

70144-4

70144-4

NO. 70144-4-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON J. EARL,

Appellant.

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

SETH A. FINE  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ISSUES**

(1) The defendant was charged with abusing a girl during a family party. The victim's mother and grandmother testified as State's witnesses. Years before, the mother had been abused by a family member. This person was present in the house at the time of the alleged abuse. The trial court admitted evidence of the prior abuse but excluded the abuser's identity. Did this ruling violate the defendant's constitutional right to confront witnesses or to present a defense?

(2) In closing argument, the defendant said that "we know" several facts. All of these facts represented inferences from the evidence. Was this argument so prejudicial that it can be challenged for the first time on appeal?

## **II. STATEMENT OF THE CASE**

### **A. EVIDENCE AT TRIAL.**

On Christmas Eve, 2010, there was a family party at a home in Granite Falls. Among the people at the party were 3½-year-old M.F., A.M. (her mother), S.M. (her grandmother), and Brandon Earl (the defendant). At one point in the evening, A.M. noticed that M.F. was not with the other children. A.M. went upstairs, where the children had been playing earlier. 3 RP 273-74.

A.M. opened the door to the defendant's bedroom.

When I opened it, I could hear a bunch of commotion. I look around, and I can see Brandon coming from the left side of the bed, kind of readjusting, sitting up to the right side of the bed. The covers were over his bottom half, fully dressed. [M.F.] is more towards the foot of the bed on the left side.

3 RP 279.

A.M. picked up her daughter and left the room. As they were walking down the stairs, M.F. said that Brandon told her not to tell.

3 RP 284. A.M. took M.F. into a bathroom and asked her what happened. M.F. didn't say anything. A.M. left the bathroom and sat her daughter on a stool next to S.M. A.M. then went to talk to the defendant's wife 3 RP 284-85.

S.M. asked M.F. what she was doing. M.F. said she was playing or watching TV. She then bent over and whispered in S.M.'s ear, "He licked my pee-pee." S.M. asked who she was talking about. M.F. said Brandon. 2 RP 360-62.

S.M. went into the garage, where A.M. was talking to the defendant and his wife. S.M. told them what M.F. had said. The defendant said no, that he was blowing butterflies. 3 RP 364-65.

Later that evening, A.M. and M.F. went home. As M.F. was getting ready for bed, she told her mother, "He made a mess down there." 2 RP 295-96.

A few days later, this incident was reported to police. 3 RP 298, 302-03. On January 7, 2011, police interviewed the defendant. A recording of that interview was introduced at trial. Ex. 40. A transcript was introduced for illustrative purposes. Ex. 58; 4 RP 545-46. The defendant told police that he was "blowing raspberries" on M.F.'s stomach. While he was doing this, his "face might of come in contact with down there." He said that his face was accidentally in contact with her genital area for 30 seconds. Ex. 58 at 27, 38.

Police were given two pairs of underwear that M.F. had been wearing around that time. On one of the pairs, amylase was found on the inside of the crotch area. 5 RP 672. Amylase is an enzyme found in saliva. It is found in lower levels in other body fluids, including urine. 5 RP 667. There was staining and a urine odor on that pair of underwear. 5 RP 671. The other pair had the same staining and odor, but no amylase was found on it. 5 RP 664, 727.

On the same pair of underwear that had the amylase, male DNA was also found. 5 RP 694. The amount of DNA is more

consistent with a body fluid deposit than a brief contact touch. 6 RP 696. The DNA was subjected to Y-STR analysis. That analysis looks solely at the Y chromosome, which is found only in males. This technique is useful for samples that contain large amounts of female DNA and smaller amounts of male DNA. 5 RP 768-69, 772-73.

The analysis disclosed a profile identical with that of the defendant. 6 RP 838. In a database that contains at least 23,000 samples, this profile does not occur. 6 RP 841, 902. Based on this information, it is 95% likely that this profile occurs less often than once in every 5200 males. 6 RP 845, 902.

#### **B. PRIOR ABUSE OF A.M.**

In pre-trial interviews, defense counsel learned that A.M. had been abused by a family member when she was a young girl. This family member was present at the Christmas party. CP 96-100 (quoting statements in interviews). A.M. was questioned about this at a pre-trial hearing. She testified that as far as she knew, the topic was never discussed among the family. The abuser was still a welcomed member of the family. "It was like 20 years ago, so I hope everybody is over it." 1 RP 135-36.

The State moved in limine to exclude evidence of this abuse. Defense counsel argued that the evidence was probative of A.M.'s state of mind. The court ruled that the existence of the prior abuse was probative, but not the identity of the abuser. Defense counsel argued that the presence of the abuser "goes to [A.M.]'s emotionality that night and her paranoia." The court rejected that argument, because there was no evidence to support it. 1 RP 183-86.

Defense counsel renewed this argument the next day. Again, she claimed that the abuser's presence showed A.M.'s and S.M.'s hypersensitivity, "given the presence of someone who made them particularly vigilant. 2 RP 200-02. The court adhered to its ruling:

I think the defense can adequately argue its facts and theory to the jury in that the Court is allowing the defense to bring out that [A.M.] was sexually molested as a child. You can bring out the age that she was at that time.

...

I don't see any prejudice in her testifying as to who made the report. But beyond that, getting into the facts of it or bringing [the name of the abuser] into it, I think, does invite the jury to speculate, as [the prosecutor] has argued.

It further leads the jury to start confusing the evidence, the facts in this case with facts in the case 20 years ago with [A.M.]

2 RP 206.

### **C. PROSECUTOR'S CLOSING ARGUMENT.**

The prosecutor gave a closing argument that covers 29 pages of transcript. 6 RP 970-98. The entire argument is attached to this brief as an appendix. In the argument, the prosecutor asked the jury to "draw on the collection of evidence that you heard." 6 RP 972. He reminded the jurors that it was their job to determine the facts:

You get to stop listening to me talk. You get to stop listening to Ms. Hardenbook [defense counsel] talk. You get to rely on your notes and your memories, and you guys get to decide what happened in this case. If there is ever a disagreement about what I remember or what Ms. Hardenbrook remembers, the fact is you guys get to be the deciders of that, okay?

6 RP 974-75.

In the argument, the prosecutor repeatedly talked about things that "you heard," "you saw," "you learned," or "you know." He used these or similar terms 45 times. On the other hand, the prosecutor referred six times to things that "we know," "we learned," or "we found out." 6 RP 977, 981, 989, 992. No objection was raised to any of these references.

### III. ARGUMENT

#### **A. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE IDENTIFYING THE PERSON WHO HAD PREVIOUSLY ABUSED THE VICTIM'S MOTHER, SINCE THAT EVIDENCE HAD MINIMAL PROBATIVE VALUE BUT A SIGNIFICANT POTENTIAL FOR PREJUDICE.**

The trial court allowed the defendant to elicit evidence that the victim's mother had herself been sexually abused. The court refused, however, to allow the defendant to elicit the identity of the abuser. The defendant claims that this ruling violated his constitutional rights to present evidence and to confront witnesses.

