

No. _____

In the Supreme Court of the United States

AMANDO MONTEALVO MARTINEZ,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

**On Petition for a Writ of Certiorari to
The Supreme Court of Iowa**

APPENDIX

**PARRISH KRUIDENIER DUNN GENTRY
BROWN BERGMANN & MESSAMER L.L.P.**

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IOWA DISTRICT COURT FOR CERRO GORDO COUNTY

STATE OF IOWA

Plaintiff

02171 FECR024943

vs.

AMANDO MARTINEZ MONTEALVO

Defendant

JUDGMENT AND SENTENCE

BE IT REMEMBERED that this matter comes before the Court for sentencing. Defendant was represented by his attorney, **BENJAMIN DAVID BERGMANN** and the State appears by **ANDREW D OLSON Assistant Cerro Gordo County Sheriff**. Defendant, having been found guilty, knows of no legal reason or cause why judgment should not now be entered, and none appears on the record. Prior to sentencing, the Court held a hearing on the motion filed by Defendant for a new trial, as supplemented by filings made on October 16 and 17, 2019. The Court heard testimony from one witness offered by Defendant and legal argument from counsel. The Court then denied the motion for new trial in its entirety, stated the reasons therefor on the record, and proceeded to sentencing.

COUNT ONE

IT IS THE JUDGMENT AND SENTENCE OF THIS COURT that Defendant is convicted of

"Sexual Abuse in the Second Degree," a class B felony, in violation of Iowa Code Section 709.1 and Section 709.3(1)(b).

IT IS THEREFORE ORDERED that taking into account Defendant's age, attitude, criminal history, and employment, financial and family circumstances, as well as the nature of the offense, including whether a weapon or force was used in the commission of the offense, the recommendations of the parties, and other matters reflected in the Court file and record, including the presentence investigation report previously filed in this case on July 26, 2016, for the protection of society and rehabilitation of Defendant:

Prison. Pursuant to Iowa Code Sections 901.5, 902.3 and 902.9, Defendant is committed to the custody of the director of the Iowa Department of Corrections for an indeterminate term, not to exceed **25 years**. The Sheriff shall transport Defendant to the reception center designated by DOC. Defendant shall be given credit for time previously served in connection with this offense. **Specifically, Defendant shall be given credit for the time he previously served under the Judgment and Sentence entered by the Court on August 30, 2016, which was later set aside. Mittimus shall issue immediately.**

Pursuant to Iowa Code Section 902.12, Defendant shall not be eligible for parole or work release until he has served 70 percent of the indeterminate term imposed on him.

Special Sentence. Pursuant to Iowa Code chapter 903B, upon completion of the sentence imposed, Defendant is committed to the custody of the director of the Iowa Department of Corrections for **life**, with eligibility for parole as provided in Iowa Code chapter 906.

Financial Obligations. Defendant shall pay a **\$[none]** fine and 35% surcharge, **[intentionally left blank]** is . **Defendant shall pay the \$100 Domestic Abuse Assault, Sexual Abuse, Stalking and Human Trafficking Surcharge.**

No Contact Order. Pursuant to Chapter 664A **the No Contact Order previously entered for the protection of the victim is extended for five years** by separate order.

Civil Rights Implications. By virtue of this conviction a number of rights are adversely affected, including, but not limited to, the right of Defendant to vote and seek or hold elective office. Pursuant to Chapter 724 and federal law, Defendant may not receive, transport, transfer or possess firearms, ammunition or offensive weapons.

DNA. By virtue of conviction of a felony or of an aggravated misdemeanor not under Iowa Code section 321J.2 (unless more than one prior license revocation within 12 years of the date of offense) or chapters 321, 716.B, 717 or 725, pursuant to Iowa Code sections 81.2 and 901.5(8A), Defendant shall provide a sample for DNA profiling.

Reasonable Ability to Pay. Pursuant to Iowa Code section 910.2, the Court is required to determine if Defendant has the reasonable ability to pay all, part or none of Category 2 restitution, to wit: crime victim assistance reimbursement, restitution to public agencies pursuant to Iowa Code chapter 321, contribution to a local anticrime organization, or restitution to the medical assistance program, as well as court-appointed attorney fees and court costs including correctional fees . **Defendant does NOT have the reasonable ability to pay any of these items of Category 2 restitution.** Any additional claims for Category 2 restitution shall be filed within 30 days, otherwise the claim will be excluded.

Payment. Financial obligations to the Court shall be paid to the Clerk of Court or at www.iowacourts.gov **within 30 days**. Failure to pay as ordered will result in an increase in the amount owed upon referral for collection and may result in punishment for contempt.

Fingerprinting. If Defendant has not previously been fingerprinted in connection with this offense, pursuant to Iowa Code section 690.2, Defendant shall appear before the Sheriff and submit to fingerprinting within 30 days OTHERWISE AN ARREST WARRANT WILL ISSUE and Defendant may be subject to additional penalties for contempt. Defendant must make prior arrangements for fingerprinting by calling the Sheriff during regular office hours. Defendant's delay in making arrangements shall not be a defense to contempt.

Sex Offender Registry. Pursuant to Iowa Code chapter 692A, Defendant shall **register** with the Sheriff of the county of Defendant's residence within five days of today or within five days of release from custody and shall complete all necessary forms and pay all required fees as directed by the Sheriff. Following registration Defendant shall inform the sheriff of any changes of address within five days of said change. Defendant shall pay a **civil penalty** of \$250 to the Clerk of Court pursuant to Iowa Code section 692A.110(2). Defendant shall also comply with all applicable provisions of Iowa Code chapter 692A.

Appeal Rights. This is a final judgment and sentence. Defendant is advised of the right to appeal. Pursuant to Iowa Code section 814.6(1)(a)(3) Defendant may not appeal the issue of guilt following a plea of guilty without a showing of good cause. To exercise the right of appeal, Defendant must first file a written notice of appeal with the Clerk within 30 days and comply with all requirements in the Iowa Rules of Appellate Procedure, otherwise appeal will be barred. If Defendant is indigent, upon a legally sufficient request, appellate counsel will be appointed and preparation of a transcript will be ordered at State expense. Bond on appeal is set in the amount of **\$NO BOND (forcible felony)**.

Appearance bond, if any, is exonerated and shall be released. Any outstanding warrants are cancelled.

Clerk to provide copies to parties of record

Sheriff

DOC

Date of Offense: **01/01/2002**



State of Iowa Courts

Case Number

FECR024943

Type:

Case Title

STATE VS MONTEALVO, AMANDO MARTINEZ
ORDER OF DISPOSITION

So Ordered

Chris Foy

Chris Foy, District Court Judge,
Second Judicial District of Iowa

Electronically signed on 2019-10-21 22:45:27

IN THE COURT OF APPEALS OF IOWA

No. 19-1788
Filed February 3, 2021

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AMANDO MONTEALVO,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Chris Foy,
Judge.

Amando Montealvo appeals his conviction for sexual abuse in the second
degree. **AFFIRMED.**

Benjamin D. Bergmann and Alexander Smith of Parrish Kruidenier Dunn
Gentry Brown Bergmann & Messamer L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Kyle Hanson, Assistant Attorney
General, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Ahlers, JJ.

AHLERS, Judge.

Amando Montealvo appeals his conviction for sexual abuse in the second degree. He argues his trial was tainted by juror misconduct and juror bias, an expert witness improperly commented on witness testimony, the court erroneously admitted vouching evidence, the evidence is insufficient to support his conviction, the weight of the evidence does not support his conviction, and cumulative errors require a new trial. We reject his arguments and affirm his conviction.

I. Background Facts and Proceedings.

A.P. was born in 1995. Growing up, she lived in a home in Cerro Gordo County with her mother and two siblings. Montealvo lived with them in the home “off and on” throughout her childhood. A.P. testified Montealvo wanted her to give him “romantic” kisses on the lips beginning at age four and more frequently after she turned six. A.P. further testified she saw Montealvo kiss her younger sister in the same way.

A.P. testified that when she was seven years old she stayed home from school one day with an illness. A.P. and Montealvo were the only persons in the home that day. A.P. fell asleep in her bedroom and woke to find Montealvo in bed with her. Montealvo’s hand was on A.P.’s vagina over her clothes, and he was trying to kiss her. A.P. managed to push Montealvo away, and she went to her grandparents’ nearby home to avoid him.

A.P. testified to another incident when she was ten years old. A.P. had just returned home from school and sat down on the living room couch to watch television. A.P. was alone in the room until Montealvo entered the room and sat on the couch uncomfortably close to her. A.P. moved to a chair to avoid

Montealvo, but he moved to the chair with her. A.P. moved to the floor to avoid Montealvo again. Montealvo moved to the floor next to A.P. and began kissing her on the lips. Montealvo then touched A.P. on the vagina under her clothes, penetrated her vagina with his fingers, and attempted to remove her pants. A.P. hit Montealvo to escape and went to her grandparents' home.

