CSC 1, so I'm going to limit my argument
20 simply to responding to the brief that I got so I'm not
21 re-arguing what I've already argued.
22 As the Court knows, our argument on affinity is
23 that there are certain bridges that are created through
24 marriage and that's the doctrine of affinity. And we rely upon
25 the *Armstrong* case to show that it doesn't have to be the

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1 defendant's marriage. That's the established law in this area
2 that we're all bound by. And I understand the defense doesn't
3 particularly like the analysis there but it is the controlling
4 analysis that should be extended in this case.
5 In response to what they say in their brief, though,
6 I'd like to comment on a couple things. On page three they
7 say, they make reference to the fact that the Supreme Court
8 has made ---- has quoted the *Bliss* case from the early
9 nineteen hundreds and essentially says, "Well, that means in
10 2012 the Supreme Court is adopting an affinity analysis and
11 determination," but they do indicate in their brief, but I
12 don't think properly so, that wasn't the central issue in the
13 *Zajaczkowki* case, and they outline the facts I think fairly.
14 And that's the whole reason we don't rely on dicta to create
15 the controlling law in a case. They weren't even addressing
16 this issue, even remotely, as it related to affinity. There's
17 a question about whether there's a biological relationship or
18 what connection there might have been in that particular
19 scenario, but the Supreme Court made no attempt in that case
20 to discuss the affinity issue. But that was the central issue
21 in *Armstrong* where the argument was exactly what the defense
22 is saying. The argument there was you can't extend it beyond
23 the defendant's marriage, and *Armstrong* said, "We disagree. It
24 doesn't make any sense. It certainly doesn't fit within the
25 statutory scheme in that marriages outside of the defendant's

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1 relationship can establish these bridges, as I'll refer to
2 them, that link people. Because there's no question that if
3 the defendant was biologically related to the victim as a
4 uncle/niece, he's within the purview of the CSC 1 statute.
5 Well, the same is true if there's an affinity connection and
6 from this standpoint there is through the course of two
7 marriages. And there is nothing in the case law that would say
8 we can't use those marriages to recognize what's already
9 obvious to us all. This is a close, special family
10 relationship between a niece and an uncle. In fact, the
11 youngest, as the Court was able to at least provide some
12 clarity on, would fit that definition. So if he molests the
13 little one the defense would have to concede that it's CSC 1,
14 but if he confesses ---- or if he molests the sibling, which
15 is what we're alleging here, that's ---- that doesn't matter?
16 Absurd. So I would say that the proposition that they ----
17 that they rely upon is just completely baseless.
18 Now the other thing I wanted to comment was as it
19 relates to the child abuse argument, the Court kind of, I
20 think clarified rightfully so, that their analysis and
21 argument does not apply in the scenario that they were
22 suggesting. Now I know that was an honest mistake. And I
23 understand that they're trying to say, "Well, all right. Well,
24 listen, if that's now our argument for CCW," but because the
25 same facts would support a CCW is the same reason why under a

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1 constitutional double jeopardy, multiple punishment double
2 jeopardy, you can't apply felony firearm to CCW. But that's a
3 flawed analysis, too, because it's the statute that says that.
4 It's not some constitutional prohibition. In fact, the
5 example, the analogy that they originally used illustrates the
6 value of our point. The fact of the matter is, you can have
7 the same facts to support felon in possession of a firearm and
8 felony firearm, the exact same facts, because the elements are
9 different. So from that aspect, I think the evidence has
10 clearly proven that the defendant was in the care ---- at
11 least by a probable cause standard, that the defendant was in
12 a caretaker function for a limited period of time, which is
13 all that's required by the statute, that he engaged in an act
14 that could cause or would likely cause substantial or serious
15 mental harm, whether that harm existed or not. The testimony
16 is replete with that example. And there is no double jeopardy
17 issue, and in that respect this is very similar to felon in
18 possession, felony firearm. And I think if the Court wants to
19 use a really good analogy, that's a good one because it's the
20 same facts that would support both convictions and that has
21 been constitutionally upheld, so why wouldn't it be upheld in
22 this situation.
23 THE COURT: Hang on a second.
24 MR. MAAT: Yes.
25 THE COURT TO GALLERY: Please be quiet. I want to

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1 give your case when it's time the due that it's deserving but
2 if you're talking, I can't really concentrate on what the
3 lawyer's arguing. I'm distracted. And when your case comes up
4 that you want me to be attending to fully, I'll do that and
5 I'll tell everybody else to be quiet. But I just need it
6 quiet, so, please. Okay?
7 UNIDENTIFIED PERSON: Yes.
8 THE COURT: Thank you. I'm sorry.
9 MR. MAAT: No, actually I appreciate that because it
10 was distracting me as well.
11 So I will simply finish by resting on my brief as it
12 relates to the rest of this law and the analysis. But I wanted
13 to correct those issues that I think are misleading,
14 unintentionally, perhaps, but it's still misleading by the
15 defense here. And I think that the Court absolutely should
16 bind this over on CSC 1 on either or both theories.
17 That's all.
18 THE COURT: All right. Mr. Prain.
19 MR. PRAIN: Thank you, Your Honor. Before I even get
20 to the affinity issue, I want to say that regardless of the
21 felony firearm CCW/felon in possession, that has nothing to do
22 with the *Robideau* analysis and I'm going to address that in a
23 moment. But that ---- we can set that whole issue aside and it
24 will not change the outcome on the issue of the other felony.
25 But first of all, with regard to the affinity. Now

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1 the prosecution characterizes this as a question of whether or
2 not the affinity relationship can arise by ---- whether it has
3 to arise by the defendant's marriage or somebody else's. I
4 don't see the case as being about that. I've taken the case
5 apart paragraph by paragraph and that's not a point of
6 analysis that they're making here. They never in here say,
7 "Let's now address the issue of whether it has to be the
8 defendant's marriage." In fact, the statutory language is it
9 says the defendant has to be related to the alleged victim by
10 blood or affinity to the fourth degree. So we have to start by
11 looking at him. Now there's the simple *Bliss* definition that I
12 won't go over again because we've gone over it again and again
13 and again, but if we look at the appellate case law in this
14 state it has taken something of a journey, a chronology, if
15 you will, because we start out with the *Bliss* case and the
16 *Denmark* case and they're saying, "We are convinced that the
17 definition of affinity should be limited to the following
18 rule, and then it states the rule. If we apply that rule,
19 which is what the Supreme Court in their last statement is
20 using right now, he is not related by affinity. It's just
21 really that simple.
22 Now *Denmark*, the *Denmark* case came first in 1977.
23 That's the case that's cited for the proposition that once
24 that ---- that affinity has an accepted meaning, and once
25 something has an accepted meaning they say judicial

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1 construction of that term is inappropriate and the legislature
2 is presumed to have used it within that meaning.
3 Then they have *Armstrong* that comes along in 1995,
4 Court of Appeals case that involves the step-siblings. And
5 they say, "Well, even though we acknowledge that *Denmark* does
6 say that affinity has an accepted meaning, we believe that we
7 kind of want to change that up in this case and we want to
8 expand it. We want to give an expanded definition in the case
9 of a step brother and step-sister because the relationship is
10 so close and we're looking at the legislative intent here." So
11 they say, "First we're going to limit the definition, then
12 we're going to expand it," and I think the question that we
13 have to ask is what would the Supreme Court do here. We have
14 this *Zajaczkowski* case and when they are ----- and I concede
15 of course as Mr. Maat pointed out and as I've said in my
16 brief, they're not addressing the issue of affinity but they
17 do take the time to define it. They do take the time ---- and
18 this is the Supreme Court, not the Court of Appeals, to say,
19 "This is the definition of affinity," and they give the *Bliss*
20 definition. They're not talking about expanded definitions,
21 they're not talking about other people's marriages. They say,
22 "This is the definition," and they give that same one. And
23 here's the problem ----
24 THE COURT: Well, Mr. Prain, I'm going to interrupt
25 you for a second, though.