The standards governing this claim are well-established:

Evidence that a defendant seeks to introduce must be of at least minimal relevance. Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. If relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. The State's interest in excluding prejudicial evidence must also be balanced against the defendant's need for the information sought, and relevant information can be withheld only if the State's interest outweighs the defendant's need.

If the evidence is of high probative value, "no state interest can be compelling enough to preclude its introduction." State v. Jones, 168 Wn.2d 713, 720 ¶ 10, 230 P.3d 576 (2010) (citations omitted).

Although the rule is clear, the standard of review is not. The Supreme Court has recognized the trial court's discretion in

deciding whether to admit evidence, even when a constitutional challenge is raised. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 17-18, 659 P.2d 514 (1983). In Jones, however, the court said that an alleged violation of the right to present a defense would be reviewed de novo. Jones, 168 Wn.2d at 579 ¶ 7. Division Two of this court has attempted to combine these standards:

We review a trial court's decision on admission or exclusion of evidence for abuse of discretion. Thus, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. We may review de novo an alleged denial of the Sixth Amendment right to present a defense, but only if the evidence is material and even then only if the defendant's need to present the evidence outweighs the State's interest in precluding the evidence.

State v. Jones, 175 Wn. App. 87, 108 ¶ 10, 303 P.3d 1084, 1095 (2013) (citations omitted).<sup>1</sup>

In the present case, it is doubtful if the excluded evidence even satisfies the threshold requirement of minimal relevance. The trial court believed that it had no probative value. 1 RP 187. "Courts may, within their sound discretion, deny cross-examination if the

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<sup>1</sup> The Jones decisions from the Supreme Court and Division Two involve different defendants. The resemblance of names is coincidental.

evidence sought is vague, argumentative, or speculative.” Darden, 145 Wn.2d at 620-21.

The defendant argues that the evidence was relevant because it made the witnesses “predisposed to believe a family member could or would do something like this.” Brief of Appellant at 15. What the witnesses *believed* is, however, completely irrelevant. “[N]o witness may express an opinion as to the guilt of a defendant.” State v. Barr, 123 Wn. App. 373, 380, 98 P.3d 518 (2004), review denied, 154 Wn.2d 1009 (2005).

The defendant also argues that the presence of this former abuser put the witnesses on “high emotional alert” and therefore likely to mis-interpret events. Additionally, the defendant questions whether the witnesses would have left the victim unsupervised for 15 minutes while this person was in the house. Brief of Appellant at 15-16. As the trial court pointed out, these arguments are based on speculation. 1 RP 185; 2 RP 206. The abuse happened 20 years before. A.M. testified that the abuser had become a welcomed member of the family. 1 RP 135-36. The defendant offered no evidence to contrary. There was nothing to show that A.M. or S.M. was more protective or vigilant when this person was present than when he was not. Nor was there anything to show that they always

monitored the whereabouts of children at every moment that this person was around. The assumptions underlying the defense argument have no basis in the record.

Even if this evidence is considered relevant, that does not mandate its admission. The relevance is at best minimal. Evidence that is minimally relevant can be excluded to protect the fairness of the fact-finding process. Jones, 168 Wn.2d at 720 ¶ 10. This includes situations in which the evidence would distract or inflame jurors. Hudlow, 99 Wn.2d at 16. Here, the court believed that the evidence would invite the jurors to speculate and lead them to confuse the evidence. 2 RP 206. These were proper bases for excluding minimally relevant evidence.

Based on similar reasoning, courts from two other jurisdictions have upheld the exclusion of evidence that State's witnesses had been victims of sexual abuse. State v. MacKinnon, 288 Mont. 329, 957 P.2d 23 (1998); State v. Albert, 50 Conn. App. 715, 732-33, 719 A.2d 1183, 1191-92 (1998), aff'd on other grounds, 252 Conn. 795, 750 A.2d 1037 (2000).<sup>2</sup> Each of these cases involved prosecutions for sexual offenses, where the victim's

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<sup>2</sup> The Connecticut Supreme Court's review was limited to an unrelated issue. Albert, 252 Conn. at 801 n. 9, 750 A.2d at 1042.

mother testified as a State's witness. In each case, the trial court excluded evidence that the mother had been a victim of abuse. Both appellate courts held that this ruling did not violate the defendant's constitutional rights.

In MacKinnon, the defendant raised arguments very similar to those in the present case. He claimed that the mother's "personal problems may have affected her perceptions of [her daughter's] initial statements that [the defendant] had touched her in inappropriate places and caused [the mother] to overreact." The Montana Supreme Court held that "the causes of [the mother's] reactions to [her daughter's] disclosures are not facts of consequence in determining [the defendant's] guilt." Furthermore, this evidence would have created unfair prejudice and confused the issues for the jury. Consequently, excluding this evidence did not violate the defendant's confrontation rights. Mackinnon, 288 Mont. at 340-43 ¶¶ 31-40, 957 P.2d at 29-31.

In Albert, the defendant claimed that the mother's abuse demonstrated her "bias and motives both as a witness and as a key factor in [her daughter's] testimony." The trial court determined that presenting this evidence would lead to testimony that would constitute "a trial within a trial." The Appellate Court of Connecticut

held that this ruling was within the trial court's discretion and did not violate the defendant's right of confrontation. Albert, 50 Conn. App. at 732-33, 719 A.2d at 1191-92.

In the present case, the trial court admitted more evidence than was allowed in either MacKinnon or Albert. Unlike in those cases, the court did admit evidence that the mother had been an abuse victim. It only excluded evidence of the identity of the abuser. That fact had little or no relevance. It had a substantial likelihood of confusing the issues and evoking prejudice. Excluding this evidence was a proper exercise of discretion and did not violate the defendant's constitutional rights.

**B. THE PROSECUTOR'S USE OF THE PHRASE "WE KNOW" IN CLOSING ARGUMENT WAS NOT REVERSIBLE ERROR.**

**1. When Considered In Context, The Prosecutor's Argument Urged The Jury To Draw Inferences From The Evidence.**

The defendant claims that the prosecutor engaged in improper "vouching" by using the phrase "we know" in closing argument. "Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness." State v. Thorgerson, 172 Wn.2d 438, 443 ¶ 10, 258 P.3d 43 (2011). A prosecutor has, however, "wide latitude to argue

reasonable inferences from the evidence, including evidence respecting the credibility of witnesses.” Id. at 448 ¶ 21.

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*

State v. McKenzie, 157 Wn.2d 44, 53-54 ¶ 15, 134 P.3d 221(2006)

(court's emphasis).

A prosecutor's use of the phrase "we know" does not change this analysis.

Although the use of [the] phrases ["we know" and "I submit"] has been often criticized (and discouraged) by this court and others, it is not always improper. It is only improper when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility. Use of "we know" and "I submit" is not plain error if it is used to refer the jury to the government's evidence and to summarize the government's case against the defendants.