In 2015, A.P.'s sister, who was a minor at the time, reported to a counselor that Montealvo inappropriately touched her about nine years earlier. The sister's disclosure prompted a police investigation, and A.P. reported Montealvo touched her when she was seven and ten as part of that investigation.

The State filed criminal charges against Montealvo stemming from the allegations by A.P. and her sister. Trial was held July 16 to 19, 2019, after which the jury found Montealvo guilty of sexual abuse in the second degree for his actions with A.P.¹ Montealvo filed post-trial motions seeking a new trial on multiple grounds, including weight of the evidence and juror misconduct and bias. After a hearing, the district court denied Montealvo's motions and sentenced him to a term of incarceration not to exceed twenty-five years. Montealvo appeals.

II. Standard of Review.

We generally review the district court's denial of a motion for new trial for abuse of discretion. *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016). However, we review constitutional issues de novo, including constitutional issues raised in a motion for new trial.² *State v. Christensen*, 929 N.W.2d 646, 676 (Iowa 2019); see

¹ The jury also found Montealvo not guilty of a second count, assault with intent to commit sexual abuse for his actions with A.P.'s sister.

² The State asserts Montealvo only preserved for our review claims of juror misconduct and juror bias that are based on Iowa's rules of criminal procedure and

also *State v. Webster*, 865 N.W.2d 223, 231 (Iowa 2015). We review evidentiary rulings, including claims that a witness is impermissibly vouching for another witness's credibility, for abuse of discretion. *State v. Dudley*, 856 N.W.2d 668, 675 (Iowa 2014). We review a claim of insubstantial evidence for correction of errors at law. *State v. Schiebout*, 944 N.W.2d 666, 670 (Iowa 2020).

III. Juror Misconduct and Juror Bias.

Montealvo sought a new trial on the grounds of juror misconduct and juror bias, asserting a juror "lied" about her experience with sexual abuse during voir dire. "The concepts of juror misconduct and juror bias are often related but are somewhat different in nature." *Christensen*, 929 N.W.2d at 661. "Juror misconduct ordinarily relates to actions of a juror, often contrary to the court's instructions or admonitions, which impair the integrity of the fact-finding process at trial." *State v. Webster*, 865 N.W.2d 223, 232 (Iowa 2015). "Juror bias, on the other hand, focuses on the ability of a juror to impartially consider questions raised at trial." *Id.* "A biased juror is simply unable to come to a fair decision in a case based upon the facts and law presented at trial." *Id.*

Early in voir dire, the district court addressed the prospective jurors:

I mentioned earlier the charges against Mr. Montealvo are sex offenses. And I want to be careful here because I don't want to pry,

not the federal or state constitutions. Thus, the State asserts, the proper standard of review for Montealvo's non-constitutional claims of juror misconduct and juror bias is abuse of discretion. Our supreme court has recognized the rules implicated in a claim of juror misconduct or juror bias "are designed to implement the constitutional demands of due process." *Christensen*, 929 N.W.2d at 677. Our supreme court has so far declined to specify the standard of review for a claim of juror misconduct or juror bias that is based entirely on the rules of criminal procedure. *Id.* at 677–78. As in *Christensen*, "we generally agree with the fact-finding of the district court" and our outcome is the same when reviewing the district court *de novo* or for abuse of discretion. *Id.*

but I think it's helpful to have this background about prospective jurors.

Anyone that's seated up front right now that either has been a victim themselves of a sex—a sex offense or is close friends or has a close family member who has been a victim?

Multiple prospective jurors raised their hands, and the court solicited general details from these persons in open court before questioning them privately with both parties' counsel. Juror H did not raise her hand or otherwise provide information about personal experience with sex offenses. Juror H eventually sat on the jury and participated in rendering the verdict.

After trial, Montalvo learned Juror H may have been the victim of a sex offense. Montalvo presented testimony from Juror H's older sister, who described two incidents occurring more than fifty years earlier.³ According to the testimony of Juror H's sister, when Juror H was "[m]aybe four" years old, the sister watched their father touch Juror H on the buttocks and the sister on the vagina after they finished a bath. In a later incident described by the sister, when Juror H was about six years old, Juror H told the sister their uncle had just made Juror H fondle him. According to the sister's testimony, when the sister learned Juror H was a juror for Montalvo's trial, the sister asked Juror H, "How can you be a juror when you have been sexually abused?" Juror H replied that "she's over it."

We agree with the district court that the testimony of Juror H's sister is not sufficient to establish Juror H lied during voir dire. As the district court found, "what a four- to six-year old might have said about the incident, how a six- to eight-year-old sister interpreted what was being told about the incident" does not establish

³ Juror H's sister testified she is currently sixty-two years old and Juror H is fifty-nine years old.

the two incidents occurred as the sister described. Even if we assume Juror H's sister credibly and accurately described these two childhood incidents from over a half-century ago, nothing in the record shows Juror H still perceived these incidents the same way or even remembered these incidents when the district court asked about sex offenses. Furthermore, nothing in the record shows Juror H perceived either incident as a "sex offense" or herself or her sister a "victim," especially considering no one defined these terms during voir dire. *See State v. Beer*, 367 N.W.2d 532, 535 (Minn. 1985) (finding a juror did not "lie" during jury selection in a sex abuse case by not responding affirmatively to questions about being a victim or perpetrator based on the wording of the questions and the lack of explanation of the terms used in the questions). Without establishing Juror H lied during voir dire or otherwise refused to answer questions honestly, Montealvo cannot show Juror H engaged in juror misconduct.

As to juror bias, "deliberate lying during voir dire may strongly suggest" bias requiring a new trial. *Webster*, 865 N.W.2d at 237. However, as explained above, the record does not establish Juror H deliberately lied during voir dire. Juror H's later statement that "she's over" the earlier incidents is ambiguous and does not show she was unable to fairly evaluate the charges against Montealvo. *See id.* at 232. We agree with the district court that Montealvo failed to establish Juror H was impermissibly biased. We reject his claims of juror misconduct and juror bias.

IV. Vouching.

Montealvo argues the State's expert witness impermissibly vouched for A.P.'s credibility. "Expert testimony in child sexual abuse cases can be very beneficial to assist the jury in understanding some of the seemingly unusual

behavior child victims tend to display.” *Dudley*, 856 N.W.2d at 675. However, “an expert witness cannot give testimony that directly or indirectly comments on the child’s credibility.” *Id.* at 677.

The State called Tammera Bibbins, a therapist and forensic interviewer for children, as an expert witness. Bibbins discussed multiple topics, including “delayed reporting” or “delayed disclosure,” which she described as occurring when “someone says they experienced abuse but they don’t report that the abuse happened until much, much later.” Montealvo claims vouching occurred during this questioning from the State: “Q. Based on your training and experience, how common is delayed reporting? A. Very common. Q Do you see it happen more than it doesn’t? A. I would agree with that statement, yes.”

Montealvo specifically asserts Bibbins’s statement that delayed reporting is “common” impermissibly commented on A.P.’s credibility and her report that Montealvo abused her more than one decade earlier. However, Bibbins later testified reporting even one week after the abuse can be considered delayed. Her testimony makes clear that delayed reporting in general is “common,” not just reporting several years after the abuse as with A.P. Furthermore, she explicitly denied that delayed reporting bolsters a claim and she acknowledged delayed reporting can happen in both bona fide sex abuse cases and false sex abuse cases. We find Bibbins was not directly or indirectly commenting on A.P.’s credibility, and we find no abuse of discretion in allowing Bibbins’s testimony. See *State v. Leedom*, 938 N.W.2d 177, 192–93 (Iowa 2020) (finding no impermissible vouching when expert’s testimony is general in nature, the expert has not treated the alleged victim, the expert does not refer to the alleged victim in any way, the

expert does not offer opinions regarding the alleged victim's truthfulness, the expert does not specifically testify that the alleged victim's behavior was consistent with the behavior of abuse victims generally, and the expert did not connect the alleged victim's experience to the research described in the expert's testimony).

V. Sufficient Evidence.

Montealvo argues the evidence is insufficient to support his conviction for sexual abuse in the second degree. Iowa Code § 709.3(2) (2005) (stating sexual abuse in the second degree occurs when a person commits sexual abuse on a person under the age of twelve). "Substantial evidence exists to support a verdict when the record reveals evidence that a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). "In making this determination, '[w]e view the evidence in the light most favorable to the verdict,' including all reasonable inferences that may be deduced from the record." *Id.* (alteration in original) (quoting *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995)).

Montealvo notes the only evidence of his guilt is A.P.'s testimony, and he raises several issues that he claims cast doubt on her credibility. However, questions of credibility are for the factfinder. See *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999) ("[I]t is for the [factfinder] to judge the credibility of the witnesses and weigh the evidence."). The jury impliedly found A.P. credible in convicting Montealvo. Furthermore, "the alleged victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt" of sexual abuse. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998). A.P. clearly testified that Montealvo committed sexual abuse when he touched and penetrated her vagina with his hand

and finger when she was under the age of twelve. See Iowa Code §§ 709.17 (defining sex act to include “contact between the finger or hand of one person and the genitalia or anus of another person”), 709.1(3) (defining sexual abuse to include performing a sex act on a child). In light of A.P.’s testimony, we find the evidence sufficient to support Montealvo’s conviction.

