

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
PLAINTIFF-APPELLEE

SUPREME COURT NO. 160060

v

COURT OF APPEALS NO: 341147

JUAN MARTINEZ III
DEFENDANT- APPELLANT

BERRIEN CIRCUIT COURT NO:
17-15329-FH

Mark Sanford (P35150)
Berrien County Prosecuting Attorney
Attorney for Plaintiff-Appellee
811 Port Street
Saint Joseph Michigan 49085
(269) 983-7111

John R. Moritz (P34859)
Law Office of John R. Moritz
Attorneys for Defendant-Appellant
217 East 24th Street Loft 107
Holland, Michigan 49423
(616) 399-8830

DEFENDANT APPELLANT'S APPENDIX

APPENDIX A	Trial Court Register of Actions	A 0001a - A 007a
APPENDIX B	Court of Appeal's Register of Actions	B 0008a – B 0012a
APPENDIX C	Judgment of Sentence	C 0013a – C 0014a
APPENDIX D	Preliminary Hearing Transcript Excerpts April 25, 2017	D 0015a – D 0020a
APPENDIX E	Motion in <i>Limine</i> Transcript Excerpts June 14, 2017	E 0021a – E 0031a
APPENDIX F	Jury Trial Transcript Excerpts August 23, 2017	F 0032a – E 0108a
APPENDIX G	Jury Trial Transcript Excerpts August 24, 2017	G 0109a- G 0167a
APPENDIX H	Court of Appeals Decision July 18, 2019	H 0168a – H 0179a
APPENDIX I	Court of Appeals Dissent July 18, 2019	I 0180a – I 0184a
APPENDIX J	Supreme Court Order July 2, 2020	J 0185a – J 0186a
APPENDIX K	<i>People v Rieman</i> Unpublished Court of Appeals Case Nos 341041, 348477 July 23, 2020	K 0187a – K 0194a

APPELLANT'S APPENDIX A
Trial Court Register of Action
A 0001a

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APPELLANT'S APPENDIX A
TRIAL COURT REGISTER OF ACTIONS

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Nov 16, 2017
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BERRIEN COUNTY JUSTICE SYSTEM
 PUBLIC ACCESS CASE EVENT REPORT

Case Id: 2017015329-FH
 Person Id: 00108448
 Page: 1

MARTINEZ, JUAN III

S M 508 250 BRD BRO
 06/16/1969

CHG: 0

REL CASE ID: OFF TYPE: P TRACK: CTN: 111700119001
 COMPLT AGY: 90 OFF DATE: 11/01/2016 00:00 PP CARD: CRT: 590C

CLOSED OW

ATTY: INDIGENT DEFENSE,
 PROS: OMALLEY-SEPTOSKI, CORTNEY C
 JUDG: PASULA, ANGELA M

1)	CSC-3RD FORCE/COERCION	ST	GUILTY ORIG CHG BY JURY	CLOS
2)	CSC-4TH FORCE/COERCION	ST	GUILTY ORIG CHG BY JURY	CLOS
3)	B W-DEF FAILED TO APPEAR	ST	DISMISSED	CLOS
03152017	DC CASE TYPE ASSIGNED PROSECUTING ATTORNEY ASSIGNED JUDGE ASSIGNED WARRANT ISSUED BOND SET AT AS TO COUNT 1,2 IE 5000.00		5000.00	FY-455D OMALLEY-SEPTOSKI, CORTNEY PASULA, ANGELA M BROCHMAN, CAROL S INTERIM BOND
03242017	DEFN ARREST ON WARRANT WARRANT RETURNED RISK LEVEL ARRAIGNMENT HELD AS TO COUNT 1,2 JUDGE/MAGISTRATE DEFN W/ATTY IN COURT CT REPORTER/RECORDER DEFNDT ADV OF CONTENT OF C&W RIGHTS READ TO DEFENDANT 1 DEF DEMANDS PRELIMINARY EXAM 2 DEF DEMANDS PRELIMINARY EXAM X DEF PETITIONED F/CT APPT ATTY COURT APPOINTED DEFENSE FIRM SCHED PRE EXAM SCHED EXAM COMMITTED IN LIEU OF BOND INTERIM BOND SET CLOSED BOND SET AT AS TO COUNT 1,2 SC 15000.00 NO ALCOHOL/NO BARS AVOID ALL CONTROLLED SUBSTANCE SUBMIT TO ALC/DRUG TEST DEF ORD N/CONT W/VICTIMS JACQUELINE GADDE/RACHEL HART/ LANA GADDE/3121 S 13TH ST MAY LEAVE STATE OF MICHIGAN IN CURFEW 24/7 EXC WORK NOT THREATEN, INTIMIDATE OR ABUSE NO WEAPONS 1 WARRANT RETURNED			3 WILEY, DENNIS M FIELDS, JENNIFER ELIZABET 2017701DCR WILEY, DENNIS M FE 04052017 0830 PASULA, ANGELA M EX 04112017 0830 PASULA, ANGELA M 5000.00 INTERIM BOND 15000.00 SURETY/CASH BOND
03272017	X PUBLIC DEFENDER - OFFICE PUBLIC DEFENDER ATTORNEY ASSIGNED			ENGRAM, JASON
04062017	3 BENCH WARRANT ISSUED BOND SET AT IE 15000.00		15000.00	DW F/APPEAR PASULA, ANGELA M INTERIM BOND
04112017	WARRANT RETURNED B/W ARRAIGNMENT HELD JUDGE/MAGISTRATE			PASULA, ANGELA M

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MARTINEZ, JUAN III

04112017	3	PROSECUTING ATTORNEY PRESENT DEFN W/ATTY IN COURT CT REPORTER/RECORDER DEFENDT ADV OF CONTENT OF C&W RIGHTS READ TO DEFENDANT DEF ADVISED OF RIGHTS (FELONY CASE) DEF PLEAD NOT GUILTY DEF PETITIONED F/CT APPT ATTY COURT APPOINTS DEFENSE FIRM SCHED PRE EXAM SCHED EXAM COMMITTED IN LIEU OF BOND INTERIM BOND SET CLOSED BOND SET AT SC 1000.00 NO ALCOHOL/NO BARS AVOID ALL CONTROLLED SUBSTANCE SUBMIT TO ALC/DRUG TEST MAY LEAVE STATE OF MICHIGAN IN X BOND AMENDED TO X AS TO COUNT 1,2 SC 20000.00 BOND POSTING CONTINUED BOVO BONDING AGENCY LLC, BOND POSTED AS TO COUNT 1,2 BOVO BONDING AGENCY LLC 3 BOND POSTED 3 BOVO BONDING AGENCY LLC			OMALLEY-SEPTOSKI, CORTNEY ENGRAM, JASON 2017701DCR PASULA, ANGELA M PE 04192017 0830 PASULA, ANGELA M RX 04252017 0830 PASULA, ANGELA M 15000.00 INTERIM BOND 1000.00 SURETY/CASH BOND 20000.00 SURETY/CASH BOND 15000.00 SURETY BOND 20000.00 SURETY BOND 1000.00 SURETY BOND
04192017	X	PRE EXAM CONFERENCE HELD AS TO COUNT 1,2,3 JUDGE/MAGISTRATE PROSECUTING ATTORNEY PRESENT DEFN W/ATTY IN COURT CT REPORTER/RECORDER DEFENDT ADV OF CONTENT OF C&W RIGHTS READ TO DEFENDANT DEF SIGNED RIGHTS FORM CONTINUE TO EXAM			SCHOFIELD, CF SCOTT OMALLEY-SEPTOSKI, CORTNEY ENGRAM, JASON 2017701DCR
04252017		PRELIMINARY EXAM HELD AS TO COUNT 1,3 JUDGE/MAGISTRATE PROSECUTING ATTORNEY PRESENT DEFN W/ATTY IN COURT CT REPORTER/RECORDER DEFN B/O CIRCUIT CT AS CHARGED CASE SUFFIX (TYPE) CHGD JUDGE ASSIGNED RECD RET F/DISTRICT CT INDIGENT DEFENSE ATTY ASSIGNED JUDGE ASSIGNED DEFN ENTRY PLEA N/GUILTY CRIMINAL SCHEDULE ORDER FILED PROOF OF SERVICE FILED MITTIMUS FILED INFORMATION FILED			PASULA, ANGELA M OMALLEY-SEPTOSKI, CORTNEY ENGRAM, JASON 2017701DCR FH PASULA, ANGELA M INDIGENT DEFENSE, PASULA, ANGELA M
04282017		SCHED CASE CONFERENCE SCHED STATUS CONFERENCE SCHED JURY TRIAL SCHED JURY TRIAL SCHED JURY TRIAL			CC 05242017 0830 PASULA, ANGELA M ST 06212017 0830 PASULA, ANGELA M JT 06282017 0830 PASULA, ANGELA M JT 06292017 0830 PASULA, ANGELA M JT 06302017 0830 PASULA, ANGELA M
05042017		WITNESS LIST			
05222017		PROOF OF SERVICE FILED FILED TRANSCRIPT OF			

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BERRIEN COUNTY JUSTICE SYSTEM
PUBLIC ACCESS CASE EVENT REPORT

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MARTINEZ, JUAN III

05222017 X PRELIMINARY EXAMINATION
TUESDAY, APRIL 25, 2017
05232017 NOTICE OF EVIDENCE PURSUANT
TO MCL 768.27A
MOTION IN LIMINE
PROOF OF SERVICE FILED
05242017 DEMAND FOR DISCLOSURE
PROOF OF SERVICE FILED
CASE CONFERENCE HELD
AS TO COUNT
1,2,3
JUDGE/MAGISTRATE
PROSECUTING ATTORNEY PRESENT
DEFENSE ATTORNEY
DEFENDANT IN COURT
CT REPORTER/RECORDER
DEF ADVISED OF RIGHTS (FELONY CASE)
GO TO STATUS
JUDGE ASSIGNED
SCHED MOTION
3 MITTIMUS FILED
X MITTIMUS FILED
AMENDED SCHEDULING ORDER
PROOF OF SERVICE FILED
06082017 ANSWER
06082017 TO PEOPLE'S NOTICE OF INTENT TO
INTRODUCE EVIDENCE OF ANOTHER
LISTED OFFENSE PURSUANT TO
MCL 768.27A
BRIEF
IN SUPPORT OF DEFENDANT'S ANSWER
TO PEOPLE'S NOTICE OF INTENT TO
INTRODUCE EVIDENCE OF ANOTHER
LISTED OFFENSE PURSUANT TO
MCL 768.27A
ANSWER
TO PEOPLE'S MOTION IN LIMINE
BRIEF
IN SUPPORT OF ANSWER TO PEOPLE'S
MOTION IN LIMINE. PARAGRAPH 3
PROOF OF SERVICE FILED
06092017 PROPOSED WITNESS LIST
PROPOSED EXHIBIT LIST
06142017 WITNESS LIST
PROOF OF SERVICE FILED
MOTION HELD
AS TO COUNT
1,2,3
JUDGE/MAGISTRATE
PROSECUTING ATTORNEY PRESENT
DEFENSE ATTORNEY
DEFENDANT IN COURT
CT REPORTER/RECORDER
MOTION IN LIMINE GRANTED.
NOTICE OF EVIDENCE PURSUANT TO
MCL 768.27A DENIED.
JUDGE ASSIGNED
MITTIMUS FILED
06212017 STATUS CONFERENCE HELD
AS TO COUNT
1,2,3
JUDGE/MAGISTRATE
PROSECUTING ATTORNEY PRESENT
DEFENSE ATTORNEY
DEFENDANT IN COURT
CT REPORTER/RECORDER
DEF ADVISED OF RIGHTS (FELONY CASE)
CASE ADJOURNED B/COURT
JUDGE ASSIGNED
AMENDED SCHEDULING ORDER

PASULA, ANGELA M
OMALLEY-SEPTOSKI, CORTNEY
ENGRAM, JASON
2017701DCR
PASULA, ANGELA M
MT 06142017 0230 PASULA, ANGELA M
PASULA, ANGELA M
OMALLEY-SEPTOSKI, CORTNEY
ENGRAM, JASON
2017701DCR
PASULA, ANGELA M
PASULA, ANGELA M
OMALLEY-SEPTOSKI, CORTNEY
ENGRAM, JASON
2017701DCR
PASULA, ANGELA M

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APPELLANT'S APPENDIX A
Trial Court Register of Action
A 0005a

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Case Id: 2017015329-FH
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MARTINEZ, JUAN III

<p>06212017 X PROOF OF SERVICE FILED WITNESS LIST PROOF OF SERVICE FILED MITTIMUS FILED</p> <p>06222017 SCHED STATUS CONFERENCE RESET JURY TRIAL RESET JURY TRIAL RESET JURY TRIAL</p> <p>06262017 AMENDED WITNESS LIST PROOF OF SERVICE FILED</p> <p>07052017 PROPOSED JURY INSTRUCTIONS STATUS CONF CALLED AS TO COUNT 1,2,3 JUDGE/MAGISTRATE PROSECUTING ATTORNEY PRESENT DEFENSE ATTORNEY DEFENDANT IN COURT CT REPORTER/RECORDER DEF ADVISED OF RIGHTS (FELONY CASE) ADJOURNED BY PARTY STIPULATION - WITNESS UNAVAILABLE PROOF OF SERVICE FILED 3 MITTIMUS FILED X MITTIMUS FILED AMENDED SCHEDULING ORDER PROOF OF SERVICE FILED</p> <p>07072017 SCHEDULE CANCELLED SCHEDULE CANCELLED SCHEDULE CANCELLED SCHED STATUS CONFERENCE SCHED JURY TRIAL SCHED JURY TRIAL SCHED JURY TRIAL</p> <p>07212017 MOTION SUBPOENA OUT/STATE WITNESS</p> <p>07212017 MOTION FOR CERTIFICATE PURSUANT TO UNIFORM ACT TO SECURE ATTENDANCE OF WITNESS FROM WITHOUT STATE WILLIAM CAM SHIRELY AS MATERIAL WITNESS FOR TRIAL (FROM ALABAMA) CERTIFICATE OF JUDGE CERTIF REGARDING RECORD & AUTHORITY AFFIDAVIT IN SUPPORT AFFIDAVIT SUPPORT OF MOTION</p> <p>08162017 STATUS CONFERENCE HELD AS TO COUNT 1,2,3 JUDGE/MAGISTRATE PROSECUTING ATTORNEY PRESENT DEFENSE ATTORNEY DEFENDANT IN COURT CT REPORTER/RECORDER DEF ADVISED OF RIGHTS (FELONY CASE) CONTINUE ON TO TRIAL GRANTED VERBAL MOTION FROM PROSECUTOR THAT DEFENSE CANNOT UTILIZE WITNESSES FOR COMMENTS ABOUT VICTIMS FLIRTATIONS OR OTHER SEXUAL ACTS WITH OTHER INDIVIDUALS 3 MITTIMUS FILED X MITTIMUS FILED</p> <p>08232017 JURY TRIAL HELD AS TO COUNT 1,2 JUDGE/MAGISTRATE PROSECUTING ATTORNEY PRESENT DEFENSE ATTORNEY DEFENDANT IN COURT CT REPORTER/RECORDER</p>	<p>ST 07052017 0830 PASULA, ANGELA M JT 07122017 0130 PASULA, ANGELA M JT 07132017 0830 PASULA, ANGELA M JT 07142017 0830 PASULA, ANGELA M</p> <p>PASULA, ANGELA M CMALLEY-SEPTOSKI, CORTNEY ENGRAM, JASON 2017701DCR</p> <p>JT 07122017 0130 PASULA, ANGELA M JT 07132017 0830 PASULA, ANGELA M JT 07142017 0830 PASULA, ANGELA M ST 08162017 0830 PASULA, ANGELA M JT 08232017 0830 PASULA, ANGELA M JT 08242017 0830 PASULA, ANGELA M JT 08252017 0830 PASULA, ANGELA M</p> <p>PASULA, ANGELA M CMALLEY-SEPTOSKI, CORTNEY ENGRAM, JASON 2017701DCR</p> <p>PASULA, ANGELA M CMALLEY-SEPTOSKI, CORTNEY ENGRAM, JASON 2017701DCR</p>
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Case Id: 2017015329-FH
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MARTINEZ, JUAN III

08232017 X DEFENSE MOTION TO SEQUESTER GRANTED
 JURY SELECTED AND SWORN. OPENING
 STATEMENTS. PEOPLE'S PROOFS
 PRESENTED IN PART. COURT ADJOURNED
 UNTIL 8/24/17 AT 8:45 A.M.
 MITTIMUS FILED

08242017 JURY TRIAL CONTINUED
 AS TO COUNT
 1,2
 JUDGE/MAGISTRATE
 PROSECUTING ATTORNEY PRESENT
 DEFENSE ATTORNEY
 DEFENDANT IN COURT
 CT REPORTER/RECORDER
 PEOPLE'S PROOFS PRESENTED IN FULL.
 DEFENSE MOTION FOR MISTRIAL HEARD
 AND DENIED. JUROR #18 INVOLVED IN
 CAR ACCIDENT OVER LUNCH HOUR
 EXCUSED BY STIPULATION. PEOPLE REST
 DEFENSE PROOFS PRESENTED IN FULL.
 COURT ADJOURNED UNTIL 8/25/17 AT
 9:00 A.M.
 MITTIMUS FILED

08252017 JURY TRIAL CONTINUED
 AS TO COUNT
 1,2
 JUDGE/MAGISTRATE
 PROSECUTING ATTORNEY PRESENT
 DEFENSE ATTORNEY
 DEFENDANT IN COURT
 CT REPORTER/RECORDER
 DEFENSE RESTG. PEOPLE'S REBUTTAL.
 PEOPLE REST. CLOSING ARGUMENTS.
 CHARGE TO JURY. JUROR #17 WITHDRAWN
 AT RANDOM. REMAINING JURORS RETIRE
 TO DELIBERATE AND RETURN A VERDICT
 OF

1 CHARGE DISPOSED AS
 COURT POLLED JURY
 VOTE UNANIMOUS
 2 CHARGE DISPOSED AS
 COURT POLLED JURY
 VOTE UNANIMOUS

X CT ORDER PRESENT INVEST
 SCHED PRE-SENTENCE REVIEW
 SCHED SENTENCING
 SCHED CONTEMPT OF COURT HEARING
 BOND REVOKED BY COURT
 JURY INSTRUCTIONS

3 MITTIMUS FILED
 X MITTIMUS FILED
 ORDER TO APPEAR FOR SENTENCING
 FORMS OF VERDICT
 AMENDED NOTICE TO APPEAR FILED
 PROOF OF SERVICE FILED

09252017 3 DEFN CALLED FOR SENTENCING
 JUDGE/MAGISTRATE
 PROSECUTING ATTORNEY PRESENT
 DEFENSE ATTORNEY
 DEFENDANT IN COURT
 CT REPORTER/RECORDER
 DEF ADVISED OF RIGHTS (FELONY CASE)
 CHARGE DISPOSED AS
 PLEA ACCEPTED BY THE COURT

X CLOSED BOND 1000.00
 1 SENTENCING HELD
 JUDGE/MAGISTRATE
 PROSECUTING ATTORNEY PRESENT
 DEFENSE ATTORNEY
 CT REPORTER/RECORDER

PASULA, ANGELA M
 OMALLEY-SEPTOSKI, CORTNEY
 ENGRAM, JASON
 2017701DCR

PASULA, ANGELA M
 OMALLEY-SEPTOSKI, CORTNEY
 ENGRAM, JASON
 2017701DCR

PG 09222017 0100 PROBATION, OFFICER D
 SN 09252017 0830 PASULA, ANGELA M
 CT 09252017 0830 PASULA, ANGELA M

PASULA, ANGELA M
 OMALLEY-SEPTOSKI, CORTNEY
 ENGRAM, JASON
 2017701DCR
 DISMISSED
 SURETY/CASH BOND
 PASULA, ANGELA M
 OMALLEY-SEPTOSKI, CORTNEY
 ENGRAM, JASON
 2017701DCR

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BERRIEN COUNTY JUSTICE SYSTEM
 PUBLIC ACCESS CASE EVENT REPORT

Case Id: 2017015329-FH
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MARTINEZ, JUAN III

09252017 1 DEFENDANT IN COURT
 DEF BEFORE COURT FOR SENTENCING
 STATE PRISON SOUTHERN MICHIGAN
 CREDIT ON MIN. & MAX FOR
 COURT RECOMMENDE
 SGRA REGISTRATION
 RECOMMEND SEX OFFENDER
 TREATMENT WHILE INCARCERATED
 SENTENCED T/PAY FINE OF 250.00
 COURT COSTS OF 750.00
 STATE COSTS 50.00
 V/R ASSESSMENT ORDER 130.00
 ATTY FEE ORDERED IN AMOUNT OF 300.00
 DEF ADVISED OF RIGHT TO APPEAL
 SENTENCING INFORMATION REPORT
 INCARCERATION COST IS 0030 MONTHS 0050 MONTHS
 DEF REMANDED SHERIFF CUSTODY 00850.00
 CLOSED - FINE & COSTS OWING
 CLOSED - VRA OWING
 CLOSED - STATE COST OWING
 CLOSED - ATTY COST OWING
 FINES & COSTS OWING
 VRA OWING
 STATE COST OWING
 ATTORNEY COST OWING
 2 SENTENCING HELD
 JUDGE/MAGISTRATE
 PROSECUTING ATTORNEY PRESENT
 DEFENSE ATTORNEY
 CT REPORTER/RECORDER
 DEFENDANT IN COURT
 DEF BEFORE COURT FOR SENTENCING
 CONFINED B/CTY JAIL FOR
 CREDIT TIME SERVED OF
 DEF ADVISED OF RIGHT TO APPEAL
 SENTENCING INFORMATION REPORT
 DEF REMANDED SHERIFF CUSTODY
 0035 DAYS
 0035 DAYS
 0000 MONTHS 0017 MONTHS
 X CASE CLOSED OWING
 1 LEIN DATA SENT TO STATE POLICE
 2 LEIN DATA SENT TO STATE POLICE
 X RECEIPT OF APPEAL NOTICE
 ORDER CANCEL LEIN BOND COND
 CERTIFICATE OF REMOVAL
 3 MITTIMUS FILED
 2 MITTIMUS FILED
 1 MITTIMUS FILED
 09262017 X AQUITTAL/DISMISSAL FORM PRINTED
 JUDGMENT OF SENTENCE FORM
 JUDGMENT OF SENTENCE FORM
 REMIT PRISONER FUNDS FORM PRINTED
 3 ORDER ACQUITTAL/DISMISSAL FILED
 X ORDER TO PAY ATTORNEY FEES FILED
 2 JUDGMENT OF SENTENCE FILED
 1 REMIT PRISONER FUNDS FORM FILED
 JUDGMENT OF SENTENCE FILED
 11142017 X REPORTERS CERTIFICATE FILED

*** END OF DATA ***

APPELLANT'S APPENDIX B
COURT OF APPEAL'S DOCKET

Case Search

Case Docket Number Search Results - 341147

Appellate Docket Sheet

COA Case Number: 341147**MSC Case Number: 160060**

PEOPLE OF MI V JUAN MARTINEZ III

1	PEOPLE OF MI Oral Argument: Timely: N	PL-AE	PRS	(35150) SANFORD MARK
2	MARTINEZ JUAN III Oral Argument: Y Timely: Y	DF-AT	RET	(34859) MORITZ JOHN R
			CO	(75058) GONZALES ABRAHAM D

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application

- 11/20/2017 1 Claim of Appeal - Criminal
Proof of Service Date: 11/17/2017
Jurisdictional Checklist: Y
Register of Actions: Y
Attorney: 34859 - MORITZ JOHN R
- 09/26/2017 2 Order Appealed From
From: BERRIEN CIRCUIT COURT
Case Number: 2017-015329-FH
Trial Court Judge: 32275 PASULA ANGELA M
Nature of Case:
CSC-3
CSC-4
Comments: judgment of sentence entered in ROA 10/27/17
- 11/20/2017 3 Appearance - Appellant
Date: 11/17/2017
For Party: 2 MARTINEZ JUAN III DF-AT
Attorney: 34859 - MORITZ JOHN R
- 11/20/2017 4 Steno Certificate - Tr Request Received
Date: 10/25/2017
Timely: Y
Reporter: 8866 - WILLIAMS KIM
Filed By Attorney: 34859 - MORITZ JOHN R
Hearings:
08/23/2017
08/24/2017
08/25/2017
- 01/30/2018 6 Transcript Overdue - Notice to Reporter
Mail Date: 01/30/2018
Reporter: 8866 - WILLIAMS KIM

- Comments: 8/23, 8/24, 8/25/17
- 02/09/2018 7 Invol Dismissal Warning - No Transcript
 Attorney: 34859 - MORITZ JOHN R
 Due Date: 03/02/2018
- 02/09/2018 8 Motion: Show Cause - Reporter
 Proof of Service Date: 02/09/2018
 Filed By Attorney: 34859 - MORITZ JOHN R
 For Party: 2 MARTINEZ JUAN III DF-AT
 Fee Code: EPAY
 Answer Due: 02/16/2018
 Reporter(s):
 8866 - WILLIAMS KIM
- 02/15/2018 9 Notice Of Filing Transcript
 Date: 02/13/2018
 Reporter: 8866 - WILLIAMS KIM
 Hearings:
 08/23/2017
 08/24/2017
 08/25/2017
- 02/20/2018 10 Telephone Contact
 Reporter: 8866 - WILLIAMS KIM
 Comments: Rptr confirmed hrg dates filed are 8/23, 8/24, 8/25/17; will send amended NFT that lists dates
- 02/20/2018 11 Submitted on Court Reporter Motion Docket
 Event: 8 Show Cause - Reporter
 District: G
 Item #: 1
- 02/20/2018 13 Other
 Reporter: 8866 - WILLIAMS KIM
 Comments: Amended NFT to show dates of hrgs filed in Lct
- 02/21/2018 14 Order: Show Cause - Deny
 View document in PDF format
 Event: 8 Show Cause - Reporter
 Panel: JPH,WBM,JMB
 Amount: \$100.00
 Steno: 8866 - WILLIAMS KIM
 Comments: Denied as moot, trns filed. Court's own mot, rptr Kim Williams assessed \$100 costs, due w/i21 days
- 03/02/2018 15 Correspondence Sent
 Reporter: 8866 - WILLIAMS KIM
 Comments: RE \$100 check to pay assessed costs; please sign & return by 3/14/18
- 03/08/2018 16 Costs Paid - Reporter
 Reporter: 8866 - WILLIAMS KIM
- 03/28/2018 17 Motion: Extend Time - Appellant
 Proof of Service Date: 03/28/2018
 Filed By Attorney: 34859 - MORITZ JOHN R
 For Party: 2 MARTINEZ JUAN III DF-AT
 Fee Code: EPAY
 Requested Extension: 05/07/2018
 Answer Due: 04/04/2018
- 04/03/2018 18 Submitted on Administrative Motion Docket
 Event: 17 Extend Time - Appellant

District: G

04/05/2018 19 Order: Extend Time - Appellant Brief - Grant
View document in PDF format
Event: 17 Extend Time - Appellant
Panel: JPH
Attorney: 34859 - MORITZ JOHN R
Extension Date: 05/07/2018

05/07/2018 20 Brief: Appellant
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 34859 - MORITZ JOHN R
For Party: 2 MARTINEZ JUAN III DF-AT

05/07/2018 21 Defective Filing Letter
Event: 20
Defect:
Proof of Service - Cured

05/09/2018 22 Proof of Service - AT Brief
Date: 05/07/2018
For Party: 2 MARTINEZ JUAN III DF-AT
Attorney: 34859 - MORITZ JOHN R

05/09/2018 23 Defect Cured
Event: 20
P/S Date: 05/07/2018
Defect:
Proof of Service - Cured

06/12/2018 24 Noticed
Record: REQST
Mail Date: 06/13/2018

06/20/2018 25 Record Filed
File Location:
Comments: FILE; 5 TRNS

07/02/2018 28 Prosecutor Advisory - No Brief
Attorney: 1111 - BERRIEN COUNTY PROSECUTOR

11/05/2018 32 Brief: Appellee
Proof of Service Date: 11/05/2018
Oral Argument Requested:
Timely Filed: N
Filed By Attorney: 35150 - SANFORD MARK
For Party: 1 PEOPLE OF MI PL-AE

12/19/2018 34 Correspondence Sent
For Party: 2 MARTINEZ JUAN III DF-AT
Attorney: 34859 - MORITZ JOHN R
Comments: L:2 rec req: Facebook messenger conversation btwn victim & Shirley (Exhibs 8-18)

12/26/2018 35 Material Received by Record Room
File Location:
Comments: FACEBOOK MESSENGER CONVERSATION (EX 8-18)

02/28/2019 44 Appearance - Appellant
Date: 02/28/2019
For Party: 2 MARTINEZ JUAN III DF-AT

Attorney: 75058 - GONZALES ABRAHAM D
 Comments: appearance of co-counsel

- 03/05/2019 38 Submitted on Case Call
 District: G
 Item #: 3
 Panel: MJR,JEM,AL
- 03/05/2019 45 Oral Argument Audio
- 06/18/2019 50 Opinion - Per Curiam - Unpublished
 View document in PDF format
 Pages: 11
 Panel: MJR,JEM,AL
 Result: L/Ct Judgment/Order Affirmed
- 06/18/2019 51 Opinion - Dissent
 View document in PDF format
 Pages: 4
 Author: MJR
- 08/09/2019 52 SCt: Application for Leave to SCt
 Supreme Court No: 160060
 Answer Due: 09/06/2019
 Fee: Indigent Person
 For Party: 2
 Attorney: 34859 - MORITZ JOHN R
- 08/09/2019 53 SCt: Miscellaneous Filing
 Filing Date: 08/09/2019
 For Party: 2 MARTINEZ JUAN III DF-AT
 Filed By Attorney: 34859 - MORITZ JOHN R
 Comments: Signed Affidavit of Indigency
- 08/09/2019 54 Other
 Date: 08/09/2019
 For Party: 2 MARTINEZ JUAN III DF-AT
 Attorney: 34859 - MORITZ JOHN R
 Comments: Notice of filing for leave to appeal in the Supreme Court
- 08/21/2019 55 Supreme Court - Record Sent To
 File Location:
 Comments: sc#160060 lcf;5 tr
- 08/21/2019 56 SCt: Trial Court Record Received
 5 tr; 1 files
- 02/04/2020 59 SCt Order: Order Directing Response
 View document in PDF format
 Comments: Direct the Berrien Cnty Pros to file an answer by 3-3-2020. Lv appl remains pending.
- 02/27/2020 60 SCt: Filing per SC Order
 Filing Date: 02/27/2020
 For Party: 1 PEOPLE OF MI PL-AE
 Filed By Attorney: 35150 - SANFORD MARK
 Comments: Prosecutor's answer per MSC order of 242020.
- 07/02/2020 61 SCt Order: MOAA -Oral Argument on Lv Appl
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 Comments: Invited AC=PAAM, CDAM.