United States v. Bentley, 561 F.3d 803, 811-12 (8th Cir.), cert. denied, 558 U.S. 865 (2009) (citations omitted); accord, United

States v. Ebron, 683 F.3d 105, 141-42 (5<sup>th</sup> Cir. 2012), cert. denied, 2013 WL 5878023 (U.S. 2013).

Here, the challenged remarks related solely to the evidence at trial. The prosecutor did not say or imply that he had some special personal knowledge that the jurors lacked. The thrust of his argument was exactly the opposite – that the jurors knew everything that he did. Although the phrasing was not ideal, the argument essentially urged that the jurors should draw certain conclusions from the evidence. In context, the argument was not improper.

The defendant argues that the use of “we” “align[s] the prosecutor and the jury on the same side as investigators out to find the truth.” Brief of Appellant at 27. Although use of the first person plural implies some shared characteristic, the nature of that characteristic depends entirely on the context. The characteristic might be membership in some group, but the group could be small (“we are family”) or large (“we are all human”). Alternatively, the shared characteristic might be cautious neutrality (“we are negotiating our disputes”) or even implacable hostility (“we are enemies to the death”). Here, the prosecutor’s remarks referred to evidence introduced at trial. “[T]he ‘we’ could reasonably be

interpreted in this context to refer to everybody who was in court when the evidence was presented.” Using “we” in that context is not improper. Nunn v. State, 753 N.W.2d 657, 663 (Minn. 2008).

The defendant compares this case to State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (2002). There, a Pacific County prosecutor asked the jury if they were “going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?” Id. at 143. As the court pointed out, this argument “emphasized the fact that [defense] counsel and expert witnesses were outsiders.” Id. at 703. The argument in the present case bears no resemblance to that argument. When considered in context, the argument in the present case was proper.

**2. Since Any Improper Suggestions Could Have Been Cured By An Appropriate Instruction, The Issue Cannot Be Raised For The First Time On Appeal.**

Even if the argument is considered improper, the defendant still bears the burden of showing prejudice.

The burden to establish prejudice requires the defendant to prove that there is a substantial likelihood that the instances of misconduct affected the jury's verdict. The failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have

been neutralized by an admonition to the jury. When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case.

State v. Thorgerson, 172 Wn.2d 438, 442-43 ¶ 8, 258 P.3d 43 (2011) (citation omitted).

This standard is based on the defendant's duty to object to improper arguments.

Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. An objection is unnecessary in cases of incurable prejudice only because there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.

Based on these principles, misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom. Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a defendant from having a fair trial?

State v. Emery, 174 Wn.2d 741, 762 ¶¶ 39-40, 278 P.3d 653 (2012) (citations and footnote omitted).

In general, it is presumed that the jury will follow the court's instructions to disregard an improper argument. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). Incurable prejudice may, however, be found if the

prosecutor's statements "engendered an inflammatory effect." Emery, 174 Wn.2d at 763 ¶ 41. For example, a prosecutor's remarks were incurably prejudicial when he referred to a group with which the defendant was affiliated as "a deadly group of madmen." State v. Belgrade, 110 Wn.2d 504, 755 P.2d 174 (1998). Similarly, incurable prejudice arose when a prosecutor implied that defense witnesses should not be believed because they were from out of town and drove fancy cars. Reed, 102 Wn.2d at 146-48. When a prosecutor's remarks do not rise to the level of these cases, they will not be considered incurably prejudicial. Emery, 174 Wn.2d at 763 ¶ 41.

Here, the prosecutor's remarks bore no resemblance to the arguments condemned in Belgrade and Reed. The prosecutor neither used inflammatory language nor appealed to sympathy and prejudice. At most, the argument may have subtly introduced personal opinion or misled the jury about its role. Had the jurors been reminded of their proper function and the kind of evidence they could consider, there is no reason to believe they would have been unable to follow those instructions.

The defendant's argument seems to assume that jurors are like well-trained dogs, who infallibly obey the slightest gesture from

their handler. According to the defendant, if a prosecutor even hints that he believes the defendant guilty, or that he and the jurors are aligned, the jurors will follow that hint and render a verdict accordingly. Furthermore, the defendant claims that there is nothing the court can say to prevent the jury from carrying out the prosecutor's wishes. If jurors are truly so subservient to prosecutors, it is hard to see what value the jury system has. "[I]f we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure." State v. Pepon, 62 Wash. 635, 644, 114 P. 339 (1911).

The defendant cites three cases in which purportedly similar arguments led to appellate reversal. All of them involved misconduct much more serious than the mere use of the phrase "we know." In one, the prosecutor also expressed a personal opinion about the defendant's credibility, appealed to the jurors' passions, improperly commented on the defendant's failure to call a witness, mis-stated evidence, referred to matters not in evidence, and improperly attacked the defendant's character. The Minnesota Supreme Court said that the scope of the misconduct was

“unprecedented in this court’s memory.” State v. Mayhorn, 720 N.W.2d 776, 791 (Minn. 2006). In a second case, the prosecutor improperly diminished the presumption of innocence, commented on the defendant’s exercise of his right to remain silent, mis-stated the evidence, infringed on the fact-finding function of the jury, and made comments that “bordered on improper denigration of defense counsel.” People v. Johnson, 149 Ill. App. 3d 465, 500 N.E.2d 728 (1986). In a third case, the prosecutor expressed personal opinions, appealed to jury sympathy, and referred to facts outside the record. Although a lower court granted a new trial, the Connecticut Supreme Court overturned that decision and reinstated the conviction. State v. Spencer, 81 Conn. App. 320, 840 A.2d 7 (2004), rev’d, 275 Conn. 171, 881 A.2d 209 (2005). The alleged misconduct in the present case is not comparable to that in any of these cases.

The defendant complains about the repeated nature of the alleged misconduct. The prosecutor used the challenged term half-a-dozen times in a 29-page argument. Most of the time, he referred to what “you heard” or “you know.” Had the defendant ever objected to use of the word “we,” the court could have sustained that objection and directed the prosecutor to avoid such argument.

There is no reason to believe that the prosecutor would have disobeyed that directive. One of the purposes of an objection is “to prevent counsel from making additional improper remarks.” Emery, 174 Wn.2d at 762 ¶ 39. Since the defendant could have minimized the problem by a timely objection, the repetition of similar arguments does not justify a new trial.

In any event, whether the arguments are looked at singly or in combination, the result is the same. Nothing in the prosecutor’s arguments was sufficiently inflammatory as to be beyond reach of an appropriate curative instruction. This being so, the defendant’s failure to object prevents him from raising the issue on appeal.