VI. Weight of the Evidence.

Montealvo argues the district court abused its discretion in denying his motion for new trial on weight-of-the-evidence grounds. “The weight-of-the-evidence standard requires the district court to consider whether more ‘credible evidence’ supports the verdict rendered than supports the alternative verdict.” *Ary*, 877 N.W.2d at 706. “The question for the court is not whether there was sufficient credible evidence to support the verdict rendered or an alternative verdict, but whether ‘a greater amount of credible evidence’ suggests the verdict rendered was a miscarriage of justice.” *Id.* (quoting *State v. Ellis*, 578 N.W.2d 655, 658–59 (Iowa 1998)). Also, with a new trial motion based on a weight-of-the-evidence claim, “appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence.” *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003).

In making his weight-of-the-evidence argument, Montealvo again attacks A.P.’s credibility. However, the district court found A.P. “particularly persuasive,” noting “she acknowledged where there were inconsistencies with other statements she had given” and “admitted that she had done her best to try to block out the abuse by Mr. Montealvo from her memory.” The court also noted the jury was aware of any inconsistencies in A.P.’s testimony and made its own credibility

determination. We find no abuse of discretion in the court's decision that the weight of the evidence supports Montealvo's conviction.

VII. Cumulative Error.

Finally, Montealvo argues the cumulative effect of errors in his case denied him a fair trial. Because we find no individual errors, there is no cumulative error. See *State v. Atwood*, 602 N.W.2d 775, 785 (Iowa 1999); *State v. Burkett*, 357 N.W.2d 632, 638 (Iowa 1984).

VIII. Conclusion.

We agree with the district court that Montealvo did not establish juror misconduct or juror bias. We further find the court did not abuse its discretion in admitting the expert witness testimony or denying Montealvo's weight-of-the-evidence claim, the evidence is sufficient to support Montealvo's conviction, and no cumulative error occurred. Therefore, we affirm Montealvo's conviction.

AFFIRMED.



State of Iowa Courts

Case Number
19-1788

Case Title
State v. Montealvo

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IN THE SUPREME COURT OF IOWA

No. 19-1788

Cerro Gordo County No. FECR024943

ORDER

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**AMANDO MARTINEZ MONTEALVO,
Defendant-Appellant.**

After consideration by this court, en banc, further review of the above-captioned case is denied.

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IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
19-1788

Case Title
State v. Montealvo

So Ordered

Susan Larson Christensen, Chief Justice

Electronically signed on 2021-04-01 13:55:40

1 of 25 people. If your name is called, I'd ask
2 that you approach the jury box and take a seat
3 in the order that you're called. So the very
4 first person will go to the -- come in the jury
5 box, go to the back row, and take the seat
6 that's closest to this wall. And the next
7 person take the next seat and so forth until
8 that back row is filled; and then we'll follow
9 the same process for the second row and the
10 third row.

11 The reason that it's important to have
12 everybody seated in the order they're called,
13 that will help me, it will help the attorneys
14 put a name with a face as we go through this
15 questioning process.

16 Ms. Myhre, if you'd call the names of 25
17 potential jurors, please.

18 COURT ATTENDANT: Mary Page.

19 Alan Haubrich.

20 Benjamin Gustafson.

21 David Clayton.

22 Elizabeth Kjeldgaard.

23 Shane Kellner.

24 Mona Servantez.

25 Daina Hewitt.

1 Elizabeth Jenkins.

2 Holly Bradbury.

3 Richard Thomas.

4 David Smith.

5 Robert Humphrey.

6 Sandra Schupanitz.

7 James Patchen.

8 Thomas Farmer.

9 Roy Alexander.

10 Kathy Kennedy.

11 Dean Mahlstedt.

12 Carla McLaughlin.

13 James Morrise.

14 Marcia Christensen.

15 Judith Watson.

16 Benjamin Lloyd.

17 Shane Muth.

18 THE COURT: Now, before I have the attorneys
19 ask some questions, there are a few questions I'm
20 going to ask. I want to let the folks know, that
21 are seated in the back, you're not out of the
22 woods yet. And I'd ask that you pay attention to
23 the questions that are being asked of the people
24 that are seated up front.

25 As we go through this process, it's not

1 possible that, Ms. Kjeldgaard and Mr. Farmer, we
2 may want to visit with you individually outside
3 the courtroom so that we can talk a little bit
4 more about the details of what you've heard. And
5 how that might affect your services as jurors.

6 Anyone else have any information about or
7 believe they know something about this case?

8 Okay. I mentioned earlier the charges
9 against Mr. Montealvo are sex offenses. And I
10 want to be careful here because I don't want to
11 pry, but I think it's helpful to have this
12 background about prospective jurors.

13 Anyone that's seated up front right now
14 that either has been a victim themselves of a
15 sex -- a sex offense or is close friends or has
16 a close family member who has been a victim?
17 And at this stage I'm just asking, you know,
18 for a show of hands.

19 Okay. We'll go through the back row.

20 Ms. Page?

21 PANELIST PAGE: Yes.

22 THE COURT: All right. Now, is this
23 something that you're comfortable talking about
24 here, or would you prefer to discuss this
25 individually with the attorneys and the Court?

1 PANELIST PAGE: Probably with the attorneys.

2 THE COURT: Okay. Then Mr. Gustafson?

3 PANELIST GUSTAFSON: Yes, Your Honor.

4 THE COURT: Same question for you. Is this
5 something that you feel comfortable discussing in
6 this situation, or you prefer to meet --

7 PANELIST GUSTAFSON: That's fine.

8 THE COURT: Did this involve you or somebody
9 close to you?

10 PANELIST GUSTAFSON: Someone close to me,
11 Your Honor.

12 THE COURT: Okay. Were criminal charges or
13 prosecution brought on account of it?

14 PANELIST GUSTAFSON: No, sir.

15 THE COURT: Okay. There might be some more
16 follow-up the attorneys have for you.

17 Is there anyone else in the back row yet?

18 Mr. Clayton.

19 PANELIST CLAYTON: Yes, sir.

20 THE COURT: Is this something that you feel
21 comfortable talking about here, or would you
22 prefer to talk with the attorneys and the Court
23 individually?

24 PANELIST CLAYTON: I think the attorneys.

25 THE COURT: All right.

1 offense --

2 PANELIST ALEXANDER: Yes.

3 THE COURT: -- but it ended up it was
4 disposed of as something else?

5 PANELIST ALEXANDER: Yes.

6 THE COURT: Okay. How long ago did this
7 happen?

8 PANELIST ALEXANDER: It's been ten, fifteen
9 years.

10 THE COURT: Would it be uncomfortable or
11 difficult for you to serve as a juror in this
12 case, given your experience with --

13 PANELIST ALEXANDER: Not --

14 THE COURT: -- your brother-in-law's
15 situation?

16 PANELIST ALEXANDER: No.

17 THE COURT: Okay. Thank you.

18 Counsel, could I have you approach,
19 please?

20 MR. OLSON: Yes, sir.

21 (A bench discussion was held off the record.)

22 THE COURT: We're going to take some of the
23 people that have mentioned either prior knowledge
24 of the case or, you know, some experience with a
25 sex offense or sexual abuse. We'll take people

1 back individually, and we'll talk a little bit
2 more about each juror's situation and, again, try
3 to determine how that might affect their ability
4 to serve.

5 While we're going through this process,
6 I'd ask that everybody remain in the courtroom.
7 Those of you that are seated up front, you need
8 to stay in your same spot. Certainly, can
9 stand up and stretch your legs, that sort of
10 thing. And the people that are seated in the
11 back are free to move around, but I'd ask that
12 you stay in the courtroom unless you touch base
13 with Ms. Myhre so that when we're ready to
14 resume with general questioning, everybody will
15 be back in the courtroom. So give us a couple
16 minutes.

17 I'm going to have my court reporter move
18 her equipment into the room where we'll meet
19 individually with people. I think we'll start
20 with you, Ms. Kjeldgaard and Mr. Farmer. And
21 then we'll meet with some of the people that
22 have mentioned some prior experience, either
23 for themselves or with somebody close to them,
24 with prior sexual offense.

25 PANELIST MUTH: Thank you.

1 THE COURT: All right. Now, you know the
2 charges against Mr. Montealvo involve sex
3 offenses. If you were selected as a juror, do
4 you feel that you could be impartial in deciding
5 whether he was guilty or not guilty?

6 PANELIST GUSTAFSON: I would like to think
7 so, but I don't think so. I would like to think
8 I could get past that, but I don't -- I don't
9 think I could. With the -- with the nature...

