

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28422

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANIEL LIVINGOOD,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN

APPELLANT'S BRIEF

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NOTICE OF APPEAL WAS FILED OCTOBER 17, 2017

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to S.D.C.L. § 23A-32-2 and S.D.C.L. § 15-26A-3(1).

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to sustain the convictions for Sexual Exploitation of a Minor.
2. Whether the evidence was sufficient to sustain the conviction for Contributing to the Delinquency of a Minor.

Relevant Cases and Statutes:

State v. Brende, 2013 SD 56, 835 N.W.2d 131, 140

Jackson v. Virginia, 443 US 307, 318-19, S. Ct. 2781, 2781, 2789, 61 L.Ed.2d

560.

SDCL 22-22-24.3

SDCL 26-8A-2(8)

PRELIMINARY STATEMENT

For purposes of this brief, references are as follows: (1) “T” designates the jury trial transcript; (2) “MH” designates the Motion(s) Hearing followed by the date the hearing was held; (3) “Appx.” designates Appellant’s Appendix; (4) “R” designates the settled record of the case. Three minors are identified in the Indictment and throughout the record, including a pretrial hearing and trial. Each will be identified by initials: **M.G.**, DOB: 08/05/02; **O.G.**, DOB 01/01/2005; and **E.G.**, DOB 01/01/2002.

STATEMENT OF THE CASE

Daniel Livingood was indicted in Minnehaha County on March 24, 2016. R. 15. The Indictment included two counts of *first-degree rape* involving M.G.; two counts of *felony sexual contact* also involving M.G.; two counts of *sexual exploitation of a minor* involving O.G.; two counts of *sexual exploitation of a minor* involving E.G.; and, two counts of *contributing to the delinquency of a minor*, with one count pertaining to O.G. and the other to E.G. See Appendix (Indictment).

Several pretrial hearings were held and will be referred to as necessary in Defendant's brief.

Jury trial commenced on June 5th, 2016 and ended on June 12th, 2016. Livingood was found *not guilty* of the rape and felony sexual contact charges involving O.G.: *not guilty* of two counts of sexual exploitation of a minor concerning E.G; and, *not guilty* as to the count charging contributing to the delinquency of a minor concerning E.G. Livingood was *convicted* on two counts of sexual exploitation regarding O.G., in violation of S.D.C.L. 22-22-24.3(1)&(2), and *guilty* of contributing to the delinquency of O.G, in violation of S.D.C.L. 26-9-1.

On the day of his sentencing, Livingood pleaded guilty to an Habitual Offender Information alleging a prior felony conviction for DUI. The circuit court suspended concurrent 10-year penitentiary terms on each conviction for *sexual exploitation of a minor* and placed Livingood on probation for 10-years. The court imposed three hundred sixty days (360) days in the county jail on the conviction for *contributing to the*

delinquency of a minor. Livingood was credited with five hundred sixty eight (568) days of pre-trial custody and ordered released following the sentencing hearing. R. 499. See Appendix (Judgment and Sentence).

STATEMENT OF THE FACTS

In 2015 Daniel Livingood was renting a small house in Sioux Falls located on West Baily Avenue. T 205. He was employed by his landlord, Royce Vega, to perform maintenance on the landlord's various properties in Sioux Falls. *Exh.* 18 & 19 (recorded interviews of Daniel Livingood); T 464. While Livingood was working on one of the rental properties located on Spring Avenue in Sioux Falls, Livingood was approached by "the Gambu family." T 327. They indicated they were homeless and asked about renting a place to live. It was agreed they could rent the upper level of livingood's home on West Baily and Livingood would move into a small living space in the lower level. T 327-28; 463. The home had one bedroom and one bathroom, both located on the upper level, along with a kitchen. *Id.* Livingood shared the bathroom with the Gambu family, along with the kitchen.

The "Gambu family" consisted of Kella Garma, biological father of M.G. and O.G. and step-father to E.G. His wife, Lagge Brimo, is the biological mother of M.G., O.G., and E.G. T 204. The family moved to the United States in 2007 from Eritrea, Africa. M.G. was born in the United States. T 209-10. The three minors testified and trial in fluent English. Kella and Lagge testified through an interpreter.