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1 MR. PRAIN: All right.
2 THE COURT: In the *Zajaczkowski* case, though, they
3 never had to address that. They don't even address *People*
4 *versus Armstrong*.
5 MR. PRAIN: And I ---- you know, and you're right. I
6 was going say they don't even say *People versus Armstrong*. And
7 I know that.
8 THE COURT: Yeah, they don't address it. But don't
9 you think they don't address it because it's ---- it is a
10 non-issue for their case. I mean, they had initially in the
11 first page or two of the *Zajaczkowski* opinion say, "This is
12 ---- this case is not about affinity, this case is about
13 relationship by blood."
14 MR. PRAIN: They do say that.
15 THE COURT: Okay.
16 MR. PRAIN: And they ---- and I acknowledge that. I
17 can't change that fact. However, they do ---- when they give
18 that definition of affinity, and you've got to look at the
19 facts of *Zajaczkowski*, too. I don't know why the prosecution
20 conceded in that case that there was no affinity. But in just
21 reading the opinion, it didn't seem like if the Supreme Court
22 was going to step outside of the question that they were
23 dealing with to take the time to deal with affinity they
24 wouldn't give a false statement of the law. And what they give
25 is the *Bliss* definition. And here's the problem that we have,

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1 Your Honor, if we apply ---- if the *Bliss* definition is
2 correct with the language "limited to", and if the statute is
3 correct when we talk about legislative intent and we look at
4 through the relationship of Dan, is he related to Alexis
5 Kersting by affinity. If we make a ruling that says that he's
6 related by affinity it flies in the face of the language of
7 that decision. I think that that's ----
8 THE COURT: Of what decision?
9 MR. PRAIN: Of the ---- of the *Bliss* definition which
10 is in *Zajaczkowski*. If the Supreme Court were to come along
11 and say, "This is the definition," which I think there's every
12 indication to say that they would, then we've got a problem
13 there because they're asking us ---- And I can see in the case
14 of step-siblings, you've got two people that grow up in the
15 same house. You know, they presume that ---- I mean, they grow
16 up like they're brother and sister. We're talking about an
17 uncle that they don't even call uncle, and to say that that is
18 brought under there when the statutory language does not say
19 that is ---- seems to me guaranteed to run into a problem and
20 they're asking the Court to make a decision that runs contrary
21 to what we believe that the letter of the law says and I think
22 we've got to take great, great caution in that.
23 The ---- the second part, Your Honor ---- and I
24 think it's an example of how this seems to be a case where
25 they're looking for any reason to bind over on first degree.

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1 First it was affinity. They gave up on the issue of affinity
2 and then they brought it back and then there was this other
3 issue that got put on the table. I'm not saying that they
4 can't do that. I think that there's some problems that have
5 been created by them doing that. But I think it goes to show
6 that what they're really asking you to do is to stretch the
7 law beyond what it logically says and they know it. This chain
8 of special relationship has to end somewhere. And they ----
9 the fact of the matter is the courts have not defined it.
10 They've defined it ---- the Court of Appeals has defined it in
11 the case of step-siblings, which is very, very different than
12 the relationship that we've got here. I mean, aside from the
13 whole issue of what happened in ----
14 THE COURT: How is it different though, Mr. Prain?
15 It's one where there's no biological relationship, but there's
16 a connection by marriage. So how is it different?
17 MR. PRAIN: Well, it's ----
18 THE COURT: How would you deal with *Armstrong*? I
19 mean, because what you're asking me to do is to say follow
20 *Zajaczkowski* and the *Bliss* definition.
21 MR. PRAIN: Correct.
22 THE COURT: And ignore *Armstrong*.
23 MR. PRAIN: I'm not asking you to ignore *Armstrong*,
24 I'm just saying that *Armstrong* is distinguished because I
25 think we've got to draw a line between step-siblings somewhere

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1 and an uncle that they don't even call uncle.
2 THE COURT: Okay.
3 MR. PRAIN: And I think that, you know, we have to
4 consider at some point what would the Supreme Court say if
5 they're asked to rule on, hopefully not Mr. Bean's case. I
6 mean, I hope this case is not the one that gets there but I
7 think that if there was any ---- this is what I'm trying to
8 say. I get it, I totally understand *Zajaczkowski*'s not an
9 affinity case. I wish it was but I'm trying to do the best I
10 can with what I've got and I really don't think that they
11 would give a definition ---- even in a case that they're not
12 addressing that issue, I don't think that they would provide
13 us a definition that is different than what they were ----
14 what they would say if they squarely addressed that question.
15 So what we do have is the Supreme Court giving their seal of
16 approval to the *Bliss* definition and it says "limited to." So,
17 I mean, we can decide it but ---- you know, and include an
18 uncle that they don't call uncle but we're really asking ----
19 it's really stretching the law, I think beyond it's logical
20 conclusion because the legislature, if that's what they meant
21 when they wrote 750.520(b) they had every opportunity to say
22 that that was the case and they're simply not saying that and
23 then we've got the -----
24 THE COURT: But don't you think that the *Zajaczkowski*
25 court, if it was at issue, would have been forced to squarely

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1 address *Armstrong*?

2 MR. PRAIN: They probably would have, yes.

3 THE COURT: That's what I think would have happened

4 if it was an affinity case.

5 MR. PRAIN: Right.

6 THE COURT: But it wasn't, it was one where they were

7 having to decide a relationship by blood of which I would note

8 as a side, the facts in that case, there wasn't even a

9 matrimonial connection when the person at issue, the victim,

10 was born and the defendant as alleged to in *Zajaczkowski* to

11 have committed the criminal ---- the sexual conduct.

12 MR. PRAIN: Sure.

13 THE COURT: There was no matrimonial bond. I mean,

14 so that had been severed like in 1979, I think. I mean, years

15 before she was even born.