APPELLANT'S APPENDIX C
Judgment of Sentence
C 0013a

APPELLANT'S APPENDIX C

JUDGMENT OF SENTENCE

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APPELLANT'S APPENDIX C
Judgment of Sentence
C 0014a

STATE OF MICHIGAN SECOND CIRCUIT COURT COUNTY OF BERRIEN	JUDGMENT OF SENTENCE COMMITMENT TO STATE PRISON SOUTHERN	CASE NO. 2017015329-FH
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ORI: MI- 110015J Court address: 911 PORT ST, ST JOSEPH, MI 49085 Court telephone no.: (268) 983-7111
 Police Report No. 90-17-1853 Agency: BERRIEN CO. SHERIFF DEPT.

The People of the State of Michigan

Defendant's name, address, and telephone no. (219) 232-2333
 JUAN MARTINEZ II
 840 36TH ST
 SOUTH BEND, IN 46615
 00109449

CTN 111700115001	SD 1743316T	DOB 05/15/1983
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Defendant attorney name: ENGRAM, JASON Bar no. 63316

Prosecuting attorney name: O'MALLEY, SEPTOSKI, CORTNEY C Bar no. 70965

THE COURT FINDS:

- 1. Defendant was advised of right to counsel and appointed counsel and knowingly, intelligently, and voluntarily waived that right.
- 2. Defendant was found guilty on August 26, 2017 of the crime(s) as stated below.

CONVICTED BY

Count	Plead	Court	Jury	Crime
1		5900	J	CR-3RD FORCE/COERCION

CHARGE CODE(S)	
MCL Citation	PAOC Code
70052001B	700 52001B

- *Plea: "G" - guilty plea; "NC" - not contest; "M" - guilty but mentally ill; "DPD" - 7411 - Dismissal pending; "DPS" - 769.44 - Dismissal pending; "DPY" - MCL 206.1(2) - Dismissal.
- 3. The conviction is reportable to the Secretary of State under MCL 257.732 or MCL 291.1040. The defendant's driver license number is: MIM636454001451
 - 4. HIV testing was ordered on _____ . Confidential test results are on file.

IT IS ORDERED:

5. Any defendant/respondent who changes his/her address before all court orders have been successfully completed (including but not limited to payment of all fines, costs, victim rights fund fees, restitution, counseling, community service, etc.), **SMALL IMMEDIATELY** notify the Berrien County Trial Court Financial Office of his/her new address. All correspondence and/or subsequent court orders are mailed to the defendant/respondent last known address on file with the court. Failure to notify the court of any address change may result in additional charges for contempt of court being brought against the defendant/respondent and/or may also result in the defendant/respondent having a bench warrant issued for his/her arrest if she fails to appear at a hearing to which she was provided notice at that last known address.

6. Defendant is sentenced to:

Count	Date Sentenced	MIN	MAX	JAIL CREDIT	TO BE SERVED	OTHER INFORMATION
1	08/26/2017	90 M	15 Y	95 D		CONCURRENT

Start Date/Time: 08/26/2017 08:00:00

7. Defendant shall pay as follows:

Count	Fine	Cost	Restitution	VRA	DRR	Other (amount)	Total	Due Date
1	250.00	750.00		130.00		90- 68-00	1120.00	

- 8. Jail for fines and costs _____ or alternate _____ days.
 - 9. Timepay Revoked.
 - 10. Defendant shall be placed on probation for _____ months and abide by the terms of probation. (See separate order.)
 - 11. Defendant shall complete the following:
- | Count | Special Program/Confinement Program | Length of Term | Starting | Time | Ending | Suspend Time |
|-------|-------------------------------------|----------------|----------|------|--------|--------------|
| | | | | | | |

- 12. The concealed weapon board shall suspend for _____ days, or permanently revoke, the concealed weapon license, permit number _____, issued by _____.

COURT RECOMMENDATIONS: BORA REGISTRATION RECOMMEND SEX OFFENDER TREATMENT WHILE INCARCERATED

Date: 9/26/17 Copy to: _____
 Honorable Angela M Pasula Bar No. 20274
 08 09/26/2017

APPELLANT'S APPENDIX D
PRELIMINARY HEARING TRANSCRIPT
April 25, 2017

STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

V

File No. 2017015329-FY

JUAN MARTINEZ, III,

Defendant.

PRELIMINARY EXAMINATION
BEFORE THE HONORABLE ANGELA M. PASULA, TRIAL JUDGE
Niles, Michigan - Tuesday, April 25, 2017

APPEARANCES:

For the People:

Ms. Cortney O'Malley-Septoski (P-70965)
Assistant Prosecuting Attorney
1205 North Front Street
Niles, MI 49120
(269) 684-5274

For the Defendant:

Mr. Jason Engram (P-60316)
515 Ship Street #208
St. Joseph, MI 49085
(269) 313-0134

Recorded by:

Ms. Mary Steltner, CER 8450

Transcribed by:

Ms. Katie Pugh, CER 8205
Certified Electronic Recorder
(269) 362-3618

COPY

1 A. 4:20, yes, sir.

2 Q. Prior to this - excuse me.. Scratch that. Recently, my client
3 had been charged with Domestic Violence. Is that correct?

4 A. Yes, sir.

5 MS. O'MALLEY-SEPTOSKI: Objection. Relevance.

6 THE COURT: How is that relevant?

7 MR. ENGRAM: We'll withdraw that.

8 THE COURT: All right.

9 BY MR. ENGRAM:

10 Q. Let me skip right to the point. During your conversation with
11 the police officer, you confirmed that you would in fact make
12 up a story about having--

13 MS. O'MALLEY-SEPTOSKI: Your Honor, objection.
14 Hearsay.

15 MR. ENGRAM: It is relevant.

16 MS. O'MALLEY-SEPTOSKI: Hearsay.

17 THE COURT: Hold on. I have not even heard the
18 question, so please, go ahead. What - what's your question?

19 MR. ENGRAM: Isn't it true, that during your
20 interview regarding this incident with the police officer, you
21 confirmed that you would tell a story about your dad, saying
22 that he touched her, if you thought your mom and him were
23 going to get back together?

24 MS. O'MALLEY-SEPTOSKI: Your Honor, objection.
25 Hearsay.

1 MR. ENGRAM: She would make up a story about
2 criminal sexual conduct to keep someone - her mom from getting
3 back together with somebody.

4 THE COURT: Oh, I see. Okay. I'm going to allow
5 the question. Go ahead.

6 THE WITNESS: Yes, sir. I was also fourteen and my
7 dad was abusive. Also, I didn't know the seriousness of that
8 crime.

9 THE COURT: Okay. You're not talking about this
10 defendant, then? You're referring to - okay.

11 THE WITNESS: No, I'm referring to my father.

12 BY MR. ENGRAM:

13 Q. But the point is, at some point, you were willing to make up a
14 story--

15 MS. O'MALLEY-SEPTOSKI: Your Honor, she's already
16 answered the question.

17 THE COURT: I'm going to sustain that--

18 MS. O'MALLEY-SEPTOSKI: Thank you.

19 THE COURT: --I misunderstood, thinking she was
20 referring to this defendant as dad.

21 MR. ENGRAM: Your Honor, if she's willing to make up
22 a story about--

23 MS. O'MALLEY-SEPTOSKI: Your Honor--

24 MR. ENGRAM: --that CSC--

25 THE COURT: Understood. I've ruled. Continue on if

- 1 A. Yes, sir.
- 2 Q. And isn't it true that the reason you came up with this story,
3 is you knew he was going to be moving back into the house and
4 you didn't want him there?
- 5 A. No, sir.
- 6 Q. So, you're indicating you didn't make up a story about CSC to
7 keep him out of the house?
- 8 A. I did not make up a story.
- 9 Q. Okay. So now, I ask you again, isn't it true that you had
10 been in the past, willing to make up a story about CSC to keep
11 somebody out of your house?
- 12 A. When I was fourteen.
- 13 Q. Okay. No further questions.
- 14 REDIRECT EXAMINATION
- 15 BY MS. O'MALLEY-SEPTOSKI:
- 16 Q. Jackie, that was your father, correct?
- 17 A. Yes, ma'am.
- 18 Q. That Mr. Engram is referring to, correct?
- 19 A. Yes, ma'am.
- 20 Q. And your concern was him moving back in the house?
- 21 A. Yes, ma'am.
- 22 Q. And did he in fact move back in the house?
- 23 A. He did.
- 24 Q. Okay. And that was after you made those statements, correct?
- 25 A. Yes, ma'am.

- 1 Q. And did you ever actually make a statement that your father
2 sexually assaulted you to anyone?
- 3 A. No, ma'am, I did not.
- 4 Q. Okay. So, you said you would do it, but you didn't actually
5 do it.
- 6 A. No.
- 7 Q. And he actually did move back in.
- 8 A. Yes, he did.
- 9 Q. Okay. When this - Jackie, let's back up a little. How - did
10 you tell your mom that this happened?
- 11 A. Yes, ma'am.
- 12 Q. And was that because you were looking to tell your mom that
13 this happened?
- 14 A. No, ma'am.
- 15 Q. How did it come out?
- 16 A. I was talking to my sister and her boyfriend.
- 17 Q. Okay.
- 18 A. And my mom had been talking about letting Johnny back into the
19 house.
- 20 Q. And which sister?
- 21 A. Lana.
- 22 Q. Okay.
- 23 A. And I basically was talking to them, I don't want him back in
24 the house because he makes me feel uncomfortable.
- 25 Q. Okay. Did you ever tell Lana at that point what happened?

APPELLANT'S APPENDIX E

MOTION IN LIMINE TRANSCRIPT
JUNE 14, 2017

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STATE OF MICHIGAN

2nd CIRCUIT COURT (BERRIEN COUNTY)

THE PEOPLE OF THE
STATE OF MICHIGAN

v

File No. 2017015329 FH

JUAN MARTINEZ, III,
Defendant.

Motion Hearing
Before Honorable Angela M. Pasula P32275, District Judge
Saint Joseph, Michigan - Wednesday, June 14, 2017

APPEARANCES:

For the People: Cortney C. O'Malley-Septoski P70965
Office of the Prosecuting Attorney
811 Port Street
St. Joseph, Michigan 49085
(269) 983-7111

For the Defendant: Jason Engram P60316
515 Ship Street, Suite 208
Saint Joseph, Michigan 49085-1155
(269) 313-0134

Recorded by: Mary Steltner CER8450

Transcribed by: Brenda K. Foley CER 4956
8165 Valleywood Lane
Portage, Michigan 49024
(269) 303-9680

* * * * *

1 MS. O'MALLEY-SEPTOSKI: Okay.

2 MR. ENGRAM: -altogether vague. I'm not sure if
3 we're still talking about the prosecutor's-

4 MS. O'MALLEY-SEPTOSKI: Okay.

5 MR. ENGRAM: -768 motion-

6 MS. O'MALLEY-SEPTOSKI: Your Honor-

7 MR. ENGRAM: -or if she moved to *limine*.

8 MS. O'MALLEY-SEPTOSKI: -I'll back up. And I'm
9 going to move into the motion *in limine*.

10 THE COURT: Now we're on the motion-

11 MS. O'MALLEY-SEPTOSKI: Yes.

12 THE COURT: -*in limine*?

13 MS. O'MALLEY-SEPTOSKI: Yes. And I'm just not
14 asking it very well, and I apologize. I'm going to back up.

15 BY MS. O'MALLEY-SEPTOSKI:

16 Q Through the investigation with regard to this case, some
17 information came out about things that Jackie previously said;
18 is that correct?

19 A Yes, ma'am.

20 Q Okay. That's what I want to talk about for a moment. Okay?
21 That had to do with your ex-husband; is that right?

22 A Yes, ma'am.

23 Q And had she made-What kinds of comments had she made to you
24 about your ex-husband?

25 A At one point, when I was discussing with my children getting

1 back with their father, her and my other daughter stated
2 that--they said that their dad had touched them.

3 Q Is that all they said, just touched them?

4 A Yes.

5 Q Did they give any further explanation?

6 A No.

7 Q Okay. And did you take that to mean sexual touching?

8 A I didn't know if they meant sexual or just physical because he
9 had, in the past, put his hands on them kind of hard.

10 Q Okay. And when they told you--they say that, what was that in
11 response to, or what was their concern?

12 A That I was going to get back with him.

13 Q Okay. And so they told you they were going to say these
14 things?

15 A Yeah, they wanted--they did not want me to get back with their
16 father.

17 Q After you had this conversation with Lana and Jackie, did you
18 get back together with their father?

19 A Yes.

20 Q Okay. And, when you got back together with their father, do
21 you know how long you were together with their father back
22 then?

23 THE COURT: Meaning like a dating relationship or
24 living--still married or what?

25 MS. O'MALLEY-SEPTOSKI: . . . (inaudible)

1 THE WITNESS: Approximately a month.

2 BY MS. O'MALLEY-SEPTOSKI:

3 Q Were you living with him at that point?

4 A Yes, we did end up living with him.

5 Q And, when you say we, do you mean the girls?

6 A Me and the children.

7 Q Okay. So you're all living together, including Jackie and
8 Lana?

9 A Yes, ma'am.

10 Q Do you remember when that was?

11 A I know that he came and got us sometime in August and we went
12 to Iowa with him-

13 Q Of what year?

14 A -and lived in Iowa.

15 Q Of what year?

16 A It had to have been over three years ago now.

17 Q Okay. So-

18 A So '14-

19 Q -2014?

20 A -2014, approximately.

21 Q And you said that you lived together for approximately a month
22 after the girls had made this comment?

23 A Yes, ma'am.

24 Q At any point in time, did Jackie ever say that your husband
25 did anything inappropriate during the time . . . (inaudible)

1 drastic measures to keep us from getting back together.

2 Q And, at no time, did they actually do it?

3 A No, ma'am.

4 MS. O'MALLEY-SEPTOSKI: Thank you.

5 I have nothing further. I'd pass this witness.

6 THE COURT: Okay.

7 CROSS-EXAMINATION

8 BY MR. ENGRAM:

9 Q You're telling me that you had no idea what they meant by he
10 touched them?

11 A I had an idea.

12 Q And your idea was he was—they were talking about being
13 sexually molested; is that correct?

14 A Sexual or physical.

15 Q Okay. And, whether they followed through or not, your
16 understanding that they were telling you flat-out that they
17 would lie; is that correct?

18 A Yes, sir.

19 Q So, whether they followed through or not, they indicated to
20 you they were willing to do that?

21 A Yes, sir.

22 Q And I understand it was very difficult talking about your
23 intimacy with my client. You indicated this would have
24 started probably what year? 1988, I think, if I calculated
25 about right.

1 A Yes, sir.

2 Q Somewhere in there?

3 A Yes, sir.

4 Q Okay. And you indicated that you loved my client?

5 A Yes, sir.

6 Q Okay. And, while you indicated that you knew what was—what
7 you guys were doing was wrong, what you're indicating was that
8 you shouldn't have been doing it, correct?

9 A Yes, sir.

10 Q But you weren't trying to stop him from doing that; is that
11 correct?

12 A No, sir.

13 Q Okay. And that was, in part, because you had feelings for
14 him; is that correct?

15 A Yes, sir.

16 Q Okay. Were you feeling like you had to do that with him?

17 A No, sir.

18 Q Were you feeling like that you could not tell anybody that you
19 were doing that?

20 A I'm sorry?

21 Q Did you feel like you were being pressured to not tell
22 anybody?

23 A I definitely knew I couldn't tell anybody.

24 Q Okay. But was my client telling you you couldn't tell
25 anybody?

1 And dad leaves and is coming back into the home. And, when
2 he's coming back into the home, she says something to the
3 effect of, if you let him come back, I'm going to say he
4 touched me. That's what she says.

5 She never does it. She never ever said that, in
6 fact. The questions were asked at the preliminary hearing,
7 and she said she never did it. So it is merely a statement of
8 a child made in 2014 about a different person—not the
9 defendant, a different person altogether.

10 Mr. Engram's motion—or Mr. Engram's response says
11 it's not hearsay. I beg to differ. Hearsay, as defined, by
12 801, is a statement—which this is, a statement—oral assertion,
13 written assertion, or nonverbal conduct intended as an
14 assertion by the person who made—the declarant—who made the
15 statement. And it is a statement that was not made while
16 testifying in a hearing or trial and that the party offers it
17 for the truth of the matter.

18 Mr. Engram wants to offer it, certainly, to show
19 that she would lie about a sexual assault. That's why he
20 wants to offer it. He wants to offer it for the truth, so
21 it's clearly hearsay.

22 It is not hearsay, under 801, if it is an
23 inconsistent—if it is inconsistent with the declarant's
24 testimony given under oath at a trial.

25 That's not the case. It's not an inconsistent

1 statement here. She didn't make this statement to the
2 defendant. She didn't make it in the course of this case.

3 And she didn't make a different statement under oath
4 or to a police officer or anything like that. She told the
5 police that she made the statement. She was asked about it at
6 the prelim. She doesn't deny it. She told the truth. So
7 it's not hearsay because of an inconsistent statement.

8 It's not consistent, necessarily, with anything
9 she's previously said that would be relevant; and it doesn't
10 identify someone.

11 So those are the three times that it would not be
12 hearsay under 801. So it is hearsay, number one.

13 So when can the defense use hearsay? If there's an
14 exception. There's no exception that applies, your Honor.

15 Mr. Engram tried to argue that the then existing
16 emotional—that would be applicable.

17 Well, your Honor, again, it was made two years
18 before the victim even lived with the defendant. It was not
19 made about the defendant. It has nothing to do with the
20 defendant's case. It's absolutely not relevant with regard to
21 that. So, even if that was an exception, it's not relevant
22 based on that information.

23 But I would argue it isn't—does not fall under that.
24 This is not an existing state of mind during this incident,
25 during what's happening here. This doesn't express how she

1 THE COURT: I did.

2 MR. ENGRAM: So you've reviewed that?

3 THE COURT: I have.

4 MR. ENGRAM: Okay. Then the only thing I'm going
5 to say at this point is that the prosecutor's argument—And
6 I'll go in reverse order.—as it relates to the motion *in*
7 *limine* that the statement should not come in is incredible.

8 You've got a witness—an alleged victim—who has said
9 under oath in this courtroom what amounts to the fact that she
10 would be willing to lie about someone in a criminal sexual
11 conduct case. Whether it was her father or someone else, the
12 point is we're not asserting it for the truth of the matter
13 asserted. I could care less whether she followed through.
14 She indicated under oath that she would, at one point, be
15 willing to lie about criminal sexual conduct.

16 And, as I said in my brief, we're not talking about,
17 well, I'm going to go to the casino; I'm going out drinking.
18 This is a CSC case. The comparison is almost exactly
19 99.9 percent on point as to what conditions she said she would
20 lie under.

21 The statement is not hearsay because we're not
22 offering it for the proof of the matter asserted; rather, the
23 fact that she made the statement; and it does indicate that
24 this witness is willing to fabricate a story.

25 The—Regarding the matter of 768—I'll make sure I get

1 However, the Court does find that that is a hearsay
2 statement. It definitely is an assertion or a statement made
3 by a witness, while not under oath in court, and it is not an
4 inconsistent statement. I agree with the prosecutor's
5 argument on that. She testified the same way under oath at
6 the preliminary examination acknowledging that statement. It
7 would not be to rebut some kind of charge about recent
8 fabrication, and that wasn't even argued by Counsel. And it's
9 not one of identity.

10 I'm not sure how that would be used specifically for
11 impeachment purposes because there isn't an inconsistency
12 there, and she acknowledges that she specifically made the
13 statement.

14 However, to say we're not using that statement for
15 the truth of the matter asserted, we're using it to show,
16 well, I guess, that she's a liar or she would lie or she said
17 she would lie under other circumstances.

18 I go back and reflect on this on the old law school
19 example, somebody yells out, wait, be careful, there's ketchup
20 on the floor. You could bring that statement in. It's not to
21 show the proof of the matter asserted that there's, in fact,
22 ketchup on the floor, but to show that a warning was given in
23 some kind of liability case.

24 In this case, the defense attorney is trying to
25 argue that--well, not trying to say that she said she would lie

APPELLANT'S APPENDIX F

JURY TRIAL TRANSCRIPT EXCERPTS

August 23, 2017

STATE OF MICHIGAN

BERRIEN COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

v

File No. 2017-015329-FH

JUAN MARTINEZ III,

Defendant.

COPY

JURY TRIAL VOLUME I OF III

BEFORE THE HONORABLE ANGELA M. PASULA, CIRCUIT COURT JUDGE

Niles, Michigan - Wednesday, August 23, 2017

APPEARANCES:

For the People: MS. CORTNEY O'MALLEY-SEPTOSKI (P70965)
Berrien County Prosecutor's Office
1205 North Front Street
Niles, Michigan 49120
(269) 983-7111

For the Defendant: MR. JASON ENGRAM (P60316)
515 Ship Street, Suite 208
Saint Joseph, Michigan 49085
(269) 313-0134

RECORDED BY: Mary Steltner, CER 8450
Certified Electronic Recorder
(269) 983-7111

TRANSCRIBED BY: Kim Williams, CER 8866
Certified Electronic Recorder
(269) 983-7111

- 1 please.
- 2 A. Jacqueline Skye Diamond Gadde. J-a-c-q-u-e-l-i-n-e S-k-y-e D-
3 i-a-m-o-n-d G-a-d-d-e.
- 4 Q. And Jacqueline could you tell the jury how old you are.
- 5 A. Seventeen.
- 6 Q. And when's your birthday?
- 7 A. September 26th 1999.
- 8 Q. Okay. So you're about to turn 18. Okay. What grade did you
9 just finish in school?
- 10 A. Eleventh grade.
- 11 Q. So you're going into your senior year.
- 12 A. Yes, ma'am.
- 13 Q. Where do you go to school?
- 14 A. Brandywine High School.
- 15 Q. Okay. Have you always gone to Brandywine?
- 16 A. No. I have not. I used to live in Alabama. I used to live a
17 lot of places.
- 18 Q. You're really quiet.
- 19 A. Sorry. No, it's not the only school I've been to.
- 20 Q. Okay. Here though in Michigan is that where you've gone to
21 school?
- 22 A. Yes, ma'am.
- 23 Q. Okay. You said I think something about living in Alabama as
24 well?
- 25 A. Yes, ma'am.

- 1 A. Jonathan.
- 2 Q. Okay. And I want to take you back to February 17th of this
3 year, 2017. Okay. Were you living with your family?
- 4 A. Yes, ma'am.
- 5 Q. Were you living with your older brother?
- 6 A. No, ma'am.
- 7 Q. Is he an adult?
- 8 A. Yes.
- 9 Q. Do he live in the state of Michigan even?
- 10 A. No.
- 11 Q. Okay. Where were you living back in February of this year?
- 12 A. I was living on 3121 South 13th Street.
- 13 MR. ENGRAM: I can't hear the answer.
- 14 BY MS. O'MALLEY:
- 15 Q. Okay. I'm gonna have you --
- 16 THE COURT: February of this year.
- 17 BY MS. O'MALLEY:
- 18 Q. February of 2017. Can you say it really loud? You're very
19 quiet.
- 20 A. 3121 South 13th Street.
- 21 Q. 3121 South 13th. Is that in Niles?
- 22 A. Yes, ma'am.
- 23 Q. Is that here in Berrien County?
- 24 A. Yes, ma'am.
- 25 Q. Okay. Who else lived at that residence?

- 1 A. Juan Martinez.
- 2 Q. Okay.
- 3 A. And Rachel Hart.
- 4 Q. Tell me everybody that live there.
- 5 A. Jonathan Gadde, Olivia Gadde, and Lana Gadde.
- 6 Q. Okay. So you, mom, your siblings, and you said Juan Martinez.
- 7 Who was Juan Martinez?
- 8 A. (non-verbal response)
- 9 Q. Okay. You're pointing for me but who is he to you.
- 10 A. He was my mom's boyfriend at the time.
- 11 Q. Okay. And he's in the courtroom right now?
- 12 A. Yes, ma'am.
- 13 Q. Can you again point for us and tell us what he's wearing so
- 14 that we record it we get that clear.
- 15 A. Blue shirt.
- 16 MS. O'MALLEY: Your Honor, I'd ask that the record
- 17 reflect she's identified the defendant here in court.
- 18 THE COURT: Yes, it may.
- 19 BY MS. O'MALLEY:
- 20 Q. And you were living here in Berrien County with that family --
- 21 how long had you lived on South 13th Street. Do you know?
- 22 A. A little over a half a year.
- 23 Q. Okay. Little over half a year. Where'd you live prior to
- 24 South 13th Street?
- 25 A. We lived on 3rd Street.