10 THE COURT: Part of the reason we're talking
11 to you individually is that we want you just to
12 state, you know, what's on your mind and not
13 worry about how you might -- how other people
14 might perceive it or what have you.

15 PANELIST GUSTAFSON: Yeah, of course.

16 THE COURT: So, I mean, because of your
17 prior experience, do you feel you'd be more
18 inclined to find Mr. Montealvo guilty simply
19 because he's been charged?

20 PANELIST GUSTAFSON: I -- I think so. In
21 all honesty, I think so. It's a...

22 THE COURT: Um --

23 PANELIST GUSTAFSON: Which isn't fair to
24 him, and I understand that.

25 THE COURT: And that's what this process is

1 about because personally, if it would be
2 difficult for you to be impartial about it, we
3 need to know.

4 PANELIST GUSTAFSON: Absolutely.

5 THE COURT: Counsel, do you have further
6 questions for Mr. Gusafson?

7 MR. OLSON: Yeah. I appreciate you being
8 honest, and I had a few questions. Like in
9 there, you said that there was no prosecution?

10 PANELIST GUSTAFSON: Yeah, I don't think she
11 reported it.

12 MR. OLSON: Okay.

13 PANELIST GUSTAFSON: I think. Which also
14 made me a little angry so...

15 MR. OLSON: How old was she?

16 PANELIST GUSTAFSON: I think 18 or 19. I
17 think she had -- I think she had moved, but it's
18 been awhile ago so I don't remember. I think she
19 wasn't living in Iowa, I don't think. So...

20 MR. OLSON: Was, kind of generally, was it,
21 like, a forced kind of sexual assault sort of
22 thing?

23 PANELIST GUSTAFSON: Yeah. You know, they
24 raped kind of...

25 MR. OLSON: Okay.

1 PANELIST GUSTAFSON: Situation.

2 MR. OLSON: I mean, have you heard, I mean,
3 do you understand that Defendant is innocent
4 until proven guilty?

5 PANELIST GUSTAFSON: Absolutely.

6 Absolutely.

7 MR. OLSON: Do you feel like your firmly
8 held beliefs, that it would hard to uphold that?

9 PANELIST GUSTAFSON: I would like to say no,
10 but I guess.

11 MR. OLSON: Okay.

12 PANELIST GUSTAFSON: That's not, you know,
13 it would be hard to know until it was -- came
14 through, I guess.

15 MR. OLSON: That's all I have.

16 MR. BERGMANN: Is it fair to say,
17 Mr. Gustafson, that you would be more inclined to
18 convict Defendant in a sex abuse case than you
19 might be in another case?

20 PANELIST GUSTAFSON: I would hope not, but I
21 suppose, probably say that. I do have some
22 pretty strong feelings about the whole sexual
23 assault.

24 MR. BERGMANN: And let me just say, for my
25 part, that I -- you're not going to get in

1 trouble if you tell us what you're really
2 thinking, okay? And so I'm hearing you say that
3 I would like to do one thing, but in the end, I'm
4 probably going to do something else. Is that
5 right?

6 PANELIST GUSTAFSON: Yeah. I don't think I
7 would be able to -- I really, in all honesty, I
8 don't think I could get past it.

9 MR. BERGMANN: In other words, you've formed
10 an opinion on the guilt or innocence on this
11 defendant that would prevent you from rendering a
12 true verdict?

13 PANELIST GUSTAFSON: Right.

14 MR. BERGMANN: I strike for cause, Your
15 Honor.

16 THE COURT: Mr. Gustafson, I have a question
17 for you because I have also been picking up on
18 what Mr. Bergmann talked about. But let me put
19 the question to you just a little bit different.

20 If you were the defendant in this case,
21 would you want a juror with your concerns
22 serving?

23 PANELIST GUSTAFSON: Not at all.

24 THE COURT: I'm going to grant the request
25 to strike. So Mr. Gustafson, if you'll touch

1 PANELIST SERVANTEZ: No.

2 THE COURT: All right. The charges against
3 Mr. Montealvo involve, you know, alleged contact
4 of a sexual nature between him and two different
5 people. Both were children at the time. If you
6 were to serve as a juror in this case, would you
7 be able to make your decision based just on the
8 information or the evidence that's presented
9 regarding Mr. Montealvo, or do you feel that
10 what's happened to your family members would
11 affect how you make your decision?

12 PANELIST SERVANTEZ: I believe I could make
13 a -- make a good decision, but I think it would
14 be difficult to go through this. Listening to
15 details.

16 THE COURT: And I understand why it would be
17 difficult. Are you asking that you not have to
18 go through this experience?

19 PANELIST SERVANTEZ: I'd rather not.

20 MR. OLSON: Your Honor, could I make a
21 motion to strike this witness?

22 I appreciate being so forthright, but
23 clearly, this is going to be emotional for you.

24 PANELIST SERVANTEZ: [Nods.]

25 MR. OLSON: And it might not be the best to

1 serve for this particular jury.

2 THE COURT: Mr. Bergmann, any concerns --

3 MR. BERGMANN: I agree.

4 THE COURT: -- concerns with that?

5 MR. BERGMANN: I agree with Mr. Olson. This
6 is just way too on the nose, based on what she's
7 been through.

8 THE COURT: There are some similarities.

9 So Ms. Servantez, I'm going to excuse you.

10 You'll touch base with Ms. Myhre so she can
11 kind of keep track of what's happening. Do you
12 have a purse or anything you need to get out of
13 courtroom?

14 PANELIST SERVANTEZ: No. I brought it with
15 me.

16 THE COURT: Okay. So then she'll just
17 direct you back out after you touch base with
18 her.

19 PANELIST SERVANTEZ: Okay. I have to go
20 back out there again?

21 THE COURT: Not in the courtroom.

22 PANELIST SERVANTEZ: Oh, okay. And I still
23 got to call next Monday?

24 THE COURT: Next Monday. And if you need an
25 excuse for work purposes, I'll have you stop by

1 the clerk's offices.

2 MR. OLSON: Thank you.

3 MR. BERGMANN: Thank you.

4 (Panelist Servantez leaves. Panelist Jenkins enters.)

5 THE COURT: Ms. Jenkins, we wanted to give
6 you a chance to talk a little bit more about what
7 you'd mentioned in the courtroom and be able to
8 do it in an environment -- I'm not saying this is
9 a comfortable environment. It's kind of close
10 quarters here. But this way there'll be a limit
11 on how many people you have to disclose things
12 to.

13 When you mentioned prior experience with
14 sexual assault or sex offense, did it involve
15 you or somebody close to you?

16 PANELIST JENKINS: My daughter.

17 THE COURT: How old is your daughter now?

18 PANELIST JENKINS: Now, she's 23.

19 THE COURT: When did the abuse take place?

20 PANELIST JENKINS: Well, the last time that
21 she reported it was within the last two years.
22 But apparently it's been a thing for awhile off
23 and on. But then there's no evidence there. And
24 every time something gets going, she basically
25 doesn't want to work with them. Doesn't want to

1 cooperate. Because of the stuff that's been
2 happening to her.

3 She was a cutter. Self harm. I've -- she
4 was in residential placement for about a
5 year-and-a-half for that. So we had to go
6 through all that. We did start court hearings.
7 We visited in the court with her several
8 different times, and then it would just go so
9 far and then we were back to taking her home or
10 going back to placements.

11 THE COURT: You say that the abuse goes back
12 a ways?

13 PANELIST JENKINS: Uh-huh.

14 THE COURT: Back to the time where your
15 daughter was maybe junior high or younger?

16 PANELIST JENKINS: Yeah, at least. Easily.

17 THE COURT: Okay. The charges against
18 Mr. Montealvo that supposedly took, you know,
19 that allegedly happened when the victims were
20 under the age of twelve and took place over ten
21 years ago. If you were to serve as a juror in
22 this case, you would you be able to make your
23 decision based only on the evidence that comes in
24 and disregard the experience that your daughter
25 has had or the experience that you've had because

1 of your daughter?

2 PANELIST JENKINS: I think it might be
3 difficult.

4 THE COURT: Do you feel that you would be
5 more inclined to find for one side or the other
6 because of the experience you've had?

7 PANELIST JENKINS: Possibly.

8 THE COURT: Okay. Who do you feel that you
9 would -- you would be inclined to favor at this
10 point? Would it be the State or the defendant?

11 PANELIST JENKINS: Probably the State. The
12 representing the matters.

13 THE COURT: Now, the law presumes that
14 Mr. Montealvo is innocent.

15 PANELIST JENKINS: Uh-huh.

16 THE COURT: And the State has the burden of
17 showing his guilt beyond a reasonable doubt. If
18 you were a juror, would you -- would you hold the
19 State to its burden of proof, or do you feel that
20 you might be more inclined to believe the charges
21 are true just because of what's happened to your
22 daughter?