The Gambu family lived on West Baily with Livingood for a few months in 2015 before Livingood was arrested for violating his parole. He was on parole for a felony

DUI and failed to maintain contact with his parole officer. *Exh.* 18. Livingood was sent to Mike Durfee State Prison in Springfield. *Id.*; T 325. The Gumbu family moved out of the West Baily property and moved to a rental home on Spring Avenue, owned by the same landlord, Royce Vega. After his release from Springfield, Livingood went back to work for Vega and moved into the upper level of the Spring Avenue rental. *Exh.* 18 & 19. The upper level had a separate entry way located at the top of the stairs and was a furnished apartment. The lower level, occupied by the Gumbu family, had a separate entry as well. *Id.*; T 460. Livingood was acquitted of these charges concerning the Spring Avenue residence. T 69.

Livingood was interviewed on two separate occasions. The first interview was conducted by DCI Agent Darin Cunningham on a referral from the Sioux Falls Police Department. The interview took place at the prison in Springfield and concerned allegations made in 2015 when Livingood lived in the West Baily home with the Gumbu family. T 320-340; *Exh.* 18.

Agent Cunningham advised Livingood the allegations concerned the minors observing him masturbate, watch pornography and walk to the bathroom at night without clothes on. T 329. Livingood acknowledged he viewed pornography, but did so in his private living space in the lower level of the home. He did not know if the girls would have witnessed him masturbate, T 329-30, but for them to see him, they would have to come down the stairs and look into his living area. T 339. Cunningham also asked about an allegation he masturbated while sitting at the top of the stairs. Livingood denied it. *Id.* He was asked about whether he would have “touched” one of the girls on the leg and

Livingood said he had not done this. *Id.* Livingood also told Cunningham that whenever he used the bathroom late at night he was clothed in a long shirt. *Id.* No charges resulted at the time from these allegations.

In 2016, Livingood was interviewed a second time at the Sioux Falls Police Department. This interview stemmed from a third-party referral about allegations made while the Gambu family and Livingood resided on Spring Avenue. T 449-78; *Exh.* 19. This time the allegations included sexual contact and rape by digital penetration of M.G. and being seen masturbating by the minors. T 463-64. M.G. testified that while sleeping with her mother, Daniel entered their room and had sex with her mother, Lagge. T 28-42. Livingood acknowledged a sexual encounter with Lagge and when M.G. awoke, he left the room immediately. Livingood also admitted he had been in a sexual relationship for some time with Lagge. *Exh.* 19; T 463-64. Lagge corroborated the affair with Livingood, and testified she observed nothing that would support M.G.'s allegation, T 15, or those made by E.G. and O.G. T 213. Phone records established that Lagge and Livingood were in frequent contact in 2016 while living on Spring Avenue. T 474. Similarly, Kella, who testified he never liked Livingood, T 203, was not told anything by M.G., T 202, O.G. or E.G., regarding inappropriate behavior by Livingood in either 2015 or 2016. T 207.

The jury acquitted Livingood of those counts in the Indictment alleging rape and sexual contact as to M.G. and the sexual exploitation counts and contributing to the delinquency count as to E.G.. The jury convicted Livingood of two counts of sexual exploitation of O.G., both alleged to have occurred on West Baily, and convicted

Livingood on a single count of contributing to the delinquency of O.G., also alleged to have occurred at the West Baily residence.

STANDARD OF REVIEW

This appeal challenges the sufficiency of the evidence. “Challenges to the sufficiency of the evidence are reviewed de novo. *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140, (citing *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764. The “relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560.)

ARGUMENT

1. The evidence presented at trial was insufficient to sustain the convictions for Sexual Exploitation of a Minor.

Under South Dakota law, sexual exploitation occurs “if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that: (1) is harmful to minors; (2) involves nudity; or (3) is obscene.... S.D.C.L. 22-22-24.3. Livingood was indicted for violating subsections (1) & (2) as to both E.G and her sister, O.G. The Jury acquitted Livingood on the counts pertaining to E.G., but convicted him on the counts concerning O.G. T 19-22.