#### **IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on November 22, 2013.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
\_\_\_\_\_  
SETH A. FINE, WSBA # 10937  
Deputy Prosecuting Attorney  
Attorney for Respondent

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(Court in recess)

(The following proceedings were had in the presence of the jury)

THE COURT: We will proceed with instructions on the law. We will hand those out to you. After I read them, we will launch into final arguments of counsel. I expect we will be here until after 5:00 tonight to get done with the arguments because we need to get this case to the jury. I don't want to delay any further doing that. We will hold you here longer to accomplish that this afternoon.

JUROR NO. 4: I forgot my glasses.

THE COURT: Yes, you will need your glasses.

(The Court's instructions were read to the jury by the Court)

THE COURT: You will now hear the arguments of counsel. Please give your attention to Mr. Alsdorf.

MR. ALSDORF: Thank you, Your Honor.

Could I have the screen down, please?

Ladies and gentlemen, a three-and-a-half-year-old girl told you, through her mother and her grandmother, exactly what happened to her on Christmas Eve 2010. What she told to her mother and to her grandmother, her most trusted

1       caregivers, was something that a three-and-a-half-year-old  
2       child simply doesn't make up or imagine, doesn't just come  
3       up with that out of nowhere.

4             She happened to describe, over the course of that  
5       evening, an act which, as adults, we probably all  
6       recognize to be something that happened, but we probably  
7       don't recognize that it happens all the time to little  
8       kids. She described oral sex between a man and a woman,  
9       but she described it that it happened to her: He licked  
10      my pee-pee. Brandon told me not to tell. He got up and  
11      shut the door. He made a mess down there.

12            I got up in my opening statement -- seems like a long  
13      time ago now -- and told you that this case was going to  
14      be all about you using your common sense and bringing back  
15      years of experience that you collectively have as citizens  
16      in this country, in this county, and bring it in that jury  
17      room with you in order to put things together, in order to  
18      form a picture in your mind of exactly what happened in  
19      that bedroom that only two people know what really  
20      happened.

21            I asked you to draw on the evidence that you would hear  
22      about what happened on the night in question from the  
23      witnesses in the case, people who saw things, people who  
24      heard things, and you have done that now. I ask you to  
25      draw on what you learned about what the defendant himself

1 said about what happened. You've heard that audio now.  
2 You got a chance to read the transcript along with that  
3 audio. You will not get a chance to read that transcript  
4 again, by the way, but you will get to play that audio as  
5 many times as you want. You heard that side of the  
6 evidence in the case.

7 I also told you that there would be a lot of forensic  
8 evidence in this case and, indeed, there was. We spent a  
9 lot of time talking about the forensic evidence in this  
10 case. To summarize, I'm talking about the amylase on the  
11 inside of those Nick Jr. underpants, along with the seven  
12 nanograms of male DNA that, according to two forensic  
13 scientists with the Washington State Patrol, is more  
14 consistent with the body fluid deposit, saliva, according  
15 to the State's theory of the case, than it is with any  
16 sort of touch or transfer. That is hugely important.

17 None of those categories of evidence are in and of  
18 themselves what I'm asking you to hang your hat on to know  
19 beyond a reasonable doubt that the defendant placed his  
20 tongue on that little girl's vagina with nothing in the  
21 between.

22 I'm asking you to draw on the collection of evidence  
23 that you heard last week and this that you have an abiding  
24 belief that you know this happened. I will talk to you  
25 about that in a little bit.

1           First of all, about those three categories, I want to  
2 talk to you about what you learned about the factual  
3 testimony from that night. You did hear from witnesses,  
4 particularly April and Sherry Mathis, who had the most  
5 direct ability to interact with little Mia on that night.

6           You heard a mother in April Mathis -- well, according  
7 to defense's theory in opening would present to you as  
8 someone who was hypersensitive to the issue of sexual  
9 abuse, someone who was looking to confirm what she knew to  
10 be true because she was suspicious about everything at  
11 every turn.

12           Is that the woman that presented here on the witness  
13 stand? I would argue that is entirely not the case. I  
14 would argue to you that, if anything, April Mathis  
15 presented as someone who is very conflicted about the  
16 horrible news that she learned on that night.

17           You heard her break down in tears when she described at  
18 first not wanting the defendant to go to jail, that she  
19 only wanted him to get help, that she didn't want a big  
20 confrontation that night that would affect her daughter or  
21 could result in someone going to jail for murder. She  
22 wanted to keep this within the family at first.

23           This isn't a woman who is motivated by any sort of  
24 improper motive or improper speculation about what  
25 happened. All she did was go looking for her daughter

1 when she was missing from 10 to 15 to 20 minutes. When  
2 she opened the door and got into that room, she heard a  
3 massive -- heard and saw a big repositioning on that bed.  
4 She couldn't quite make it out, but you saw her describe  
5 it physically as best that she remembered, that she  
6 remembered the defendant basically returning to a sitting  
7 position, having been leaned over towards Mia. She  
8 remembered that the covers were disturbed.

9 Compare that to Stefanie Waugh, formerly Stefanie Earl,  
10 who said, oh, no, the covers were completely made like a  
11 hotel the whole time.

12 MS. HARDENBROOK: Objection, facts not in  
13 evidence.

14 MR. ALSDORF: The fact is, ladies and  
15 gentlemen --

16 THE COURT: I will overrule the objection.

17 MR. ALSDORF: I will take a moment to speak  
18 about that. Finally, you get to decide what happened in  
19 this case. You are the people who determine what are the  
20 facts, what's not. You get to stop listening to me talk.  
21 You get to stop listening to Ms. Hardenbrook talk. You  
22 get to rely on your notes and your memories, and you guys  
23 get to decide what happened in this case. If there is  
24 ever a disagreement about what I remember or what  
25 Ms. Hardenbrook remembers, the fact is you guys get to be

1 the deciders of that, okay?

2 What you learned from that night is that one thing that  
3 Mia said happened, there has been some differing testimony  
4 about the words she used. Did she say "peep?" Did she  
5 say "pee-pee?" Did she say "pee?" Those are the kinds of  
6 differences you expect to fade over time. This is over  
7 two years ago this happened.

8 The telephone game that you heard Tyler Quick talk  
9 about with the defendant in his interview. Some things  
10 you don't forget. You don't forget the basic gist of what  
11 your daughter or granddaughter told you on that night on  
12 Christmas Eve, delivered in that way.

13 By the way, one word has not changed about what Mia  
14 said happened to her. She said "licked." No one has ever  
15 said Mia said anything other than "licked." Kids know  
16 what "lick" means. She didn't say "kiss." She didn't say  
17 "blow raspberries" or "blow bubbles" or "blow butterflies"  
18 or "zerbert," if you have ever heard that one before. She  
19 said "lick" and that is huge. She is describing something  
20 that she should not know about. She found out about it on  
21 that night.

22 You heard evidence of an actual motive in this case  
23 and, no, I'm not talking about anyone coming right out and  
24 saying that the defendant is sexually attracted to Mia or  
25 anything quite so overt as that, but you have evidence

1 that can give you a glimpse into the defendant's state of  
2 mind because Mia talked about it.