- 1 Q. IS that also in Niles?
- 2 A. Yes, ma'am.
- 3 Q. Okay. And when you lived on 3rd Street did all those same
4 people live with you on 3rd Street?
- 5 A. Yes, ma'am.
- 6 Q. Okay. How long did your mom date the defendant?
- 7 A. About two years.
- 8 Q. And did he live with throughout that two years?
- 9 A. Yes, ma'am.
- 10 Q. Okay. Tell me a little bit about what his role was in your
11 family during that two years.
- 12 A. Pretty much just my mom's boyfriend.
- 13 Q. Okay. Maybe I didn't ask a very good question. How about I
14 ask this. During that time did your mom work?
- 15 A. Yes, ma'am.
- 16 Q. Okay. What about the defendant did he work?
- 17 A. No, ma'am.
- 18 Q. Okay. And so he wasn't working. But did he watch you and
19 your siblings at all when you were home?
- 20 A. Yes, ma'am.
- 21 Q. Okay. During that time did he discipline you and your
22 siblings?
- 23 A. Yes, ma'am.
- 24 Q. Okay. And as far as you know did he have the approval of your
25 mother to discipline you?

- 1 A. Brandywine High School.
- 2 Q. And what grade again?
- 3 A. Eleventh grade.
- 4 Q. And so when you would go to school what were the hours that
5 you would be in school?
- 6 A. I would be in school from about 7:15 to 2:40 was when I got
7 out. I would get home around 3.
- 8 Q. Okay. You said 7:15 to 2:40. And you get really super quiet
9 so try to keep that voice up.
- 10 A. Sorry.
- 11 Q. Okay. Sorry.
- 12 THE COURT: 7:15 a.m. to 2:40 p.m. correct?
- 13 THE WITNESS: Yes, ma'am.
- 14 THE COURT: Okay. Thank you.
- 15 BY MS. O'MALLEY:
- 16 Q. What about Lana?
- 17 A. She went to school at 7:15 and she had basketball after
18 school. So she usually wouldn't get around until 4.
- 19 Q. Did she also go to the high school?
- 20 A. Yes, ma'am.
- 21 Q. So she got out as the same time as you.
- 22 A. Yes, ma'am.
- 23 Q. But did she come home directly after school then?
- 24 A. No, ma'am.
- 25 Q. What time -- you said she would go to basketball --

- 1 A. She would get home around 4.
- 2 Q. Around 4. And how did she get home?
- 3 A. My mom would pick her up.
- 4 Q. Okay. So I'd like to talk about your mom. Was your mom
5 working at that point and time?
- 6 A. Yes, ma'am.
- 7 Q. And what was her schedule typically like if you remember?
- 8 A. She would get home around 3:30, 4.
- 9 Q. Okay. So was there a period of time before your mom got home
10 that you would be home?
- 11 A. Yes, ma'am.
- 12 Q. Was there a period of time before your mom got home that Lana
13 would be home?
- 14 A. Yes, ma'am.
- 15 Q. What about your youngest siblings, Olivia and Jonathan, what
16 grades were they in?
- 17 A. They're in third and fourth grade, I believe.
- 18 Q. So elementary school age?
- 19 A. Yes, ma'am.
- 20 Q. And so did they get out of school at the same time as you?
- 21 A. No.
- 22 Q. Okay. Do you know what time they would get out of school?
- 23 A. They would get out of school at about 4 and get home about
24 4:20.
- 25 Q. Okay. Did they -- how'd they get home?

- 1 A. The bus.
- 2 Q. How did -- did the bus come directly to the house --
- 3 A. Yes, ma'am.
- 4 Q. -- did they go to a bus stop? Okay. And was that pretty
5 standard every day?
- 6 A. Yes, ma'am.
- 7 Q. How many days a week was Lana at basketball. Do you know?
- 8 A. Every day.
- 9 Q. During the week?
- 10 A. Yes, ma'am.
- 11 Q. Do you know if she was ever at basketball on the weekends?
- 12 A. No.
- 13 Q. Okay. And so was there a period of time where during the day
14 when you would come home that it would just be you and the
15 defendant at the house?
- 16 A. Yes, ma'am.
- 17 Q. And typically what was that timeframe during the day?
- 18 A. About 3 to 3:30.
- 19 Q. Okay. During that November to January timeframe did something
20 happen in the home with the defendant and you?
- 21 A. Yes, ma'am.
- 22 Q. Okay. And I know it's difficult but we need to talk about it.
23 Okay. Do you remember was it on a weekday or on a weekend?
- 24 A. It was a weekday.
- 25 Q. Okay. Do you remember what time of day?

1 A. Around 3 to 3:30.

2 Q. Okay. Was there anybody --

3 MR. ENGRAM: I'm sorry. I did not hear the answer.

4 THE COURT: About 3 to 3:30. Does that mean p.m.
5 again?

6 THE WITNESS: Yes, ma'am.

7 THE COURT: Thank you.

8 BY MS. O'MALLEY:

9 Q. And that was at the house. Correct?

10 A. Yes, ma'am.

11 Q. And who was at the house?

12 A. Juan and I.

13 Q. Okay. You said the defendant --

14 A. Yes, ma'am.

15 Q. -- and you.

16 A. Yes, ma'am.

17 Q. Really, really quite still so. Was anyone else there?

18 A. No, ma'am.

19 Q. And if you could tell was it after school then if it was
20 between 3 and 3:30?

21 A. Yes, ma'am.

22 Q. And so when you came home from school that day what'd you do?

23 A. I came home, changed into pajamas, got a snack, and we were
24 gonna watch a movie.

25 Q. Okay.

1 MR. ENGRAM: I'm sorry I -- she's needs to speak a
2 little clearer. I don't want to come down on a witness but --

3 THE COURT: Can you say that one more time a little
4 louder. Or you could hold the microphone up a little bit
5 also.

6 THE WITNESS: I came home, changed into pajamas, got
7 a snack, and we were going to watch a movie.

8 BY MS. O'MALLEY:

9 Q. Okay. So let's talk about that. So you come home from
10 school.

11 A. Yes, ma'am.

12 Q. What'd you change into can you tell the jury?

13 A. A hoodie and pajama pants.

14 Q. And were you wearing underpants?

15 A. Yes, ma'am.

16 Q. Were you wearing a bra or t-shirt or anything under your
17 hoodie?

18 A. No, ma'am.

19 Q. Okay. So just the hoodie and the pajama pants and underpants.

20 A. Yes, ma'am.

21 Q. You have shoes, or socks, or anything on, if you know.

22 A. Probably socks. I don't - can't remember.

23 Q. Okay. So you change your clothes. And where so you change
24 your clothes when you come home?

25 A. In my room.

- 1 A. Yes, ma'am.
- 2 Q. Okay. So what -- where were you gonna watch a movie. Gonna
3 watch it on a disc, were you gonna watch it on TV, what.
- 4 A. A DVD.
- 5 Q. Okay. And is there -- was there more than one place in the
6 house that you could watch movies?
- 7 A. Yes, ma'am.
- 8 Q. Okay. Where did you and the defendant watch this movie
9 Captain America Civil War?
- 10 A. In my mother's room.
- 11 Q. In your mother's room. And is that the room that she shared
12 with the defendant?
- 13 A. Yes, ma'am.
- 14 Q. Okay. So tell us a little bit about that. When you were in
15 the bedroom where was the defendant?
- 16 A. He was laying on the bed.
- 17 Q. Okay. And when you came into the room was he already in the
18 room?
- 19 A. Yes, ma'am.
- 20 Q. Okay. Was he already on the bed? Do you remember?
- 21 A. Yes, ma'am.
- 22 Q. And was he standing on the bed, sitting on the bed, laying on
23 the bed. How was he?
- 24 A. Laying on the bed.
- 25 Q. Okay. Was he laying on his back on the bed, if you could

- 1 describe --
- 2 A. On his side.
- 3 Q. Okay. Was he facing the television, was he facing away?
- 4 A. The television.
- 5 Q. Okay. And so when you come into the bedroom where'd you go?
- 6 A. I sat down in the chair in front of the TV.
- 7 Q. Okay. So this room has a bed, it has chairs. Is that
- 8 correct?
- 9 A. Yes, ma'am.
- 10 Q. We've already talked about these additional exhibits 4 through
- 11 7, those are of the bedroom.
- 12 A. Yes, ma'am.
- 13 Q. And you said that they're not -- the furniture's not in the
- 14 same position as it was when this happened. Correct?
- 15 A. No, ma'am.
- 16 Q. And what is the difference?
- 17 A. It's just switched.
- 18 Q. Okay. The orientation of the furniture, is it the same just
- 19 in a different -- just flipped around?
- 20 A. Yes, ma'am.
- 21 Q. Okay. So let's start with People's 4. This isn't the best of
- 22 the pictures. But that shows in the corner a TV is that
- 23 right?
- 24 A. Yes, ma'am.
- 25 Q. And it has two what look to be like arm chairs or chairs.

- 1 A. Yes, ma'am.
- 2 Q. Okay. So did you sit the chair closest to the bed or the
3 chair further away from the bed? If you remember.
- 4 A. They were next to each other the same.
- 5 Q. They were right next to the bed, both of them?
- 6 A. They were the same distance from the bed.
- 7 Q. I see. Okay. So you sat in one of the chairs. And again who
8 was in the room?
- 9 A. Juan.
- 10 Q. And then just you?
- 11 A. Yes, ma'am.
- 12 Q. And at that point and time do you know where your little
13 brother and your little sister, Jonathan and Olivia were?
- 14 A. They were at school.
- 15 Q. And Lana.
- 16 A. Basketball.
- 17 Q. And mom.
- 18 A. Work.
- 19 Q. Okay. So you come in, you sit down in the chair, and you're
20 watching the movie. The defendant's on the bed you said.
- 21 A. Yes, ma'am.
- 22 Q. Does that change at some point?
- 23 A. Yes, ma'am.
- 24 Q. What changes?
- 25 A. He asked me to lay on the bed with him.

1 Q. Who asked you to lay on the bed?
2 A. Juan.
3 Q. Okay. And did he say why or did he say anything about laying
4 on the bed.
5 A. No.
6 Q. What did you think when asked you to lay on the bed?
7 A. I thought it was odd.
8 Q. Let me ask you this. Before this day, before you watched this
9 movie with the defendant, what was your relationship like with
10 him in general?
11 A. No real relationship.
12 Q. Okay.
13 MR. ENGRAM: I'm sorry. I did not hear the answer.
14 BY MS. O'MALLEY:
15 Q. Can you tell us again?
16 A. No real close relationship.
17 Q. Okay. Did you -- I mean were you around him?
18 A. Yes, ma'am.
19 Q. And did you have any major issues with him in any way?
20 A. No.
21 Q. Okay. Did he -- if you were to do something that was wrong
22 could he discipline you?
23 A. Yes, ma'am.
24 Q. Had he been disciplining you?
25 A. Yes, ma'am.

- 1 Q. What would he do? What kinds of discipline?
- 2 A. He would take my phone or ground me.
- 3 Q. Okay. Did he do that at times in conjunction with your mom?
- 4 A. Yes, ma'am.
- 5 Q. Did he do that at times in front of your mom?
- 6 A. Yes, ma'am.
- 7 Q. So before this day he had been acting in the role of a
8 guardian of sorts. Correct?
- 9 A. Yes, ma'am.
- 10 Q. Okay. Had you had any major fights or arguments with him
11 prior to that day?
- 12 A. No, ma'am.
- 13 Q. What about your mom prior to that day. What was your
14 relationship like with your mom?
- 15 A. It was okay.
- 16 Q. Okay. She would discipline you as well?
- 17 A. Yes, ma'am.
- 18 Q. What kind of discipline would your mom use?
- 19 A. She would ground and take my phone as well.
- 20 Q. Okay. So they used similar methods of discipline.
- 21 A. Yes, ma'am.
- 22 Q. Okay. And had that been pretty much the same throughout the
23 relationship up until that point?
- 24 A. Yes, ma'am.
- 25 Q. Okay. So had you ever been alone with the defendant before?

- 1 A. Yes, ma'am.
- 2 Q. And had you ever been in that room before with the defendant?
- 3 A. Yes, ma'am.
- 4 Q. Okay. So in this day you're watching a movie. And he asked
5 you to come lay on the bed. You said you thought it was
6 strange?
- 7 A. Yes, ma'am.
- 8 Q. Did you -- did you move onto the bed?
- 9 A. I did.
- 10 Q. Okay. Tell us what you were thinking at that point.
- 11 A. Just thought it was weird.
- 12 Q. Okay. But you moved.
- 13 A. (non-verbal response)
- 14 Q. Okay. And when --
- 15 THE COURT: You have to answer out loud for us.
- 16 THE WITNESS: Yes.
- 17 BY MS. O'MALLEY:
- 18 Q. Okay. Jacqueline when you moved onto the bed did the
19 defendant remain where he was?
- 20 A. Yes, ma'am.
- 21 Q. Okay. So he's lying on his side. And where did you lay on
22 the bed or go on?
- 23 A. At first I just sat down.
- 24 Q. At first you sat down. Where'd you sit?
- 25 A. I sat on the edge of the bed.

- 1 Q. Okay. And were you sitting closer to the television or
2 further away?
- 3 A. Closer.
- 4 Q. So you're in between the defendant and the television when you
5 sit down?
- 6 A. Yes, ma'am.
- 7 Q. Then what happened?
- 8 A. He asked me to lay down.
- 9 Q. And when you say he, who are you talking about?
- 10 A. The defendant.
- 11 Q. Okay. And did he say anything other than lay down or do you
12 remember what he said?
- 13 A. No.
- 14 Q. What did you think about that when he asked you to lay down.
- 15 A. Odd. Sorry.
- 16 Q. That's okay. Take your time.
- 17 A. I just thought it was strange.
- 18 Q. You thought it was strange. Okay. Did you lay down?
- 19 A. Yes, ma'am.
- 20 Q. Okay. And when you laid down how'd you lay down?
- 21 A. On my side.
- 22 Q. Okay. You were on your side. And were you facing the TV or
23 were you facing away from the TV?
- 24 A. The TV.
- 25 Q. And were you facing the defendant or were you facing away from

- 1 the defendant?
- 2 A. Away.
- 3 Q. So you're laying facing the television. He's also laying
4 facing the television?
- 5 A. Yes, ma'am.
- 6 Q. Is his front to your back essentially?
- 7 A. Yes, ma'am.
- 8 Q. Are the two of you laying with your head at the same end of
9 the bed and your feet at the same end of the bed?
- 10 A. Yes, ma'am.
- 11 Q. Okay. And how close were the two of you?
- 12 A. About a foot apart.
- 13 Q. Okay. But your bodies weren't touching at that point?
- 14 A. No, ma'am.
- 15 Q. Okay. And so when you're there and you're laying down on the
16 bed you still watching the movie?
- 17 A. Yes, ma'am.
- 18 Q. Did something happen after that?
- 19 A. Yes, ma'am.
- 20 Q. Okay. What happened? Tell us.
- 21 A. He reached his arm around me and put it on my stomach.
- 22 Q. Who is he?
- 23 A. The defendant.
- 24 Q. Okay. And when you say he reached his arm around you. What
25 do you mean by that?

- 1 A. He put his arm over me on my stomach.
- 2 Q. Okay. Did his arm go up over your side?
- 3 A. Yes, ma'am.
- 4 Q. From behind?
- 5 A. Yes, ma'am.
- 6 Q. Okay. And what did he do with his hand?
- 7 A. He just held it on my stomach for a second.
- 8 Q. Held it on your stomach?
- 9 A. Yes, ma'am.
- 10 Q. Okay. Jacqueline you're getting really quiet and I'm sorry, I
11 know this is the hard part but please try your best if you can
12 for me to speak up. Okay. So he put his hand on your stomach.
13 When he put his hand on your stomach were still wearing your
14 sweatshirt?
- 15 A. Yes, ma'am.
- 16 Q. And was his hand on the outside of your sweatshirt or was it -
17 -
- 18 A. Outside.
- 19 Q. I'm sorry.
- 20 A. It was on the outside.
- 21 Q. Okay. So he's touching the outside of your clothing. Is that
22 fair?
- 23 A. (non-verbal response)
- 24 Q. Okay. Is he dressed at that point and time?
- 25 A. Yes, ma'am.

- 1 Q. Okay. Do you remember what he was wearing?
- 2 A. I don't -- hoodie and sweatpants I think.
- 3 Q. Okay. So he's fully dressed too?
- 4 A. Yes, ma'am.
- 5 Q. Okay. So what did you think when his hand went onto your
6 stomach?
- 7 A. I was uncomfortable.
- 8 Q. Had that happened before?
- 9 A. No, ma'am.
- 10 Q. Was that a common thing for --
- 11 A. No, ma'am.
- 12 Q. Okay. Did you say anything at that point?
- 13 A. No, ma'am.
- 14 Q. Did he say anything at that point?
- 15 A. No.
- 16 Q. Okay. Did his hand stay on your stomach?
- 17 A. No, ma'am.
- 18 Q. Okay. What happened?
- 19 A. He reached his hand up to my chest.
- 20 Q. Okay. So it's on your stomach and you said he reached it up
21 to your chest.
- 22 A. Yes, ma'am.
- 23 Q. How did he do that?
- 24 A. He moved it up.
- 25 Q. Okay. And so was it still on the outside of your clothing?

- 1 A. Yes, ma'am.
- 2 Q. Okay. When that happened what were you thinking?
- 3 A. I wanted to get up.
- 4 Q. You wanted to get up.
- 5 MR. ENGRAM: I again -- answer --
- 6 THE COURT: She said, I wanted to get up.
- 7 BY MS. O'MALLEY:
- 8 Q. What did you do when that happened?
- 9 A. I tried to get up and he held me by my chest.
- 10 Q. Okay. You tried to get up.
- 11 A. Yes, ma'am.
- 12 Q. And you said, what did he do? What did the defendant do?
- 13 A. He held me.
- 14 Q. Okay. Where did he hold you?
- 15 A. He kept his hand on my chest.
- 16 Q. Okay. Did you say anything to him at that point?
- 17 A. No, ma'am.
- 18 Q. Did you do anything more?
- 19 A. No, ma'am.
- 20 Q. What happened next?
- 21 A. He moved his hand back down to my stomach and then up my shirt
- 22 again.
- 23 Q. Okay. And you doing okay?
- 24 A. (non-verbal response)
- 25 Q. Okay. Do you need a break?

- 1 A. (non-verbal response)
- 2 Q. Okay. So let's -- so his hand was on your chest on the
3 outside of your clothing. Where on your chest was it
4 underneath your chest, was it on top of your chest, how is his
5 hand?
- 6 A. On my chest.
- 7 Q. Okay. Flat across your chest? What was his hand doing?
8 Describe for us.
- 9 A. Grabbing.
- 10 Q. Grabbing. Okay. And you said though at some point he moved
11 his hand back to your stomach.
- 12 A. And went up my shirt.
- 13 Q. Okay. And did he touch the skin of your stomach?
- 14 A. Yes, ma'am.
- 15 Q. And did his hand move somewhere once he was touching the skin?
- 16 A. Yes, ma'am.
- 17 Q. Where did it move after that?
- 18 A. On to my breast.
- 19 Q. Okay. And did he touch your breast with his hand?
- 20 A. Yes, ma'am.
- 21 Q. Did he touch the skin of your breast with his hand?
- 22 A. Yes, ma'am.
- 23 Q. Okay. What kind of a touch?
- 24 A. Grabbing.
- 25 Q. Okay. What was going on at this point?

- 1 A. I was scared.
- 2 Q. Yeah. Did you say anything to him that you remember? Or do
3 anything?
- 4 A. I tried to move his hand away.
- 5 Q. Okay. And were you able to do that?
- 6 A. Yeah, when I moved his hand down it went into my pants.
- 7 Q. Okay. Tell us about that.
- 8 A. He went into my pants and touched my vagina.
- 9 Q. Okay. So his hand went down into the pants.
- 10 A. (non-verbal response)
- 11 Q. Did you have underpants on?
- 12 A. Yes, ma'am.
- 13 Q. Okay. Did his hand go beneath your underpants?
- 14 A. Yes, ma'am.
- 15 Q. And did his hand touch the outside of your vagina?
- 16 A. Yes, ma'am.
- 17 Q. And did his hand to inside of your vagina?
- 18 A. Yes, ma'am.
- 19 Q. Do you know if his entire hand all of his fingers went in
20 there or what happened.
- 21 A. A finger.
- 22 Q. A finger. Okay. What are you thinking at that point?
- 23 A. Scared.
- 24 Q. Yeah. Okay. Anything being said at that point?
- 25 A. No, ma'am.

1 Q. Okay. And what were you doing at that point. Were you still
2 trying to move his hand or was that done.

3 A. I was just laying there.

4 Q. Okay. Had you asked him to stop or --

5 A. When his had was on my chest yes.

6 Q. Okay. Did he say anything about that when you asked him to
7 stop?

8 A. No.

9 Q. Okay. How long do you think this went on for Jacqueline, if
10 you know?

11 A. About a minute.

12 Q. About a minute. Okay. And what made it all end?

13 A. He just stopped.

14 Q. Okay. Are you still on the bed when it ends?

15 A. As soon as it ended I left.

16 MR. ENGRAM: Didn't hear the answer.

17 BY MS. O'MALLEY:

18 Q. What happened as soon as it ended? What did --

19 A. I left and went to my room.

20 Q. And when you went to your room what'd you do?

21 A. I can't remember.

22 Q. Okay. Well, tell me this did you shut the door, did you leave
23 the door open, if you know.

24 A. I don't have a door.

25 Q. Oh, you don't have a door.

1 A. No.

2 Q. Okay. Did you stay in your room at that point?

3 A. Yes, ma'am.

4 Q. How long did you stay in your room?

5 A. I think the rest of the night maybe until dinner.

6 Q. Okay. When was the next time you saw the defendant?

7 A. When my mom got home.

8 Q. Okay. And where did you see him?

9 A. In the hallway.

10 Q. And where was your mom?

11 A. In the shower.

12 Q. Okay. And what happened?

13 A. He told me don't tell your mom.

14 Q. Okay. Did he say anything else?

15 A. No.

16 Q. He just said, don't tell your mom.

17 A. (non-verbal response)

18 Q. Did you tell your mom?

19 A. No.

20 Q. Okay. How did all of this make you feel?

21 MR. ENGRAM: Objection. Relevance.

22 THE COURT: How is it relevant?

23 MS. O'MALLEY: Well, your Honor, I think that it's

24 relevant for the jury to know how she felt about it because it

25 certainly goes to who she told, and when she told, and why she

1 told them. The defense is that she is making this up because
2 of some outside circumstance. So I think she should be able
3 to explain that to them.

4 THE COURT: Well, if that comes up then you can do
5 that on cross. I'll sustain for now.

6 BY MS. O'MALLEY:

7 Q. Jacqueline, you said you didn't tell your mom.

8 A. No, ma'am.

9 Q. The date that this happened did you tell anyone?

10 A. No, ma'am.

11 Q. And do you remember -- we talked about somewhere between
12 November and January. Do you remember approximately when this
13 say would have been? If you know.

14 A. Early December.

15 Q. Early December. Okay. Who was the first person you talked to
16 about this?

17 A. My friend Cam.

18 Q. And if you could tell the jury who is Cam.

19 A. He is my ex-boyfriend.

20 Q. Okay.

21 A. That I was very close to.

22 Q. Little bit louder.

23 A. My ex-boyfriend who I was close to.

24 Q. Okay. And is Cam's name Cam?

25 A. It's William.

- 1 Q. William Shirley.
- 2 A. Yes, ma'am.
- 3 Q. Okay. Goes by Cam though. Right?
- 4 A. Yes, ma'am.
- 5 Q. And where does Cam live?
- 6 A. He lives in Alabama.
- 7 Q. And did you know him when you lived in Alabama?
- 8 A. Yes, ma'am.
- 9 Q. Okay. So when you talked to Cam about his how did you talk to
10 him about it? Did you talk to him in person, did you talk to
11 him on a phone, did you talk to him in some other way?
- 12 A. I texted him.
- 13 Q. I texted him. Okay. And there were messages that were sent
14 back and forth?
- 15 A. Yes, ma'am.
- 16 Q. Okay. And do you know when it was that you would have talked
17 to Cam about this?
- 18 A. Early in January.
- 19 Q. And when you talked to Cam about this had you talked to your
20 mom about what happened?
- 21 A. No, ma'am.
- 22 Q. Had you told your siblings what happened?
- 23 A. No, ma'am.
- 24 Q. Had you told anybody but Cam what happened?
- 25 A. No, ma'am.

1 Q. Okay. At that point you hadn't reported it to the police or
2 anything like that?

3 A. No, ma'am.

4 Q. And when you talked to Cam about it did you tell him
5 everything that happened? And I don't want you to tell me
6 specifically what you said but did you tell him everything
7 that happened?

8 A. No.

9 Q. Okay. Did you leave things out?

10 A. Yes, ma'am.

11 Q. Why did you leave things out when you talked to Cam?

12 A. I couldn't bring myself to say it.

13 Q. Okay. We talked about that you didn't talk to mom about it.
14 And I know what the defendant told you. But is there a reason
15 that you didn't feel like you could talk to your mom?

16 A. I felt like she wouldn't believe me and I was also scared.

17 MR. ENGRAM: I'm sorry. I heard the end statement
18 but I heard her say, I thought and that's all I heard.

19 BY MS. O'MALLEY:

20 Q. Can you repeat it for me again?

21 A. I didn't think she would believe me and I was also scared.

22 Q. Okay. Did the defendant continue to live at the house --

23 A. Yes, ma'am.

24 Q. -- after this happened. Okay. So he was still around.

25 A. (non-verbal response)

1 was not working on the house as much as he should have been.

2 THE COURT: No. Sustained. Go on to the next
3 question.

4 BY MR. ENGRAM:

5 Q. Your mom had had conversations with him before about not
6 working in the house. Right?

7 MS. O'MALLEY: Objection. Hearsay.

8 MR. ENGRAM: Just asking yes or no.

9 THE COURT: Sustained.

10 MR. ENGRAM: I'm not asking what was said.

11 MS. O'MALLEY: Relevance.

12 THE COURT: Sustained.

13 BY MR. ENGRAM:

14 Q. You indicated that he would discipline you at the approval of
15 your mother. Right?

16 A. Yes, sir.

17 Q. Okay. And you indicate that during this particular day you
18 came to the bedroom. Right?

19 A. Yes, sir.

20 Q. Okay. And who's idea was it to go into the bedroom?

21 A. It was a mutual idea.

22 Q. Okay. This particular bed it was -- something was wrong with
23 it. It was broken. Had broken springs or frame or something
24 like that.

25 A. Yes. They slept on it sideways because of it.

- 1 me like this was not an ordinary thing. In other words you
2 weren't in the habit of going into my client's bedroom to
3 watch a movie. Right?
- 4 A. We have watched some movies before.
- 5 Q. Okay.
- 6 A. But it had never been him and I.
- 7 Q. Okay. Well, on a regular basis? On a regular basis?
- 8 A. No, him and I had not.
- 9 Q. Okay. So essentially what you're telling me is according to
10 your testimony this is was the first time.
- 11 A. For just him and I, yes.
- 12 Q. Okay. You indicated that -- prosecutor asked you and you said
13 while ago, that there was no real close relationship between
14 you and Juan. Right?
- 15 A. Yes, sir.
- 16 Q. He would discipline you by taking your phone away, grounding
17 you. Right?
- 18 A. Yes, sir.
- 19 Q. Okay. Sometimes in conjunction with mom or in front of her.
- 20 A. Yes, sir.
- 21 Q. Okay. But let me ask you this, he would discipline you for
22 things like not doing your chores. Right?
- 23 A. Yes, sir.
- 24 Q. And not folding the laundry or whatever it was. Not washing
25 dishes. I don't know. Just things like that. Right.