16 MR. PRAIN: Correct.

17 THE COURT: So there was no room in *Zajaczkowski* to

18 argue affinity. But don't you think they would have addressed

19 Arm ----- *Armstrong* if it was of any issue?

20 MR. PRAIN: Well, that's a good question because

21 here's ---- this is where I struggle with that. Because they

22 are addressing affinity. They take the time to bring it up and

23 then they mention that the prosecution conceded it. And here's

24 the thing, at the time the way that the issue came up, at the

25 time if the facts of the case and the relationship between the

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1 people were what everybody thought they were there would have
2 been no question that there was at least a relationship by
3 affinity. They thought that it was blood. So the fact ----
4 what I'm suggesting to you, Your Honor, is the fact that they
5 took the time to acknowledge it. If there was ever a case
6 where they might just say, "Here's the definition of affinity,
7 however ---- you know, and here's the definition from *Bliss*.
8 "However, we acknowledge that this definition might have to be
9 expanded in certain circumstances." There was never a case
10 where you would have a closer more likely expansion of the
11 definition and if they were going to make a mention of it than
12 the *Zajaczkowski* case because you've got people that are
13 growing up essentially as siblings or what you might call half
14 siblings, brother and sister, so you would think that that
15 would at least make a footnote and I think that's a really
16 powerful concern that the Supreme Court, when they get to
17 decide this eventually, is going to say *Bliss* is the
18 definition.
19 THE COURT: All right. Anything else, Mr. Prain?
20 MR. PRAIN: No, Your Honor.
21 THE COURT: All right.
22 MR. PRAIN: But except on the other issue.
23 THE COURT: Go ahead.
24 MR. PRAIN: Okay. As to this ---- during the
25 commission of any other felony, this is a double jeopardy

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1 issue. How do we know that it's a double jeopardy issue,
2 because the *Robideau* case is an example that tells us that. In
3 that case what you had was three separate defendants who were
4 charged with criminal sexual conduct in the first degree. And
5 between defendant one, two and three, respectively, their
6 underlying predicate charge was armed robbery, armed robbery,
7 kidnapping. And these guys were saying, "Well, this is double
8 jeopardy, how could I be convicted of all these things?" The
9 Court said ---- and they were charged under the same variable
10 that they are charging here, which is (b)(1)(c), so we know
11 double jeopardy is the analysis, there's no question. Double
12 jeopardy cases have three aspects. There's those where a
13 defendant is recharged after acquittal. Of course, we don't
14 have that. Recharged after conviction. Of course, we don't
15 have that. And then we have the multiple punishment cases.
16 That comes from the US ---- North Carolina versus ---- it's in
17 my brief, the North Carolina case, where they break that all
18 down. Our Court in *Robideau* characterizes that exact compound
19 and predicate scenario with CSC 1 with that exact variable as
20 multiple punishment and then they give the analysis. They
21 acknowledge the *Blockburger* test, which is the same offense
22 test, which as Mr. Maat pointed out last time, is essentially
23 of one ---- each charge has to have one element that the other
24 charge does not require proof of. And I hasten ---- I'm not
25 going to agree that the *Blockburger* test would come out as

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1 different offenses here and the reason is because there is a
2 section of *Robideau* where they say, you know, "Actually ----
3 and I pointed this out in my brief. They say, "Actually, where
4 you're dealing with CSC 1, one of the elements they have to
5 prove is the other felony." So the elements of that other
6 felony, the predicate, therefore become an element of CSC 1,
7 so that's one way to look at is that the predicate felony and
8 its elements are subsumed within CSC 1, so technically they're
9 actually the same offense. But then they go on to say,
10 "Despite the *Blockburger* test and despite the outcome of it
11 it's always a question of legislative intent." And then we
12 ---- we have to address the question does the *Blockburger* test
13 even always apply because, and I apologize to the court for
14 making you read this, this had to be like the most boring read
15 ever, but they go on for like 20 pages where they chronicle
16 the history of double jeopardy analysis in the Federal Courts
17 and in Michigan. And the point of what they're saying is they
18 have switched between applying the *Blockburger* same
19 offense/same element test, which they call looking at the
20 abstract elements of a statute or jury instruction just
21 without any regard to the facts. And then there's other cases
22 where they take this other approach, which is a practical
23 approach. They simply say is it the same conduct or the same
24 evidence that's being used to prove it. And they say the
25 Federal Courts have gone back and forth almost without

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1 explanation as to which test to apply. And then they say,
2 "Well, let's look at our own cases here in Michigan, we've
3 actually done the same thing." Then toward the end of the
4 opinion, about three-quarters of the way through, they say,
5 "Well, what we're left with in the end is a question of
6 legislative intent." So the question here is did the
7 legislature intend under (b)(1)(c) for a prosecutor to be able
8 to increase, to ask the Court to increase a child abuse second
9 degree ---- or a criminal sexual conduct, excuse me, third
10 degree charge to a first degree charge predicated on child
11 abuse second with the exact same conduct being used to apply
12 to both. So did the legislature really intend that and that's
13 the question that we're asking. I pointed out in my brief, and
14 this was on I think page 8 of my brief, I have a blocked
15 quotation from ---- no excuse me, page 9 of my brief. I have a
16 blocked quotation from the *Robideau* case. So when we address
17 the question in the context of compound and predicate, which
18 is what we're doing, in a double jeopardy analysis under this
19 particular CSC multiple variable statute, they say that there
20 ---- there's two hits, two general principles that we should
21 look at.
22 Number one, statutes prohibiting conduct that is
23 violative of distinct social norms can generally be viewed as
24 a separate and a ---- as separate, excuse me, and amenable to
25 permitting multiple punishments. Where two statutes prohibit

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1 violations of the same social norm; albeit in somewhat
2 different manner, as a general principle it can be concluded
3 the legislature did not intend multiple punishments. And
4 again, multiple punishments is their way of saying, doing
5 exactly what they're trying to do here, charging both of them
6 and using it to elevate it. So if we look at that, Your Honor,
7 well, what do we have? The prosecution concedes in their
8 argument on the affinity issue that they think that it's the
9 same social norm that's essentially at issue in the child
10 abuse statute and the CSC 1, protecting young people from a
11 class of people. So if we apply that, that would seem to
12 indicate that the legislature did not intend for this to
13 happen. In other words, they didn't intend that every time you
14 have a person charged with CSC 3 on somebody who's under 16,
15 that they can simply call it child abuse second and then
16 therefore elevate it at their whim to a first degree life
17 offense. No way.
18 Secondly, they ----
19 THE COURT: Well, let me ask you this. Let me ask you
20 this, Mr. Prain. What if the prosecutor charged count two?
21 Didn't allege this to be a CSC 1 and setting the affinity
22 argument aside, just alleged CSC 3 and child abuse second?
23 MR. PRAIN: Well, that's a good question. I think the
24 analysis would still be the same because -----
25 THE COURT: So you're saying ---- I want to be clear