At trial, O.G. testified that her family lived in the upper level of the West Baily residence and Daniel stayed in the basement. T 61. She described Daniel’s living area as consisting of “lots of junk and a bed and a T.V.” *Id.* Although Daniel had put up a curtain, T 81-82, O.G. said she could see his T.V. and bed from the top of the stairs. T 62.

Asked if she had ever seen Daniel do inappropriate things, O.G. described two occasions when she saw him touching himself.

The first occasion apparently occurred in the “middle of the night.” T 63. She was watching T.V. while on a pullout couch in the living room with her sisters. T 69. O.G. walked into the kitchen when she saw Daniel seated at the top of the stairs near the microwave. T 63. He was wearing a white shirt. T 64. She testified she saw him touch his dick, T 62, but she also testified she didn’t actually see his penis in his hand. T 70. O.G. said it was dark at the time and she doesn’t think Daniel saw her. T 69.

The second time she claimed to have seen Daniel touching himself was when she walked halfway down the stairs to his living area, T 66, and he was laying on his bed watching inappropriate stuff on his T.V. T 65. She described seeing a boy and girl having sex on the T.V. *Id.* Asked if she could hear the movie, O.G. answered, “[b]eside the door. T 66. This was the only time she had seen Daniel watching “this type of movie.” *Id.* She testified she never saw his penis, T 70, and Daniel never saw her. T 71:

Q. So when Daniel was watching this T.V. down there, you saw inappropriate stuff. Did he know you were looking?

A. No.

...

Q. Did you stay for awhile and watch or did you leave?

A. No. I left.

O.G. also testified she never observed Livingood walking around naked. T 69.

When O.G. was asked why she had gone down the stairs, she said it was to use a side door to leave the house. T 71. It was located at the half-way point down the stairs. She agreed that this was supposed to be Daniel's door, and the family would use the upstairs door to enter and leave the house. *Id.*

Livingood denied in his interview that he had ever sat at the top of the stairs and masturbated. T 339. He did, however, admit he could have watched "porn" downstairs in his living area and didn't deny he may have masturbated while watching it. *Id.* He said, if he was seen masturbating, the kids would have to come downstairs into his area. *Id.* He didn't know whether they did, or didn't. Livingood was upset, telling the Agent he had a right to privacy in his living area, and the girls should stay out of his living area. *Id. Exh. 18* (interview with Agent Cunningham).

The prosecution argued to the jury that Livingood was guilty of sexual exploitation because his actions involved nudity and were harmful to minors as well. T 517. "And" the prosecutor contended, "he continued to expose them or make them participate in that activity despite knowing they could see him." T 518.

The prosecution's argument was flawed both legally and factually. O.G. testified Daniel did not see her when she said she observed him touch himself. She did not testify to any interaction with Daniel, on either occasion, either physically or verbally, or even by way of eye contact. The occasion in the basement was because she went down the stairs and looked, then left, testifying he never saw me. The top-of-the-stairs observation occurred in the middle of the night, in the dark, and she testified she saw what she saw after walking into the kitchen. Again, she testified he did not see her. And contrary to the

prosecution's argument, Livingood made no admission he was seen masturbating in his living area, but only that it might be possible if they came down the stairs. He was not aware that ever occurred, however.

There are two questions presented when applying this statute. Initially, does the evidence establish the defendant caused or knowingly permitted the minor to engage in the forbidden activity. A rational fact-finder could not conclude Livingood caused or knowingly permitted O.G. to come down the stairs and look into his living area, particularly considering her testimony that he never saw her, which is consistent with Livingood's interview. As for the incident at the top of the stairs in the middle of the night, perhaps an inference can be made that Livingood placed himself in a position where he might be seen, although, O.G. testified Livingood did not see her. Moreover, the inference is he did not want to be seen and O.G. unexpectedly entered the kitchen. But assuming the first inference can be made, the statute requires more proof, and this is where the evidence falls short of the mark.