3 Mia talked about "Brandon told me not to tell." Well,  
4 if Brandon told her not to tell, he is hiding something.  
5 He has got a guilty conscience. He knows what he doesn't  
6 want Mia to talk about. Thank goodness, she did.

7 You know that Brandon got up to shut the door. Why did  
8 he do that? Why do you make it so that you are the only  
9 one alone in a room with someone who is not related to  
10 you? The only possible reason to do that is the reason  
11 that Sherry Mathis basically has a policy that no kids  
12 should ever be alone in a room with another adult that  
13 they don't know.

14 Evidence of the defendant's motive. You know that he  
15 had the opportunity to do this. Ten, 15, 20 minutes,  
16 whatever --

17 MS. HARDENBROOK: Objection, facts not in  
18 evidence. There was no testimony about 20 minutes.

19 MR. ALSDORF: I disagree. Stefanie Waugh talked  
20 about it.

21 THE COURT: I will overrule the objection.

22 As counsel has indicated, the jury is the final decider  
23 in terms of what the facts are that have to be proven in  
24 this case.

25 MR. ALSDORF: Whatever it is, 10, 15, 20, I know

1 it's hard to wrap your mind around the fact that how could  
2 someone be so bold and so stupid to do this during a  
3 Christmas party. That does boggle the mind, but so does  
4 the fact that these crimes happened at all. We know it  
5 did. It happened to Mia.

6 You heard evidence about whether or not Mia was ever  
7 alone with the defendant after everything hit the fan that  
8 night. Who is the only person who ever talked about that?  
9 The former Stefanie Earl. She said, oh, yeah, I remember  
10 after all this happened and we had the big confrontation  
11 in the garage, then at least one or two more times Mia was  
12 up there laying down with the defendant again. How  
13 preposterous is that idea from April Mathis' perspective  
14 and from the defendant's perspective? You heard April  
15 categorically deny that she would ever allow Mia to be  
16 alone with the defendant after this accusation came up.  
17 It simply doesn't make sense.

18 On the flip side, neither does it make sense for the  
19 defendant or his wife to even allow that to happen even if  
20 the allegation is completely false. He has just been  
21 accused of molesting a child. Oh, it's April Mathis' job  
22 to make sure she knows where her child is and, you know,  
23 no reason to be concerned about whether or not that child  
24 ever ends up alone in the room with that person again on  
25 that evening. That does not make sense, and it should

1 tell you a great deal about how to assess the credibility  
2 of Stefanie Earl.

3 Keep in mind that Stefanie Earl had a chance to talk  
4 with the defendant for at least five minutes up in the  
5 bedroom when she described herself as pushing and  
6 insisting that the defendant should go down and confront  
7 April and Sherry about these accusations. Why would she  
8 have to push him on that issue? Why wouldn't the  
9 defendant -- of course, she also said he sprang right up,  
10 okay? So there are two very inconsistent things.

11 Why should she have to push and insist at all?  
12 Shouldn't the defendant be angry and outraged that he has  
13 been accused of something like this? I would submit to  
14 you, ladies and gentlemen, that the defendant knew that he  
15 had been caught. The defendant knew that someone knew  
16 what he did and that his instructions to a  
17 three-and-a-half-year-old girl about not telling, that  
18 somehow had been ignored, and that he was in trouble.

19 No one saw the defendant blowing any sort of  
20 raspberries or whatever you want to call it on different  
21 children that night. There has been plenty of testimony  
22 about, oh, sure, Brandon Earl has given raspberries to  
23 kids in the past. No one said it happened that night;  
24 certainly not Mia. Mia was very clear what happened to  
25 her. It was a lick. It wasn't a kiss or a blow or a

1 raspberry or anything else.

2 You've actually heard some testimony about Mia's  
3 behavior that night. You heard that she started out  
4 playful, basically part of the group with all the other  
5 kids, racing up and down the stairs, everything like that,  
6 interacting with the defendant who, by the way, she never  
7 has had any problem with before this happened. But  
8 somehow that changed when April sprang into that room and  
9 she saw -- well, she demonstrated it to you with her eyes  
10 more than she did talk about it with words. You saw in  
11 April's eyes she was trying to recreate a look of  
12 surprise, a deer in the headlights that she saw her  
13 daughter have in that moment on that bed.

14 After that moment, when Mia came down the stairs and  
15 whispered that Brandon told me not to tell, and then told  
16 her grandma what happened on the stool in the kitchen,  
17 grandma described her as quiet. She was quiet for the  
18 rest of the evening. That's about all the evidence that  
19 you would expect to find from a three-and-a-half-year-old  
20 girl who just had something happen that didn't hurt, okay?  
21 It might have tickled. It might have even felt good,  
22 okay?

23 But she doesn't know. She doesn't know if what  
24 happened was wrong or anything about it. She shouldn't  
25 know anything about it. She was quiet. She was probably

1 picking up on the fact that the grown-ups around her in  
2 her life were becoming more and more disturbed about the  
3 information that they were learning.

4 You have enough evidence before you to know that  
5 something was definitely wrong with the defendant that  
6 night. Counsel said in her opening that he just wasn't  
7 feeling it, and that's probably a good way to describe it.  
8 He wasn't feeling it. He licked it. He licked Mia.

9 You know that he went up to his room before any of the  
10 other adults were tired at this party and sort of withdrew  
11 himself from this social gathering. You know that he was  
12 drinking. You know that he was having troubles with his  
13 wife, that he had worked hard that day.

14 I would submit that you also have evidence that he was  
15 initially reluctant to come down and confront these  
16 allegations. It doesn't make sense other than in the  
17 context of someone who has something going on in their  
18 mind that would cause him to try to do something like this  
19 and who is then caught for doing it.

20 Let's talk about the defendant's statement a little  
21 bit. You heard Detective Ferreira and Detective Quick  
22 talk about that interview. The interview was on display  
23 for you to assess and critique and mostly determine are  
24 the things the defendant says on that tape credible in the  
25 slightest? I would submit to you that, no, they are not.

1           Detective Ferreira talked about that, generally  
2 speaking, it is not going to happen that someone walks  
3 into a police station and fully confesses to one of these  
4 horribles crimes. It just doesn't happen. It's the  
5 rarest of occasions.

6           What you are looking for is admission and provable  
7 lies. There are ample of both of those things in the  
8 defendant's statement for you to find. Why would there be  
9 provable lies other than the natural conclusion of that,  
10 which is the defendant knows he has been caught? He knows  
11 that he is locked into a statement that basically is  
12 consistent with whatever you saw in that garage that  
13 night. He is going to try to explain it the best way that  
14 he knows how. Do you remember those words? He tried to  
15 explain it the best way he knew how.

16           Well, nice try. Provable lies. He said he had never  
17 been alone with Mia ever before this incident. It's on  
18 the tape. You can hear it for yourself. We know that's  
19 not true because of what we learned about that birthday  
20 party in the garage that happened a few weeks before all  
21 this in which we have multiple witnesses saying that  
22 Brandon was alone with Mia during that time.