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1 on this.
2 MR. PRAIN: Yes.
3 THE COURT: So you're saying that they could not
4 charge a count two ----
5 MR. PRAIN: Unless it was in ----
6 THE COURT: ---- child abuse second degree?
7 MR. PRAIN: Unless it was in the alternative because
8 otherwise it would violate everything that they're saying in
9 *Robideau* in the exact same way.
10 THE COURT: That would fly in the face ---- that, to
11 me, would fly in the face of *Blockburger*.
12 MR. PRAIN: Well, that ---- but what they're saying
13 in *Robideau* is *Blockburger* is not the correct test.
14 THE COURT: All right.
15 MR. PRAIN: And that's the issue.
16 THE COURT: Okay.
17 MR. PRAIN: Okay.
18 THE COURT: Okay, go ahead. Proceed.
19 MR. PRAIN: And then they say in *Robideau* as the
20 second general principle, a further ---- because we have to
21 remember, with *Robideau* they were dealing with exactly this,
22 guy's charged with CSC 1 with a predicate and they're making
23 the same argument we're making. They're saying, "We can't be
24 ----- they can't use this predicate just to up it to CSC 1.
25 The difference between ----

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1 THE COURT: Do you have anything to say that
2 *Blockburger* is not the standard to be applied?
3 MR. PRAIN: Yes, *Robideau*. That's what I'm telling
4 you right now. That that's the conclusion that they come to in
5 *Blockburger*.
6 THE COURT: Well, don't they come to a conclusion
7 that there might be an alternative in *Blockburger*?
8 MR. PRAIN: And that's ----
9 THE COURT: They don't overrule *Blockburger*. I don't
10 think they did that.
11 MR. PRAIN: Certainly not.
12 THE COURT: Okay.
13 MR. PRAIN: But what they do say is that *Blockburger*
14 is because the prohibition on double jeopardy is a limitation
15 on the legislature, *Blockburger* is a ---- is a question of
16 legislative intent. Because when I read this, I think to
17 myself, wait a second, when the US Supreme Court says this is
18 the test how is Michigan coming along and saying that there
19 might be something else or we don't have to apply it? And when
20 you read on, it's how the double jeopardy applies to the
21 legislature and not the judiciary, which is why there's
22 openness to multiple tests. The first test is *Blockburger*.
23 And then we have the other test, which is where ---- under
24 *Blockburger* you take out the jury instruction or the statute
25 in a state where they don't have 'em and you look at and you

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1 say, "Okay, check this element, check that element. Okay,
2 this one has this one, this other crime has one that this one
3 doesn't require," and then that's it. The test that they
4 suggest in *Robideau* for a case just like Dan's where the
5 conduct is the same is they say, "Let's look at the facts and
6 the evidence used to prove it. Let's look at the penalties and
7 let's really decide if this is the outcome that the
8 legislature was aiming at." And I think if we apply their
9 principles that I'm reading you we have to come to the
10 conclusion that they did not intend for this because it
11 produces an absurd result.
12 The second principle on top of looking at the social
13 norms that are to be prevented, if it's the same social norm
14 which they, I would again guessing would agree here, it
15 dictates toward they are separate offenses, they cannot do
16 this. Second principle is, "A further source of legislative
17 intent can be found in the amount of punishment expressly
18 authorized by the legislature." Our criminal statutes often
19 build upon one another. Where one statute incorporates most of
20 the elements of a base statute and then increases the penalty
21 as compared to the base statute, it is evident that the
22 legislature did not intend punishment under both statutes. So
23 that's what we have here. We have CSC 1 and the any other
24 felony. That's the base statute which elevates it and that's
25 why we decided *Robideau* in the context of these CSC 1 cases,

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1 just like his. The legislature has taken conduct from the
2 statute, decided that an aggravating conduct deserves
3 additional punishment and impose it accordingly instead of
4 imposing dual convictions. So what we have here is a case
5 where they say, "And look at the punishment." Well, in
6 *Robideau* it came up the opposite way because you had life
7 offense, life offense. CSC 1 is life offense. Armed robbery is
8 life offense. They're based on different conduct. But in Dan's
9 case, they're trying to take the same exact conduct and take
10 it a ten year felony and say that that makes a 15 year felony
11 now a life offense. And it's wrong. Because if you look at
12 all the cases that are on this variable, they're all criminal
13 sexual conduct committed in the course of a home invasion, a
14 drug transaction. I ---- I have seen nothing otherwise and
15 I've researched this for a long time, there isn't one single
16 case that we're going to find where criminal sexual cond ----
17 where child abuse or anything similar to it is used to elevate
18 CSC 3 to CSC 1 when there's no other conduct alleged other
19 than the alleged sexual penetration itself. And the *Robideau*
20 test says the legislature would not intend that. And I think
21 if they're going to ask the Court to bind him over on first
22 degree on that they've got to come forward with some
23 authority, at least one case where that child abuse second
24 statute ---- that would be the ultimate proof if they had a
25 case where the child abuse second degree statute is used to

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1 actually increase to first degree based on the same alleged
2 sexual penetration. There's no drug transaction, there's no
3 other felony.
4 THE COURT: What if, Mr. Prain, you prevail in your
5 argument and the case goes to trial and you're in the judge's
6 chambers and at the end of the presentation of proofs and they
7 are presented consistent with what we have here today and
8 probably more expounded for a trial setting ---- this is a
9 preliminary examination, I recognize that. But what if you
10 have the same set of facts and you prevail today and the
11 prosecutor asks to have a lesser included offense of child
12 abuse second degree included? Wouldn't you argue to the judge,
13 "Hey, *Blockburger* keeps this out?"
14 MR. PRAIN: Well, it would not be a lesser ----
15 THE COURT: Because it's not a necessarily lesser
16 included, it's a cognate ----
17 MR. PRAIN: It's a cognate, right.
18 THE COURT: Yes. It would be a cognate lesser
19 included offense, right?
20 MR. PRAIN: Yes, and I would be ----
21 THE COURT: Okay, and you say without charging it,
22 *People versus Cornell* says it can't come in, right?
23 MR. PRAIN: I would not argue that *Blockburger* buys
24 it. I would be making the same argument that *Blockburger* is
25 not the test to be applied here.

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1 THE COURT: Well, so the prosecutor would say,
2 "Listen, *Blockburger* applies," you'd say, "No, it doesn't,"
3 and you'd say ----
4 MR. PRAIN: *Cornell*.
5 THE COURT: ---- *Cornell* keeps it out because if they
6 wanted to charge it they'd allege it and charge it from the
7 beginning. It's a cognate lesser included, not a necessarily
8 lesser included.
9 MR. PRAIN: I would say if ---- I would say
10 *Blockburger* is not the analysis here. If they were to charge
11 that as a lesser included offense. It doesn't matter what they
12 want to call it. It's violative of the multiple punishment
13 protection under -----
14 THE COURT: All right.
15 MR. PRAIN: Under *Robideau*.
16 THE COURT: All right. All right. Anything else?
17 MR. PRAIN: I think I ---- that's pretty much
18 everything I wanted to -----
19 THE COURT: All right.
20 MR. PRAIN: I wanted to say, Your Honor. Thank you
21 for the opportunity.
22 THE COURT: You're welcome.
23 MR. MAAT: Judge, I'm going to ask to rebut just one
24 statement he made.
25 THE COURT: Go ahead.