- 1 A. Yes, sir.
- 2 Q. Okay. Now right before you started to describe what happened
3 in this case you indicated that when the two of you were
4 laying on this bed, I assume he was laying on one side, you
5 were laying closer to the TV. Correct?
- 6 A. Yes, sir.
- 7 Q. Okay. He was behind you.
- 8 A. Yes, sir.
- 9 Q. And today you indicate you were about a foot apart. Right?
- 10 A. Yes, sir.
- 11 Q. Okay. And you claim that he put his arm over your stomach.
12 Right?
- 13 A. Yes. He moved closer when he did that.
- 14 Q. Okay. Still not touching you.
- 15 A. He was touching me when he did that.
- 16 Q. From behind.
- 17 A. Oh, no. His body wasn't touching me.
- 18 Q. You've known him how long?
- 19 A. Two years.
- 20 Q. Okay. My client is a large guy. Correct?
- 21 A. Yes, sir.
- 22 Q. And my client does not have overly long arms does he?
- 23 A. I don't know.
- 24 Q. Okay. And here's the thing. We're talking about all kinds of
25 sensitive issues today. We're not trying to embarrass anybody

- 1 so I'm not trying to do that at this point. But you are not
2 what we could consider petite. Are you?
- 3 A. No.
- 4 Q. Okay. And you're telling me -- you're telling this jury that
5 he's able to get his arm over you, around your stomach, up to
6 your chest, and on your vagina.
- 7 A. Yes, sir.
- 8 Q. Not touching you from behind. And he's a large guy with quite
9 frankly a large stomach. Correct?
- 10 A. Yes.
- 11 Q. You state today that you were wearing a sweatshirt and
12 sweatpants. Correct?
- 13 A. Yes, sir.
- 14 Q. Today you indicate, it sounds like, you said he started
15 outside of your shirt, on top of your shirt on your stomach.
16 Right?
- 17 A. Yes, sir.
- 18 Q. Moved up and grabbed your breast. Correct?
- 19 A. Yes, sir.
- 20 Q. Okay. And you wanted to get up and you tried to get up and he
21 held you there. Right?
- 22 A. Yes, sir.
- 23 Q. Okay. That point no talking. Right?
- 24 A. No, sir.
- 25 Q. Okay. And then you said he moved his hand -- oh, and I think

- 1 you said at that point he was grabbing you. Grabbing your
2 breast. Right?
- 3 A. Yes, sir.
- 4 Q. Outside your shirt.
- 5 A. Yes, sir.
- 6 Q. Then moved his hand back down to your stomach but under your
7 shirt.
- 8 A. Yes, sir.
- 9 Q. And then he went back up your chest again on your skin.
10 Right?
- 11 A. Yes, sir.
- 12 Q. Grabbed you again. Yes.
- 13 A. Yes, sir.
- 14 Q. Okay. And you said at that point you tried to move your hand.
15 Right?
- 16 A. Yes, sir.
- 17 Q. Okay. And then he moved down and went into your pants.
- 18 A. Yes, sir.
- 19 Q. Touched you inside on your vagina put a finger -- at least a
20 finger inside you. Right?
- 21 A. Yes, sir.
- 22 Q. And this -- all this time nothing was being said at that
23 point?
- 24 A. No, sir.

- 1 Q. Okay. And you state that, sounds to me like by implication
2 you're indicating you never said anything to anybody during
3 these couple of months between the time it happened and the
4 time he left the house because you were scared. Right?
- 5 A. Yes, sir.
- 6 Q. He was always around you. Correct?
- 7 A. Yes, sir.
- 8 Q. Okay. It's important, you indicate you were scared. Right?
- 9 A. Yes, sir.
- 10 Q. Of him?
- 11 A. Yes, sir.
- 12 Q. You made, as the prosecutor indicated, statements to the
13 police. Right?
- 14 A. Yes, sir.
- 15 Q. Statements to the CAC interviewer. Correct?
- 16 A. Yes, sir.
- 17 Q. And here in court. Correct?
- 18 A. Yes, sir.
- 19 Q. All right. When you talked to the police officer that was
20 soon in time after you talked to your mom. Right?
- 21 A. Yes, sir.
- 22 Q. And you indicated under direct exam while ago you indicated
23 that your mom was asking you about having Juan come back to
24 the house. Is that correct?
- 25 A. Yes, sir.

- 1 Q. And that's when you told her about what you've described here
2 today. Right?
- 3 A. No. That's when I told my sibling that I was not comfortable
4 with him coming back to the house after she told me he might
5 be coming back to the house.
- 6 Q. All right. So your mom told you he might be coming back.
7 Then you talked to your sibling, then you talked to your mom
8 about what happened. Right?
- 9 A. My mom called me to talk to me. Yes.
- 10 Q. Okay. So this story that you've told didn't come out until
11 after your mom had asked you about him moving back to the
12 house. Right?
- 13 A. Yes, sir.
- 14 Q. And you indicate that you had this conversation with Mr.
15 Shirley. Right?
- 16 A. Yes, sir.
- 17 Q. Mr. Shirley -- this was entirely by text. Right?
- 18 A. Yes, sir.
- 19 Q. Cause he lives in Alabama.
- 20 A. Yes, sir.
- 21 Q. All right. So you spoke to the police right around February.
22 Right?
- 23 A. Yes, sir.
- 24 Q. February -- well, 17th. Was it the same day?
- 25 A. Yes, sir.

1 Q. Okay. Then you had a conversation with Ms. Welke on the 28th.
2 Right?

3 A. Yes, sir.

4 Q. Okay. And then as Ms. O'Malley indicated while ago you were
5 sitting there in that chair on April 25th. Is that correct?

6 A. Yes, sir.

7 Q. You told the police officer on February 17th that you were
8 unsure of the date. Didn't you?

9 A. Yes, sir.

10 Q. Okay. You also told the forensic examiner that you can't
11 remember the day.

12 A. Yes, sir.

13 Q. All right. Do you remember that the officer asked you if it
14 was before or after New Years?

15 MS. O'MALLEY: Your Honor, at this point, I would
16 object. He's asking her questions about what she said and
17 what the officer said, that's hearsay and he is not elicited
18 any impeachable statements at this point. She has said today
19 she wasn't sure what the day was. So I don't know --

20 THE COURT: What's your question again? Did you --
21 tell me the specific --

22 MR. ENGRAM: I said did the officer ask you if it
23 was before or after New Years.

24 THE COURT: Oh, I'll allow that.

25 MR. ENGRAM: Okay.

1 BY MR. ENGRAM:

2 Q. And you told the officer you couldn't remember the day.

3 A. Yes, sir.

4 Q. But at that time you said you think it was a school day.
5 Right?

6 A. Yes, sir.

7 MS. O'MALLEY: Again, your Honor, it's all
8 consistent with what she's already testified to so I don't --

9 MR. ENGRAM: Well, --

10 THE COURT: If that's objection I'm gonna overrule
11 that and allow the question. Go ahead.

12 BY MR. ENGRAM:

13 Q. Because my next question is when you had the exam at the
14 forensic interview center with Ms. Welke on the 28th you said
15 it was a school day. Didn't you?

16 A. Yes, sir.

17 Q. Okay. So when you made the report you said I think it's a
18 school day. Then two weeks later you said it was a school
19 day.

20 A. I tried to not think about it until then.

21 Q. Okay. And told the -- you said today that it was -- excuse
22 me. Yeah, well you did, you said today that it would have
23 been probably around 3:30. Right?

24 A. Yes, sir.

25 Q. Okay. But when you talked to the officer on the 20 -- excuse

1 me on the 17th you weren't sure of the time of day.

2 A. No, sir.

3 Q. Again, and I should ask by the way. I asked you that same
4 question at the preliminary exam. Right?

5 A. Yes, sir.

6 Q. And you said then that it was -- you thought it was 3:30.

7 A. Yes, sir.

8 Q. Do you remember my next question after that?

9 A. No, sir.

10 Q. I asked you, okay on April 25th you say it was 3:30 but the
11 day you were --

12 THE COURT: Are you reading from the transcript?

13 MR. ENGRAM: Yes, well summarizing --

14 THE COURT: Will you give us the page.

15 MR. ENGRAM: -- but it would have been page 11 line
16 16. Okay. But regardless she confirmed the time today. And
17 that's my -- that's my point.

18 BY MR. ENGRAM:

19 Q. You're confirming the time today as 3:30 put when talked to
20 the officer way back in February and February was closer in
21 time to this event. Right?

22 A. Yes, sir.

23 Q. Okay. You told the officer you weren't sure of the time of
24 day.

- 1 incident happened?
- 2 A. Yes, ma'am.
- 3 Q. Okay. At some point Jacqueline did you talk with anybody else
4 about what happened?
- 5 A. I talked to my sister and her boyfriend.
- 6 Q. Okay. And I want to take you to that day, okay. Was that
7 February 17th of this year?
- 8 A. Yes, ma'am.
- 9 Q. And what were you guys doing. Where were you when you talked
10 with your sister and her boyfriend?
- 11 A. We were on a walk from the store.
- 12 Q. Okay. You were on walk from the store.
- 13 A. Yes, ma'am.
- 14 Q. So is this during the day. Is it in the evening? When was
15 it?
- 16 A. The day.
- 17 Q. During the day. Okay. And you sister, which sister?
- 18 A. Lana.
- 19 Q. And who else was with you?
- 20 A. Tanner, her boyfriend.
- 21 Q. Okay. And tell me, Jacqueline, at that point did you tell
22 them what you just told us?
- 23 A. No, ma'am.
- 24 Q. Okay. Did you tell them something different?
- 25 A. Yes, ma'am.

1 Q. What did you tell them?

2 A. I told them --

3 MR. ENGRAM: I'm gonna object. This is hearsay at
4 this point.

5 MS. O'MALLEY: It's not for the truth of the matter,
6 your Honor, it's just to explain what happened next,
7 essentially.

8 THE COURT: Well, why do you need what she said
9 then?

10 MS. O'MALLEY: I think it will be -- I'll wait, your
11 Honor, I'll go back to that.

12 THE COURT: Okay. For now I'll sustain the
13 objection.

14 BY MS. O'MALLEY:

15 Q. Backing up, you didn't tell them everything you just told us.
16 Is that fair?

17 A. Yes.

18 Q. Okay. Was your mom there when this happened?

19 A. When I told them?

20 Q. Yes.

21 A. No.

22 Q. Did you seek your mom out and talk to your mom about this?

23 A. No.

24 Q. Okay. So once you commented to your sister what happened?

25 A. My mom was talking about letting him come back to the house.

1 Q. I'm gonna back up a little. You're really quiet. You said
2 your mom was talking. Did you mom come and talk to you
3 specifically?

4 A. We were talking about her letting him come back into the house
5 after being arrested.

6 Q. Jacqueline let's back up a little. Okay. When you talked to
7 your sister Lana -- you made a comment to your sister Lana.
8 Right? And did that comment prompt your mom to come talk to
9 you about the defendant?

10 A. Yes, ma'am.

11 Q. Okay. And did your mom ask you about what had happened with
12 the defendant?

13 A. Yes, ma'am.

14 Q. And did you want to talk to your mom about what had happened
15 with the defendant when she came to you?

16 A. No.

17 Q. Was that that same day, February 17th?

18 A. Yes, ma'am.

19 Q. Okay. And did you talk to your mom about what happened?

20 A. Yes, ma'am.

21 Q. Okay. And when you talked to with your mom how did that feel?

22 MR. ENGRAM: Objection. Relevance.

23 MS. O'MALLEY: And again, your Honor, I don't know
24 how her emotions and how when she's talking about something
25 that happened to her aren't relevant to this case. Certainly

- 1 Q. Okay. How was that?
- 2 A. It was also hard.
- 3 Q. After you talked with the police what was the next thing that
4 happened?
- 5 A. I had to file a report.
- 6 Q. Okay. Did you have to go and talk with someone else about
7 what was going on?
- 8 A. Yes, ma'am.
- 9 Q. Did you have to go to the Child Assessment Center?
- 10 A. Yes, ma'am.
- 11 Q. Do you know when that was in relation to when you talked to
12 the police? Was it the next day, was it a week later. How
13 long was it?
- 14 A. It was soon after.
- 15 Q. Okay. And when you went there did you have to talk about what
16 happened to you again?
- 17 A. Yes, ma'am.
- 18 Q. How was that?
- 19 A. It was still difficult.
- 20 Q. Okay. Jacqueline you had to come to court at least one other
21 time. Right?
- 22 A. Yes, ma'am.
- 23 Q. And you had to testify about what happened as well. Right?
- 24 A. Yes, ma'am.
- 25 Q. We talked about the fact that you had this conversation with

1 Q. You've said today that you were wearing a gray hoodie
2 sweatshirt?

3 A. Yes, sir.

4 Q. Okay. Remember having that forensic exam on the 28th with Ms.
5 Welke. You told her that you were in a t-shirt. Right?

6 A. I remember saying a hoodie.

7 Q. You think you said a hoodie.

8 A. Yes, sir.

9 Q. Referring to the CAC --

10 MR. ENGRAM: May I approach the witness?

11 THE COURT: Yes.

12 BY MR. ENGRAM:

13 Q. Referring to the CAC interview summary report it's page 4 of 6
14 and it's, I guess you'd call it the middle paragraph. I'm
15 asking you to read that section starting on the line I had
16 just gotten. Don't read it out loud read it to yourself. Do
17 you see the answer that is in this report?

18 A. Yes, sir.

19 Q. Okay. Didn't you tell Ms. Welke that you usually change into
20 a t-shirt --

21 MS. O'MALLEY: Your Honor, at this time I would
22 object. This report is not written by Lana -- or by
23 Jacqueline. I think she said she -- what she remembered was
24 this. So I guess I'd ask him to ask it in that fashion. What
25 does she remember now that she's refreshed her memory. If

1 that's what he was doing. Not what did you --

2 THE COURT: He -- he can -- I'm gonna let him state
3 the question then I'll let you know if that is a valid
4 objection.

5 BY MR. ENGRAM:

6 Q. Do you remember if you told her that you were wearing a --
7 excuse me, that you usually change into a t-shirt.

8 THE COURT: I'll allow that.

9 THE WITNESS: I don't wear t-shirts often. I
10 usually change into a sweatshirt.

11 BY MR. ENGRAM:

12 Q. Okay. Well, you testified on April 25th. Correct?

13 A. Yes, sir.

14 Q. Okay. Because again referring to page 9, which I probably
15 should keep out, let me show you page 9 which I showed you a
16 few minutes ago, same page I showed you a few minutes ago this
17 time I'm asking you to read line 14, 15, 16, 17, and 18.

18 A. A t-shirt and a hoodie.

19 Q. Yeah. So you said under oath that you were wearing a t-shirt.

20 MS. O'MALLEY: Your Honor, I would object. That was
21 not what she just said.

22 THE COURT: I'll read from the transcript. And it
23 says, I changed into a drawstring pajama pants, a t-shirt and
24 a hoodie, page 9 line 17 of the transcript dated April 25,
25 2017. Accurate counsel.

1 MS. O'MALLEY: Yes, your Honor, thank you.

2 THE COURT: Thank you.

3 BY MR. ENGRAM:

4 Q. No mention today of a t-shirt. Was there?

5 A. No, sir.

6 Q. Okay. Also I have a question about the pants you were
7 wearing. You said you were wearing pajama pants. Right?

8 A. Yes, sir.

9 Q. Okay. Now when you talked to the police officer you couldn't
10 remember which set of pajama pants. Right?

11 A. Yes, sir.

12 Q. And that was on the 17th of February. Right?

13 A. Yes, sir.

14 Q. Okay. But when you talked to Ms. Welke do you remember that
15 you told her that you were wearing Grinch pajama pants that
16 button in the front.

17 A. Yes, sir.

18 Q. Okay. And you remember sitting on that witness stand telling
19 us that you were wearing drawstring pajama pants.

20 A. Yes. They have a drawstring and buttons. They're men's
21 pajama pants.

22 Q. So today you're saying you can explain the differences by now
23 saying the drawstring with a button.

24 A. Yes, sir.

25 Q. And you didn't volunteer that at any time in the past did you.

- 1 You didn't volunteer that until just now. Right?
- 2 A. I don't understand the question.
- 3 Q. Well, previously at one point to Ms. Welke you said they were
4 Grinch pajama pants. At the prelim you said they were
5 drawstring pajama pants. Now today you're saying, oh well
6 they have a drawstring and a button.
- 7 A. They're men's pajama pants. They have a button in the front.
- 8 Q. And what I'm saying is the information you just gave us that
9 they're drawstring with a button and all that stuff, you
10 didn't give any of that information before did you?
- 11 A. No, sir.
- 12 Q. You only told the police officer about his putting his hand on
13 your stomach under your shirt and going up to the bottom of
14 your breast. Right?
- 15 A. He grabbed my breast.
- 16 Q. But that's not what you told the police officer. Was it?
- 17 A. He had it at the bottom but he was grabbing at the same time.
- 18 Q. And did you tell the police officer that at that point you
19 grabbed his hand and stopped it from covering your breast.
- 20 A. I can't remember.
- 21 Q. Okay. But you didn't tell the police officer that there was
22 anything done outside your shirt on your breast. Did you?
- 23 A. I believe I did.
- 24 Q. Okay. And you told the police officer that he went from your
25 breast down into your pants. Correct?

- 1 A. Yes, sir.
- 2 Q. And stopped after a few minutes.
- 3 A. Yes, sir. A minute. Not too long.
- 4 Q. Okay. Okay. When you talked to Ms. Welke, again, you didn't
5 say anything about him starting on top of your shirt and going
6 to your breast. Did you?
- 7 A. I can't remember.
- 8 Q. Okay. And in fact didn't you tell her that he moved his hand
9 up and it was on your breast.
- 10 A. Yes, sir.
- 11 Q. Okay. And isn't it true that's the first time that you said
12 he squeezed your breast?
- 13 A. Yes, sir.
- 14 Q. Okay. And when she asked you about how long you thought it was
15 you told her it was approximately 5 minutes. Didn't you?
16 That he was inside your pants.
- 17 A. No. The whole ordeal was about 5 minutes.
- 18 Q. Okay. You claim, I think by implication, that you were
19 uncomfortable with my client after this event.
- 20 A. Yes, sir.
- 21 Q. Were you uncomfortable with him before that event?
- 22 A. No, sir.
- 23 Q. Okay. And you think as near a possible this event occurred
24 when?
- 25 A. Early December.

- 1 Q. Early December?
- 2 A. Yes, sir.
- 3 Q. Okay. And isn't it true really you just want him out of the
4 house?
- 5 A. No, sir.
- 6 Q. Okay. You state that he did some discipline against you. Is
7 that correct?
- 8 A. Yes, sir.
- 9 Q. Let's be fair. He's not your father is he?
- 10 A. No, sir.
- 11 Q. He's the guy that's living with your mom. Right?
- 12 A. Yes, sir.
- 13 Q. Okay. When he would discipline you in fact you got very upset
14 about that didn't you.
- 15 A. Not too upset.
- 16 Q. Really. You wouldn't stomp off and pout in your room --
- 17 A. No, sir.
- 18 Q. -- when he'd take your phone? You wouldn't talk about his
19 discipline behind his back?
- 20 A. No, sir. I thought it was -- he would ground me for dumb
21 things sometimes.
- 22 Q. Okay. But I mean disrespecting him to other people behind his
23 back. You're saying you wouldn't do that?
- 24 A. No, sir.
- 25 Q. Okay. You didn't tell his father this is my house?

1 A. No, sir.

2 MS. O'MALLEY: Your Honor, I would object to that --

3 MR. ENGRAM: He --

4 THE COURT: Hold on just a second.

5 MS. O'MALLEY: -- it's hearsay, what she said to
6 anyone before. And I don't see how that relevant either.

7 THE COURT: And how is that at this juncture
8 relevant?

9 MR. ENGRAM: I'm sorry.

10 THE COURT: How is that relevant?

11 MR. ENGRAM: Well, I've been asking her about her --
12 about my client's discipline of her and she say's, oh no
13 nothing wrong with it. This goes all to the part of the
14 discipline, how she's reacting to the discipline. It's very
15 relevant for that purpose. I mean she's basically telling a
16 witness, well actually I expect to be a witness, this is my
17 house. As if I can do what I want. So it's relevant because
18 my client has a vested interest of putting on a defense and
19 this is his defense.

20 MS. O'MALLEY: How is it not hearsay I guess is my
21 question, your Honor.

22 THE COURT: Well, the question isn't is it hearsay;
23 it is offered for a reason other than the truth of the matter
24 asserted. That's what Mr. Engram needs to answer.

25 MR. ENGRAM: I quite frankly, I can bet that this 17

- 1 Q. Okay. You don't think you went with him after this happened.
- 2 A. No, sir.
- 3 Q. So you didn't go to the store with him, like Wal-Mart alone
- 4 after this incident?
- 5 A. I can't remember.
- 6 Q. You didn't go with him alone to the Pay 'n Pakit by yourself
- 7 with him?
- 8 A. I usually walk there. I usually walk there on my own.
- 9 Q. Okay. You didn't go with him after this incident?
- 10 A. I can't remember.
- 11 Q. Do you remember a time back in January of this year that you
- 12 and the family went to church?
- 13 A. Yes, sir.
- 14 Q. And there was a plan to go out to eat after church.
- 15 A. I can't remember specifics.
- 16 Q. Well, isn't that true that you don't want to remember the
- 17 specifics because the truth decided the first thing out of
- 18 your mouth was I'm gonna ride shotgun and you rode in the seat
- 19 next to him after church? You couldn't wait to get in the
- 20 car.
- 21 A. We all went to church together and my mom would come with us.
- 22 I couldn't ride shotgun.
- 23 Q. I'm sorry.
- 24 A. I couldn't ride shotgun if my mom was with us.
- 25 Q. Okay. So you're saying you didn't ride in that car with my

- 1 client after church back in January?
- 2 A. I probably did but we were all taking the same car if we did.
- 3 Q. Wasn't it true there was too many of you to take the same car.
- 4 In fact it took two cars?
- 5 A. No, sir.
- 6 Q. And you wanted to ride with him?
- 7 A. No, sir. We have the SUV.
- 8 Q. You state that you didn't go much places -- many places with
- 9 him after this happened.
- 10 A. No, sir.
- 11 Q. And this happened in early -- early December?
- 12 A. Yes, sir.
- 13 Q. Isn't it true that right around Christmas you came up to him
- 14 and begged him to let him go -- let -- to have him let you go
- 15 shopping with him right around Christmas?
- 16 A. I -- no, sir.
- 17 Q. Isn't it true that the day after Christmas you and him were
- 18 sitting on a couch together in front of the fireplace,
- 19 A. No, sir.
- 20 Q. You voluntarily sat down on a sofa right next to him the day
- 21 after Christmas.
- 22 A. No, sir.
- 23 Q. You --
- 24 A. After Christmas we were all together.
- 25 Q. Remember there was a party at Scott Grady's house --

1 A. When?

2 Q. Late in the year. Early December right around this time.

3 A. I can't remember.

4 Q. Okay. Isn't it true that the reason you can't remember is
5 because you realize now that what you did was you went up to
6 him in a normal family way, put your arm around him, and said
7 I love you.

8 A. No, sir.

9 Q. Didn't do that at a social gathering at Scott Grady's house?

10 A. No, sir.

11 Q. Juan, his children, were there.

12 A. No, sir. I think they were there but no I didn't do that.

13 THE COURT: Can you give us a timeframe for this,
14 counsel.

15 MR. ENGRAM: I did the best I can do it was right
16 around the time this happened, early December.

17 THE COURT: For the social gathering?

18 MR. ENGRAM: Yeah.

19 THE WITNESS: I thought you said that was near
20 Christmas.

21 MR. ENGRAM: No --

22 THE COURT: I'm asking --

23 MR. ENGRAM: -- the one over at Scott Grady's --

24 THE COURT: -- you have no idea when this social
25 gathering was.

1 MR. ENGRAM: The best I can get is it was around
2 early December, when this happened.

3 MS. O'MALLEY: Your Honor, I would object to the
4 relevance then. Cause it could have happened before.

5 THE COURT: Okay. I'm gonna -- I will -- I'll allow
6 it and the jury will use their collective memory as to the
7 dates testified. Go ahead.

8 BY MR. ENGRAM:

9 Q. Do you also remember that in early December that you, my
10 client, and Scott Grady, took my client's car over to Scott
11 Grady's house?

12 MS. O'MALLEY: Your Honor, objection. Relevance.

13 MR. ENGRAM: Early -- right at about the time this
14 happened.

15 THE COURT: Okay. And your objection is for what
16 reason?

17 MS. O'MALLEY: I -- again, your Honor, I don't know
18 why it's relevant if she was with the defendant and someone
19 else. I don't know why that's relevant or how --

20 MR. ENGRAM: I'm about to make it --

21 MS. O'MALLEY: -- it's relevant.

22 THE COURT: Okay. If this is foundational I'll
23 allow that.

24 MR. ENGRAM: Okay.

25 THE COURT: And you can ask another question.

1 THE WITNESS: I can't remember.

2 BY MR. ENGRAM:

3 Q. Okay. So you don't remember then riding back then alone in my
4 client's car back from Scott Grady's house to your house?

5 A. No, sir.

6 Q. Isn't it true you just don't want to admit it?

7 A. No, sir.

8 Q. Isn't it true that one of the last -- well, excuse me. Isn't
9 it true that during the last several months before my client
10 left the house the last time you kept asking him to let you
11 move out of the house and he kept saying no?

12 MS. O'MALLEY: Your Honor, objection. Hearsay.

13 THE COURT: Say that again. You kept asking --

14 MR. ENGRAM: You kept asking him to let you move out
15 of the house.

16 THE COURT: To let her move out of the house.

17 MR. ENGRAM: Yes.

18 THE COURT: When --

19 MR. ENGRAM: And he kept saying no. Again, I'm
20 trying to establish a motive here, your Honor.

21 MS. O'MALLEY: Your Honor, he said --

22 THE COURT: I understand, Mr. Engram. One more
23 time, when?

24 MR. ENGRAM: Around -- I -- within the -- from the
25 time that my client left the house, which would have been

1 after these incidences happened --

2 THE COURT: There has been no testimony as to that,
3 as to the time that he left the house. So --

4 MR. ENGRAM: The time that he left the house would
5 have been --

6 MS. O'MALLEY: Your Honor --

7 THE COURT: You can't testify, Mr. Engram.

8 MR. ENGRAM: I'm sorry.

9 THE COURT: You are not allowed to testify. So for
10 right now I'll sustain the objection.

11 BY MR. ENGRAM:

12 Q. When did my client leave the house? When did he last leave
13 the house?

14 MS. O'MALLEY: Your Honor, I'd object to the form of
15 that question. What does that even mean? To go to the store
16 --

17 THE COURT: What does leave the house mean? Very
18 broad, counsel.

19 MR. ENGRAM: Move out of the house.

20 THE COURT: Thank you.

21 THE WITNESS: When he was arrested for domestic
22 violence.

23 BY MR. ENGRAM:

24 Q. Okay. Okay. That was when?

25 A. It was late January, early February.

1 Q. Okay. And that -- that -- that was definitely after the event
2 you described here today. Correct?

3 A. Yes, sir.

4 Q. And from around the time that he was arrested backwards even
5 to before this incident occurring you'd been asking to let you
6 move out of the house. Right?

7 A. No, sir. I never asked to move out of the house.

8 Q. You never asked him that at all?

9 A. Never.

10 Q. Well, you've moved out of the house now, haven't you?

11 A. I was kicked out.

12 Q. Do you remember a specific incident in January, and forgive me
13 because I have to describe it, that you wanted to go with him
14 in the car to the store and you weren't dressed in street
15 clothes ready to go, my client told you you couldn't go so you
16 changed to go with him.