23           You heard Brandon talk about how drunk April Mathis was  
24 at this party and how she was basically the only one who  
25 was having a drinking problem at the party and everyone

1 else was keeping it safe and sober, basically. Does that  
2 jibe with your memory of what people testified to as far  
3 as how much people had to drink?

4 Keep in mind this is over two years ago, right? Is  
5 each person going to remember exactly what they drank?  
6 No. That's one of those things that falls into the  
7 category of that kind of detail fades with time.

8 Like when April told you that she had a shot of  
9 Fireball and one to two glasses of wine, and maybe,  
10 according to Annette Tupper, the defense witness, you  
11 could add a beer or two on top of that, over a period of  
12 multiple, multiple hours.

13 How does that compare to Sheri Morrow who had four,  
14 five, six shots of whiskey, which was abnormal for her  
15 because she was sad about certain people that weren't  
16 going to be at the party? Or with Stefanie Earl, who  
17 admitted that she had many drinks over the course of that  
18 evening.

19 You heard the defendant on that tape say, no, he was  
20 sure, he was sure that Mia was wearing jeans or slacks.  
21 He remembers. Keep in mind, this statement was taken on  
22 November 7, 2011, so that is two weeks after this  
23 incident.

24 MS. HARDENBROOK: January.

25 MR. ALSDORF: Yes, January 7, 2011. I added a 1

1 in there. Thank you, counsel.

2 So two weeks after the incident. Of course, he places  
3 his own mouth over that girl's vaginal area. So you  
4 figure two weeks after that, if it's an accident, you are  
5 going to remember what kind of pants those were. But here  
6 it is. Red tights taken on the night of the incident. So  
7 was he just not remembering two weeks later? Or did he  
8 have a reason to lie? Did he have a reason to worry about  
9 what might be found in that area?

10 Here is another thing, another provable lie. He says  
11 in that statement that April came upstairs and flung the  
12 door open, not once but twice, before everything hit the  
13 fan, okay? He basically does a repeat of April came in,  
14 flung the door open, Mia was by my side, and then he told  
15 her to take the kid away, she did so, and then, all of a  
16 sudden, it happens all over again. That's the time that  
17 April whisks her daughter out of the room, goes  
18 downstairs, and then everything goes from there.

19 He is the only person who testifies to two different  
20 incidents happening that way. Remember I talked a few  
21 minutes ago about Stefanie Earl being the only one who  
22 testified to an incident after everything hit the fan  
23 where, all of a sudden, Mia was upstairs again  
24 inexplicably with the defendant after this happened?

25 Those two things, in and of themselves, are entirely

1        improbable, don't make sense at all. But when you compare  
2        them together, and realize husband and wife had talked  
3        about this before both of them talked to the police, you  
4        realize that someone just got their story wrong. It was  
5        supposed to be two times, right? There was supposed to be  
6        the time that April flung the door open and took her  
7        daughter downstairs. There was supposed to be the time  
8        afterwards when inexplicably Mia was there after the  
9        incident.

10        The defendant made a mistake. He said inexplicably  
11        that April came upstairs and flung the door open two times  
12        before any of this happened, and that is not supported by  
13        any of the evidence. It helps you know that the defendant  
14        was lying.

15        What are some of the admissions that the defendant  
16        made? Well, the biggest one -- this is probably the  
17        biggest one in the whole case really. That from a common  
18        sense perspective, 30 seconds is no act. That's  
19        impossible. Think about that for a second or 30. An  
20        accident down there in the genital region of a  
21        three-and-a-half-year-old child. Is he saying that he  
22        missed? Mia's body is too tiny that he just missed his  
23        mark for 30 seconds? Why does it take 30 seconds to  
24        figure that out?

25        There is a second hand on the clock behind you and the

1 accident starts now. He is blowing. He is blowing his  
2 raspberries. It has been five seconds. It's an accident.  
3 Is he figuring it out yet? It has been 10 seconds now.  
4 He's still blowing, still making that raspberry sound,  
5 tickling that girl. But you are in the wrong place. Is  
6 it an accident yet? It's 20 seconds. When do you figure  
7 out it is an accident and you keep blowing and blowing and  
8 blowing? And now, 30 seconds is over. That's no  
9 accident.

10 It's not like Detectives Quick or Ferreira put those  
11 words in his mouth. Listen to the tape. He came up with  
12 that estimate. They gave him multiple chances to go back  
13 on that and he tried. I will get to that in a minute.  
14 But he confirmed it was 30 seconds, no more, no less; not  
15 10 minutes, not one minute, 30 seconds.

16 You didn't really hear this on the tape, but you heard  
17 Detective Quick talk about it that there comes a point  
18 when the defendant gets teary-eyed, and Detective Quick is  
19 talking about I can see how it's tearing you up inside,  
20 how you want to come clean about this, and his answer,  
21 "yeah." What does that tell you about what was going on  
22 in that man's mind?

23 Now, it's understandable that it would be hard for  
24 anyone, even someone who has done this, to come to terms  
25 with what they have done, because it's a horrible crime.

1 So even people that would have done this don't want to  
2 necessarily think of themselves as someone who could have  
3 done this. You have seen evidence of that in the  
4 defendant's own statement.

5 For example, how he keeps coming back to the tummy.  
6 Even though you hear him say in that audio that he himself  
7 acknowledges inappropriately placing his mouth in her  
8 genital area for 30 seconds by accident, of course. He  
9 keeps trying to come back to tummy. Why does he keep  
10 doing that? Because he can't bring himself to come to  
11 terms internally with what he has done.

12 Another evidence of that is how he keeps saying, well,  
13 on the night when this all blew up and I had to go  
14 downstairs and confront the allegation, they kept saying I  
15 had touched Mia. Well, no, that wasn't the accusation.  
16 The accusation is that you licked Mia. When he keeps  
17 trying to bring it back to touch, you can see the  
18 minimization that Detective Quick talked about. You can  
19 see how hard it would be to admit that you have done  
20 something like this.

21 I encourage you to review the defendant's statement as  
22 many times as you want and think to yourself does this  
23 even come close to providing a reasonable explanation for  
24 what happened in that room. I submit that you will each  
25 come to the conclusion that the answer to that is a

1       resounding no. Once you know that the defendant's story  
2       isn't worth the tape that it's recorded on, you can make a  
3       number of other different conclusions from there.

4             What does it mean that you know he's lied? It tells  
5       you a great deal. It tells you that he knows that the  
6       very few words that that little girl said about what  
7       happened are the real version of what happened.