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1 MR. MAAT: Because I think it's misleading on the
2 record. And it's what he just argued and it's in his brief
3 where he says, "Listen, if you allow this that means every CSC
4 3 in the State of Michigan is really CSC 1. And I don't think
5 that's ---- it raises by the prosecution's logic basically
6 every single 15 year maximum felony CSC 3 charge brought in
7 the State of Michigan where the victim is 13 to 16, which is
8 CSC 3, would automatically be increased to CSC 1. And I simply
9 want to say, that absolutely is not true, certainly not in
10 Muskegon County. Most of our CSC 3 cases that remain CSC 3
11 have nothing to do with a caretaker. Now most of them involve
12 15/14 year old kids that are engaged with sexual relationships
13 that aren't ---- they're not related to or there's no affinity
14 argument and there's no caretaker function. So I think it's
15 incredibly misleading to say that our analysis would cause all
16 CSC 3's to move to CSC 1 in age based cases when the reality
17 is exactly the opposite. Most of the facts wouldn't permit us
18 to move a CSC 3 to a CSS 1.
19 That's all.
20 MR. PRAIN: May I briefly respond? I wasn't
21 suggesting ----- I understand that's totally a question of
22 prosecutorial discretion. I said basically every. What I'm
23 talking about, Your Honor, is that it leads to an absurd
24 result that flies in the face of what the Supreme Court told
25 us in *Robideau*. Because what I'm suggesting is, it would give

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1 the prosecutor the opportunity in a case like this for what
2 the legislature intended to be third degree punishable by 15
3 years to use a little technical trick to increase it to a life
4 offense that the legislature did not intend. What I'm
5 suggesting is it leads to the possibility of an absurd result.
6 Whether they choose to exercise it or not or in what county
7 doesn't matter, Your Honor.
8 THE COURT: All right, well the Court is going to
9 start off first by indicating that the amended felony
10 complaint as filed by the People on August 17, 2014 is what
11 I'm working from. I had put that on the record previously, but
12 I think it's worth reiterating that it charges alternative
13 theories of criminal sexual conduct in the first degree and
14 that the defendant did engage in sexual penetration; to wit,
15 digital penetration of the vaginal area with a 15 year old
16 child under the following circumstances; first, that the
17 defendant and the victim were related by blood or affinity to
18 the fourth degree and/or was committed during the commission
19 of a felony, in this case child abuse second degree.
20 I will start off by dealing with the affinity
21 question first. And before I get into that, I want to be
22 cognizant that I'm considering each and every element of
23 criminal sexual conduct in the first degree as outlined in the
24 Michigan Criminal Jury Instructions. The first element that
25 the prosecutor must prove in this case by a probable cause

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1 standard, not a trial, this is not a trial, it's a probable
2 cause standard. But the first element is that the defendant
3 engaged in a sexual act that involved entry into the victim's
4 genital opening. Any entry, no matter how slight is enough. In
5 this case, I'm finding that the evidence supports a finding
6 that that element has been satisfied, certainly for probable
7 cause purposes. The victim in this case, Alexis Kersting,
8 testified that the defendant had his hand on her bare skin
9 covering her vaginal area and that a portion of his hand
10 penetrated the vaginal lip, inside her lips as I remember her
11 testimony. And so I'm finding that that does satisfy the
12 definition of penetration, however slight.
13 The second element that the Court must consider is
14 the victim's age. The element requires the prosecutor prove by
15 a probable cause standard that the alleged victim was between
16 ----- was 13, 14 or 15 years old at the time of the alleged
17 act. The prosecutor has placed on the record sufficient
18 evidence to convince me by a probable cause standard that the
19 victim was 15 years old. Her date of birth as sworn to by her
20 is March 18, 2001. These events took place in September of
21 2016, so at the time of the alleged event she was 15 years
22 old.
23 As to the first theory put forward by the
24 prosecutor, then the Court must decide the issue of whether
25 the defendant is related to the victim. And actually the Jury

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1 Instruction reads the opposite way. It says that the victim is
2 related to the defendant by blood or affinity or by marriage
3 ---- excuse me, blood or by marriage. And so we get to the
4 affinity argument.
5 I first want to deal with the applicability of
6 *People versus Zajaczkowski*, Z-A-J-A-C-Z-K-O-W-S-K-I at 493
7 Michigan 6. And I spell that out for Ms. McGoran's benefit so
8 when she types the transcript she doesn't have to look the
9 case up.
10 COURT RECORDER MCGORAN: Thank you.
11 THE COURT: But I want to deal with that case and
12 make a couple comments on it. It is a Supreme Court case. It's
13 the most recent case that's been presented to the Court. It
14 was decided in 2012. But as I probably tip my hand a bit to
15 Mr. Prain in my question, the *Zajaczkowski* case deals solely
16 with the issue of whether there was a relationship based upon
17 blood. Again, that case was deciding the issue of a
18 relationship in a criminal sexual conduct case based on
19 whether there was a blood relationship. In the facts of
20 *Zajaczkowski*, it became clear to me that they could have never
21 argued affinity because there was no matrimonial bond to
22 connect these people. It had ---- that matrimonial bond had
23 been severed years before the alleged victim was born. I see
24 no way that they could have argued affinity in that case.
25 Affinity played no role in that decision. It was not an issue

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1 in the case. I think any law articulated by the Supreme Court
2 on affinity in *Zajaczkowski* is dicta. If it was a necessary
3 issue to be decided I would have thought they certainly would
4 have dealt with *People versus Armstrong*. And I think that they
5 would have if that would have been an issue. Affinity was not
6 an issue and so *Zajaczkowski* is of little assistance to me.
7 That's not to say that the *Bliss* decision must not be
8 considered and the *Denmark* decision, but I think that those
9 decisions on affinity have to be from a district court
10 standpoint guided by *People versus Armstrong*. That's a
11 controlling Court of Appeals case and I'm bound to follow
12 precedent in this case, so I'm distinguishing *Zajaczkowski* for
13 the reasons stated.
14 The *Armstrong* decision is found at 212 Mich App,
15 page 121, and I have reviewed that case. And I find the
16 *Armstrong* case to be more controlling in this case as defining
17 affinity where affinity is directly at issue and I find the
18 reasoning logic of *Armstrong* to be controlling and compelling
19 to me here simply for these reasons; that the defendant is
20 married to ---- to Amy, and that would be a degree of
21 relationship to the second on the consanguinity table and that
22 he certainly is related by affinity to Joe, the husband of
23 Tabatha and the mother of the victim. He certainly is related
24 by affinity in the second degree to Tabatha. He certainly
25 would be related by affinity to Joe's daughter, Madison. He

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1 certainly would be related by affinity to Joe's son, Jayse.
2 And Zane, Jayse and Alexis, the three children of Tabatha, all
3 live in the same house. They have the same relationship with
4 the defendant in fact. When they went to visit on the holidays
5 and birthdays and to be around the bonfire, I don't think
6 anybody in that group said, "Well, you know, Alexis, you're a
7 step-niece and you can't be around us." No, it was a family
8 relationship and I think the logic of *Armstrong* just compels
9 me to find ---- to find that there is an affinity
10 relationship. There ---- and I recognize that there is -----
11 it requires the Court to say that two matrimonial bonds create
12 that relationship, the matrimonial bond between Tabatha and
13 Joe and the matrimonial bond between Joe's sister Amy and the
14 defendant Dan. But if you read *Armstrong* and look at its
15 logic, I would be hard pressed to say that Jayse is in
16 affinity with the defendant and Madison but not their step-
17 sister Alexis, that to me is what I would catagorize an absurd
18 result. So I am finding that there is a relationship by
19 affinity for those reasons.
20 Now onto the second issue of whether this alleged
21 sexual act occurred under circumstances involving the
22 commission of another felony, and I think that's the language
23 of the statute. Yes, under MCL 750.52(b)(1)(c), it says the
24 sexual penetration occurred under circumstances involving the
25 commission of any other felony.