23 PANELIST JENKINS: Possibly. It's a tough
24 thing. I mean, I don't know. I don't personally
25 know him so I'm not going to say, you know,

1 anything personal toward anybody. But to me, if
2 somebody's willing to speak up, you know, and say
3 that, it gives you that, you know, that thought
4 that why would we do this if they're not, you
5 know, or why would you say somebody did it if
6 they didn't? So it would be hard.

7 THE COURT: Mr. Olson, do you have some
8 questions for --

9 MR. OLSON: I have a question.

10 One is, just emotionally, how do you think
11 you would do hearing about an alleged sexual
12 assault? Would you be able to sit there for a
13 day or two and --

14 PANELIST JENKINS: I think it would be
15 difficult.

16 MR. OLSON: Okay. Your Honor, I have a
17 motion to strike this witness. It may not be the
18 best case for her.

19 THE COURT: And you said witness but you're
20 --

21 MR. OLSON: Sorry. I meant juror.

22 THE COURT: -- referring to a prospective
23 juror?

24 Mr. Bergmann?

25 MR. BERGMANN: I join in that motion. I

1 would just also add, if the Court's considering
2 it, that in the present case, there's going to be
3 evidence that one of the alleged victims had been
4 in residential treatment for maybe seven times
5 before she disclosed it. And then I think that
6 that is going to be pretty on the nose for her,
7 that she's had her daughter go through treatment
8 as well. And I think that that's just going to
9 get to where we have a juror who is not going to
10 be able to render a true verdict based on the
11 evidence because she's going to be looking
12 through the lens of her own experience.

13 THE COURT: I believe that it is appropriate
14 to excuse Ms. Jenkins. We'll have somebody else
15 take her place.

16 Ms. Jenkins, I'll walk out with you here.

17 (Panelist Jenkins leaves. Panelist McLaughlin enters.)

18 THE COURT: Ms. McLaughlin, we want to give
19 you a chance the tell us just a little bit more
20 about what you mentioned in the courtroom.

21 Have you been a victim of assault --

22 PANELIST McLAUGHLIN: Yes.

23 THE COURT: -- or was it -- okay.

24 And to the extent you're comfortable, I
25 mean, you don't have to give details, but when?

1 How long ago?

2 PANELIST McLAUGHLIN: It was, well, it's
3 been very long ago. It was when I was a child,
4 and it was a babysitter. A male babysitter
5 sexually abused me.

6 THE COURT: All right.

7 PANELIST McLAUGHLIN: And nothing ever
8 happened of it because I tried to put it out of
9 my mind, and I did until I met him when I was in
10 college again. And he approached me, and all of
11 the memories came back. It was absolutely
12 horrible. By the time I -- how do you -- nothing
13 ever came of it. You know. I believe statutes
14 of limitations have expired. It's been 40 years
15 ago.

16 THE COURT: And they've made some changes
17 with statutes of limitation, but it probably
18 would not have helped your situation.

19 PANELIST McLAUGHLIN: Uh-huh.

20 THE COURT: Now, you know, every case is
21 different. There's going to potentially be some
22 similarities between --

23 PANELIST McLAUGHLIN: Uh-huh.

24 THE COURT: -- what's happened to you and
25 what the State is alleging has happened in this

1 case. The victims, the alleged victims, here
2 were both under twelve when the acts that formed
3 the crimes --

4 PANELIST McLAUGHLIN: Uh-huh.

5 THE COURT: -- supposedly took place. But
6 they were not reported until later.

7 Do you feel that you could be impartial in
8 this kind of case?

9 PANELIST McLAUGHLIN: I was thinking of
10 that, and I'm not really sure. It -- I honestly
11 don't know. You know and...

12 THE COURT: That's a fair answer.

13 PANELIST McLAUGHLIN: Don't know how it's
14 going to affect me. Sometimes we'll be watching
15 something on TV and I have to leave the room. I
16 can't watch it. You know, because it -- it
17 brings back those very painful memories.

18 THE COURT: And that, I guess, ma'am,
19 because we're -- you're talking about your
20 situation, not something that a person close to
21 you has gone through, I want to ask you, would it
22 be uncomfortable for you to serve as a juror in
23 this kind of case?

24 PANELIST McLAUGHLIN: I'm -- I'm going to
25 say probably, yes.

1 THE COURT: This process isn't necessarily
2 about right or wrong. It's about honest, you
3 know, people being honest --

4 PANELIST McLAUGHLIN: Yes.

5 THE COURT: -- with how they're feeling.

6 Counsel, I don't know if either one of you
7 have more questions for Ms. McLaughlin.

8 MR. OLSON: Your Honor, I just think with --
9 this might hit a little too close to home with
10 this juror, and she might hear some things that
11 might make it difficult to sit there throughout
12 the trial. And it might not be the best fit for
13 this particular jury.

14 I just want to thank her for her openness
15 about it, though, and my sympathy for what
16 you've gone through.

17 PANELIST McLAUGHLIN: Thank you.

18 MR. OLSON: But based on that, I make a
19 motion to remove this juror for cause.

20 THE COURT: Mr. Bergmann?

21 MR. BERGMANN: I concur. It meets the rule,
22 especially the part where she says it's difficult
23 for her to hear such evidence. I mean, it almost
24 reaches the level of physical disability. If she
25 was -- she's going to need to flee the jury box

1 when she hearing the evidence, she can't be a
2 juror. So I join.

3 THE COURT: All right. And I'm going to
4 excuse you, Ms. McLaughlin.

5 PANELIST McLAUGHLIN: Uh-huh.

6 THE COURT: I'll have you step out with me.
7 We'll touch base with Ms. Myhre.

8 PANELIST McLAUGHLIN: Sure.

9 THE COURT: So she keeps track of what's
10 going on. If you have your personal belongings

11 --

12 PANELIST McLAUGHLIN: Uh-huh.

13 THE COURT: -- you'll be able to go just
14 directly --

15 PANELIST McLAUGHLIN: Okay.

16 THE COURT: -- out from here. Just remember
17 to call in next week --

18 PANELIST McLAUGHLIN: Yep.

19 THE COURT: -- after five. And if you need
20 an excuse for work purposes, you can get that
21 from the clerk.

22 PANELIST McLAUGHLIN: Okay.

23 THE COURT: Ma'am, thank you for your
24 candor.

25 PANELIST McLAUGHLIN: Yep. It's a very

1 All right. Well, we are going to break
2 for the day. I apologize for those of you that
3 are -- well, for everyone. Ideally, we'd have
4 the jury picked yet today. But as things
5 stand, I'll need everybody to report back
6 tomorrow. We'll start up again with
7 questioning at 9 o'clock, so I'd ask that
8 everybody check back in with Ms. Myhre no later
9 than 8:45.

10 Now, there is -- I guess I'm going to
11 refer to it as an admonition that I want to
12 give. Even though none of you, no one has been
13 selected as a juror right now, these are a few
14 things that are going to be important for all
15 of you to keep in mind. And provided that
16 everyone follows what I'm going to be
17 instructing you about, it will help our process
18 go more smoothly tomorrow.

19 Until we actually select the jury and
20 present all the evidence and submit the case to
21 the jury, it's going to be important that all
22 of you keep an open mind. At this stage, it's
23 much too early to make any kind of decision
24 regarding the proper outcome of this case. You
25 know, I have been asking questions. No

Panel Selection Report Cover Sheet

Date: 7/16/19

Time: 2:24PM

| | |
|----------------------------|--|
| Case Id: FECR024943 | Description: STATE VS AMANDO MONTEALVO MARTINEZ |
| Case Type: Criminal | Room: Court Room 1 |
| Charge Description: | Prosecutor Attorney: ANDREW OLSON |
| No. Requested: 25 | Defense Attorney: BENJAMIN BERGMANN |
| No. Sent: 53 | |
| Judge: Chris Foy | |

2019 JUL 17 PM 1:12
CLERK'S COURT
CERRO GORDON COUNTY, IOWA

Data Entry

Panel End Date : _____

Event Disposition: _____

Sequestered Date: _____

Deliberation Date : _____

Judgement Amount: _____

Accused:

Please return this form together with Panel Selection Report .