8             I want to talk a little bit about the physical  
9       evidence, the forensic evidence in this case. Just as a  
10       practical matter, you guys get all the exhibits that have  
11       been admitted into evidence, with a few exceptions, that  
12       basically include the pictures and the actual physical  
13       property, okay? You don't get transcripts. You don't get  
14       police reports. That's the way the Rules of Evidence  
15       work. Maybe you wish --

16            MS. HARDENBROOK: Objection, Your Honor. They  
17       get their instructions on the law from the Court.

18            THE COURT: I'll sustain the objection on the  
19       comment on the Rules of Evidence.

20            MR. ALSDORF: Fair enough.

21            THE COURT: The Court has instructed the jurors  
22       regarding what they will see.

23            MR. ALSDORF: You will get what you get. Don't  
24       get upset. That's what I tell my kids.

25            I would encourage you to not be worried about

1 interacting with that evidence back there, okay? You  
2 don't need to be concerned with wearing gloves or  
3 protecting anything in the future, okay? This evidence is  
4 yours now. You can interact with it however you want. To  
5 the extent you are comfortable, I will encourage you to do  
6 that because it's important.

7 What you learned about the evidence in this case is  
8 that -- I'll take it item-by-item. These are the little  
9 tights that Mia was wearing that night. First of all,  
10 Kristina Hoffman interacted with all the evidence in this  
11 case in a way that basically defines the professionalism  
12 that is expected of those forensic scientists at the  
13 Washington State Patrol Crime Laboratory.

14 You didn't hear Dr. Riley take any issue with how  
15 Kristina Hoffman interacted with evidence as a scientist.  
16 I would submit that's because she is beyond reproach in  
17 that area. What she found when she examined the tights  
18 was that, first of all -- and this is a big, huge "first  
19 of all" -- the tights were negative for amylase on the  
20 exterior crotch portion of the tights.

21 How can a negative result be significant in a case like  
22 this? Well, it just proves the defendant's theory. Well,  
23 I suppose the defendant's theory is actually that there  
24 were jeans or slacks.

25 MS. HARDENBROOK: Objection. He can't possibly

1 know what the defendant's theory is.

2 THE COURT: Sustained.

3 MR. ALSDORF: The defendant said that there were  
4 jeans or slacks on that child. We know that that's not  
5 the case. But whatever was on that child, he said he had  
6 his mouth down there for 30 seconds. You would expect, if  
7 he was blowing raspberries on a clothed surface for 30  
8 seconds, that there is going to be saliva on those clothes  
9 that would result in an amylase hit on the crotch of the  
10 tights. That's a huge problem with the defendant's story.

11 Kristina Hoffman also found a mixture of DNA by  
12 standard DNA analysis that was consistent with at least  
13 four contributors of which the defendant and Mia were both  
14 included in that list of potential contributors. But the  
15 statistic is relatively significant, right, because it is  
16 one in 2,900 people in the US population who could also  
17 have been contributors to that mainstream.

18 I submit to you that is evidence of plenty of people  
19 basically picking up that child during the night, okay,  
20 interacting with Mia in a way that's entirely appropriate.  
21 That's because, keep in mind, we are talking about the  
22 exterior of her garments. So it's really not that  
23 significant in the context of trying to figure out did the  
24 defendant lick that girl's vagina with nothing in-between.

25 I hate to keep coming back to these terms, but that's

1        what this case is about. Sometimes it's difficult to talk  
2        about these things, and I hope you can get over that in  
3        your deliberations, but we need to confront what this  
4        allegation is.

5            You know that the tights were worn correctly. I expect  
6        that there will be some argument made about suggesting  
7        that you can't know whether the tights were worn  
8        inside-out or right-side-in or anything in-between, but  
9        consider this. The tights came to Kristina Hoffman  
10       inside-out, okay? Anyone who uses your common sense or  
11       has interacted with small children or even any of you  
12       ladies on the panel who take off your own tights know that  
13       the quickest, easiest way for tights to be taken off  
14       someone is to have them end up inside-out, okay? You  
15       actually have to be pretty careful about that process in  
16       order to make them come off in a way that's not  
17       inside-out.

18           Second, you know that the stains on the bottom of the  
19       feet of those tights were on the exterior, if you are  
20       referencing tags on the garment. If there is stains on  
21       the bottom of the feet on the outside, that is indicating  
22       Mia was walking around, picking up things on the bottom of  
23       her feet, by wearing them the correct way, right-side-out.

24           So moving to the Disney underwear. Well, as it  
25       happens, once all the testing was completed on the two

1 pairs of underwear, it turns out that the Disney underwear  
2 certainly were not the pair that Mia was wearing that  
3 night. It falls into the category of the proof is in the  
4 pudding really. Well, one of those pairs of underwear had  
5 the quantity of DNA that is consistent with the body fluid  
6 deposit from the defendant and one of them didn't.

7 The Disney underwear didn't, but there are still some  
8 things you can learn in this case based on those Disney  
9 underwear. One thing that you can learn is that the  
10 yellow staining on that Disney underwear being on the  
11 interior portion shows that she wore that pair of  
12 underwear correctly, right? That's circumstantial  
13 evidence that she wears her underwear correctly in  
14 general.

15 I would also point out that both of these pair of  
16 underwear have graphics on them, right, like a pretty  
17 picture related to Disney or Nick Jr. You can see that  
18 for yourself back in the jury room. Well, that also is  
19 circumstantial evidence that these pairs of underwear were  
20 worn correctly because one thing that a child likes or is  
21 proud of, I want the Disney underwear, I want the Nick Jr.  
22 underwear, I want the fairy or the princess to be showing,  
23 to be the right-side-out.

24 But the biggest scientific significance of the Disney  
25 underwear is that those, too, were negative for amylase.

1 So what does that have to do with anything if we are  
2 saying that this pair was worn on that night? Here is  
3 what it has to do with it. There is going to be an  
4 argument, I anticipate, that any amylase result, like  
5 Dr. Riley said, any amylase result on the inside of any  
6 underwear has to be from a false positive for urine,  
7 right? That's the argument.

8 Well, there we have the Disney underwear with yellow  
9 staining, negative for amylase. It says it all.

10 The Nick Jr. underwear. This is the pair that Mia wore  
11 on that night. The proof is in the pudding. The  
12 defendant said that there would be no reason -- no reason  
13 -- for his saliva, for his DNA, to be on the inside of  
14 that little girl's underwear. What have we just found out  
15 through a meticulous, rigorous course of testimony over  
16 the past week? We found out that, in fact, the defendant  
17 was wrong about that.

18 The yellow staining, the graphics on the underwear,  
19 those are the things that help you know that this pair of  
20 underwear was worn the correct way, the right-side-out.

21 About the quantity of DNA, it's seven nanograms. It's  
22 easy to get up here and say there is a billion nanograms  
23 in a gram. Look at this amount of salt, right? It's just  
24 impossible to fathom how small seven nanograms is. From a  
25 real world perspective, yes, that is true, okay? There is

1 no doubting that. But this is the world of scientific  
2 forensic analysis, DNA analysis using machines that are  
3 incredibly sensitive and where incredibly small amounts of  
4 things can result in powerful evidence. That's what  
5 happened in this case.