17 A. I can't remember.

18 Q. Okay. You know who Levi is. Right?

19 A. Yes, sir.

20 Q. Okay. My client's relative. Right?

21 A. Yes, sir.

22 Q. Son?

23 A. Yes, sir.

24 Q. Yeah. After these incidents happened or you state that they
25 happened, I should say, you voluntarily went with my client

1 over to Levi's house to help so that my client could build a
2 studio over at that house. Didn't you?

3 A. Yes, sir. I remember that.

4 Q. Okay. You voluntarily went with my client?

5 A. Yes, sir.

6 Q. Nobody forced you to do that did they?

7 A. No, sir.

8 Q. And that was because you were so uncomfortable with him.
9 Wasn't it?

10 A. I tried to forget about it.

11 Q. Since you've mentioned it and thrown it out there, when my
12 client was arrested that was back when?

13 A. Late January, early February.

14 Q. All right. Prior to you actually talking to the police
15 officer about these events. Right?

16 A. Yes, sir.

17 Q. So you had some interaction with a police officer. Right?

18 A. Huh.

19 Q. When my client was arrested?

20 A. Yes, sir.

21 Q. Okay. Didn't volunteer a thing to that police officer about
22 these incidences did you?

23 A. No, sir.

24 Q. And you're -- at the time you were how old?

25 A. Seventeen.

1 Q. Okay. And at some point did you mom have a boyfriend that
2 lived with you there?

3 A. Yes.

4 Q. Who was that?

5 A. Johnny.

6 Q. And is he in the courtroom right now?

7 A. Yes.

8 Q. Could you point to him and tell us what he's wearing?

9 A. A blue shirt.

10 MS. O'MALLEY: Your Honor, I'd ask the record
11 reflect she has identified the defendant here in court.

12 THE COURT: Yes, it may.

13 BY MS. O'MALLEY:

14 Q. You called him Johnny. Is that his name?

15 A. Juan.

16 Q. Okay. Juan is his name but you call him Johnny.

17 A. Yes.

18 Q. Is that a pretty standard common nickname from everybody?

19 A. Yes.

20 Q. Okay. How long have you known Johnny?

21 A. Two years.

22 Q. How long did he live with your family?

23 A. A year and a half to two years.

24 Q. Okay. And when he lived with you and your mom and your
25 siblings did he watch you?

1 A. Yes.

2 Q. Was your mom living there?

3 A. Yes.

4 Q. Was your sister living there?

5 A. Yes.

6 Q. And when I say your sister I mean Jacqueline. And your little
7 siblings too?

8 A. Yes.

9 Q. And on that day did you have a conversation with your sister?

10 A. Yes.

11 Q. And did that conversation -- where did that conversation take
12 place?

13 A. We were walking to the store.

14 Q. Okay. And when you say we who are you talking about? Who was
15 there?

16 A. It was me, my sister, and my boyfriend.

17 Q. Who is your boyfriend?

18 A. Tanner.

19 Q. Okay. And do you remember what time of day it was?

20 A. It was evening.

21 Q. Okay. And at some point did you talk about -- and without
22 talking with us specifically what was said, okay, but did the
23 conversation turn to the defendant?

24 A. Yes.

25 Q. And when it turned to the defendant was there a comment made

1 by your sister about the defendant?

2 A. Yes.

3 Q. Okay. Did that comment concern you?

4 A. Yes.

5 Q. Tell me why it concerned you?

6 A. She usually talks to be about everything but she seemed a
7 little standoffish about it. She didn't want to go into
8 details and it made her really uncomfortable.

9 Q. Okay. How could you tell that she was uncomfortable?

10 A. She kind of tried to change the subject and didn't want to
11 talk about it anymore and kept dismissing it.

12 Q. Okay. Did she give you any details?

13 A. No.

14 Q. Okay. So what did you do when that happened?

15 A. Later that evening I talked to my mom about it while we were
16 at the store.

17 Q. Why did you feel you needed to talk to your mom about it?

18 A. Because usually she's very open with me.

19 Q. When you who -- she who --

20 A. My sister Jacs.

21 Q. Okay. And that was not the case on this day?

22 A. Yeah.

23 Q. Did she -- you said she was standoffish, she wasn't very open
24 about it. Did -- what else did act like, what was her
25 demeanor like? Did she seem to be -- to get upset or was she

- 1 just not talking about it?
- 2 A. She was kind of upset about it.
- 3 Q. Okay. And so you talked with your mom.
- 4 A. Yes.
- 5 Q. And after you talked with your mom do you know if your mom had
6 a conversation with your sister?
- 7 A. Yes.
- 8 Q. Were you present for that conversation?
- 9 A. No.
- 10 Q. At some point that same day did the police come to your house?
- 11 A. Yes.
- 12 Q. How long after your conversation with your mom did the police
13 come to your house?
- 14 A. A few hours.
- 15 Q. Okay. Did you see Jackie -- or Jacqueline talking with the
16 police?
- 17 A. Yes.
- 18 Q. And again, I don't want to talk about what she said to the
19 police. But when she was talking to the police how did she
20 appear. What was her demeanor like?
- 21 A. She was crying.
- 22 Q. Yeah. Okay. And how long did she talk to the officer?
- 23 A. About 45 minutes.
- 24 Q. Okay. Did she seem open with the officer?
- 25 A. No. She was scared at first.

- 1 Q. Correct me if I'm wrong, it was your sister that brought it
2 up. Right?
- 3 A. Well, we both brought it up.
- 4 Q. What do you mean?
- 5 A. We were talking about him possibly coming back and getting
6 back together with my mom.
- 7 Q. Okay. So in the context of this situation with my client
8 possibly coming back to you house. Your sister brought
9 something up.
- 10 A. Yes.
- 11 Q. Okay. You indicated that as she was talking to the police
12 that -- and that's why I wanted to clarify this a moment ago.
13 You said she was generally -- I think when you mean -- well
14 let me ask you this. Correct me if I'm wrong, but when you
15 say she was giving long answers you mean that it was more than
16 yes and no.
- 17 A. Well, yes.
- 18 Q. Okay. So she was giving some details. Is that correct?
- 19 A. Yes.
- 20 Q. Okay. You -- just a second here -- you saw how your sister
21 would interact with Juan. Correct?
- 22 A. Yes.
- 23 Q. She didn't get along with him very well. Right?
- 24 A. Yes.
- 25 Q. Okay. And that's --

1 THE COURT: That was a negative. Would you restate
2 that in the positive?

3 BY MR. ENGRAM:

4 Q. Did she get along with him very well?

5 A. No.

6 Q. And that was due to his discipline. Correct?

7 A. No.

8 Q. No.

9 A. No.

10 Q. Okay. Do you remember having a conversation with the forensic
11 interviewer at the Child Assessment Center?

12 A. Yes.

13 MS. O'MALLEY: Your Honor, I'd object to hearsay.

14 MR. ENGRAM: This is about to be a inconsistent
15 statement.

16 THE COURT: He asked whether or not she remembers
17 the conversation. And that's a legitimate question. So
18 overruled.

19 MR. ENGRAM: Okay. All right.

20 BY MR. ENGRAM:

21 Q. Weren't you asked if my client was harsh with the discipline
22 by the interviewer?

23 A. Yes.

24 Q. Okay. You were asked to describe what you meant by harsh.

25 A. Yes.

- 1 Q. Correct me if I'm wrong, it was your sister that brought it
2 up. Right?
- 3 A. Well, we both brought it up.
- 4 Q. What do you mean?
- 5 A. We were talking about him possibly coming back and getting
6 back together with my mom.
- 7 Q. Okay. So in the context of this situation with my client
8 possibly coming back to you house. Your sister brought
9 something up.
- 10 A. Yes.
- 11 Q. Okay. You indicated that as she was talking to the police
12 that -- and that's why I wanted to clarify this a moment ago.
13 You said she was generally -- I think when you mean -- well
14 let me ask you this. Correct me if I'm wrong, but when you
15 say she was giving long answers you mean that it was more than
16 yes and no.
- 17 A. Well, yes.
- 18 Q. Okay. So she was giving some details. Is that correct?
- 19 A. Yes.
- 20 Q. Okay. You -- just a second here -- you saw how your sister
21 would interact with Juan. Correct?
- 22 A. Yes.
- 23 Q. She didn't get along with him very well. Right?
- 24 A. Yes.
- 25 Q. Okay. And that's --

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2 that in the positive?

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6 Q. And that was due to his discipline. Correct?

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8 Q. No.

9 A. No.

10 Q. Okay. Do you remember having a conversation with the forensic
11 interviewer at the Child Assessment Center?

12 A. Yes.

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15 statement.

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17 the conversation. And that's a legitimate question. So
18 overruled.

19 MR. ENGRAM: Okay. All right.

20 BY MR. ENGRAM:

21 Q. Weren't you asked if my client was harsh with the discipline
22 by the interviewer?

23 A. Yes.

24 Q. Okay. You were asked to describe what you meant by harsh.

25 A. Yes.

1 A. Well, no none of us liked it.

2 Q. Okay. She wanted him out of the house. Didn't she?

3 A. We all wanted him out of the house.

4 Q. And is that why she said what she said as far as what he did -

5 -

6 MS. O'MALLEY: Your Honor, objection. Objection.

7 THE COURT: What's your objection?

8 MS. O'MALLEY: Objection.

9 THE COURT: Please state your objection.

10 MS. O'MALLEY: She doesn't know she's not
11 Jacqueline. He can't ask that question, she doesn't know why
12 said anything first of all. And if she does --

13 THE COURT: So you're saying it calls for
14 speculation.

15 MS. O'MALLEY: Yes. It calls for speculation.

16 THE COURT: It calls for speculation. Okay. I'll
17 sustain that. Go ahead.

18 BY MR. ENGRAM:

19 Q. So you last answer then before I asked my last question was we
20 all wanted him out of the house. Right?

21 A. Yes.

22 Q. Okay. You had opportunity to observe your sister between the
23 beginning of December and until January and February.
24 Correct?

25 A. Yes.

1 BY MR. ENGRAM:

2 Q. Okay. During the timeframes, you understand we're talking
3 December and January --

4 THE COURT: Just restate the last part.

5 MR. ENGRAM: Okay. All right.

6 BY MR. ENGRAM:

7 Q. Did you ever see Jacqueline either leave alone with my client
8 or other people.

9 A. Yes.

10 Q. Okay. And what I asked you was is then did you ever -- or did
11 she seem uncomfortable around him.

12 A. Not that I know of.

13 Q. Okay. Were there either parties or family gatherings in
14 December and January? Let me ask you this. Around Christmas
15 day, the day after, day before, Christmas day, something like
16 that --

17 A. Yes.

18 Q. -- okay. Did you see Jacqueline sitting next to my client on
19 a couch by the fireplace?

20 A. No.

21 Q. Okay. Were you there for that?

22 A. Yes.

23 Q. Okay. So if she had you would have seen that?

24 A. Yes.

25 Q. Okay. Did you go to church with the family around the first

DIRECT EXAMINATION

1
2 BY MS. O'MALLEY:

3 Q. If you could just briefly tell us your full name and spell
4 your last name for us.

5 A. Erica Furkis. F-u-r-k-i-s.

6 Q. And if you could tell the jury how are you employed?

7 A. I am employed as a children's service specialist at the
8 Michigan Department of Health and Human Services as a CPS
9 Investigator.

10 Q. What is that?

11 A. I investigate allegations of child abuse and neglect.

12 Q. Okay. And do you do that independent of law enforcement?

13 A. Yes.

14 Q. Okay. And how long have you been with CPS?

15 A. Four years.

16 Q. And as an investigator kind of just generally tell us what is
17 your job. What do you do?

18 A. My job is that I receive a referral that has allegations on it
19 involving an individual family and we go and we interview all
20 the parties involved with that family and then make a
21 determination if there's a preponderance of evidence or not
22 that child abuse or neglect occurred.

23 Q. Okay. And so you do an investigation, fair?

24 A. Yes.

25 Q. And what if law enforcement is involved?

- 1 A. If law enforcement is involved then at times we'll coordinate
2 interviews with law enforcement and we'll collect police
3 reports.
- 4 Q. Okay. If there is law enforcement involvements would you do
5 your investigation along side that law enforcement?
- 6 A. Yes.
- 7 Q. Okay. I'd like to take you back to February of this year.
8 And were you working at CPS then?
- 9 A. Yes.
- 10 Q. And how do you get assigned to a case? Tell us about --
- 11 A. We get assigned cases in round robin.
- 12 Q. Okay. What does that mean?
- 13 A. Basically, we have a list of names in alphabetical order and
14 as investigations come in they're time stamped so the first
15 one that comes in goes to the person on the top of the list
16 and so forth and it goes down through the list.
- 17 Q. Do you get any -- I would assume your job is typically a 9 to
18 5 job, or 8 to 5.
- 19 A. Typically.
- 20 Q. Typically. But to you have to also be on call at time?
- 21 A. Yes. I work two to four on call shifts a month.
- 22 Q. Okay. And so can you get cases when you're on call as well?
- 23 A. Yes.
- 24 Q. Okay. Did you get assigned a case involving a Jacqueline
25 Gadde?

1 A. Yes.

2 Q. And did you get that through your typically round robin or did
3 you get that as an on call worker?

4 A. I got it as an on call worker.

5 Q. Okay. Do you stay with that case though if you get it as an
6 on call worker?

7 A. Yes.

8 Q. And did you in this case stay with that case?

9 A. Yes.

10 Q. Okay. And when you get case was law enforcement already
11 involved?

12 A. Yes.

13 Q. Okay. So if you could just briefly tell us in this case what
14 your involvement would be then.

15 A. I received allegations that there was sexual abuse occurring
16 in the Gadde home. And I went out and I made initial contact
17 with the family.

18 Q. Okay. And who initially do you contact. Or who did you
19 initially have contact with?

20 A. I had contact with the mother, Rachel Hart and the four minor
21 children.

22 Q. Okay. At that point and time was it your understanding that
23 he alleged suspect or perpetrator was still in the home or was
24 out of the home?

25 A. He -- I confirmed that he was out of the home. He was

1 incarcerated on a domestic violence charge.

2 Q. Okay. And so what then once you have contact with -- the

3 initial contact what do you do next? What did you do in this

4 case?

5 A. I made a referral to the Child Assessment Center for all four

6 children to be interviewed and coordinated that with law

7 enforcement.

8 Q. Okay. And once that interview is scheduled do you attend that

9 interview or did you attend that interview?

10 A. Yes, I did attend the interviews.

11 Q. Are you the only one present at that interview?

12 A. No.

13 Q. Who else is present at that interview?

14 A. There is a note taker for the person complete the forensic

15 interview as well as law enforcement --

16 Q. Okay.

17 A. -- and the prosecuting attorney.

18 Q. Okay. So law enforcement was involved in that as well.

19 A. Yes.

20 Q. Was that Detective Easton?

21 A. Yes.

22 Q. And once that is done what is your continued investigation

23 entail in this case?

24 A. Then after the interviews are completed we'll interview the

25 alleged perpetrator as well.

1 Q. Okay. Were the police involved in doing that here?

2 A. Yes, our interviews took place separately they weren't
3 coordinated.

4 Q. Okay. And did you speak with the defendant specifically about
5 the sexual assault?

6 A. Yes.

7 Q. And did he give you any information at all?

8 A. Just that he hadn't done it.

9 Q. Okay. When was that in time?

10 A. That was on March 2nd.

11 Q. As far as you were aware had police interviewed him at that
12 point?

13 A. Yes, I believe they had.

14 Q. Okay. So you did that after they were done with their
15 investigation. Correct?

16 A. Yes.

17 Q. Okay. So he already knew that the police investigation was
18 ongoing and that sort of thing when you got involved?

19 A. Yes.

20 Q. Anything else that you did in this case? That you recall.

21 A. No.

22 Q. Okay. Is there anything that would be -- based on our
23 discussions is there anything that you would have done
24 differently than law enforcement aside from what we've already
25 talked about?

- 1 Q. Okay. And how long had you lived in the 3rd Street address?
- 2 A. About a year.
- 3 Q. Okay. When you lived at the 3rd Street address did anyone
- 4 besides your children live with you?
- 5 A. Yes, ma'am.
- 6 Q. Who?
- 7 A. Juan Martinez and his father.
- 8 Q. Okay. Who is Juan Martinez?
- 9 A. The defendant.
- 10 Q. Okay. But who is he? Tell me who he is.
- 11 A. He was my boyfriend at the time.
- 12 Q. Okay. He's here in the courtroom right now?
- 13 A. Yes, ma'am.
- 14 Q. Point him out for us again and tell us what he's wearing.
- 15 A. A blue shirt and a dark blue tie.
- 16 MS. O'MALLEY: Your Honor, I'd ask the record
- 17 reflect she's identified the defendant here in court.
- 18 THE COURT: Yes, it may.
- 19 MS. O'MALLEY: Thank you.
- 20 BY MS. O'MALLEY:
- 21 Q. How long were you in a relationship with the defendant?
- 22 A. A little over two years.
- 23 Q. Okay. When did that start?
- 24 A. We started seeing each other in September of 2014.
- 25 Q. Okay.

1 A. And moved in the end of January, beginning of February of
2 2015.

3 Q. Moved in together?

4 A. (non-verbal response)

5 Q. Okay. And while he lived with you did your four children live
6 with the two of you?

7 A. Yes, ma'am.

8 Q. And tell me while he was living with you was he employed?

9 A. No, ma'am.

10 Q. Was he at home with your children when you were unable to be
11 there?

12 A. Yes, ma'am.

13 Q. Were you employed?

14 A. Yes, ma'am.

15 Q. Where did you work?

16 A. At first I worked at Sanctuary of Holy Cross Nursing Home.

17 Q. Okay.

18 A. And then I went to Wellbrooke of South Bend after about nine
19 months.

20 Q. When did you start at Wellbrooke?

21 A. I started at Wellbrooke in March of -- I've been there a
22 little over a year already.

23 Q. So March of 2016?

24 A. Yes, ma'am.

25 Q. So -- I'm sorry, yes 2016. And what day it is today. So

1 Wellbrooke is also --

2 A. A nursing home.

3 Q. Nursing facility. So what is your job there?

4 A. I'm a nurse.

5 Q. Okay. And what do you typically -- when do you typically work
6 there?

7 A. Now our hours are 6 to 2:30; but before they were 7 to 3:30
8 ish.

9 Q. Okay. When you say before what do you mean?

10 A. It just recently changed.

11 Q. When is recently?

12 A. Maybe 8 months, 6 months ago, something like that.

13 Q. So I'd like to go back to the end of last year 2016.

14 November, December, maybe even early January. What were you
15 working at that point and time?

16 A. Till 3:30.

17 Q. And then how far is that from your home?

18 A. About 6 or 7 minutes.

19 Q. So when did you usually get home?

20 A. It depended sometimes I had to stay over to chart. Sometime
21 around 4 or a little there after.

22 Q. Okay. And so by the time that you got home were any of your
23 kids home from school on average?

24 A. Jacqueline was usually home already. And John and Olivia were
25 there usually shortly thereafter.

1 Q. Okay. So tell me what time did Jacqueline, if you know, get
2 home from school?
3 A. Jacqueline and Lana would get home sometime around 3 I believe
4 but I wasn't usually there so I'm not positive.
5 Q. What is that based on?
6 A. Just what they tell me.
7 Q. Okay. And I would assume you know when school got out as
8 well.
9 A. Yeah, about 2:30.
10 Q. Okay. And so Jacqueline and Lana were in late 2016, were both
11 in what school?
12 A. At Brandywine.
13 Q. Which one. Which school?
14 A. The High School.
15 Q. High School.
16 A. Yes.
17 Q. Okay. Lana was in 9th grade?
18 A. Yes.
19 Q. And Jacqueline in 11th?
20 A. Yes.
21 Q. Okay. Lana participated in after school activities?
22 A. Yes. She wouldn't get home -- usually Juan would pick her up
23 sometime after 5, usually.
24 Q. Okay. What was she doing between the time --
25 A. Basketball.

APPELLANT'S APPENDIX G

JURY TRIAL TRANSCRIPT EXCERPTS

August 24, 2017

RECEIVED by MSC 8/11/2020 1:25:11 PM

STATE OF MICHIGAN

BERRIEN COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

v

File No. 2017-015329-FH

JUAN MARTINEZ III,

Defendant.

COPY

JURY TRIAL VOLUME II OF III

BEFORE THE HONORABLE ANGELA M. PASULA, CIRCUIT COURT JUDGE

Niles, Michigan - Thursday, August 24, 2017

APPEARANCES:

For the People: MS. CORTNEY O'MALLEY-SEPTOSKI (P70965)
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For the Defendant: MR. JASON ENGRAM (P60316)
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- 1 Q. And what was the call originally for?
- 2 A. Dispatch sent me there for unknown, suspicious type call.
3 They weren't really sure what it was. Upon arrival and taking
4 to the complainant it turned into a sexual assault.
- 5 Q. Okay. And who was the first person you had contact with when
6 you got to the scene?
- 7 A. I spoke with the victim's mother, Rachael Hart.
- 8 Q. Okay. And who was -- did you at some point speak with the
9 victim as well?
- 10 A. I did.
- 11 Q. And who was that?
- 12 A. Jackie Gadde.
- 13 Q. Okay. And tell me if you could, when you got there what was
14 Jacqueline's demeanor?
- 15 A. When I arrived there and I went into the house Jackie, her
16 mom, and her aunt, were sitting around the kitchen table.
17 Once I started talking to them and talking to Jackie she
18 seemed a little discomfort about talking to me about what
19 happened. She would cover her face, she was crying, she was
20 visibly upset.
- 21 Q. Okay. Did she in fact though give you a description of what
22 had happened to her?
- 23 A. She did.
- 24 Q. And did she in fact describe a suspect?
- 25 A. She did.

1 Q. Was that person in the home that night when you arrived?

2 A. No, he was not.

3 Q. Okay. In talking with her was it your understanding that this
4 was something that had just happened or something that had
5 happened in the past?

6 A. Something that had happened in the past.

7 Q. Okay. So when you talked with them and I would assume then
8 you make a report of the information they give you. Is that
9 correct?

10 A. That's correct.

11 Q. And is part of your job as a road patrol officer also to, I
12 guess, plan next steps for a case?

13 A. It is.

14 Q. And so in this case what were those next steps.

15 A. In this case due to the fact that it was a belated sexual
16 assault, due to the fact that I'm on third shift, I made
17 arrangements with the Detective Bureau to possibly interview
18 the suspect. Conduct other like forensic interviews at are
19 Child Assessment Center with the victim along with the other
20 children in the house in hopes of collecting more evidence.

21 Q. Aside from talking to witnesses on February 17th did you do
22 anything additional that night?

23 A. That night no I did not.

24 Q. Okay. What other types of things would you or could you do in
25 a sexual assault investigation like this?

1 A. In a sexual assault case if it's something that recently just
2 occur we could send the victim to the hospital for it's a
3 sexual assault examination. In that sexual assault
4 examination a specialized nurse will do a examination in hopes
5 of collecting DNA or other physical evidence. But in this
6 case since the report was a couple months after the alleged
7 event there was no indication that you needed to send the
8 victim for a case like that. If the suspect was unknown we
9 would collect DNA from the house and try to identify the
10 suspect. However, in this case the suspect was known. The
11 suspect lived in the home so his DNA is gonna be there.
12 Sometimes we would collect the victim's clothing, again since
13 this was such a delay in the report the clothing had been
14 washed, you know, so any DNA evidence that possibly could have
15 been there was washed in the laundry.

16 Q. Okay. At the point you were talking with these witnesses are
17 you thinking about what evidence may assist in the helping or
18 the figuring out what happened in this case?

19 A. I do.

20 Q. And so on that night were you thinking about those things we
21 just talked about?

22 A. I was.

23 Q. And so taking fingerprints or looking for DNA was that going
24 to be helpful in this case?

25 A. No. Like I said taking fingerprints and taking DNA it

1 Q. Okay. After those referrals were made then the case was
2 turned over to the Detective Bureau. Is that fair?

3 A. That's correct. Yes.

4 Q. Okay. And does end your involvement at that point?

5 A. At that point. Yes.

6 Q. Okay.

7 MS. O'MALLEY: Your Honor, I have nothing further.
8 Pass this witness.

9 THE COURT: Mr. Engram.

10 CROSS-EXAMINATION

11 BY MR. ENGRAM:

12 Q. Deputy Walls good morning.

13 A. Good morning.

14 Q. You interviewed Ms. Gadde in this case. Correct?

15 A. That's correct.

16 Q. Did you review the statements before you came in here?

17 A. Yes, I did.

18 Q. Okay. So you're familiar with it?

19 A. Yes, I am.

20 Q. And you wrote the report.

21 A. I did.

22 Q. Okay. Or you at least dictated it.

23 A. I dictated the report. Yes.

24 Q. Okay. And so when you were talking to her you said that she
25 was in an emotional state. Correct?

- 1 A. Correct.
- 2 Q. Okay. But she was able to talk to you. Right?
- 3 A. (no response)
- 4 Q. She was able to talk to you. Correct?
- 5 A. It was difficult at first. With the support of her mom being
6 there and some of the training that I've been to as a police
7 officer I was able to get the information from her.
- 8 Q. Okay. And she gave you details and events.
- 9 A. That's correct.
- 10 Q. Okay. And one of the things she indicated to you was that my
11 client put her -- his hand on her stomach. Correct?
- 12 A. That's correct.
- 13 Q. Okay. Outside her shirt and started rubbing.
- 14 A. That's correct.
- 15 Q. Okay. And then she indicated that his hand went under her
16 shirt, continued rubbing stomach?
- 17 A. Correct.
- 18 Q. Okay. And then he slid his bare hand up to the bottom of her
19 breast. Correct?
- 20 A. Correct.
- 21 Q. Okay. So at this point there's no mention whatsoever that the
22 breast were touched outside of her shirt. Correct?
- 23 A. Correct.
- 24 Q. And she said that when his hand got up to her breasts that she
25 grabbed his hand and stopped it from covering her breasts.

- 1 A. Yep. Correct.
- 2 Q. And she tried to move his hand away but he held it there.
- 3 A. Correct.
- 4 Q. And then he moved his hands down do her pants --
- 5 A. Correct.
- 6 Q. -- and into her pants.
- 7 A. Correct.
- 8 Q. And she tried to move his hand away but he held it there.
- 9 A. Correct.
- 10 Q. And at that point was when she indicated she tried to get up
11 or get away from the defendant but was unable to. Correct?
- 12 A. Correct.
- 13 Q. And then she indicated also when his hand were inside her
14 pants that he fingered her. Correct?
- 15 A. Correct.
- 16 Q. And that after he stopped she got up and walked away.
- 17 A. Correct.
- 18 Q. And that he told her that she was not to tell anyone about
19 what happened.
- 20 A. Correct.
- 21 Q. Was there any mention that when that conversation that she
22 wasn't suppose to tell anyone was there any mention that
23 anybody -- by Gadde that anybody else was there. Like her mom
24 anything like that?
- 25 A. She initially said that she didn't think anyone was in the

- 1 mouth. So if you've ever gotten like bitten the inside of
2 your cheek that kind of thing, for like the first day it's
3 kind of, you know, irritated you know it's there. The second
4 day towards the end of the day you kind of don't even realize
5 it's there. So those tissues heal rapidly. I would say
6 anywhere from two to three days you don't even see the injury.
- 7 Q. If you were to know that it was a penetration that was not
8 with a penis or a foreign object but a finger would that make
9 you feel like there may be less likelihood of injury?
- 10 A. Yes. That is correct.
- 11 Q. And why would that be?
- 12 A. That would be because the -- again the tissue in our vaginal
13 or anal area is made to stretch. So sometimes with a smaller
14 object such as a finger typically you don't see the stretching
15 of the tissue like you would with a penis or a foreign object.
- 16 Q. And if that that penetration was several months was several
17 months -- you find out about it several months after. Is it
18 likely that you would find injury at that point?
- 19 A. Yeah, not likely that we would.
- 20 Q. Okay. Cause several months later you'd be looking just for
21 scaring?
- 22 A. That's correct.
- 23 Q. All right. Okay. And tell me if you were to find some sort
24 of injury or finding of scaring are you able to as a sexual
25 assault nurse or even just as a registered nurse attribute

1 that to any one particular thing.