Judge's List

Judge: Foy Chris

Date: 7/16/19

Case Id: FECR024943

Time: 2:24PM

| Random No. | Juror ID. | Pool Seq. Name | Challenge Plaintiff | Challenge Defense | Strike Plaintiff | Strike Defense |
|------------|-----------|--|---------------------|-------------------|------------------|----------------|
| * | 1 | 170016583 01-0043PAGE, MARY E RETIRED | | | FROM CHAMBERS | |
| * | 2 | 170067340 01-0033HAUBRICH, ALAN J RETIRED | | | FROM CHAMBERS | |
| * | 3 | 170009387 01-0082GUSTAFSON, BENJAMIN J GOVERNMENT | | | FROM CHAMBERS | |
| * | 4 | 170033662 01-0121CLAYTON, DAVID C RETIRED | | | | |
| * | 5 | 991945009 01-0012KJELDGAARD, ELIZABETH H RETIRED | | | PZ | |
| * | 6 | 100254468 01-0148KELLNER, SHANE J TRANSPORTATION | | | | AG |
| * | 7 | 170082500 01-0099SERVANTEZ, MONA R PROFESSIONAL | | | FROM CHAMBERS | |
| * | 8 | 170081259 01-0005HEWITT, DAINA D FINANCIAL | | | | |
| * | 9 | 340027831 01-0057JENKINS, ELIZABETH E NONE | | | FROM CHAMBERS | |
| * | 10 | 170024468 01-0156BRADBURY, HOLLY E OTHER | | | | |
| * | 11 | 170002275 01-0146THOMAS, RICHARD L RETIRED | | | | |
| * | 12 | 170009597 01-0059SMITH, DAVID M RETIRED | | | P4 | |

Judge's List

Judge: Foy Chris

Date: 7/16/19

Case Id: FECR024943

Time: 2:24PM

| | Random No. | Juror ID. | Pool Seq. Name | Challenge | | Strike | |
|---|------------|-----------|--|-----------|---------|-----------|---------|
| | | | | Plaintiff | Defense | Plaintiff | Defense |
| * | 13 | 170032882 | 01-0030 HUMPHREY, ROBERT G FINANCIAL | | | | |
| * | 14 | 170067467 | 01-0133 SCHUPANITZ, SANDRA R RETAIL | | | | |
| * | 15 | 170078936 | 01-0085 PATCHEN, JAMES D SELF EMPLOYED | | | | |
| * | 16 | 170089576 | 01-0077 FARMER, THOMAS E GOVERNMENT | | | | |
| * | 17 | 170057382 | 01-0040 ALEXANDER, ROY D LABORER | | | | |
| * | 18 | 170005050 | 01-0041 KENNEDY, KATHY L CARE PROVIDER | | | | |
| * | 19 | 070023435 | 01-0051 MAHLSTEDT, DEAN W SELF EMPLOYED | | | | |
| * | 20 | 980000286 | 01-0147 MCLAUGHLIN, CARLA J SALES | | | | |
| * | 21 | 170088969 | 01-0117 MORRISE, JAMES W LABORER | | | | |
| * | 22 | 170066787 | 01-0056 CHRISTENSEN, MARCIA A RETIRED | | | | |
| * | 23 | 170078779 | 01-0127 WATSON, JUDITH K RETIRED | | | | |
| * | 24 | 990116159 | 01-0020 LLOYD, BENJAMIN D EDUCATION | | | | |

Judge's List

Judge: Foy Chris

Date: 7/16/19

Case Id: FECR024943

Time: 2:24PM

| Random No. | Juror ID. | Pool Seq Name | Challenge Plaintiff | Challenge Defense | Strike Plaintiff | Strike Defense |
|------------|-----------|--|---------------------|-------------------|------------------|----------------|
| 25 | 170062772 | 01-0071MUTH, SHANE C LABORER | | | FROM CHAMBERS | |
| 26 | 170023379 | 01-0032NICHOLAS, JULIE A EDUCATION | | | | A |
| 27 | 170075118 | 01-0055STRICKER, KEVIN D MANAGEMENT/ADMINISTRATOR | | | | |
| 28 | 410018646 | 01-0084HARMS, CHARLES M LABORER | | | | |
| 29 | 960028941 | 01-0004HOLIEN, CHASE A PROFESSIONAL | | | | |
| 30 | 170073739 | 01-0140FLATNESS, CHERYL A RETIRED | | | | A4 |
| 31 | 170007338 | 01-0069CARTER, LORETTE A LABORER | | | | PS |
| 32 | 990820701 | 01-0108ENGELS, MIKAYLA R CARE PROVIDER | | | | P3 |
| 33 | 170023253 | 01-0025MALEK, EUGENE C SELF EMPLOYED | | | | A3 |
| 34 | 170035740 | 01-0078HICOK, WILLIAM A OTHER | X | | | |
| 35 | 991512097 | 01-0093TILKES, BAILEY L MEDICAL | | | | |
| 36 | 170023125 | 01-0116JOHANNESEN, ROLINDA L MEDICAL | | | | PI |

Judge's List

Judge: Foy Chris

Date: 7/16/19

Case Id: FECR024943

Time: 2:24PM

| Random No. | Juror ID. | Pool Seq. Name | Challenge Plaintiff | Challenge Defense | Strike Plaintiff | Strike Defense |
|------------|-----------|--|---------------------|-------------------|------------------|----------------|
| 37 | 170065315 | 01-0160 CHRISTIANSON, TIMOTHY R INSURANCE SHEFFIELD | | | | A5 |
| 38 | 170004860 | 01-0024 HUANG, JESSE A EDUCATION MASON CITY | | | | |
| 39 | 100397872 | 01-0115 TEEPE, AMY J LABORER MASON CITY | | | | |
| 40 | 170024442 | 01-0062 STUMPE, MICHAEL A RETIRED MASON CITY | | | | |
| 41 | 170076078 | 01-0019 BOLAND, JOHN C RETIRED MASON CITY | | | | |
| 42 | 170073513 | 01-0142 ZIRBEL, SANDRA K NONE MASON CITY | | | | |
| 43 | 170070155 | 01-0029 BOWERS, DANIEL L LABORER ROCKWELL | | | | |
| 44 | 170093716 | 01-0143 RESSLER, MATTHEW P SALES MASON CITY | | | | |
| 45 | 170060067 | 01-0026 HYLAND, LINDA J CLERICAL CLEAR LAKE | | | | |
| 46 | 170069898 | 01-0113 LEE, JAMES A EDUCATION CLEAR LAKE | | | | |
| 47 | 660014096 | 01-0038 SHAW, TERESA L FINANCIAL MASON CITY | | | | |
| 48 | 980001240 | 01-0008 OTOOLE, JEFFREY C RETIRED CLEAR LAKE | | | | |

Judge's List

Judge: Foy Chris

Date: 7/16/19

Case Id: FECR024943

Time: 2:24PM

| Random No. | Juror ID. | Pool Seq. Name | Challenge | | Strike | |
|---------------|-----------|-------------------------------------|-----------|---------|-----------|---------|
| | | | Plaintiff | Defense | Plaintiff | Defense |
| 49 | 170012019 | 01-0136MULKINS, JUDI M CLERICAL | | | | |
| 50 | 170070765 | 01-0119CAREW, MICHAEL J SALES | | | | |
| 51 | 991588093 | 01-0164JOHNSTON, NATASHA D OTHER | | | | |
| 52 | 170029787 | 01-0101TREBIL, DONNA R RETIRED | | | | |
| 53 | 170072362 | 01-0047ARNOLD, DUANE A RETIRED | | | | |

1 contemplate what testimony I might be
2 receiving. I don't know that I want to
3 necessarily allow a standing objection,
4 Mr. Olson. I mean your concern is noted. But
5 I believe it would be appropriate for you to
6 specifically state an objection, or if you seek
7 to voir dire the witness before they answer a
8 question, you can ask for that opportunity.

9 MR. OLSON: Thank you, Your Honor.

10 THE COURT: All right. Mr. Bergmann.

11 MR. BERGMANN: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. BERGMANN:

14 Q Will you please state your name for the
15 record and spell it?

16 A Dari L -- Dari Lou Marino, D-a-r-i, l-o-u,
17 m-a-r-i-n-o.

18 Q Where do you live?

19 A Ventura, Iowa.

20 Q Do you have siblings that live in Cerro
21 Gordo County?

22 A Yes, I do.

23 Q Specifically, do you have a sister that
24 goes by the initials H.B.?

25 A Yes.

3 A Yes.

7 MR. OLSON: Your Honor, could I voir dire
8 that question?

9 THE COURT: Yes.

10 VOIR DIRE EXAMINATION

11 BY MR. OLSON:

12 Q Okay. So we'd need to distinguish between
13 what you heard and what you saw.

14 A Okay.

15 Q Did you actually see a sex act occur?

16 A He touched us, yes.

17 Q Did you see him, your father, touch your
18 sister?

19 A Yes.

20 Q Where did he touch your sister that you
21 saw on her?

22 A On her vagina. I mean on her bottom.

24 A But I got in front of her and I pushed her
25 behind me because I always protected her and...

1 Q Where was this at?

2 A At the -- at home. We'd just gotten out
3 of the bathtub.

4 Q And sorry you have to talk about this.

5 A It's okay.

6 Q Describe the story here. What happened
7 after you got out of the bathtub?

8 A Got out of the bathtub and he started to
9 touch her, and -- and I pushed her behind me and
10 stood in front of her and -- and he touched me.
11 Then -- and then he left us alone.

12 Q How old was she?

13 A We were little. Maybe four. Five. I
14 can't remember.

15 MR. OLSON: That's all the voir dire I
16 have.

17 THE COURT: Okay. You can continue,
18 Mr. Bergmann.

19 CONTINUED DIRECT EXAMINATION

20 BY MR. BERGMANN:

21 Q Were there other times that your sister
22 made statements -- and I want -- just let me say the
23 whole question here.