6 Don't discount the seven nanograms just based on some  
7 sort of false equivalency of holding up a bag of salt and  
8 saying it is even way smaller than this. How could this  
9 be? Listen to what the scientists say. Listen to what  
10 Kristina Hoffman and Michael Lin say about seven  
11 nanograms.

12 Based on their hundreds of cases a year -- Kristina  
13 says she does about 130 cases a year. She has been doing  
14 this about five years. She is day-to-day in the trenches  
15 doing forensic casework on cases from all over the state  
16 that come to her. She is telling you that based on her  
17 training and experience of interacting with scenarios and  
18 fact patterns in like gun handle cases or a banknote case  
19 or wiping a counter from a bank robbery, cases that she  
20 has had real world experience of trying to learn whether  
21 DNA comes from a touch or from some sort of body fluid  
22 deposit, she is telling you this is consistent with a body  
23 fluid deposit.

24 Sure, Dr. Riley can get up here and earn his \$2,000 for  
25 the day and write a four-page report and tell you he

1 disagrees. But how many cases has he done of forensic  
2 case analysis in the past 30 years? You heard him. Two  
3 cases.

4 You know, if I was in that position to make that kind  
5 of money and have to do that amount of work, you know, who  
6 knows what decision I would make? I do know what decision  
7 I would make, but that is not relevant.

8 MS. HARDENBROOK: Objection. Counsel is  
9 testifying.

10 THE COURT: Sustain the objection. I'll strike  
11 counsel's comment.

12 MR. ALSDORF: Thank you, Your Honor.

13 The ones in the trenches that do this kind of work are  
14 the ones who can tell you reliably, incredibly, what the  
15 evidence they see before them means. Michael Lin and  
16 Kristina Hoffman both said it is consistent with a body  
17 fluid deposit.

18 Don't forget the exterior of those underwear were  
19 negative for amylase. So that just feeds a theory that  
20 somehow saliva transferred from the crotch of the tights  
21 which, by the way, was negative for amylase, through the  
22 exterior of her underwear which, by the way, was negative  
23 for amylase, and somehow magically ends up on the interior  
24 of that underwear, defeats that theory entirely.

25 This is critical because the State has to prove he made

1 direct contact with that girl's genitals with no clothing  
2 in-between.

3 Beyond a reasonable doubt, when you combine all of the  
4 evidence that you have heard in this case from what  
5 happened in that room from the witnesses who know anything  
6 about it, including Mia, including the words of the  
7 defendant, and when you combine that with what you know  
8 about physical forensic evidence in this case, it does add  
9 up to proof beyond a reasonable doubt.

10 Think of the numbers that you've heard. You have heard  
11 a lot of numbers as far as the one in 2,800. That was the  
12 initial number that Michael Lin came up with when he put  
13 the Y-STR profile from the inside of those underwear  
14 through the statistical website and came up with that  
15 statistic that that profile would expect to be seen in  
16 approximately -- well, no more frequently than one in  
17 2,800 men in the US population. But there is some  
18 limitations about that database, right? The State has  
19 never tried to make any more of this evidence than what it  
20 actually shows.

21 What that number shows is a 95 percent confidence  
22 interval that tries to take into account all of the sample  
23 size issues or the racial disparity issues that counsel  
24 will no doubt point out and enable you to say with 95  
25 percent certainty, the most conservative thing we can say

1 about this DNA is that it wouldn't be expected to be seen  
2 in more than one in 2,800 individuals in the US  
3 population. That is back in November 2011 when the  
4 database was relatively smaller. The database grows over  
5 time and that only makes sense. That's the primary factor  
6 in what changes the number.

7 So when Michael Lin ran the number earlier this week --  
8 sorry, earlier this month in January of 2013, rather, sure  
9 enough, the database had grown, more samples had been  
10 submitted, and it's now one in 4,400.

11 You know, we thought this case was going to be a  
12 five-day case, and I'll apologize for any role I took in  
13 making it more than a five-day case. I know you are  
14 anxious to get this in your hands. One of the things that  
15 happened, unbeknownst to anyone, is that database got  
16 updated this Saturday, okay, February 2.

17 The State is not trying to hide anything from this  
18 jury. To the extent that it was possible, and it turned  
19 out that it was, the State had Michael Lin rerun the  
20 numbers on the new database and, sure enough, more  
21 profiles had been added to the database and, sure enough,  
22 as we stand here today, the best estimate is that profile  
23 wouldn't appear in more than one in 5,200 men in the US  
24 population, okay? So this is an illustrative graph of  
25 those three datapoints. Are we starting to see a trend

1 here? What's that number going to look like in five years  
2 from now or 10 years from now when the database is  
3 significantly bigger?

4 That brings me to a very important issue, which is your  
5 abiding belief in the truth of the charge. This is no  
6 doubt not an easy decision because you know that a lot of  
7 things are in the balance here. I would submit that  
8 justice hangs in the balance.

9 The jury instructions talk about that you have been  
10 satisfied that the elements of the crime have been proven  
11 beyond a reasonable doubt if you have an abiding belief in  
12 the truth of the charge. What the heck does that mean?

13 Well, everyone has their own interpretation of what  
14 that means, but I would submit to you that you have been  
15 satisfied to a degree of having an abiding belief in the  
16 truth of the charge. If you take everything that you know  
17 about this case from all the categories, not just the  
18 categories that Dr. Riley reviewed or concentrated on, but  
19 everything, and if you are able to tell yourself that a  
20 month from now or a year from now or five years from now  
21 or 10 years from now that you know what happened in this  
22 case, that you know that Mia was telling the truth about  
23 what happened, and she didn't have any reason to make this  
24 up or to even know about what this meant, if you know what  
25 happened in that room, you are satisfied beyond a

1 reasonable doubt.

2 Ladies and gentlemen, I ask you to do the right thing.  
3 Be careful with the evidence, but follow your instincts,  
4 follow your gut, use your common sense, and work with each  
5 other to arrive at the only just verdict in this case,  
6 which is one of guilty.

7 Thank you.

8 THE COURT: Please give your attention to the  
9 argument of Ms. Hardenbrook.

10 MS. HARDENBROOK: The problem with making  
11 assumptions is that once we make an assumption, we believe  
12 it's the truth. We treat it as the truth. Whether we  
13 know it or not, it will turn the information coming in  
14 through that assumption. Ladies and gentlemen, this is a  
15 case about the danger of assumptions and how, followed to  
16 their conclusion, they can cause a catastrophe.

17 I thank you, counsel, Your Honor, ladies and gentlemen  
18 of the jury for your time, for your attention, and for  
19 your careful deliberation. My time to speak with you, my  
20 time to be with you is almost ended. Pretty soon, the  
21 case is going to be in your hands. You have a tough job.

22 After I finish speaking with you, I won't get a chance  
23 to respond again because the State bears the burden.  
24 Because they have to prove beyond a reasonable doubt what  
25 happened, they get another chance to address you.