2 A. No.

3 Q. Can scaring or injury be caused by things outside of sexual
4 penetration?

5 A. Yes.

6 Q. What types of things?

7 A. It could be you know, maybe falling on an object or even, you
8 know, for women wearing thong underwear or even riding a
9 bicycle or you know, and it could be hygiene as well if
10 they're not good hygiene down there.

11 Q. Okay. So I guess ultimately we've discussed no exam was
12 performed on Jacqueline Gadde is that correct?

13 A. That's correct.

14 Q. In your understanding of your program there she was never seen
15 by your program. Is that right?

16 A. That's correct.

17 Q. And let me ask you this in the -- in a situation where the
18 disclosure is several months later, three months later and the
19 disclosure is of digital penetration. Would you recommend a
20 sexual assault exam?

21 A. No, I would not.

22 Q. Okay. And what would the reason for that be?

23 A. The reason would be because again they would be out of that
24 timeframe period to collect evidence and also to provide
25 preventative medication. And then again we wouldn't want to

- 1 Department.
- 2 Q. And what does that mean?
- 3 A. I work up in the Detective Bureau and I investigate crimes.
- 4 Q. How long have you been doing that?
- 5 A. I've been -- almost 11 years.
- 6 Q. Prior to that did you work in any other capacity with the
7 Sheriff's Department?
- 8 A. Yes, I was a Sergeant in the Communications Division and on
9 the road and then a road deputy and a deputy in the jail for a
10 short time.
- 11 Q. And in total how long have you been with the Sheriff's
12 Department?
- 13 A. Twenty-two years.
- 14 Q. Any other law enforcement experience?
- 15 A. I worked four and a half years at Benton Harbor Police
16 Department.
- 17 Q. And what was your position at Benton Harbor?
- 18 A. Road patrol and I was at the Detective Bureau briefly.
- 19 Q. Okay. And so as a detective have you investigated cases of
20 sexual assault?
- 21 A. Yes.
- 22 Q. You have any idea how many cases of sexual assault. And if
23 you don't know I'd understand.
- 24 A. Quite a few.
- 25 Q. Okay. And have you been involved in other investigations of

1 violent types of crime?
2 A. Yes.
3 Q. That would require evidence collection and that sort of thing?
4 A. Yes.
5 Q. Have any idea how many you've been involved in over the years?
6 Obviously also quite a few.
7 A. Quite a few.
8 Q. Okay. So were you working back in February of this year?
9 A. Yes, I was.
10 Q. And did you receive a request to follow up on a sexual assault
11 investigation from Deputy Walls?
12 A. Yes, I did.
13 Q. And was that regarding Jacqueline Gadde?
14 A. Yes.
15 Q. And the defendant Juan Martinez III?
16 A. Yes.
17 Q. And so if you could tell us when did you first get assigned or
18 become aware that you needed to follow up on the case?
19 A. Probably the following Monday.
20 Q. Okay. --
21 A. Or maybe sooner I don't know.
22 Q. -- Somewhere right after the information was taken?
23 A. Yes.
24 Q. Okay. And what if you could kind of walk us through what you
25 did in your investigation.

- 1 A. I interviewed the suspect, Juan Martinez.
- 2 Q. And when was that?
- 3 A. That was February 23rd. And then I spoke with -- briefly with
4 Jacqueline and her mother Rachel.
- 5 Q. And where did you speak with them?
- 6 A. At their residence.
- 7 Q. Okay. Do you know when that was?
- 8 A. That was on the 23rd, I believe.
- 9 Q. Okay. After you spoke with both the defendant and the victim
10 and her mother what was the next step in your investigation?
- 11 A. I attended the forensic interviews at the Child Assessment
12 Center.
- 13 Q. And do you know when that was?
- 14 A. February 28th I believe.
- 15 Q. Okay. And what was the next step after those interviews?
- 16 A. I interviewed a couple other witnesses.
- 17 Q. Okay. Was one of those witnesses Cam Shirley?
- 18 A. Yes.
- 19 Q. And was one of those witnesses Roxanne Tancil?
- 20 A. Yes.
- 21 Q. And was it your understanding that Ms. Tancil was the victim's
22 aunt?
- 23 A. Yes.
- 24 Q. And would have been then the person present with her that
25 night that Deputy Walls came out. Is that correct?

- 1 A. I believe so. Yes.
- 2 Q. Okay. Did you interview anyone else in regard to this case
3 that you can recall?
- 4 A. I believe --
- 5 Q. Did you at some point interview a Scott --
- 6 A. Pardon.
- 7 Q. Did at some point you interview a Scott Grady?
- 8 A. Yes, I did.
- 9 Q. And at some point did you do some follow up taking photographs
10 that sort of thing?
- 11 A. Yes, I did.
- 12 Q. Okay. Let's talk about evidence collection in this case. You
13 indicated you took photos.
- 14 A. Yes.
- 15 Q. If you could tell the jury what were those photos of?
- 16 A. Of the house, the residence.
- 17 Q. Okay. And yesterday we saw Peoples #1 through #7. Were those
18 the photos you took?
- 19 A. Yes.
- 20 Q. Okay. And they were photos of the outside of the house and of
21 what?
- 22 A. Of the bedroom.
- 23 Q. And the importance of taking those photos of the bedroom?
- 24 A. To show where the incident occurred.
- 25 Q. Okay. There were no allagations it occurred anywhere else in

- 1 Q. Okay. And one that they were looking to purchase at some
2 point and time. Was that his description?
- 3 A. Yes.
- 4 Q. Okay. And during that discussion did you talk to him about
5 his role in this relationship and this family?
- 6 A. Yes.
- 7 Q. What did he portray to you or what did he tell you was his
8 position in this household?
- 9 A. He was like a father figure to Rachel's kids.
- 10 Q. Okay. Did he indicate that they acted like a family?
- 11 A. Yes.
- 12 Q. And did you talk with him about whether or not that meant that
13 he was able to discipline the kids?
- 14 A. Yeah, we did talk about discipline.
- 15 Q. And what did he tell you about that?
- 16 A. That he did discipline the kids.
- 17 Q. Did he tell you how he did that or if he did that in
18 conjunction with Rachel?
- 19 A. He did do -- both him and Rachel disciplined and grounding or
20 taking away privileges, taking away their phones.
- 21 Q. Okay. Did he indicate to you if he and Rachel talked about
22 discipline and what they would do and that sort of thing?
- 23 A. I don't believe he specifically said they discussed it.
- 24 Q. Okay. At some point did you talk to him about -- you said you
25 talked to him about his bedroom.

- 1 A. Yes, I did.
- 2 Q. And did he confirm that there was a television in the bedroom?
- 3 A. Yes, he did.
- 4 Q. He confirm that there was a bed in the bedroom?
- 5 A. Yes.
- 6 Q. And chairs?
- 7 A. Yes.
- 8 Q. Did he confirm that at some point he and Jacqueline had
9 watched a movie together in that bedroom?
- 10 A. Yes.
- 11 Q. In fact did he specifically know what you were talking about?
12 Was he able to point to a specific time that that happened?
- 13 A. Yes, he said it was about two to three months ago.
- 14 Q. Okay.
- 15 A. Or prior.
- 16 Q. Two to three months prior to your February 23rd interview?
- 17 A. Yes.
- 18 Q. So that would put it somewhere in November or December. Fair?
- 19 A. Yes.
- 20 Q. Okay. And was he able to describe to you how that occurred?
21 Or what happened?
- 22 A. She had come into the bedroom. They were gonna plan on
23 watching a movie. And she came into the bedroom and sat on
24 the chair and --
- 25 Q. Did he indicate where he was when she sat on the chair? Do

- 1 you remember?
- 2 A. I don't know if he actually indicated where he was.
- 3 Q. Okay.
- 4 A. And that at some point she came onto the bed with him.
- 5 Q. Okay.
- 6 A. And --
- 7 Q. Did he tell you what movie he believed they were watching?
- 8 A. Suicide Squad.
- 9 Q. Okay. And how did he describe that movie?
- 10 A. It was a Marvel --
- 11 Q. Like a comic book movie --
- 12 A. -- like an action.
- 13 Q. Okay. But he confirmed at some point she came on the bed with
- 14 him. Is that correct? That's what you just said?
- 15 A. Yes.
- 16 Q. Did you talk to him about whether or not there was any
- 17 inappropriate touching?
- 18 A. Yes, he did.
- 19 Q. How'd that come up? Do you know?
- 20 A. I asked him if he ever touched her.
- 21 Q. During this incident or ever?
- 22 A. During this incident.
- 23 Q. Okay. And what was his response? If you remember.
- 24 A. No, not in an improper way.
- 25 Q. Okay. Had you mentioned in an improper way at that point?

1 MS. O'MALLEY: 19.

2 MR. ENGRAM: That's what I thought.

3 MS. O'MALLEY: And the disc is the exhibit, your
4 Honor, I just marked the envelope.

5 MR. ENGRAM: Obviously.

6 (At 10:06 a.m., PX#19 played for the jury)

7 (At 10:18 a.m., PX#19 completed playing for the
8 jury)

9 MS. O'MALLEY: Okay.

10 BY MS. O'MALLEY:

11 Q. That was that interview?

12 A. Yes.

13 Q. And again after listening to that does that help you to
14 remember the defendant in fact tell you he was laying on the
15 bed?

16 A. Yes.

17 Q. Okay. And that Jacqueline did in fact come on the bed.

18 A. Yes.

19 MS. O'MALLEY: Your Honor, I'd pass this witness.
20 Thank you.

21 THE COURT: Mr. Engram.

22 CROSS-EXAMINATION

23 BY MR. ENGRAM:

24 Q. Detective you remember him stating that as far as when he
25 thought this occurred it was mostly likely a Saturday or a

1 weekend.

2 A. Yes.

3 Q. Correct?

4 A. Yes.

5 Q. Did -- other children were there because he mentioned that
6 John came in the room.

7 A. Yes.

8 Q. And that the movie they were watching was Suicide Squad.

9 A. Yes.

10 Q. Okay. And you heard Jacqueline's testimony yesterday.

11 A. Yes.

12 Q. No school.

13 A. Pardon.

14 Q. No school. Right?

15 A. (no verbal response)

16 Q. There was no school that day according to Jacqueline. Right?

17 A. No.

18 MS. O'MALLEY: Your Honor, I think that misstates
19 the evidence.

20 MR. ENGRAM: According to Jack --

21 THE COURT: Well, he's asking the question.

22 BY MR. ENGRAM:

23 Q. According to Jacqueline there was no school that day. Right?

24 A. No. Not that I --

25 Q. You do -- you did sit through this trial. Right?

1 Q. Okay. And you specifically asked her about how my client
2 would discipline the children. Correct?

3 A. Yes.

4 Q. Okay. And isn't it true that she told you that she thought he
5 was a little bit strict?

6 A. Yes.

7 Q. Okay. Did you speak to Jacqueline yourself or -- you said
8 just briefly though. Right?

9 A. Just briefly.

10 Q. Okay. So when you say briefly. About how long?

11 A. It was only a couple minutes.

12 Q. Okay.

13 MR. ENGRAM: No further questions.

14 THE COURT: Anything else, Ms. O'Malley?

15 REDIRECT EXAMINATION

16 BY MS. O'MALLEY:

17 Q. Did the defendant tell you that there was ever another day
18 that he watched a movie with the victim in his bedroom?

19 A. No.

20 Q. Did he specifically tell you this was the only time?

21 A. Yes.

22 Q. And he said it was a comic book superhero movie. Right?

23 A. It was a Marvel -- yeah superhero movie.

24 Q. And she said it was a comic book superhero movie? Right?

25 A. Not that I'm aware of.

1 Q. If you could state for us your full name and spell your last
2 name for the record.

3 A. Barbara Welke. W-e-l-k-e.

4 Q. And if you could tell the jury are -- know that you are partly
5 employed currently.

6 A. Yes.

7 Q. And semi-retired. Correct?

8 A. Yes.

9 Q. If you would tell them how you are currently employed please.

10 A. I served for 13 years as the director and forensic interview
11 specialist at the Child Assessment Center and I currently
12 serve as a consultant in those fields. So I do contractual
13 forensic interviewing and I do peer reviews for children's
14 advocacy centers throughout the state.

15 Q. And if you could tell us what that means that would be great.

16 A. What --

17 Q. What that is. What your job is.

18 A. So as a forensic interviewer I am called up to interview
19 children who are alleged to have been abused. Most of the
20 cases we deal with are sexual abuse cases although we also see
21 children who are severely physically abused or children who've
22 been a witness to violence. So I conduct forensic interviews
23 at Child Assessment Center which is a private non-profit
24 agency that assists in investigations. Our cases come to us
25 referred by either law enforcement or children's protective

1 verbal on up. We also conduct forensic interviews for
2 developmentally disabled adults.

3 Q. And have you -- has part of your career studied the impact or
4 victims of sexual abuse just generally in the ways in which
5 they respond to that sexual abuse. That sort of thing?

6 A. Yes. I have studied that.

7 Q. And in your career have you testified as an expert?

8 A. I have.

9 Q. How many times do you think you've testified as an expert?

10 A. Approximately 50 times.

11 Q. Here in Berrien County. Right?

12 A. Berrien County. Yes.

13 Q. Cass County?

14 A. Yes.

15 Q. Van Buren County?

16 A. Yes.

17 Q. Any other counties that you can think of?

18 A. Ottawa County Michigan and Kent County Michigan and Allegan
19 County.

20 Q. Okay. And typically qualified in the area of forensic
21 interviewing and child sexual abuse?

22 A. Yeah, more specifically the process of disclosure in child
23 sexual abuse cases.

24 MS. O'MALLEY: Your Honor, at this time I'd move to
25 qualify Ms. Welke as an expert in the area of forensic

1 interviewing and also in the area of child sexual abuse and
2 specifically the process of disclosure.

3 MR. ENGRAM: I'm very familiar with her credentials.
4 She's been in the area for a long time and I've reviewed her
5 CV and all that. And I have no problem with that.

6 THE COURT: All right. She may testify as an expert
7 in those areas.

8 MS. O'MALLEY: Thank you, your Honor.

9 BY MS. O'MALLEY:

10 Q. If you could just briefly so that the jury understands,
11 explain to us -- we've already talked a little bit about the
12 Child Assessment Center. But just explain to us its physical
13 -- physical -- like what it looks like.

14 A. Okay.

15 Q. How about that.

16 A. So as I said we're a private non-profit agency. We're set up
17 so that all our interviews can be observed by a team. We
18 don't ever do interviews without the involvement of a
19 multidisciplinary team. So we have an interview suite set up
20 with a two-way mirror. Most -- typically interviewer and the
21 child are in the interview room and then on the other side of
22 the mirror observing the interview is someone from law
23 enforcement, someone from children's protective services, a
24 prosecuting attorney, and then someone from our office that's
25 a designated note taker. The team can hear the interview, the

1 that tell enough because they just want that behavior to stop.
2 So to expect them to come in and tell every detail is just
3 unrealistic. It's embarrassing the things they're talking
4 about. They're ashamed of it. Very often it's hard to talk
5 to talk about. So more typically they'll tell as much as they
6 need to tell in order to get the behavior to stop. And then
7 it's not unusual for us to see that later on when they're
8 feeling safe, or when all the things they worried about
9 happening hopefully don't happen to them, that they're able to
10 give more of the detail.

11 Q. Okay. So would it be a surprise to you to see a child who
12 gives more information about what happened to them over time?

13 A. No. That wouldn't be a surprise and I think that would be a
14 typical disclosure pattern.

15 Q. We've talked a little about this process of disclosure and
16 that children delay in disclosure. Are there -- I guess what
17 are the reasons that children delay in disclosing?

18 A. Kids have lots of reasons for not telling. And sometimes it
19 seems like they have more reasons not to tell very often than
20 to tell. There was a study in 2010 out of the Yale School of
21 Medicine that I like because I think it fits very well with
22 the kids that I see. And what they -- these researchers just
23 incorporated a question about telling into their forensic
24 interview protocol. They ask kids what made you decide to
25 tell and what stopped you from telling sooner. And what they

- 1 Q. Could that be the reason that different details come out in
2 different conversations?
- 3 A. Yes.
- 4 Q. Have you experienced that or seen that?
- 5 A. Yes.
- 6 Q. I'd like to take you back to February 28th of this year 2017.
7 Did you interview Jacqueline Gadde?
- 8 A. I did.
- 9 Q. And when you interviewed her she was a teenager is that
10 correct?
- 11 A. That's correct.
- 12 Q. Seventeen I believe at the time.
- 13 A. Yes.
- 14 Q. And did you interview her using the forensic interviewing
15 protocol?
- 16 A. I did.
- 17 Q. And I'd just like to talk a little bit about how that
18 interview proceeded, not what she told you specifically, but
19 how she responded during the interview. Did you bring her in
20 and do the introduction phase?
- 21 A. Yes, I did.
- 22 Q. And how she when you were talking to her during that
23 introduction phase?
- 24 A. She appeared comfortable talking to me. And I judged that
25 usually based on is the child able to give spontaneous lengthy

1 narratives or are they only giving me yes or no questions
2 which -- yes or no answers, I'm sorry, which happens if
3 somebody's kind of nervous. She was able to give lengthy
4 narratives. We were talking about neutral topics. I think we
5 were talking about how junior year of high school was going.
6 And she was able to give quite a bit of detail about that. So
7 she appeared comfortable during those initial phases.

8 Q. At some point then did you move into the introduction of the
9 topic?

10 A. Yes.

11 Q. Was she able to cue in on what you were talking about? Or
12 what the issue was that she was there for?

13 A. Yes.

14 Q. Did her behavior change at that point?

15 A. Yes, it did.

16 Q. If you could explain to the jury a little bit.

17 A. At a - at a point in the interview she became teary eyed and
18 her voice kind of quivered, and she was looking down.

19 Q. And did you have to do anything to adjust for that or to deal
20 with her reactions?

21 A. I did. We kind of moved off the topic for a few minutes. I
22 just wanted to give her a chance to sort of get it together.
23 I just didn't want to push on until she had her emotions under
24 control a little bit more. So we moved to -- back to a little
25 bit more neutral of a topic before we returned to the topic

1 MR. ENGRAM: -- expert witness. She's an expert
2 witness and she can testify to hypothetical.

3 THE COURT: Okay. But it's cross-examination. So

4 MR. ENGRAM: Correct.

5 THE COURT: So sustained. You can ask your next
6 question.

7 BY MR. ENGRAM:

8 Q. Do you know how many times Ms. Gadde's been interview or given
9 statements about what allegedly occurred?

10 A. No. I don't.

11 Q. Okay. And isn't it generally agreed among professionals that
12 a child shouldn't be subject to repeated interviews?

13 A. Yes.

14 Q. Okay. And there is distinct types of interviews such as
15 therapeutic and forensic. Correct?

16 A. Correct.

17 Q. And your roll in this case was as a forensic examiner.
18 Correct?

19 A. Correct.

20 Q. Okay. And isn't it true that sometimes young people can make
21 up stories about abuse?

22 A. Yes.

23 Q. Okay. And they can sometimes be lead by adults to make up
24 claims of abuse.

25 A. That's true.

1 Q. Okay. And sometimes they exaggerate things that happen.

2 A. Yes.

3 Q. Okay. And sometimes they say things are true that they've
4 imagined fantasized about, made up, whatever. Correct?

5 A. That happens.

6 Q. Okay. Did -- well, during this interview -- let me ask you
7 this. Ms. Gadde did she tell you things about herself the way
8 she felt, things she'd done, things like that?

9 A. Yes.

10 Q. Okay. And you talked to other such as her mother. Correct?

11 A. Yes, during the pre-interview.

12 Q. Okay. Did the mother or anyone else tell you about how she
13 acts?

14 MS. O'MALLEY: Your Honor, objection relevance.

15 MR. ENGRAM: Well, she's --

16 MS. O'MALLEY: I guess I don't --

17 THE COURT: Did the mother tell you about how she --
18 it's pretty general.

19 MR. ENGRAM: Okay. I'm just asking if --

20 THE COURT: Can you --

21 MR. ENGRAM: -- the mother asked her any questions --
22 -- or excuse me, if she stated anything about Jacqueline or how
23 she acts.

24 THE COURT: You mean, day in day out on anything.
25 What.

- 1 A. She did.
- 2 Q. Okay. Did she say, oh I mean a superhero movie such as
3 Captain America or did she say Civil War?
- 4 A. She used the word Civil War.
- 5 Q. Okay. And she said ultimately she laid down on the bed.
6 Correct?
- 7 A. Yes.
- 8 Q. Okay. And that my client put his hand on her stomach.
- 9 A. Yes.
- 10 Q. Okay. That he was rubbing her stomach.
- 11 A. Yes. I'm sorry.
- 12 Q. Okay. And that she tried to sit up but he kind of held her
13 there.
- 14 A. Yes.
- 15 Q. Okay. And then he moved his hand up and it was on her breast.
- 16 A. Yes.
- 17 Q. Okay. Now in this time when she's talking to you she says that
18 first time was on my breast was over my breast it was over my
19 clothes.
- 20 A. Yes.
- 21 Q. And then apparently went back and went under her clothes and
22 touched the bottom of her breast. Right?
- 23 A. Yes.
- 24 Q. Okay. Did she ever use the phrase he cupped my breast with
25 you?

1 Q. Did she say anything about wearing a hoodie?

2 A. Wearing a what?

3 Q. Hoodie. Like a sweatshirt.

4 A. She described it as a t-shirt to my recollection.

5 Q. Okay. So I take that as a no.

6 A. No she didn't say anything about a hoodie.

7 Q. Thank you. That's what I was asking. At this point -- excuse
8 me, I'm sorry. After this stopped she indicated that she
9 walked away. Correct?

10 A. Yes.

11 Q. And then she indicated to you that when her mom got home --
12 well, excuse me, when she walked away she went to her room
13 first. Correct?

14 A. Yes.

15 Q. Okay. And then when her mom got home she came out of her
16 room, my client stopped her and said you better not tell.

17 A. Yes.

18 Q. Okay.

19 MR. ENGRAM: Pass the witness.

20 THE COURT: Any other questions Ms. O'Malley?

21 MS. O'MALLEY: Yes, thank you.

22 REDIRECT EXAMINATION

23 BY MS. O'MALLEY:

24 Q. Ms. Welke you were qualified as an expert today in your area
25 of study. Is that correct?

1 A. Yes.

2 Q. And behaviors alone would also not guide you to whether or not
3 a child has been sexually assaulted.

4 A. No. Behaviors alone would not.

5 Q. Again, would you want to look at that in combination with the
6 information they're giving you?

7 A. Yes.

8 Q. So there's no clear formula of A,B,C, -- of $A + B = C$. You
9 want to look at A, and B, and can you say that might be
10 consistent with C. That sort of thing?

11 A. Yes.

12 Q. You talked with Jacqueline for 40 minutes. You observed her
13 behavior. And we've talked about this process in this
14 interviewing discussions, discussion as being a truth seeking
15 process. So are there things that you did in that interview
16 to try to make sure that she knew she could tell you the
17 truth?

18 A. Well, for one thing we talked about the importance of telling
19 the truth and I asked her if she would commit to making sure
20 that what we talked about in here today was only the truth and
21 she agreed to do so. And there was nothing that she said or
22 did that made me believe that that wasn't happening.

23 Q. And do you --

24 MR. ENGRAM: Objection. May we approach?

25 THE COURT: Okay. Come on up counsel.

1 (At 12:06 p.m., bench conference)

2 (At 12:07 p.m., bench conference concluded)

3 THE COURT: All right. Counsel my understanding is
4 counsel you're asking the very last statement of the witness
5 be stricken.

6 MR. ENGRAM: For sure. Yes. I --

7 THE COURT: All right. So I instruct the jury that
8 the very last statement made by the witness is not to be
9 considered by them. Okay. And that is stricken from the
10 record. Go ahead. Any other questions.

11 MS. O'MALLEY: Yes.

12 BY MS. O'MALLEY:

13 Q. Let's talk a little bit more about what the conversation was
14 with Jacqueline since you discussed that with Mr. Engram. She
15 did in fact indicate to you that this happened at her home.
16 Right?

17 A. Yes.

18 Q. And did she indicate to you whether or not Juan Martinez was
19 the perpetrator?

20 A. Yes, she did.

21 Q. And was that who she indicated was the perpetrator?

22 A. Yes, it was. I'm sorry.

23 Q. I realize that wasn't a very good question. And at some point
24 she talked with you about the fact that she was wearing pajama
25 pants. Is that correct?

1 that while certainly we understand the client -- that the
2 Court would be striking the statement about, I don't remember
3 the exact statement but it was regarding when Ms. Welke
4 indicated regarding whether the truth was being told and what
5 have you. And I indicated at the bench that obviously well
6 established and an expert witness cannot vouch for the
7 creditability of the complainant in this particular case and
8 it I think went over the line at that point. And I realize
9 the statement probably was accidentally made. I don't fault Ms.
10 O'Malley. I don't think she elicited it necessarily it
11 unfortunately came out. And because of quite frankly one of
12 the last trials we had a couple years ago where the expert --
13 well the interviewer, and I'm sure the Court knows what I'm
14 talking about, and the interviewers statements were
15 essentially found by an Appeals Court to be inappropriate and
16 I just want to make sure -- I think at this point I have to
17 ask for a mistrial. The Court's indicated it's not gonna
18 grant one. I understand that but for the record I have to
19 grant one -- I mean I have to ask for one.

20 THE COURT: All right. And I'm gonna ask that we do
21 play the statement back just so it's clear. And just listen
22 to it again here briefly. Because I think the very last
23 statement made right before the objection. I think.

24 (At 12:16 p.m., playing of witness statement)

25 (At 12:17 p.m., playing of witness statement)

1 consistent statement the defense has all long been that she
2 lied to keep the defendant out of the house after the incident
3 that happened at the end of January. He's indicated this was
4 -- this conversation was early January so again it is a
5 consistent -- prior consistent statement which is not hearsay.

6 THE COURT: Under 801 hearsay definition, a prior
7 statement that is consistent with the declarant's testimony is
8 offered to rebut or express an implied charge that the
9 declarant made recent fabrication or improper influence or
10 motive is not hearsay by definition.

11 So I will allow you to continue. Overrule the
12 objection.

13 MS. O'MALLEY: Thank you, your Honor.

14 BY MS. O'MALLEY:

15 Q. Do you remember what she told you?

16 A. She said that -- I can't remember her exact words because it's
17 been awhile but that he had touched her inappropriately and
18 tried to move forward.