24 Are there other times that your sister
25 made statements to you that she had been abused and

1 that she made those statements soon after it
2 happened?

3 A Yes. Uh-huh.

4 Q How many times?

5 A Two.

6 Q Okay. What did she say happened on the
7 first of those two times?

8 MR. OLSON: Objection, Your Honor.

9 I don't think we've established an excited
10 utterance for the question yet.

11 THE COURT: So is it an hearsay objection?

12 MR. OLSON: Hearsay objection.

13 THE COURT: All right. For the reasons
14 I've stated previously, I believe that that, a
15 hearsay objection, is a valid one here.

16 Witness may answer for purposes of allowing
17 Mr. Bergmann to make his offer of proof.

18 You may answer.

19 THE WITNESS: My uncle had her fondle him
20 at his home.

21 Q Okay. And how long after that happened
22 did she tell you about it?

23 A Right away.

24 Q Okay.

25 MR. BERGMANN: And so, Your Honor, at this

1 point, I would like you to accept that
2 testimony into the record as an excited
3 utterance or present sense impression. Or
4 both.

5 MR. OLSON: Your Honor, right away could
6 be a day, could be hours. It could be minutes.

7 THE COURT: If you would like to voir dire
8 the witness...

9 MR. OLSON: Okay.

10 CONTINUED VOIR DIRE EXAMINATION

11 BY MR. OLSON:

12 Q What's right away mean?

13 A I believe as soon as we got home. Because
14 we were at my uncle's house. My grandparents'. My
15 great-grandparents' house. That's where he lived.

16 Q Okay. So there was a drive between the
17 conduct and the time she told you?

18 A Yeah.

19 Q How long of a drive?

20 A Probably two miles.

21 Q Okay. So when you got out of the house,
22 did anything else happen first?

23 A After we got home?

24 Q Yeah.

25 A I went and I, after she told me, I went

1 and I told my mom right away.

2 Q Okay. How long after you got home did she
3 tell you?

4 A She was shortly. It was... got home...

5 Q And did you see her alone with your uncle?

6 A She was upstairs with him, yeah.

7 Q Okay. And after she came downstairs,
8 did -- was there any time gap between that time
9 until you left?

10 A I don't know. I can't remember.

11 Q How old are you compared to your sister?

12 A Three years older.

13 Q How old are you?

14 A I'm 62.

15 Q How old is your sister?

16 A She's 59.

17 Q And this is when she was four --

18 A Yep.

19 Q -- or was that the other incident?

20 So correct me if I'm wrong here. I don't
21 want to put words in your mouth. How old was she at
22 this point?

23 A When she with my uncle?

24 Q Yeah.

25 A That was -- she was probably a little --

1 she was older than that, so probably six.

2 MR. OLSON: No further voir dire.

3 THE COURT: Okay. Next question,

4 Mr. Bergmann.

5 CONTINUED DIRECT EXAMINATION

6 BY MR. BERGMANN:

7 Q Was she upset when she told you that her
8 uncle had --

9 THE COURT: Oh, you know what,
10 Mr. Bergmann? I'm sorry. There was an
11 objection outstanding on hearsay grounds. I'll
12 admit -- or overrule the objection because
13 under the circumstances, this witness has
14 testified to... Boy. Give me a moment.

15 I believe that the exception to the
16 hearsay rule for excited utterance would apply.

17 You may continue.

18 Q Was there another time that she'd told you
19 that she had been sexually abused as a child?

20 MR. OLSON: Your Honor, objection.

21 Hearsay.

22 THE COURT: Sustained at this point. I'll
23 allow the witness to answer for purposes of
24 allowing Mr. Bergmann to make his offer in
25 proof.

1 A Yes. When we were older, she told me that
2 my brother had -- she -- he wanted her to touch him.

3 Q How old was she when she made that
4 statement?

5 A That was when we were adults. She
6 didn't... She admitted.

7 Q And when you say adults, can you give us
8 your best estimate how old she was when she made
9 that statement?

10 A I don't know.

11 Q Twenties, thirties, forties?

12 A Thirties.

13 Q Has she made any statements to you since
14 her thirties in which she mentioned that she had
15 been a victim of sex abuse?

16 MR. OLSON: And Your Honor, we're still in
17 the offer of proof; right?

18 THE COURT: Yes.

19 A No. That was the last time.

20 Q Okay. So the last time that she made any
21 statements of that sort was in her 30s?

22 A Uh-huh.

23 Q Yes?

24 A Yes.

25 Q How did this come to light? How did

1 you -- how did it come to be that you were a witness
2 here today?

3 A She told me -- I -- that she was on -- I
4 asked her why she was so busy, and she said she was
5 on jury. Had been on jury duty.

6 And I said, Oh.

7 And it was for a child abuse, a sexual
8 abuse case.

9 And I said, How can you be a juror when
10 you have been sexually abused?

11 Q Did she respond?

12 A She said she's over it.

13 MR. BERGMANN: I have no further
14 questions, Your Honor.

15 THE COURT: All right.

16 Okay. So that -- Well, so that our record
17 is as clear as we can try to make it, the Court
18 will consider Ms. Marino's testimony regarding
19 that incident where she and her sister, H.B.,
20 were coming out of the bath and will consider
21 Ms. Marino's testimony about what happened as
22 they were coming out of the bath. The Court
23 will consider the testimony Ms. Marino made or
24 gave regarding an excited utterance H.B. made
25 to her about being touched in a sexual way by

1 her great-uncle.

2 The other -- the other testimony that was
3 given from Ms. Marino concerning what H.B. has
4 told her would be hearsay, in the Court's
5 opinion, and not admissible. So --

15 I don't think that's hearsay because the
16 statement doesn't go to the truth of the matter
17 of whether or not she really is over it. It
18 merely goes to show some other purpose, which
19 goes to show her knowledge of her status as
20 someone that had previously been sexually
21 abused and her own diagnosis of her bias. The
22 hearsay statement needs to be made for the
23 truth of the matter.

24 I don't care whether or not she's over it
25 or not, but the fact that she opened her mouth

1 and made the statement shows that she knew that
2 she had been a victim of sex abuse and that she
3 had made some determination on her own about
4 how much it -- about how much bias she had.

5 Because under rule five oh one -- excuse me,
6 5.801, hearsay is a statement other than one
7 made by the declarant while testifying at trial
8 or hearing comma offering evidence to prove the
9 truth of the matter asserted.

10 It's not relevant, nor do I care to enter
11 into evidence, whether or not H.B. really
12 thought she was over it; but her statement goes
13 to show that she recognized at the time of the
14 trial that she had been a victim of sex abuse
15 and that she, in her own mind, had made some
16 sort of rationalization about how much it
17 affected her.

18 THE COURT: I'm not sure the testimony
19 does everything that you're suggesting it does,
20 Mr. Bergmann. I will also consider that
21 testimony from Ms. Marino insofar as it may
22 have some bearing on H.B.'s, I guess, attitude,
23 for lack of a better word.

24 Mr. Olson, do you have any questions for
25 this witness?

1 H.B. told Ms. Marino a couple years, as far as
2 the timing of all this, it appears that it was
3 a couple years after the bathtub incident that
4 a great-uncle had improperly touched her while
5 they were visiting grandparents or
6 great-grandparents. Now, the second incident,
7 the evidence comes in because it's arguably an
8 excited utterance. But it does not change the
9 fact that Ms. Marino had no personal knowledge
10 of what took place.

11 And what a four- or six-year-old might
12 have said about the incident, how a six- to
13 eight-year-old sister interpreted what was
14 being told about that incident, is not the kind
15 of competent, objective evidence that the Court
16 believes is necessary to throw out a jury
17 verdict that was reached after, I believe, four
18 to five hours of deliberation. I believe that
19 the Defense is asking the Court to make several
20 presumptions or assumptions in granting the
21 motion.

22 The Defense, at every chance, has
23 characterized this juror's conduct as lying to
24 the Court, lying to the attorneys. In fact,
25 the most accurate way to characterize this

1 would be that H.B. did not disclose
2 information. And arguably, under the
3 circumstances, silence could constitute an
4 assertion of fact.

5 But another problem here is that the
6 Defense is asking the Court to assume that
7 during voir dire, H.B. had a conscious --
8 consciousness or awareness of the events or the
9 incidents that Ms. Marino testified to here
10 today, that H.B. considered those events to
11 constitute a sex offense or sexual abuse or
12 being molested. And there is not -- there's no
13 evidence here for the Court to conclude either
14 one of those things, that she has a con--

15 We don't -- and you're shaking your head
16 Mr. Bergmann, but we have nothing from H.B.
17 that she's aware of this.

18 MR. BERGMANN: The evidence came into the
19 record, Your Honor.

20 THE COURT: And that evidence was after
21 the verdict was reached. We don't know what Ms
22 -- what -- we do not know what H.B. was
23 thinking at the time she was asked.