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1 I am first finding that *Blockburger* test is still
2 controlling law on the issue of double jeopardy. I am finding
3 that the nearest case to our circumstance is the *Waltonen*
4 case, *People versus Waltonen* at 272 Mich App 678. And the
5 *Waltonen* decision dealt with an allegation that the criminal
6 sexual conduct occurred in connection with the commission of
7 another felony or occurred under circumstances involving the
8 commission of any other felony. And that the other felony in
9 that case was delivery of a major controlled substance, in
10 that case Oxycontin. And the Court of Appeals articulated some
11 rules that I'm going to apply here. And at page 680, the
12 Court of Appeals concludes, and I quote, "We conclude that the
13 prosecution was required to submit evidence sufficient to
14 establish probable cause to believe that defendant sexually
15 penetrated the victim, that defendant committed the underlying
16 felony, and that there is a direct inter relationship between
17 the felony and the sexual penetration which does not
18 necessarily require penetration to occur during the commission
19 of the felony." Because that's different language than in the
20 statute. Now admitted, in the *Waltonen* case the argument was
21 that the other felony was too attenuated from the sexual
22 penetration to be considered another felony. In our case, the
23 defense argument is that the other felony is too associated
24 with the sexual penetration to be in the category of any other
25 felony. And I understand that. It's kind of turning the

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1 *Waltonen* decision on its head. *Waltonen* said there has to be a
2 nexus between these two. The defense argument is there's too
3 much of a nexus between these two. And so I ---- I appreciate
4 that.
5 What I find to be somewhat of assistance is language
6 in the *Waltonen* case at page 692 when they discuss what they
7 believed the legislative ---- the legislative body intended.
8 And it's in the quote in the middle of 692 and they're quoting
9 *People versus Jones*. And *People v Jones* is at 144 Mich App, 1.
10 It's a 1985 case. But I'm back into the *Waltonen* case at 692
11 and the *Waltonen* Court says the legislature, however did not
12 attempt to narrowly define the coincidence or sequence of
13 sexual ---- of the sexual act and the other felony, rather it
14 choose to address the increased risks to the debasing
15 indignities inflicted upon, victims by the combination of
16 sexual offenses and other felonies by treating the sexual acts
17 as major offenses when they occur "under circumstances
18 involving the commission of any other felony." And to me,
19 that's guiding.
20 What the *Waltonen* Court went on to say at the top of
21 693 is that the statutory language does require a direct
22 inter-relationship between the felony and the sexual
23 penetration. Well, I'm finding in this case that there
24 certainly was a direct inter-relationship between the other
25 felony. I also find that if presented with an alternative

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1 count or a count two charging the defendant with child abuse
2 in the second degree the Court would go to those elements and
3 do a *Blockburger* examination, is there a separate and distinct
4 element aside from the criminal sexual conduct, and I would
5 have to conclude that there is. Child abuse in the second
6 degree is defined in MCL 750.136(b)(1)(3) as follows; a person
7 is guilty of child abuse in the second degree if any of the
8 following applies. And under B, as alleged by the prosecutor,
9 it says the person knowingly or intentionally commits an act
10 likely to cause serious physical or mental harm to a child,
11 regardless of whether the harm results. If there was an added
12 count two based on the record in front of me I would have to
13 say that there is probable cause to believe that that felony
14 offense was committed based upon the testimony of the
15 counselor here today and of Tabatha Wesley. And certainly
16 child abuse in the third degree would not require proof of any
17 event likely to cause serious physical or mental harm to the
18 child regardless of whether the harms results. That's a
19 different element. And so under the *Blockburger* examination
20 then I would say, yes, there's a different element. I would
21 say it's a cognate lesser included offense, not a necessarily
22 lesser included offense. And because of that, I'm finding that
23 another ---- that another felony was committed and it was
24 committed during the course of a sexual penetration. At least
25 there's probable cause to find that. And I have been presented

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1 with no evidence to say that the *Blockburger* test isn't the
2 one that I should apply. I am considering *People versus* ----
3 is it *Robideau*? I think it's *Robideau*. At 419 Michigan 458,
4 but I just think that that there is a record which supports a
5 bind over on that charge. So as a matter of fact, I'm finding
6 that the defendant is Tabatha's Wesley's brother-in-law and
7 that relationship in line with the *Armstrong* decision is one
8 that creates an affinity. I'm also finding that the
9 *Blockburger* test permits the prosecutor to make this argument.
10 How far Waltonen goes, I don't know. There's a footnote in
11 *People versus Waltonen* that cautions, that cautions the real
12 intent of how far the analysis should go, and that's at 272
13 Mich App 678, at page 694. It's footnote number 8. So I'm
14 following what the law says, the legislature ----- the
15 legislature passed this law and I'm duty bound to follow that
16 law as written.
17 So let me make sure I've covered everything. I
18 believe I have.
19 Anything else for the record, Mr. Maat?
20 MR. MAAT: No, thank you, Judge.
21 THE COURT: Anything else for the record, Mr. Prain?
22 MR. PRAIN: No.
23 THE COURT: All right. I want to commend, commend
24 both lawyers on their professionalism and their diligence in
25 providing the Court with the briefs. They were of great

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1 assistance. I appreciate the hard work of both lawyers.
2 So based upon the record in front of me, I am
3 finding that the crime alleged in the amended complaint is one
4 that's not cognizable in the district court and I am therefore
5 binding the defendant over for trial on the amended complaint
6 as I articulated at the beginning of my ruling and findings of
7 facts and I'm signing the bind over at this time.
8 MR. MAAT: Thank you, Your Honor.
9 MR. PRAIN: Your Honor, before everybody leaves, I
10 have a question. Do we do circuit court arraignment in
11 district court here ever?
12 THE COURT: No. There is a local administrative order
13 that basically ---- it follows the Court Rule, it says I could
14 arraign.
15 MR. PRAIN: Sure.
16 THE COURT: But there's an agreement by the district
17 and the circuit court that as long as the prosecutor turns
18 over to defense within 5 days of the bind over a copy of the
19 information that obviates the need to read that information
20 again on the record.
21 MR. PRAIN: So we don't have to worry about an
22 arraignment on the information, we just wait for the ----
23 THE COURT: You do not. As long as ---- well, we gave
24 you a copy of the amended complaint ----
25 MR. PRAIN: Right.