In addition to the "causes or knowingly permits" requirement, the evidence must further establish that the minor was *engaged in the activity*. The operative language is crucial: "A person is guilty of sexual exploitation if the person causes or knowingly permits ***a minor to engage in an activity or the simulation of an activity that (1) Is harmful to minors; (2) Involves nudity...***" (emphasis supplied) "Engage" is a transitive verb, which by definition is an action verb expressing a doable activity. A transitive verb must be accompanied by an object, which in this case, is the word "activity." Webster's New Universal Unabridged Dictionary. The self-evident import of the statute is to

prohibit the minor from actively participating in the harmful activity or nudity. In this case, at best the evidence established she observed on two occasions, one at the top of the stairs, one in Livingood's downstairs living space, an adult male masturbating. This evidence establishes nothing more than something she observed, but was not actively engaged in the activity.

To read the statute as broadly as urged by the prosecution at trial, would criminalize an array of activities one can only assume, by the carefully chosen language in the statute, the legislature did not intend be included within the sexual exploitation law. There is a separate law prohibiting indecent exposure involving a child, S.D.C.L. 22-24-1.3, that does address a circumstance where a minor observes nudity and involves an intent to arouse. Sexual exploitation addresses a differing harm not established by the evidence presented in this trial. Defendant respectfully submits that the evidence must establish more than observance, but actual participation in the unlawful activity.

Defendant's argument is further buttressed by the language found in S.D.C.L. 22-24.3 which reads: "Consent to *performing these proscribed acts* is not a defense...." (emphasis supplied) Performing is not a passive act of observing, but the active role of participating. The legislative intent is apparent by this statute and should not be ignored or disregarded to affirm a conviction because the underlying conduct offends.

2. The evidence at trial was insufficient to sustain the conviction for Contributing to the Delinquency of a Minor.

Livingood was acquitted of contributing to the delinquency of E.G., but convicted of contributing to the delinquency of O.G. Presumably the jury relied on the same facts to find Livingood guilty of the contributing charge as it did for the sexual exploitation

charge, but because the trial court gave a unanimity instruction, R 386, it is not clear what conduct the jury agreed upon to convict. (See Amended Instruction 39).

S.D.C.L. 26-8A-2 (8) would substantiate a conviction for contributing to the delinquency of a minor if this Court found the evidence sufficient to support the sexual exploitation convictions. Subsection (8) specifically provides that a child who is subjected to “sexual exploitation” is abused or neglected under South Dakota law. If this Court vacates Livingood’s convictions for sexual exploitation of O.G., for those same reasons the conviction for contributing to the delinquency of O.G. must be vacated as well.

CONCLUSION

For the reasons and arguments set forth in Appellant Livingood’s brief, he respectfully requests his convictions in Counts 5 and 7 for Sexual Exploitation of a Minor (as to O.G.) and Count 10 for Contributing to the Delinquency of a Minor be reversed and vacated with instructions to the Circuit Court to enter Judgments of Acquittals.

REQUEST FOR ORAL ARGUMENT

Daniel Livingood respectfully requests oral argument before this Court.

Respectfully submitted this 27th day of April, 2018.

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Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Brief and all appendices were mailed by first class mail, postage prepaid to:

Matthew templar
Attorney General's Office
1302 E Hwy 14, #1
Pierre SD 57501

Dated this 27th day of April, 2018.

Michael J. Butler, Esq.

CERTIFICATE OF COMPLIANCE

In accordance with S.D.C.L. §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 2,890 words from the Statement of the Case through the Conclusion. I have relied on the word count of the word-processing program to prepare this certificate.

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STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
Plaintiff

*

SFPD 201615140

vs.