19 Q. And all of that was captured by these messages. Correct?

20 A. Correct.

21 Q. And did you in fact forward those messages so that we would
22 have those messages?

23 A. Yes, ma'am.

24 Q. Okay.

25 MS. O'MALLEY: Your Honor, may I approach the

- 1 Q. Okay. And where for the last two years, specifically, have
2 you been living?
- 3 A. With my son.
- 4 Q. And where was that?
- 5 A. On 3rd Street one year and 13th Street another year.
- 6 Q. Okay. And who did you live there with?
- 7 A. My son, Rachel, Jacqueline, Lana, Olivia and Jonathan.
- 8 Q. Okay. And that's been at least for the last two years.
9 Correct?
- 10 A. Yes, sir.
- 11 Q. And when did you meet Rachel and her children, Jackie
12 specifically?
- 13 A. Two years ago.
- 14 Q. Okay. And I should say there about what percentage of the
15 time do you live at that address?
- 16 A. Ninety percent of the time.
- 17 Q. About 90 percent of the time?
- 18 A. Yes, sir.
- 19 Q. So you were there most days?
- 20 A. Yes, sir.
- 21 Q. Okay. Did you -- you saw the kids, especially Jacqueline
22 often?
- 23 A. Yes.
- 24 Q. Okay. And you -- did you have opportunity to see your son
25 distribute discipline to the children, specifically

1 BY MR. ENGRAM:

2 Q. You started to say 3rd Street.

3 A. Yes. When he disciplined them on 3rd Street they didn't seem
4 too -- too upset like they did on 13th Street. I noticed a
5 big difference on the way they acted when they got disciplined
6 there was a big, big, difference. Especially the last six
7 months that we were there on 13th Street.

8 Q. Okay.

9 A. I noticed there was a big difference in that.

10 Q. And what specifically can you remember that Jackie would do in
11 the last six month that was different or worse than what she
12 would do before?

13 A. She would get upset, stomp away. Sometimes she would just go
14 away real upset. And she didn't do that on 3rd Street. That
15 was the difference. She really got upset on 13th Street.

16 Q. All right. And then did Rachel seem to get more and more
17 involved and supportive of the defendant discipline.

18 A. They would go up to Rachel and ask if they could get their
19 phones back and Rachel would ask why were they taken away and
20 most of the time she would just say well Jacqueline you should
21 have done -- done it right.

22 Q. Okay. So she would -- she would start siding with the
23 defendant?

24 A. Yes.

25 Q. Okay. Have you ever caught Jackie doing something -- just in

1 Q. Okay. In what way? What would she do?

2 A. Well, like I said her body language she showed that she was
3 really upset and stomping away and just the way she acted with
4 her body language I could tell that she was very upset at
5 that. Compared to 3rd Street.

6 Q. Okay. And have there been time when you have actually, other
7 than disciple, watch Jackie interact with my client?

8 A. Yes, sir.

9 Q. Okay. And specifically since the beginning of December 2016
10 into January?

11 A. Yes, sir.

12 Q. Okay. And have there been times when my client has left the
13 house and Jackie goes with him?

14 A. Yes, sir.

15 Q. Okay. And where if you know would they go?

16 A. Different places. To the Wal-Mart, to the grocery store close
17 by the house. And other places like my daughter's house.

18 Q. And you've had -- you're how old?

19 A. 65.

20 Q. You've had a lot of time over the years to see people and how
21 they act. Right?

22 A. Yes, sir.

23 Q. Would you say -- well, let me ask you this. She never -- did
24 she ever appear uncomfortable around my client?

25 MS. O'MALLEY: Objection, your Honor. Calls for

- 1 Q. All right. And have there been times since December -- the
2 first part of December 2016 and until January that you had any
3 occasion to see my client interacting with Jacqueline
4 together?
- 5 A. I don't understand the question.
- 6 Q. Let me un-bumble that question. Between December of 2016 and
7 January of 2017 did you ever see my client interacting with
8 Jacqueline?
- 9 A. Like how.
- 10 Q. With her. Did you ever see them together?
- 11 A. Yeah. They were at the house all the time.
- 12 Q. Okay.
- 13 A. You know, or she would go with him somewhere.
- 14 Q. That's what I'm asking you.
- 15 A. Oh, okay.
- 16 Q. Okay. And so was she -- and how many times do you think you
17 say them together.
- 18 A. A few times.
- 19 Q. Okay. And during any of those times did somebody force her to
20 go, if you know, with the defendant?
- 21 A. No.
- 22 Q. Okay. And were there time that you observed that Juan to be
23 going to the store?
- 24 A. Yes. Cause there was times I would go. Like I would go visit
25 them and he would -- he would go to the store and get

1 something and she always wanted to go with him or there was a
2 time when I went with him and she, you know, she always wanted
3 to go.

4 Q. Okay. And you're talking -- are you talking specifically
5 about incidences from December to January?

6 A. Yes.

7 Q. Okay. And again nobody forced her to go?

8 A. No.

9 Q. Okay. Do you remember around Christmas of 2016 an incident
10 when my client was gonna go shopping?

11 A. No. I wasn't there.

12 Q. Okay. You weren't there. You've obviously known your son for
13 a long time.

14 A. Yeah, I gave birth to him.

15 Q. And I know sometimes it sounds like we ask ridiculous questions
16 but sometimes you might not have had contact with him for a
17 long time but you have?

18 A. Yes. I have.

19 Q. Okay. Ever see him laying in bed at 3:30 in the afternoon?

20 A. No.

21 Q. Okay. And in January of 2017 did you go to church with my
22 client and Gloria, your daughter -- or his daughter and some
23 other individuals?

24 A. Yes.

25 Q. Okay. And did Jackie go with you?

- 1 A. Two.
- 2 Q. Okay. And how do you know, if you know, Juan Martinez?
- 3 A. Brother in law. Friends before that.
- 4 Q. Okay.
- 5 A. Thirty years.
- 6 Q. All right. And so you've known him 30 years?
- 7 A. Yes.
- 8 Q. Okay. And have you ever observed his behavior or interacting
9 with Jacqueline Gadde?
- 10 A. Yes.
- 11 Q. Okay. Over the last two years how often would you think you'd
12 see that?
- 13 A. More in the last year cause we were working on their house
14 quite a bit.
- 15 Q. Okay. So you were over at my client's house quite a bit.
- 16 A. Yeah. And they came to our house for dinners and parties and
17 different things.
- 18 Q. Okay. And within the months of December of last year and
19 January this year did you specifically see my client
20 interacting with Jackie?
- 21 A. Yes.
- 22 Q. At any time did she ever leave the house with him to go
23 anywhere?
- 24 A. Yes.
- 25 Q. That you saw?

- 1 A. Yes.
- 2 Q. Okay. How many times did you see that?
- 3 A. At least once that I was in the car he gave me a ride home
4 after we worked one night and she was in the car before I got
5 there.
- 6 Q. When you say she was in the car before you got there how did
7 that happen?
- 8 A. He said, hey Rachel I'm taking Scott home and Jacqueline just
9 ran out, got in the car, and rode with us.
- 10 Q. She wasn't forced to do that?
- 11 A. No, sir.
- 12 Q. Where in the car did she ride?
- 13 A. She got in the backseat it was a small two door car.
- 14 Q. Okay.
- 15 A. Obviously no room in the front.
- 16 Q. Okay. And the plan was to take you home.
- 17 A. Correct.
- 18 Q. And then he would return back to his house.
- 19 A. I believe that was the plan. Yes.
- 20 Q. When he left your house who was in the car with him?
- 21 A. Jacqueline. She jumped out and got in the front seat.
- 22 Q. Okay. She went from the backseat to the front seat after you
23 got out?
- 24 A. Correct.
- 25 Q. Did anybody force her to do that?

1 A. No.

2 Q. I should ask you about what time was this?

3 A. It was probably dusk or it was a little after --

4 Q. I'm sorry. Time wise. When was it in the year?

5 A. Oh, it was right before Christmas.

6 Q. Of 2016?

7 A. Yeah. They were having problems with the heater we was trying
8 to get the electric heat going.

9 Q. Okay. And have you observed him disciplining Jacqueline at
10 all?

11 A. I -- yes I did.

12 Q. Okay.

13 A. He liked to take her cell phone away when she didn't listen.

14 Q. Okay. And how would she react?

15 A. Like most teenagers.

16 Q. Which is how?

17 A. You know, an ugly look and stomp away.

18 Q. Okay. And ever complain about it? That you heard?

19 A. Well, I mean she would debate maybe once or twice, please can
20 I, you know.

21 MR. ENGRAM: No further questions.

22 THE COURT: Ms. O'Malley any questions?

23 CROSS-EXAMINATION

24 BY MS. O'MALLEY:

25 Q. You just said she acted like a normal teenager when she got

1 A. 26.

2 Q. All right. So you've known him 26 years?

3 A. Yes.

4 Q. Okay. And do you know Jacqueline Gadde?

5 A. Yes, I do.

6 Q. Okay. Let me ask you this, you don't live with my client.

7 Correct?

8 A. No. I do not.

9 Q. Okay. But have there been times when you have observed he and

10 Jackie interacting?

11 A. Yes.

12 Q. Okay. And when was the first time you met Jackie?

13 A. Two years ago.

14 Q. Okay.

15 A. She came to my house it was actually it January 3rd my

16 fiancé's birthday.

17 Q. Okay. And in -- specifically in December or January 2017 did

18 you observe at any time my client leaving the house and Jackie

19 going with him?

20 A. Yeah. A lot of times I saw Jacqueline and I heard Jacqueline

21 ask to go with my dad places, to the store, to ride with her -

22 - to ride with him just anywhere.

23 Q. Okay. Did anyone ever force her to do that to your knowledge?

24 A. No.

25 Q. Okay. And again we're talking I'm specifically need to

1 concentrate -- you're talking about December and January.

2 Correct?

3 A. Yes.

4 Q. Okay. And places like the store?

5 A. Yes. There was one time we had all went to church together in
6 January.

7 Q. Okay.

8 A. And we were leaving church and they had to take two cars
9 because my sister was with them and Rachel, Jacqueline's
10 mother, had my sister, my sister's kids, and her kids with
11 her. And then my dad had the other car and Jacqueline wanted
12 to ride up front. So I remember her asking Johnny can I ride
13 with you, can I ride up front. And she did.

14 Q. And that was in January of this year?

15 A. Yes.

16 Q. Okay. And do you recall if you were together with my and some
17 others the day after Christmas?

18 A. Yes, we had a party after Christmas.

19 Q. Okay. And was Jackie at this party?

20 A. Yes, Jacqueline was at the party.

21 Q. Was there a place in that house some of you were sitting down?

22 A. Yes, we were all sitting in the living room having just time
23 together. There was a fire we were just spending time talking
24 and my fiancé and I and my dad and Jacqueline were all sitting

- 1 on the couch. And I remember Jacqueline was sitting in
2 between my dad and my fiancé.
- 3 Q. Okay. Did anyone force her to sit there?
- 4 A. No. She chose to sit there.
- 5 Q. Okay. Were there other places in the room she could have sat
6 down?
- 7 A. Yes. It was a big couch, there was a big living room. There
8 was a lot of other places she could have sat.
- 9 Q. And what you're indicating is she came over to that specific
10 location and sat down next to my client?
- 11 A. Yes.
- 12 Q. And this was the day after Christmas?
- 13 A. Yes.
- 14 Q. And around that same time was there a time when you were in a
15 particular room of that house checking out a closet?
- 16 A. Yes. We --
- 17 Q. And --
- 18 A. -- my dad had built -- oh, sorry.
- 19 Q. Now, who was in that particular room?
- 20 A. It was my brother --
- 21 Q. Who is?
- 22 A. Braxton. He's not here.
- 23 Q. Okay.
- 24 A. My brother Levi, my fiancé, me and my dad.
- 25 Q. Okay. And you were in a particular -- what room of the house?

1 couldn't wait until she turned 18 so she could move out of the
2 house. That I don't want to cuss but she would say a lot of -

3 -

4 MS. O'MALLEY: Your Honor, objection. She has
5 testified here to things that Jacqueline has said to her.
6 That's hearsay.

7 MR. ENGRAM: And again --

8 THE COURT: Sustained.

9 MR. ENGRAM: -- it's specifically as it relates to
10 her reaction to my client's discipline and her state of mind.

11 MS. O'MALLEY: I don't know why what specifically
12 she said or going on and talking about what she said is --

13 THE COURT: I'll let him ask specific questions --

14 MR. ENGRAM: Okay.

15 THE COURT: -- and see if it's relevant or not.

16 BY MR. ENGRAM:

17 Q. Was there a time when after a particular discipline incident
18 within the last couple months that she said he's such an ass?

19 A. Yes.

20 Q. Okay.

21 A. She told me he's such an ass and I said --

22 MS. O'MALLEY: Your Honor, objection to any
23 additional hearsay.

24 MR. ENGRAM: That's fine. She answered the
25 question.

1 And I'd ask to approach.

2 (At 3:26 p.m., bench conference)

3 (At 3:27 p.m., bench conference concluded)

4 MS. O'MALLEY: Your Honor, I would withdraw the
5 objection.

6 THE COURT: All right. Go ahead counsel.

7 BY MR. ENGRAM:

8 Q. What specifically did you see if anything Jackie do with my --
9 wait a minute. Just want to make sure everybody's back in
10 place. People were still sitting down and --

11 THE COURT: Go ahead.

12 MR. ENGRAM: Okay. Thank you.

13 BY MR. ENGRAM:

14 Q. What specifically did you see Jackie, if anything, do as it
15 relates to my client?

16 A. Okay. Like I was saying, I remember this specifically because
17 it sort made me like jealous kind of of their relationship,
18 she -- I was sitting down and I was pregnant so everybody was
19 just kind of partying and I was just minding my own business
20 and my dad was sitting next to me to the left on barstools and
21 we were just sitting there and then I seen Jacqueline come up
22 to him and put her arms around him and say I love you Johnny.
23 And it was just kind of weird --

24 Q. Okay.

25 A. -- to me --

1 THE COURT: All right. Thank you.

2 THE WITNESS: -- because I --

3 THE COURT: Ma'am that's --

4 THE WITNESS: -- didn't like that --

5 THE COURT: Okay.

6 BY MR. ENGRAM:

7 Q. Okay. But he's your dad.

8 A. Yeah, that's why it bothered me --

9 Q. Okay.

10 A. -- because he's my dad and not her dad.

11 Q. Sure. And that was it. That's all it was.

12 A. Yeah. That's all. Well, he had said okay Jacqueline get off
13 me.

14 Q. That's -- that's -- okay, thank you. You had occasion to be
15 at his house there on 13th Street. Correct?

16 A. Yes.

17 Q. At times. Various times?

18 A. Yes. I was able to go over to my dad's at any time, any day,
19 never had to call the doors were always unlocked. I was
20 always -- could go.

21 Q. Okay. My question is at anytime when you were there did you
22 ever see my client in bed at 3:30 in the afternoon?

23 A. Never. My dad was not that type of person to lay down in the
24 middle of the day. Never -- he was always working on the
25 house. He was not -- is not a person who does that in the

1 Court, testified as follows)

2 THE COURT: All right. Have a seat.

3 DIRECT EXAMINATION

4 BY MR. ENGRAM:

5 Q. Jessica could you state your name for the record please.

6 A. Jessica Ruth Blankenship.

7 Q. And spell your last name.

8 A. B-l-a-n-k-e-n-s-h-i-p.

9 Q. And how are you related to Juan Martinez III?

10 A. Biologically not at all.

11 Q. Okay.

12 A. But that's my dad.

13 Q. Okay. And you've known him then how long?

14 A. I'm 30 years old, I've known him 29 years and 8 months.

15 Q. And you don't live with him on 13th Street. Correct?

16 A. No, sir. I did for one month period of time.

17 Q. When was that?

18 A. I would say roughly October.

19 Q. Of last year.

20 A. Last year.

21 Q. But have you been over to the house before?

22 A. Yes, sir.

23 Q. More than once?

24 A. Yes, sir.

25 Q. All right. Do you know Jacqueline Gadde?

- 1 A. Yes, sir.
- 2 Q. How long have you known Jacqueline Gadde?
- 3 A. About two years, little over two years.
- 4 Q. Okay. And is that about the time that my client and her mom
5 moved in together?
- 6 A. Yes.
- 7 Q. Okay. And during those times have you seen him interacting
8 with her?
- 9 A. Yes, sir.
- 10 Q. Okay. And have known him to discipline her?
- 11 A. Yes, sir.
- 12 Q. Okay. And in what ways?
- 13 A. He would just like take their phones away or you know, say the
14 girls are -- Jacqueline in cases getting bad grades give me
15 your makeup for the week, give me your hair straighter. You
16 know, anything that she valued would just be I'm taking this
17 right now because it means something to you and this is the
18 best way for you to learn.
- 19 Q. And how would she react to that?
- 20 A. Oh, not at all happy. Any normal teenager would be very
21 upset. She's stomp off. Call him names if he wasn't in the
22 room. And you know just things like that.
- 23 Q. She'd call him names behind his back?
- 24 A. Oh, yeah.
- 25 Q. Okay. And there was a time in 2016 that she had her phone

- 1 Q. I day December of last year or January of this year. Correct?
- 2 A. Yes, sir.
- 3 Q. All right. On how many occasions do you think?
- 4 A. There was multiple.
- 5 Q. Okay.
- 6 A. More than --
- 7 Q. Okay. And were there ever times when your father would leave
8 the house and Jacqueline would go with him?
- 9 A. Yes. She would always ask if she could go.
- 10 Q. Okay. Was she ever forced to go?
- 11 A. No.
- 12 Q. Did that voluntarily?
- 13 A. Voluntarily.
- 14 Q. And -- okay. And did you ever see her get into the car?
- 15 A. Yes.
- 16 Q. And where would she usually sit or sometimes sit in the car?
- 17 A. If I was with her -- if I was with them she would sit in the
18 back. But she would often ask for the front seat.
- 19 Q. She would ask for the front seat?
- 20 A. Yes, sir.
- 21 Q. Okay. Anybody ever force her to sit in the front seat?
- 22 A. No, sir.
- 23 Q. And I take it you'd go to places like the store or whatever.
24 Right?
- 25 A. Yes, sir. Like Wal-mart.

- 1 Q. And did you -- have you ever seen your dad in bed at 3:30 in
2 the afternoon?
- 3 A. No, sir.
- 4 Q. Okay. Why not?
- 5 A. He's a working man. He had a house that he was working on.
6 He also had a studio he was building for me at my house so he
7 was always on his feet doing something.
- 8 Q. Okay. And this studio when was he working on that?
- 9 A. It was around from November to December.
- 10 Q. Okay. And in December was there a time that he came over to
11 your house and Jackie came with him?
- 12 A. Yes, sir.
- 13 Q. Okay. And when he arrived besides Jackie was anybody else
14 with him?
- 15 A. No, sir.
- 16 Q. Jackie came with him by herself?
- 17 A. Yes, she did.
- 18 Q. In a car to your house?
- 19 A. Yes.
- 20 Q. And this was in around December 2017 -- in '16?
- 21 A. Yes, sir.
- 22 Q. Okay. And she stayed there at your house while he was there?
- 23 A. She was there. Yes.
- 24 Q. And when my client left did she leave with him?
- 25 A. Yes, sir.

- 1 Q. Okay. In December of 2016 and into January?
- 2 A. There was an instance were two -- about a couple -- two days
3 before Christmas we went over there. He watched our kids for
4 us so that we could go Christmas shopping. Jacqueline came
5 with us. Well, she had wanted to come with us and she didn't
6 do her duties that she was suppose to do that -- for that day
7 he had wanted her to do some laundry before she went. She
8 hadn't done it. So she went to go do it, rushed to go do it
9 stomped off, you know, she wasn't real happy about it, but she
10 did it. She came back asked if she could go. She was allowed
11 to go. We went Christmas shopping. He watch our kids.
- 12 Q. Okay. And have you ever seen him laying in bed at 3:30 in the
13 afternoon?
- 14 A. No, I have not.
- 15 Q. Okay. And have you ever observed him disciplining her in any
16 manner in the last -- well, last two years?
- 17 A. Yeah, pretty much just occasions where she wouldn't do her
18 chores. You know, like her laundry, if she didn't fold the
19 laundry or do the dishes like he said. He would take away her
20 phone. Pretty much wouldn't allow her to do the things she
21 wanted to do.
- 22 Q. And how would she react to that?
- 23 A. She -- pretty childish. Pouting, you know, she would storm
24 off, stomping away, running to her room. Pretty much how I
25 would describe it, I guess.

- 1 A. Yes, sir.
- 2 Q. Did you ever call her into the room to watch a video?
- 3 A. No, sir.
- 4 Q. What did she do? Did -- wait a minute -- let me make it
5 clear. How did she get into the room?
- 6 A. I don't know.
- 7 Q. Okay. Were you already in the room?
- 8 A. Yes, sir.
- 9 Q. Okay. And she walked in the room?
- 10 A. Yes, sir.
- 11 Q. But you did not call her in the room?
- 12 A. No, sir.
- 13 Q. Okay. And did you call her in there to watch TV?
- 14 A. No, sir.
- 15 Q. Okay. Were there times when the children would run into your
16 room?
- 17 A. Yes, sir.
- 18 Q. Okay.
- 19 A. All of them.
- 20 Q. How much?
- 21 A. All of them.
- 22 Q. Okay. And what would they do?
- 23 A. Jump on the bed. Say good morning, what are we doing, what's
24 for breakfast. Normal, everyday stuff.
- 25 Q. Okay. And you heard your interview with the police. Correct?

- 1 A. Yes, sir.
- 2 Q. All right. And if you know what day of the week would this
3 movie that you were describing to the police officer occur?
4 A. It was a Saturday.
- 5 Q. Okay. And you know this why?
6 A. Because I had to get up early to take Lana to basketball
7 practice and I came back home and went back to the bed.
- 8 Q. All right. And that's why you were in bed?
9 A. Yes, sir.
- 10 Q. Cause it was in the morning?
11 A. The morning.
- 12 Q. On Saturday?
13 A. On Saturday.
- 14 Q. Okay. And there were other children present in the home?
15 A. Yes, sir.
- 16 Q. Okay. Who else would have been present in the home when you
17 came back at dropping Lana off at basketball practice?
18 A. Well, my father would be in the living room watching TV. And
19 John and Olivia would be up in there room watching TV or they
20 would come into the room -- in my room.
- 21 Q. Okay. And this was on a Saturday?
22 A. Saturday.
- 23 Q. Okay. Would you have ever been in bed at 3:30 in the
24 afternoon?
25 A. No, sir.

- 1 A. Side to side.
- 2 Q. Okay. Did you -- would you have had any particular problem
3 lying on the bed lengthwise?
- 4 A. Yes.
- 5 Q. And what would that be?
- 6 A. I have a bad shoulder and I couldn't lay on that side.
- 7 Q. Okay. And so you would not have been able to lay on the bed
8 in the manner in which Ms. Gadde indicated?
- 9 A. Correct.
- 10 Q. Okay. And remember I had asked Ms. Gadde if you had shorter
11 arms, she didn't know. Do you have short arms?
- 12 A. Yes, sir. I get called T-rex all the time.
- 13 Q. Okay. And referring to the dinosaur with the short arms.
- 14 A. Correct.
- 15 Q. Okay. And you obviously have a larger body. Correct?
- 16 A. Yes, sir.
- 17 Q. All right. And you heard her say you allegedly but your arm
18 around her stomach. Correct?
- 19 A. Yes, sir.
- 20 Q. And she indicated that you reached around her while not
21 touching her from behind. Correct?
- 22 A. Correct.
- 23 Q. All right. Given what you know of your own body and having
24 lived with Jackie for a couple of years would you have been
25 able to get your arm around her stomach while not touching her

- 1 Q. Okay. During the week any way.
- 2 A. Yes, sir.
- 3 Q. Okay. And who lived there at that house with you?
- 4 A. It was me, Rachel, Jacqueline, Lana, Olivia, Jonathan, and my
5 father.
- 6 Q. Your father lived there too?
- 7 A. Yes, sir.
- 8 Q. And about what percentage of the time would you think he lived
9 there?
- 10 A. The whole time.
- 11 Q. Okay. About what time -- what percentage during the day do
12 you think he would be there?
- 13 A. Unfortunately for me, all day.
- 14 Q. Okay. And so basically he was home most days?
- 15 A. Yes, sir.
- 16 Q. Where did he stay in the house?
- 17 A. On the sofa.
- 18 Q. Okay. And that was pretty much a regular thing for him?
- 19 A. Yes, sir.
- 20 Q. Okay. So most days, most times he was there at that house.
- 21 A. Yes, sir.
- 22 Q. Okay. Who was the disciplinarian in this family?
- 23 A. I was.
- 24 Q. And did you share those responsibilities at all with Rachel?
- 25 A. It depend.

- 1 Q. Okay.
- 2 A. It depend on if she was there we would talk sometimes. If she
3 wasn't then no I didn't ask --
- 4 Q. Okay.
- 5 A. -- I just gave the discipline out.
- 6 Q. Okay. So obviously cause Rachel wasn't there all the time
7 obviously.
- 8 A. No, sir.
- 9 Q. Okay. And how specifically would you discipline?
- 10 A. I would take their phones. I would ground them from their
11 friends. I send them to their room. Add on extra chores.
- 12 Q. Okay. And what was -- what were you trying to do by that?
- 13 A. What was I trying to do. Teach them morals.
- 14 Q. Okay. And specifically within the last two years that you've
15 known Jackie and then more specifically within December,
16 January, within those several months. Okay. Late fall of
17 last year into January. When disciplined how would Jackie
18 react?
- 19 A. Well, at that new house she would be really upset.
- 20 Q. When you say really upset what do you mean?
- 21 A. She would -- depend if she would cry, walk away mad, just, you
22 know, walk away mad and upset.
- 23 Q. Okay. Where would she go?
- 24 A. To her room.
- 25 Q. Okay. Would she ever yell?

- 1 A. Yes, sir.
- 2 Q. Okay. And what if anything did you tell her?
- 3 A. Told her no she was too young.
- 4 Q. Okay. And did she like that?
- 5 A. No.
- 6 Q. Okay. And you heard Jackie state that before the alleged
7 sexual assault that there were no real close relationship with
8 you and her.
- 9 A. Out of the four kids Jacqueline and I did not get along the
10 best.
- 11 Q. Okay. And you remember that during the beginning of December
12 there was a party at Scott's house.
- 13 A. Yes, sir.
- 14 Q. Okay. And while you might not have gotten along with her.
15 What if anything did she do as it relates to you at that
16 party?
- 17 A. At that party she came up and gave me a hug. And said I love
18 you Johnny.
- 19 Q. Okay. And right before Christmas of 2016 you were with Scott
20 Grady working at your house?
- 21 A. Yes, sir.
- 22 Q. Okay. And was his car there?
- 23 A. No, sir.
- 24 Q. Okay. And did there come a time when he had to go home?
- 25 A. Yes, sir.

APPELLANT'S APPENDIX H
Court of Appeals Decision
H 0168a

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APPELLANT'S APPENDIX H
COURT OF APPEALS DECISION
June 18, 2019

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN MARTINEZ III,

Defendant-Appellant.

UNPUBLISHED

June 18, 2019

No. 341147

Berrien Circuit Court

LC No. 2017-015329-FH

Before: RIORDAN, P.J., and MARKEY and LETICA, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (force or coercion to accomplish sexual penetration), and fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(b) (force or coercion to accomplish sexual contact). He was sentenced to 50 months to 15 years' imprisonment for the CSC-III conviction and to 35 days' incarceration for the CSC-IV conviction. We affirm.

I. BACKGROUND

In December 2016, while watching a movie with his girlfriend's sixteen-year-old daughter, JG, in his bedroom, defendant touched JG's breasts outside and under her clothing, held her to the bed when she attempted to leave, and digitally penetrated her.¹ Later that evening, defendant told JG not to tell her mother what had occurred. JG told her boyfriend about the assault approximately a month after it took place, communicating with him via Facebook Messenger because he resided in Alabama. JG did not specifically inform him about the digital penetration because of embarrassment. Defendant was later arrested and temporarily incarcerated for an unrelated domestic violence incident. JG learned from her sister that defendant "might be coming back to the house" upon his release from jail, which made JG visibly uncomfortable and prompted JG to tell her sister and her sister's boyfriend about the assault. JG did not share many of the details regarding the assault. JG's sister then told their mother about the assault, who in turn questioned JG about the incident. Although JG did not

¹ Defendant, JG, JG's mother and three siblings, and defendant's father all lived together in the family home.

wish to talk to her mother about the sexual assault, she eventually told her what happened. JG's mother became upset and called the police. Defendant testified on his own behalf; he denied that he engaged in any improper behavior or touching with JG. Defendant asserted that JG lied about the assault in an effort to prevent defendant's return to the family home. Defendant was convicted by a jury of CSC-III and CSC-IV.