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1 THE COURT: ---- and warrant but now Mr. Maat will
2 have to within 5 days of today's date provide a copy of the
3 information in circuit court and that obviates the need for me
4 to read it again on the record.
5 MR. PRAIN: I understand it. Do we know how we'll get
6 our circuit court AOI/pre-trial date?
7 THE COURT: You'll be given a notice. The case will
8 be ---- as I said, I just signed the bind over and it will be
9 ---- a judge will be drawn and then that judge by way of their
10 staff will send you notice of the pre-trial conference.
11 MR. PRAIN: Okay. Thank you.
12 THE COURT: Did Mr. Maat give you just a copy of the
13 information?
14 MR. PRAIN: Yes, and I acknowledge receipt of a
15 document entitled Amended Felony Information.
16 THE COURT: All right.
17 MR. PRAIN: Which does appear to have both theories
18 under (B)(1)© and the affinity ----
19 THE COURT: All right. So that obviously ---- you
20 don't need me read that on the record again.
21 MR. PRAIN: Yes, we would waive the reading.
22 THE COURT: All right. All right, thank you.
23 MR. PRAIN: Thank you.
24 THE COURT: Same bond's continued.
25

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1 (At 2:35 p.m., proceedings were concluded).
2
3
4
5 STATE OF MICHIGAN
6 ss
7 COUNTY OF MUSKEGON
8 I, Sally A. Johnson-McGoran, do hereby certify that I am a
9 Certified Court Recorder for the 60th District Court of
10 Muskegon County, that the foregoing transcript of record is a
11 full, true and correct copy of the proceedings had at the
12 time and place and in the matter hereinbefore set forth, as
13 recorded and transcribed by me.
14
15
16
17 Sally A. Johnson-McGoran
18 Sally A. Johnson-McGoran, CER 3460
19 DATE: November 27, 2017
20
21
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23
24
25

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2007 WL 2331866
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Delonnie Venaro SILLIVAN, Defendant-Appellant.

Docket No. 269501.
|
Aug. 16, 2007.

Wayne Circuit Court; LC No. 05-009357-01.

Before: SMOLENSKI, P.J., and FITZGERALD and KELLY, JJ.

Opinion

PER CURIAM.

***1** Defendant was convicted of first-degree home invasion, MCL 750.110a(2), and first-degree criminal sexual conduct ("CSC"), MCL 750.520(b)(1)(c) (commission of felony), and received concurrent sentences of 61 months to 20 years each. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that there was insufficient evidence to support either his conviction of first-degree home invasion or first-degree CSC. "This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial. The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v. Lanzo Const Co,* 272 Mich.App 470, 473-474; 726 NW2d 746 (2006) (citation omitted).

Defendant first claims that first-degree home invasion requires a showing of entering a dwelling without permission with the specific intent to commit a felony therein. We disagree. Under MCL 750.110a, the element of intent is not required, as first-degree home invasion can be proven where: (1) a person breaks and enters a dwelling or enters a dwelling without permission, (2) a felony, larceny or assault is committed while the person is in the dwelling, and (3) another person is lawfully present in the dwelling. *People v. Sands,* 261 Mich.App 158, 163; 680 NW2d 500 (2004).

The trial court determined that there was a breaking and entering into the home. The victim testified that all the doors were locked. Defendant claimed in his statement to police that a door was wide open. Michigan courts have recognized that, "[p]articularly where the issue involves the credibility of the witness whose testimony is in conflict, the trial court's resolution of a factual issue is entitled to deference." *People v. Parker,* 230 Mich.App 337, 341; 584 NW2d 336 (1998), quoting *People v. Burrell,* 417 Mich. 439, 448-449; 339 NW2d 403 (1983). The trial court's findings of fact may not be set aside unless clearly erroneous, which has been defined by this Court as a definite and firm belief that the trial court's findings of fact are mistaken. *Parker, supra* at 339 (citation omitted); MCR 2.613. The trial court believed the victim's testimony, finding it not credible that, in the middle of the night, with several adults in the home, a door would be left standing wide open. Such a conclusion was supported by the victim's testimony.

In addition, an assault was committed while defendant was in the home. This court recently reaffirmed the definition of the term "assault" as "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v. Musser,* 259 Mich.App 215, 223; 673 NW2d 800 (2003) (citation omitted). Further, the *Musser* Court ruled that "fourth-degree criminal sexual conduct constitutes an assault for purposes of the home invasion statute." *Id.* at 224. Therefore, if CSC without penetration qualifies as assault, it logically follows that the greater offense of CSC with penetration also qualifies as an assault for determining criminal liability for home invasion.

***2** The final requirement to find first-degree home invasion has been met because there were other people present in the dwelling at the time the breaking and entering occurred. It is undisputed that the victim was in the home when defendant entered. The victim also testified that her children, her mother and her mother's friend were sleeping in the home at the time of defendant's unauthorized entry. Therefore, sufficient evidence existed

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to convict defendant of first-degree home invasion in accordance with MCL 750.110a.

Defendant also argues there was insufficient evidence to sustain defendant's conviction of first-degree CSC. We disagree. MCL 750.520b(1)(c) provides that "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and ... [s]exual penetration occurs under circumstances involving the commission of any other felony." Defendant does not deny having sexual contact, including penetration, with the victim. The conviction for first-degree home invasion comprises the requisite felony to complete the elements of first-degree CSC.

Affirmed.

All Citations

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL RAY BEAN,

Defendant-Appellant.

UNPUBLISHED
February 14, 2019

No. 342953
Muskegon Circuit Court
LC No. 17-000174-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DANIEL RAY BEAN,

Defendant-Appellee.

No. 343008
Muskegon Circuit Court
LC No. 17-000174-FC

Before: METER, P.J., and SAWYER and CAMERON, JJ.

PER CURIAM.

In Docket No. 342953, defendant, Daniel Ray Bean, appeals by leave granted the trial court's order denying his motion to quash a charge of first-degree criminal sexual conduct (CSC-I) on the basis that the sexual penetration occurred under circumstances involving the commission of another felony, MCL 750.520b(1)(c). In Docket No. 343008, the prosecution appeals by leave granted the trial court's order granting defendant's motion to quash the charge on the theory that defendant was not related to the child by affinity, MCL 750.520b(1)(b)(*ii*). These consolidated appeals are interlocutory. We reverse in part and affirm in part.

This case arises out of the alleged sexual assault of a 15-year-old child. Defendant's wife is the sister of the child's stepfather, and therefore, defendant is the child's stepuncle by marriage. Defendant is accused of digitally penetrating the child and touching her breast while

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she slept on a couch at defendant's home. The prosecution originally charged defendant with third-degree criminal sexual conduct (sexual penetration of a victim between the ages of 13 and 16), MCL 750.520d(1)(a). However, the prosecution later sought to elevate the charge to CSC-I on two theories: (1) that the sexual penetration occurred under circumstances involving the commission of any other felony; and (2) defendant and the child were related by affinity. The "other felony" was second-degree child abuse, MCL 750.136b(3)(b) (knowingly or intentionally committing an act likely to cause serious mental harm). The second-degree child abuse was based solely on the alleged digital penetration. At the conclusion of the preliminary examination, the district court agreed to bind over defendant on a charge of CSC-I under both theories.