24 MR. BERGMANN: And respectfully, Your
25 Honor, I think this misapprehends the entire

1 argument. She misled me. She misled you. She
2 misled Mr. Olson.

3 THE COURT: And that's assuming something,
4 Mr. Bergmann. And I am going to ask that you
5 sit down.

6 MR. BERGMANN: Okay.

7 THE COURT: That's assuming that she had a
8 conscious awareness of these events that
9 transpired at least 50 to 55 years ago.

10 MR. BERGMANN: That evidence is in the
11 record.

12 THE COURT: What we have from Ms. Marino
13 is that after the verdict was received, the
14 sister said, Well, how can you serve on this
15 jury?

16 And it wasn't -- I did not hear that H.B.
17 volunteered, Well, I know I'm a victim of sex
18 abuse but I'm over it.

19 Ms. Marino said, You're a victim of sex
20 abuse. How can you serve on this jury?

21 And she answered she was over it.

22 MR. BERGMANN: And --

23 THE COURT: That does not -- that is not
24 enough, Mr. Bergmann, for me to assume that
25 whatever time earlier, and I'm assuming that

1 we're probably talking two or three weeks
2 earlier, is when the actual voir dire took
3 place. That is not -- that statement to her
4 sister is not enough for me, in my opinion; and
5 I'm just going to tell you that is my opinion.

6 It's not enough for me to conclude to
7 the -- this -- the level of confidence that I
8 think I have to reach to be able to set aside
9 the jury's verdict, that H.B. had a conscious
10 awareness that she was the type of person we
11 were trying to talk to.

12 And so in the Court's opinion and my
13 conclusion is that, first of all, there isn't
14 enough for me to conclude that there was an
15 intent, any intent. I think it's -- there is
16 certainly insufficient evidence for me to
17 conclude that this was juror misconduct.
18 Because that would -- that would require me to
19 conclude that as she sat here in the jury box
20 and answered questions, that at the time, she
21 was thinking, you know, 55 years ago, there
22 were these incidents. And from Ms. Marino's
23 testimony, we don't really know because she was
24 only a personal witness to one. And it
25 certainly could have been inappropriate contact

1 by the father, but there are too many things
2 that the Court is being required to assume.

3 And given that the Defense has the burden,
4 and given the general -- the general rule that
5 a jury verdict should be upheld, the Court does
6 not find the failure of Ms -- or of H.B. to
7 disclose whatever might have happened to her as
8 a child as significant to set aside the jury's
9 verdict.

10 Now, I appreciate we have other grounds.
11 And I intend to allow the public to come in and
12 observe the rest of the arguments. If there is
13 anything further that the parties want to say
14 about -- let me take a moment just to collect
15 my thoughts. I want to make sure that I've
16 made the record that I wanted to on this
17 particular point.

18 I guess there is one more point I did wish
19 to make, and that has to do with the precedent
20 that I am concerned about we would establish if
21 I were to allow Defendant here to seek to set
22 aside a guilty verdict by attacking a juror.

23 And I appreciate, Mr. Bergmann, that in
24 your view, this juror intentionally misled or
25 concealed information from the Court. As I've

1 just stated, I don't believe that the record is
2 sufficient for the Court to reach that
3 conclusion. But I also want to make the point
4 that, you know, jurors don't come here
5 voluntarily.

6 It is a civic obligation they perform.
7 And if a juror, prospective juror comes to the
8 conclusion that if I serve on a jury and I come
9 back and I'm part of a guilty verdict, I'm
10 subject to having my personal past and all
11 issues concerning that I would typically want
12 to consider private, that those can be
13 reopened, and inquired into, I fear that we'll
14 have a lot more trouble getting people to come
15 to the courthouse to be available.

16 And I understand why you raised the issue,
17 Mr. Bergmann. I'm not impugning why you've
18 raised this. But I do think that's a factor
19 the Court has to keep in mind in deciding where
20 is the right place to -- where's the balance in
21 making a decision on what -- what constitutes a
22 fair trial for a defendant. I did want to make
23 that point, but there's some follow-up
24 comments. I don't want to belabor things too
25 much more because we have more work to do.

1 MR. BERGMANN: I understand, Your Honor.
2 I'd just ask you to expand your finding to
3 state affirmatively one way or the other
4 whether when H.B. failed to mention these facts
5 to us, did that prejudice Mr. Montealvo by
6 robbing him of the opportunity to use a
7 peremptory strike?

8 THE COURT: And I don't believe that I
9 need to go there because, ultimately, I'm
10 not -- unless I can find, that I can conclude
11 it was intentional concealment on her part or
12 that there was some, you know, there was
13 misconduct here as opposed to what I am
14 concluding based on the record I have in front
15 of me, is that if she ever considered this to
16 be assault or abuse, she -- it was not
17 something she considered or thought about when
18 she was going through the voir dire process.

19 MR. BERGMANN: Okay. I understand your
20 ruling.

21 THE COURT: So -- all right. Anything
22 more?

23 MR. BERGMANN: I just got to be sure I got
24 it all on the record.

25 THE COURT: Sure.

1 MR. BERGMANN: Iowa Rule of Criminal
2 Procedure 2.24 states the Court may order a new
3 trial when a jury is guilty of any misconduct
4 tending to prevent a fair and just
5 consideration of the case.

6 And in Your Honor's ruling, you spoke
7 about intentional misconduct or acting to
8 intentionally deceive. But the standard is
9 actually the jury is guilty of any misconduct
10 tending to prevent a fair and just
11 consideration of the case.

12 THE COURT: You're looking at Rule
13 2.24(2)--

14 MR. BERGMANN: B three.

15 THE COURT: -- B three?

16 MR. BERGMANN: Yes.

17 THE COURT: All right. And basically, for
18 similar reasons, I don't know that I can make a
19 conclusion that there's been any misconduct
20 because to get to that point, Mr. Bergmann, the
21 Court would have to conclude that there was
22 concealment, that H.B. knew and was thinking
23 about the fact that she had been a child victim
24 of sexual abuse when she was being asked
25 questions and chose not to disclose that. And

1 again, the record that I have, I don't believe
2 that's sufficient for me to reach that
3 conclusion.

4 MR. BERGMANN: One other issue that I
5 would ask you expound on and so -- or I'd ask
6 you make further findings, is did H.B. violate
7 the oath to tell the truth.

8 THE COURT: And based on the record I
9 have, I don't believe I can make that finding.
10 That -- I don't believe that's something that I
11 can conclude. Because again, given the passage
12 of time, the fact that Ms. Marino only had
13 personal knowledge of one incident that
14 involved both of them and their father after a
15 bath -- the other incident there was not
16 personal observation, it was purely information
17 that she had heard from H.B. -- I don't -- I
18 cannot conclude on that record that there was
19 concealment.

20 MR. BERGMANN: And I guess I know we got
21 to get going, but what I'm not following, I
22 guess, is that it's in the record that
23 Ms. Marino and H.B. spoke contemporaneous to
24 the time of her serving as a juror.

25 THE COURT: That's not what the record

1 was. It was after the verdict.

2 MR. BERGMANN: I don't think that the
3 temporal part is in there, Your Honor.

4 THE COURT: Then how am I supposed to
5 presume that it was? It's your burden.

6 MR. BERGMANN: Right. And we entered
7 evidence in the record and it's in the record
8 that they spoke contemporaneous to the trial,
9 and that H.B. said, I think I'm over it.

10 And that's why I went to such lengths to
11 get that in is because it shows her knowledge
12 at the time, contemporaneous to the voir dire
13 examination, that she recognizes what happened
14 to her and that she's made the decision that
15 she's over it. And so at that point, that's
16 the part that I don't understand.

17 Is Your Honor saying that she forgot? Is
18 Your Honor saying that there needs to be some
19 sort of specific intent mens rea for a juror to
20 violate their oath to tell the truth? Because
21 we don't need that intent. That's not in the
22 rule, and we have the evidence in the record
23 that she knew about it at the time that --
24 contemporaneous to the voir dire examination.

25 THE COURT: You're making an assumption

1 there, Mr. Bergmann. My recollection of
2 Ms. Marino's testimony is that when she had
3 this conversation, it was after the verdict had
4 been returned.

5 MR. BERGMANN: And that's not my
6 recollection, but the record speaks for itself.

7 THE COURT: It will. And that was my
8 recollection. And that's why, in my opinion,
9 that conversation with Ms. Marino was not close
10 enough in time to voir dire for me to come to
11 any different conclusion other than we don't
12 know what she might have had in her
13 consciousness at the time. At the time of voir
14 dire.

15 Does that --

16 MR. BERGMANN: I think I've covered all my
17 bases.

18 THE COURT: -- explain where the Court's
19 coming from?

20 MR. BERGMANN: I understand your ruling.

21 THE COURT: All right.

22 Mr. Olson, anything further for the
23 record?

24 MR. OLSON: No, Your Honor.

25 THE COURT: All right. Well, we're going