II. ANALYSIS

A. EXCLUSION OF TESTIMONY REGARDING A PRIOR THREAT

On appeal, defendant first argues that the trial court erred in excluding testimony regarding a threat made a few years earlier by JG in connection with her father. Assuming error, we hold that the presumed error did not prejudice defendant and that a miscarriage of justice did not result as a consequence of the error.

At the preliminary examination, defense counsel elicited testimony from JG on cross-examination in which JG indicated that she had previously told her mother that she would falsely accuse her biological father of inappropriate touching were her mother to allow JG's father back into the family home. It is this testimony that defendant sought to introduce at trial, but the court ruled that it constituted inadmissible hearsay. JG explained at the preliminary examination that she made the threat because she was only fourteen, her father was abusive, and because she did not fully appreciate the "seriousness" of her accusation. On redirect examination, the prosecutor launched into the following questioning that sought to rehabilitate JG's credibility and which we find particularly important in assessing prejudice:

Q. [JG], that was your father, correct?

A. Yes, ma'am.

Q. That [defense counsel] is referring to, correct?

A. Yes, ma'am.

Q. And your concern was him moving back in the house?

A. Yes, ma'am.

Q. And did he in fact move back in the house?

A. He did.

Q. Okay. And that was after you made those statements, correct?

A. Yes, ma'am.

Q. And did you ever actually make a statement that your father sexually assaulted you to anyone?

A. No, Ma'am, I did not.

- Q.* Okay. So, you said you would do it, but you didn't actually do it.
- A.* No.
- Q.* And he actually did move back in.
- A.* Yes, he did.
- Q.* Okay. . . . [D]id you tell your mom that [the offenses at issue] happened?
- A.* Yes, ma'am.
- Q.* And was that because you were looking to tell your mom that this happened?
- A.* No, ma'am.
- Q.* How did it come out?
- A.* I was talking to my sister and her boyfriend.
- Q.* Okay.
- A.* And my mom had been talking about letting [defendant] back into the house.
- Q.* And which sister?
- A.* [LG].
- Q.* Okay.
- A.* And I basically was talking to them, I don't want him back in the house because he makes me feel uncomfortable.
- Q.* Okay. Did you ever tell [LG] at that point what happened?
- A.* No, I did not.
- Q.* Okay. And so, when you told [LG] that, did your mom then come and talk to you?
- A.* Yes, she immediately went and told my mom, and then I told my mom what happened after she questioned me.
- Q.* Okay. So, you didn't go looking for your mom, or ask your mom not to have him move back in.

A. No, ma'am.

Q. And in fact, you didn't tell her until she confronted you, right?

A. Yes, ma'am.

Q. Several months later?

A. Yes, ma'am.

Nearly two months after the preliminary examination was conducted, the trial court held a pretrial evidentiary hearing on a number of motions. At the hearing, JG's mother testified, recounting the matter involving JG's threat in regard to her father. The testimony by JG's mother was consistent with JG's testimony at the preliminary examination with respect to JG's assertions that after talking to her mother about her father's return home, she never accused her father of improper touching, even after he moved back into the home.

The trial record reflects that JG first disclosed the sexual assault by defendant about a month after it occurred, informing her boyfriend of the incident over Facebook Messenger; this was approximately a month before JG told her sister and mother about the assault.

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MCL 769.26 was construed by our Supreme Court in *Lukity*, 460 Mich at 495, wherein the Court explained:

Section 26 places the burden on the defendant to demonstrate that "after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." We agree . . . that reversal is only required if such an error is prejudicial and that the appropriate inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. The object of this inquiry is to determine if it affirmatively appears that the error asserted undermines the reliability of the verdict. In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. [Citations, quotation marks, and alteration omitted.]

Defendant views the excluded evidence in a vacuum or in isolation, failing to appreciate and understand that had the evidence of JG's threat relative to her father been admitted into evidence, the trial court, undoubtedly, would have also been compelled to allow testimony by JG and her mother that in all likelihood would have been consistent with their earlier testimony quoted and discussed above.² This would have greatly diminished the value of the evidence defendant sought to introduce. JG never followed through on or carried out her threat regarding her father even though he moved back into the home. Indeed, when the excluded evidence is considered in context and conjunction with the testimony that likely would have been elicited by the prosecution to counter evidence of JG's threat, it may have actually enhanced her credibility. It showed that she could not bring herself to fully engage in a fabrication involving criminal sexual conduct. Moreover, JG made her claims about defendant's assault to her boyfriend before she ever spoke to her sister and learned of defendant's return home and before her mother confronted her.³ And we should not lose sight of the fact that JG's threat was made a few years earlier and did not pertain to defendant. We conclude that defendant has failed to demonstrate that any assumed error in excluding the evidence resulted in a miscarriage of justice. The reliability of the verdict was not undermined considering the untainted evidence, nor has defendant established that it is more probable than not that a different outcome would have resulted absent the error. We conclude that the jury would still have convicted defendant of the offenses had it heard the testimony the trial court excluded, especially in light of the testimony that certainly would have been produced or elicited by the prosecution regarding all of the

² Defendant maintains that the prospective testimony at issue was admissible under MRE 608(b). "Specific instances of the conduct of a witness . . . , if probative of truthfulness or untruthfulness, [may] be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness" MRE 608(b). We take no stance on whether MRE 608(b) supported admission of the testimony, although we question whether the threat, in and of itself, was probative of JG's truthfulness or untruthfulness, as opposed to a prior incident of actual fabrication. The Michigan Rules of Evidence generally parallel the text of the federal rules, and we may find caselaw referring to and construing the Federal Rules of Evidence helpful and even persuasive in some instances. *People v Denson*, 500 Mich 385, 405; 902 NW2d 306 (2017). In *United States v Chapman*, 765 F3d 720, 729 n 3 (CA 7, 2014), the Seventh Circuit for the United States Court of Appeals observed that "[a]lthough Rule 608(b) refers to inquiries into specific instances of conduct 'on cross-examination' once a witness's truthfulness has been challenged, counsel can inquire into specific instances of the witness's truthful conduct to rehabilitate the witness on redirect examination." We find *Chapman* persuasive and that had defendant elicited testimony regarding JG's threat, the prosecutor, in order to rehabilitate JG, could have properly elicited testimony about JG's conduct in not accusing her father of sexual abuse on his return home. Such evidence would also have been admissible under MRE 401-403.

³ With respect to the issue of prejudice, the dissent minimizes the relevance of JG's Facebook communication to her boyfriend about the assault. Given the sequence of events, we find this evidence particularly pertinent because it undermined defendant's position that the allegations of sexual abuse were in response to learning that defendant would be returning to the family home. By undermining defendant's theory, the evidence of the Facebook messages also diminished the evidentiary value of JG's threat regarding her father, which was connected to his return home.

surrounding circumstances, and just as the prosecution had done earlier at the preliminary examination and motion hearing.⁴ Under these facts, we find that reversal is unwarranted on this issue.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his attorney was ineffective at trial in three instances. First, defendant contends that counsel was ineffective for eliciting inadmissible hearsay statements from a police officer. Second, defendant maintains that counsel was ineffective for failing to object to the admission of JG's statements that she made to her boyfriend, which were captured in an exhibit showing the two messaging each other on Facebook. And third, defendant claims that counsel was ineffective for failing to object to a county deputy's presence on the jury.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court addressed the basic principles governing a claim of ineffective assistance of counsel, stating:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and quotation marks omitted.]

An attorney's performance is deficient if the representation falls below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of

⁴ Our dissenting colleague indicates that it should be the province of the jury and not this Court to decide whether to believe JG in light of all of the evidence. The dissent is effectively asserting that we are invading the jurors' province by deciding for them whether they still would have convicted defendant if they had heard the testimony in dispute. Any harmless-error analysis, which this Court engages in on a regular basis, necessarily involves an assessment of what a jury would have done absent the error, and the assessment entails consideration of the untainted evidence. Pertinent here, and as conceded by the dissent, is that the assessment must also contemplate the testimony that would have been admitted along with the threat. The dissent, however, gives little to no weight to this prospective evidence.

counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We cannot, however, insulate the review of counsel's performance by simply calling it trial strategy. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Initially, this Court must determine whether strategic choices were made after less than complete investigation, with any choice being reasonable only to the extent that reasonable professional judgment supported the limitations on investigation. *Id.*; see also *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015).

With respect to the first alleged instance of ineffective assistance, defendant argues that when counsel cross examined a county deputy sheriff, counsel elicited inadmissible hearsay statements that were damaging to defendant. Defendant’s trial strategy was to demonstrate that JG was not credible. In executing that strategy, defense counsel had the deputy sheriff testify to each allegation and statement JG made and that the deputy had recorded in his police report. Counsel then used the deputy’s testimony to illustrate multiple inconsistencies in JG’s testimony. Defense counsel highlighted the various discrepancies in his closing argument, maintaining that JG was “changing the details” of the assault. We cannot conclude that this was an unreasonable approach in defending against the charges. The case hinged on credibility assessments, and while some of the testimony counsel elicited was consistent with JG’s testimony, there were inconsistencies that counsel could and did exploit in challenging JG’s credibility. Assuming that the deputy’s testimony constituted inadmissible hearsay as defendant claims, we hold that trial counsel’s performance did not fall below an objective standard of reasonableness. Defendant fails to overcome the strong presumption that counsel’s performance reflected sound trial strategy, formed upon the exercise of reasonable professional judgment following adequate investigation. “The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

With respect to the second alleged instance of ineffective assistance, defendant argues that counsel should have objected to the admission of an exhibit showing JG’s Facebook conversation with her boyfriend.

The prosecution moved to admit the evidence during JG’s testimony, claiming that it was not hearsay under the language in MRE 801(d)(1)(B) regarding prior consistent statements. MRE 801(d)(1)(B) provides that a statement is not hearsay if “[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]” The trial court agreed that the evidence was not hearsay under MRE 801(d)(1)(B). When the prosecutor continued questioning JG, defense counsel voiced an objection to those parts of the exhibit showing the boyfriend’s statements. The prosecutor responded that she was introducing the boyfriend’s statements in order to give context to the conversation and JG’s comments. The trial court sternly ruled that the exhibit had already been admitted and that the prosecutor could proceed.

On appeal, defendant argues that the exhibit was not admissible under the test governing the application of MRE 801(d)(1)(B); therefore, counsel was ineffective for failing to object based on the inapplicability of MRE 801(d)(1)(B). For a statement to be admissible under MRE

801(d)(1)(B), the declarant must testify at the trial and be subject to cross-examination; there must be an express or implied charge of recent fabrication or improper motive of the declarant's testimony; the statement must be a prior statement that is consistent with the declarant's challenged in-court testimony, and the consistent statement must be made prior to the time that the supposed motive to falsify arose. *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000). A prior consistent statement that is made after the motive to fabricate arose does not fall within the ambit of MRE 801(d)(1)(B). *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001); *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

JG testified at trial and was subject to cross-examination. Further, JG's messaged statements to her boyfriend were consistent with her in-court testimony. Additionally, there was an express charge by defendant of recent fabrication by JG. Finally, the consistent statements made to the boyfriend occurred before the purported motive to lie arose. It was defendant's theory and his testimony that JG fabricated the sexual assault upon learning that defendant would be returning to the family home. And JG told her boyfriend of the assault over Facebook Messenger about a month prior to hearing from her sister that defendant would be returning to the house. Stated otherwise, the motive to fabricate developed after JG made the prior consistent statements.⁵ Accordingly, any objection to the admission of the exhibit premised on the inapplicability of MRE 801(d)(1)(B) would have been futile; therefore, counsel was not ineffective. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (counsel is not ineffective for failing to make futile objections).

With respect to the third and final alleged instance of ineffective assistance, defendant argues that trial counsel should have objected to a county deputy being on the jury. "[A]n attorney's decision relating to the selection of jurors generally involves matters of trial strategy, which we normally decline to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (citations omitted). Jurors are presumed to be both competent and impartial, and the burden of establishing otherwise rests with the defendant. *Id.* A prospective juror may be challenged for cause if he or she "is biased for or against a party or attorney." MCR 2.511(D)(2). Particularly relevant here, in *People v Walker*, 162 Mich App 60, 64-65; 412 NW2d 244 (1987), this Court observed that "[t]he fact that [the] juror . . . was a police officer is not of itself sufficient to warrant an inference of bias[,] [n]or is the mere fact that he was acquainted with the prosecuting attorney and several prosecution witnesses."⁶

⁵ Defendant argues that JG had a motive to fabricate based on her unhappiness with how defendant disciplined her, which motive arose before she informed her boyfriend of the assault. Although there was evidence that JG was unhappy with defendant's discipline, the argument posited at trial was that the motive to lie arose when JG was told that defendant would be returning to the family home. The admissibility of evidence must be judged under the circumstances existing at the time of trial. See generally MRE 103 (rulings on evidence). Defendant cannot create a different context on appeal.

⁶ We do note that in *People v Hannum*, 362 Mich 660; 107 NW2d 894 (1961), our Supreme Court granted the defendant a new trial after it was discovered that a police officer, who had not

Defendant argues that it was “unlikely” that the deputy could be impartial. But the deputy represented to the trial court that while he worked the same shift as the officer investigating the case, he could be impartial and unbiased. The deputy also stated that he had no direct knowledge of the case. Defense counsel was able to hear, observe, and judge the deputy as the deputy spoke to the court. We are not in a position to question counsel’s judgment in allowing the deputy to remain on the jury. Indeed, a law enforcement officer may be more attuned and receptive to testimonial inconsistencies and discrepancies causing credibility problems even if they seem minor. There is no basis in the record to find that the deputy was biased or would not be impartial. Accordingly, we cannot conclude that counsel’s performance in not excusing the deputy with a peremptory challenge or objecting to his presence on the jury fell below an objective standard of reasonableness. We believe that *People v Hannum*, 362 Mich 660; 107 NW2d 894 (1961), and *Walker* are distinguishable because there is nothing in the record showing a close, long-term working relationship as existed in *Walker*, the deputy’s identity as an officer was fully disclosed here contrary to the situation in *Hannum* and because defendant’s argument is framed in terms of ineffective assistance of counsel. For whatever reason, defense counsel chose to leave the deputy on the jury without objection, and we are not prepared to second guess that decision based on any arguable “inference” of bias.

Defendant points to an incident that occurred during the trial in which the deputy, during a lunch break, was observed entering the prosecutor’s office. The court’s inquiry into the matter, however, revealed that the deputy simply went to the prosecutor’s office to have a power of attorney form notarized because he was closing on a home the following day but could not be present for the closing because of his jury-duty obligation. The deputy merely spoke to a couple of secretaries and no one else. This event does not alter our ruling; it does not establish any bias or prejudice on the deputy’s part against defendant.

In sum, we reject defendant’s claims of ineffective assistance of counsel.

C. MISTRIAL

Defendant next argues that the trial court erred when it denied his motion for a mistrial based on alleged improper expert testimony and that the court also erred in failing to sua sponte declare a mistrial predicated on the deputy-juror’s visit to the prosecutor’s office.

said anything in his juror questionnaire or during voir dire about being an officer, sat on the jury. The Court observed, “Would any experienced trial lawyer, or, for that matter, the public generally, feel differently as to the capacity of a local police officer to sit as a juror and consider impartially the case of a defendant charged with a crime committed in the community? We think not.” *Id.* at 666. The *Walker* panel, citing *Hannum*, was “persuaded that the same inferences of bias may be drawn in [its] . . . case.” *Walker*, 162 Mich App at 66. But the Court did so because the officer-juror “worked closely with the prosecutor and certain police witnesses over a course of ten years.” *Id.* at 65. In *Walker*, defense counsel had attempted to dismiss the officer-juror using a challenge for cause, but the trial court rejected it because the officer indicated that he could be impartial. *Id.* at 62-63.

Defendant unsuccessfully moved for a mistrial based on the testimony of a specialist in forensic examinations who interviewed JG. Accordingly, the mistrial issue was preserved with respect to the expert's testimony. Defendant, however, did not move for a mistrial on the basis of the deputy's going to the prosecutor's office. Therefore, the mistrial issue was unpreserved in regard to the deputy's conduct.

We review for an abuse of discretion a trial court's decision to deny a motion for a mistrial. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "An abuse of discretion occurs when the trial court renders a decision that falls outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). Unpreserved claims of error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A trial court "should only grant a mistrial for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial and when the prejudicial effect of the error cannot be removed in any other way." *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014) (quotation marks and citations omitted).

On the second day of trial, the prosecutor asked the expert, "So are there things that you did in that interview [with JG] to try to make sure that [JG] knew she could tell you the truth?" The expert answered the question, but she then added that "there was nothing that [JG] said or did that made me believe that that wasn't happening." Defense counsel quickly objected, requesting that the last part of the expert's answer be stricken from the record because it improperly vouched for JG's credibility. The trial court sustained the objection and struck the offending portion of the expert's response. Defendant also moved for a mistrial on the matter, but the trial court denied the request.

We conclude that the expert's testimony that JG was credible during her interview constituted an unresponsive, volunteered answer to a proper question. The prosecutor did not seek to elicit a credibility assessment from the expert. Rather, the prosecutor essentially asked the expert how she explained to JG the importance of telling the truth during the forensic examination.⁷ The expert went beyond the scope of the prosecutor's question by commenting on JG's credibility.

In *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), this Court stated that "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." This Court has also observed that unresponsive answers from witnesses generally do not justify a mistrial. *People v Jackson*, 313 Mich App 409, 427; 884 NW2d 297 (2015). Unless, however, the prosecutor knew in advance that the witness would provide unresponsive testimony or the prosecutor encouraged or conspired with the witness to give unresponsive testimony. *Id.* There is nothing in the record suggesting that the prosecutor had advance notice

⁷ The prosecutor's question was inartfully phrased, and more care should be taken in any future prosecutions. We, however, do not view the question as asking the expert to opine on JG's credibility.

that the expert would give an unresponsive answer to the question or that the prosecutor and expert engaged in any conspiracy to submit unresponsive testimony.

In light of the fact that the trial court struck the challenged testimony⁸ and that it was very brief in nature, thereby removing any prejudicial taint, we cannot conclude that the “irregularity” prejudiced defendant’s rights and impaired his ability to receive a fair trial.

Next, the trial court did not err when it failed to sua sponte declare a mistrial based on the deputy-juror’s actions in going to the prosecutor’s office during trial to have a power of attorney notarized. We discussed this issue earlier, and it simply did not warrant a mistrial. There is nothing in the record suggesting that the deputy’s conduct was anything but innocent or that his presence on the jury unfairly prejudiced defendant.

Finally, defendant argues that the cumulative effect of the alleged errors at trial is overwhelming, requiring us to grant him a new trial. We disagree. “The cumulative effect of several minor errors may warrant reversal where the individual errors would not.” *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). But “only actual errors are aggregated to determine their cumulative effect.” *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

The assumed error in excluding testimony regarding JG’s prior threat against her father was plainly not prejudicial when viewed in context, and the only other “error” was the expert’s unresponsive, volunteered, and brief credibility assessment. Together, these errors simply do not warrant reversal.

We affirm.

/s/ Jane E. Markey
/s/ Anica Letica

⁸ “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

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APPELLANT'S APPENDIX I

COURT OF APPEALS DISSENT
July 2, 2020

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN MARTINEZ III,

Defendant-Appellant.

UNPUBLISHED

June 18, 2019

No. 341147

Berrien Circuit Court

LC No. 2017-015329-FH

Before: RIORDAN, P.J., and MARKEY and LETICA, JJ.

RIORDAN, J. (*dissenting*)

I dissent.

I would reverse and remand for a new trial because, after hearing the disputed evidence, a jury very well may have found JG not to be truthful as the excluded testimony was almost word-for-word identical to the allegations at issue in this case. In a nutshell, she previously threatened to lie about a sexual assault, and that behavior directly bears on her credibility in this case.

JG, the teenage daughter of defendant's then-girlfriend, accused defendant of touching her breasts outside and under her clothing, holding her to the bed when she tried to leave, and digitally penetrating her vagina. JG told her ex-boyfriend about the assault a few weeks later. She did not tell her family about the assault until her mother informed her that defendant might be moving back into the family home when he was released from jail on an unrelated domestic violence incident. At the preliminary examination, defendant elicited testimony from JG that she previously told her mother that she would fabricate a story about her biological father "touching her" if her mother chose to let him move back home. JG's mother corroborated that story.

Here, defendant maintains that he did not assault JG, and he alleged at trial that she made up the story to prevent him from returning to JG's home. Before trial, the court granted the prosecution's motion in limine to bar defendant from asking similar questions at trial. In this appeal, the majority now concludes that any error was harmless. However, I would hold that the trial court abused its discretion by granting the motion because the evidence was admissible, and that this was not harmless error.

A trial court's decision to grant or deny a motion in limine is reviewed for an abuse of discretion. *People v Vansickle*, 303 Mich App 111, 117; 842 NW2d 289 (2013). "An abuse of

discretion occurs when the trial court renders a decision that falls outside the range of principled decisions.” *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

The trial court concluded that the preliminary examination testimony regarding JG’s contemplated false accusations of sexual abuse by her father was inadmissible hearsay and that no exception applied. Hearsay “is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Hearsay is inadmissible unless it falls within one of the exceptions listed in the Michigan Rules of Evidence. MRE 802; *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013). Unsworn, out-of-court statements concerning prior false allegations of molestation are not inadmissible hearsay when they are offered to directly attack a declarant’s credibility, rather than to show that any such molestation occurred. *People v Solloway*, 316 Mich App 174, 198–99; 891 NW2d 255 (2016).

Here, the unsworn, out-of-court statements regarding JG’s self-admitted plan to falsely accuse her biological father of sexual abuse were not offered for the truth of the matter asserted. In seeking admission of these statements, defendant did not set out to prove that JG’s biological father sexually abused her, that JG actually alleged any such abuse, or that JG disclosed to her mother, or any other party, her plan to falsely accuse her father of sexual abuse. Rather, defendant sought to directly attack JG’s credibility. Preclusion of such testimony on hearsay grounds is improper. *Solloway*, 316 Mich App at 199. Moreover, JG made statements under oath that she had been willing to fabricate a story of criminal sexual conduct to keep her mother from getting back together with a man. Accordingly, I would hold that this evidence was improperly excluded as inadmissible hearsay and the trial court’s finding otherwise was in error.

Furthermore, I do not believe that the error was harmless. Our Supreme Court recently reiterated the proper analysis in light of such an error in *People v Denson*, 500 Mich 385, 396–397; 902 NW2d 306 (2017) (footnote omitted):

When we find error in the admission of evidence, a preserved nonconstitutional error “is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict.” *People v Douglas*, 496 Mich 557, 565–566; 852 NW2d 587 (2014) (quotation marks and citations omitted); [*People v*] *Lukity*, 460 Mich [484,] 495–496[; 596 NW2d 607 (1999)]. This inquiry “focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.” *Lukity*, 460 Mich at 495 (quotation marks and citation omitted). “In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.” *Id.*

Considering all of the evidence admitted at trial, it was more probable than not that the jury’s verdict was affected by its inability to properly consider JG’s credibility. The admitted evidence amounted to a credibility battle between JG and defendant. There were no other witnesses to the alleged assault, nor was any DNA or other physical evidence admitted which would have corroborated JG allegations or defendant’s account. The prosecution introduced as

evidence a Facebook message between JG and her boyfriend which amounted only to a recounting of the testimony JG gave as a witness and was a rehash of the same allegations she considered lodging against her biological father. In other words, the Facebook conversation was not additional, substantive evidence of defendant's guilt, but merely was cumulative of JG's testimony at trial. Moreover, JG omitted from her Facebook conversation any mention of the digital penetration. Accordingly, that evidence would, at most, support only the allegations of CSC-IV—not the allegations of CSC-III.

In addition to this case amounting to a one-on-one credibility battle between defendant and JG, the excluded evidence also was specific and highly relevant. As our Supreme Court held nearly 90 years ago, an "elementary principle[] of cross-examination is that the party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything . . . which tends or may tend to elucidate the testimony or affect the credibility of the witness." *People v Salimone*, 265 Mich 486, 499-500; 251 NW 486 (1933). "Clearly, evidence is relevant when it affects the credibility of the victim," and the "jury is generally entitled to weigh all evidence that might bear on the truth or accuracy of a witness's testimony." *People v King*, 297 Mich App 465, 476-477; 824 NW2d 258 (2012).

At the preliminary examination, the trial court permitted defendant to engage in the line of questioning that is the subject of this appeal, and JG admitted that when she was 14 years old, three years before the trial in this case, her mother suggested that she might allow JG's biological father to move back in with the family. JG further admitted, under oath, that she told her mother that she would accuse her father of inappropriately touching her if her mother allowed him in the home. JG's mother corroborated that story during her testimony at the preliminary examination. JG attempted to explain away her previous conduct by stating that she was younger, her father was abusive, and she did not fully understand the seriousness of the allegation.

Here, JG was aware that her mother again was considering the possibility of allowing a former love interest to move back into the family home. After being alerted to that possibility, JG informed her mother of the alleged sexual abuse by defendant. The similarities between the two situations are eerily striking and render JG's prior threat to falsely accuse her father highly probative of her character for truthfulness as to the allegations she made against defendant. Although JG's father eventually did move back into the family home and JG never followed through on the threatened allegations, those two facts, though also admissible, are insufficient to convince me that a reasonable juror would not have seriously questioned JG's motives in the matter before us.

Ultimately, considering the circumstances of this case, the decision on whether to believe JG in light of all of those competing facts should lay with the jury, not with this Court on appeal, and the jury in this case was denied the opportunity to make an informed decision based on admissible evidence on the single most important and, most likely, deciding issue in the case.

I also have taken into account that our Supreme Court has stressed that an error is more likely to be outcome determinative in cases such as these, "where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant . . ." *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010). Although the Supreme Court in *Gursky* was considering improperly admitted hearsay testimony corroborating the victim's version of the

story, the same reasoning applies here. See *id.* To wit, a jury being permitted to hear additional inadmissible testimony bolstering the credibility of the victim, like in *Gursky*, would have a similar effect as a jury being denied the opportunity to hear additional admissible evidence suggesting that the victim lacks credibility. Indeed, the Supreme Court also has held that an admissible and highly probative attack on a complainant's credibility in a case "providing mere 'he said, she said' testimony contradicting the complainant's version of events . . . would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt." *People v Armstrong*, 490 Mich 281, 291-292; 806 NW2d 676 (2011).

Considering the probative value of JG's prior threat to make a false accusation of inappropriate touching under almost the same circumstances as here, I would hold that "it is more probable than not that a different outcome would have resulted without the error." *Denson*, 500 Mich at 397 (quotation marks omitted); see also *Armstrong*, 490 Mich at 291-292. In this matter, it should be the province of the jury to determine whether to believe JG in light of *all* the evidence regarding her credibility. See *Salimone*, 265 Mich at 499-500.

I would reverse and remand for a new trial consistent with this opinion.¹

/s/ Michael J. Riordan

¹ Because, in my view, a new trial is warranted, defendant's remaining issues regarding the alleged ineffective assistance of counsel and necessity for a mistrial have been rendered moot and I would decline to consider them. *People v Pointer-Bey*, 321 Mich App 609, 626; 909 NW2d 523 (2017) ("Given that we have already granted defendant relief in connection with these issues, his [remaining] arguments in this regard are moot, and we need not consider them.").