In circuit court, defendant moved to quash the information, arguing that he could not be charged with CSC-I because he was not related to the child by affinity, and the same conduct (the digital penetration) could not constitute the "other felony" for purposes of MCL 750.520b(1)(c). The trial court granted defendant's motion on the affinity ground but denied it on the other-felony ground. Both parties applied for leave to appeal the trial court's decision. This Court granted both applications for leave to appeal and consolidated the appeals. *People v Bean*, unpublished order of the Court of Appeals, entered August 23, 2018 (Docket No. 342953); *People v Bean*, unpublished order of the Court of Appeals, entered August 23, 2018 (Docket No. 343008).

First, in Docket No. 342953, defendant argues that the trial court erred in denying his motion to dismiss the information on the other-felony theory. We agree.

"This Court reviews a trial court's decision on a motion to quash the information for an abuse of discretion. To the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010) (citation omitted). In addition, "[t]he primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Id.* "To determine the intent of the Legislature, this Court must first examine the language of the statute." *Id.* This Court will "enforce clear and unambiguous statutory provisions as written." *Id.* "If a statute is ambiguous, judicial construction is appropriate." *Id.* at 210.

Under MCL 750.520b(1)(c), "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if . . . [the] [s]exual penetration occurs under circumstances involving the commission of any other felony." In this case, the prosecution submits that the "other felony" is second-degree child abuse contrary to MCL 750.136b(3)(b), which provides that a person is guilty of second-degree child abuse if "[t]he person knowingly or intentionally commits an act likely to cause serious . . . mental harm to a child regardless of whether harm results."

The phrase "any other felony" is not defined in MCL 750.520b(1)(c) or elsewhere in MCL 750.520a (containing the definitions to be used in the criminal sexual conduct chapter). Therefore, this Court may "consult the dictionary to discern [the word's] meaning." *People v Caban (On Remand)*, 275 Mich App 419, 422; 738 NW2d 297 (2007). In pertinent part, the dictionary defines "other" as "being the one (as of two or more) remaining or not included;"

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"being the one or ones distinct from that or those first mentioned or implied;" or "not the same [or] different." *Merriam-Webster's Collegiate Dictionary* (11th ed).

In *People v Jones*, 144 Mich App 1, 4; 373 NW2d 226 (1985), this Court explained:

> The Legislature . . . did not attempt to narrowly define the coincidence or sequence of the sexual act and the other felony; rather it chose to address the increased risks to, and the debasing indignities inflicted upon, victims by the combination of sexual offenses and other felonies by treating the sexual acts as major offenses when they occur "under circumstances involving the commission of any other felony."

This Court upheld *Jones* in *People v Waltonen*, 272 Mich App 678, 692-693; 728 NW2d 881 (2006), stating:

> The key language of the statute is "occurs under circumstances involving," which does not necessarily demand that the sex act occur during the commission of the felony, although this generally will be the case. But the statutory language does require a direct interrelationship between the felony and the sexual penetration.

The Court concluded that to support a charge of MCL 750.520b(1)(c), the prosecution is

> required to submit evidence sufficient to establish probable cause to believe that defendant sexually penetrated the victim, that defendant committed the underlying felony, and that there existed a direct interrelationship between the felony and the sexual penetration, which does not necessarily require that the penetration occur during the commission of the felony. [*Id*. at 680.]

In this case, there is no separate act underlying the "other felony"—the second-degree child abuse. Therefore, there are no "increased risks" or "debasing indignities inflicted" upon the child because there was no combination of a sexual act with another felony. See *Jones*, 144 Mich at 4. In addition, the prosecution must show "a direct interrelationship between the felony and the sexual penetration." *Waltonen*, 272 Mich App at 694. In this case, there is no "direct interrelationship between the felony and the sexual penetration" because the felony *is* the sexual penetration. That is to say, the sexual penetration underlying the second-degree child abuse is not "distinct" or "different" from the sexual penetration, but rather is the exact same conduct.[1] As such, under the facts of this case, the second-degree child abuse cannot constitute the "other felony" in MCL 750.520b(1)(c), and the trial court abused its discretion in denying defendant's motion to quash on this ground. See *Miller*, 288 Mich App at 209.

Next, defendant argues that the trial court erred in not granting his motion to dismiss on double-jeopardy grounds. However, defendant concedes that this appeal is controlled by the

[1] The prosecution's interpretation of the statutory language would automatically elevate every CSC-III charge to CSC-I. This cannot be the intent of the legislature.

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statutory construction issue discussed above. Because we agree with defendant that the trial court erred in not granting his motion to dismiss on the other-felony ground, we need not address this issue further.

Finally, the prosecution contends in Docket No. 342953 that the trial court erred in granting defendant's motion to quash on the basis of affinity. We disagree.

MCL 750.520b(1)(a)(*ii*) provides that a person is guilty of CSC-I if he engaged in sexual penetration with a person who "is at least 13 but less than 16 years of age" and the "actor is related to the victim by blood or affinity to the fourth degree." In this case, there is no dispute that the child was 15 years old at the time of the alleged sexual assault or that the child and defendant are not related by blood. The issue to be resolved is whether a stepniece and stepuncle are related by affinity. We conclude they are not.

The definition of "affinity" in our courts has developed over time, but the definition has ultimately returned to that first established in *Bliss v Callie Bros Co*, 149 Mich 601; 113 NW 317 (1907). In that case, the Michigan Supreme Court defined "affinity" in the context of judicial disqualification as

> the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all blood relatives of the husband. *Id*. at 608.

In *People v Armstrong*, 212 Mich App 121, 126; 536 NW2d 789 (1995), this Court concluded that *Bliss* did not provide "conclusive guidance concerning whether the Legislature intended the term 'affinity' to encompass stepbrothers and stepsisters." Thus, we employed the dictionary definition of affinity, which was broader than the definition established in *Bliss*. See *Armstrong*, 212 Mich App at 128 (defining affinity simply "as a relationship by marriage or by ties other than those of blood") (quotation marks and citation omitted). However, in *Lewis v Farmers Ins Exch*, 315 Mich App 202, 214-215; 888 NW2d 916 (2016), a case involving a claim for personal protection insurance benefits, this Court held that the definition of affinity in *Bliss* controlled. This Court concluded that the Supreme Court's reliance on *Bliss* in *People v Zajaczkowsi*, 493 Mich 6, 13-14; 825 NW2d 554 (2012), demonstrated that the *Bliss* definition remained "the commonly understood meaning of affinity under Michigan law." *Lewis*, 315 Mich App at 214. Therefore, the definition established in *Bliss* applied "without the limiting language emphasized by the *Armstrong* Court." *Lewis*, 315 Mich App at 214.

Under the definition of affinity in *Bliss*, the child and defendant in this case are not related by affinity because the child is not a blood relative of defendant's wife. See *Bliss*, 149 Mich at 608. Considering this Court's acceptance of the *Bliss* definition of affinity in *Lewis*, 315

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Mich App at 214, the trial court did not err when it concluded that the child and defendant were not related by affinity. See *Miller*, 288 Mich App at 209.

Reversed in part and affirmed in part. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Thomas C. Cameron