*

INDICTMENT

DANIEL LIVINGOOD

Defendant

*

CR I16-1794

COUNT 1: RAPE 1ST DEGREE – VICTIM LESS THAN 13 YEARS OLD – CLASS C FELONY

COUNT 2: RAPE 1ST DEGREE – VICTIM LESS THAN 13 YEARS OLD – CLASS C FELONY

COUNT 3: SEXUAL CONTACT W/CHILD UNDER 16 ACTOR MORE THAN 3 YRS. – CLASS 3
FELONY

COUNT 4: SEXUAL CONTACT W/CHILD UNDER 16 ACTOR MORE THAN 3 YRS. – CLASS 3
FELONY

COUNT 5: SEXUAL EXPLOITATION – CLASS 6 FELONY

COUNT 6: SEXUAL EXPLOITATION – CLASS 6 FELONY

COUNT 7: SEXUAL EXPLOITATION – CLASS 6 FELONY

COUNT 8: SEXUAL EXPLOITATION – CLASS 6 FELONY

COUNT 9: CONTRIBUTE-DEP/DEL. OR CHILD NEED SUPERVISION – CLASS 1 MISD.

COUNT 10: CONTRIBUTE-DEP/DEL. OR CHILD NEED SUPERVISION – CLASS 1 MISD.

THE MINNEHAHA COUNTY GRAND JURY CHARGES:

That the Defendant, DANIEL LIVINGOOD, in Minnehaha County, State of South Dakota, on or between AUGUST, 2015 AND MARCH, 2016, then and there did commit the crime of Rape in the First Degree by accomplishing an act of sexual penetration with M.G., DOB: 08/05/2008, who was less than thirteen years of age, which conduct on the part of the Defendant was in violation of SDCL 22-22-1(1), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 2

That the Defendant, DANIEL LIVINGOOD, in Minnehaha County, State of South Dakota, on or between AUGUST, 2015 AND MARCH, 2016, then and there did commit the crime of Rape in the First Degree by accomplishing an act of sexual penetration with M.G., DOB: 08/05/2008, who was less than thirteen years of age, which conduct on the part of the Defendant was in violation of SDCL 22-22-1(1), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 3

That the Defendant, DANIEL LIVINGOOD in Minnehaha County, State of South Dakota, on or between AUGUST, 2015 AND MARCH, 2016, did while being sixteen years of age or older, and more than three years older than the victim, did knowingly engage in sexual contact with another person, M.G., DB: 08/05/2008, who was not the Defendant's spouse and who was under the age of sixteen years, in violation of SDCL 22-22-7 contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 4

That the Defendant, DANIEL LIVINGOOD in Minnehaha County, State of South Dakota, on or between AUGUST, 2015 AND MARCH, 2016, did while being sixteen years of age or older, and more than three years older than the victim, did knowingly engage in sexual contact with another person, M.G., DOB: 08/05/2008, who was not the Defendant's spouse and who was under the age of sixteen years, in violation of SDCL 22-22-7 contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 5

That the Defendant, DANIEL LIVINGOOD, in Minnehaha County, State of South Dakota, on or between DECEMBER, 2014 AND MARCH, 2015, did cause or knowingly permit a minor, namely O.G., whose date of birth is 01/01/2005, to engage in an activity that:

- ☒ is harmful to minors, or in the simulation of such an activity;
- ☐ involves nudity, or in the simulation of such an activity, or
- ☐ is obscene, or in the simulation of such an activity

and thereby committed the offense of Sexual Exploitation of a Minor, in violation of SDCL 22-22-24.3, a Class 6 felony. Consent to performing these proscribed acts by a minor or a minor's parent, guardian or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section, contrary to the form of the of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 6

That the Defendant, DANIEL LIVINGOOD, in Minnehaha County, State of South Dakota, on or between DECEMBER, 2014 AND MARCH, 2015, did cause or knowingly permit a minor, namely E.G., whose date of birth is 01/01/2002, to engage in an activity that:

- ☒ is harmful to minors, or in the simulation of such an activity;
- ☐ involves nudity, or in the simulation of such an activity, or
- ☐ is obscene, or in the simulation of such an activity

and thereby committed the offense of Sexual Exploitation of a Minor, in violation of SDCL 22-22-24.3, a Class 6 felony. Consent to performing these proscribed acts by a minor or a minor's parent, guardian or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section,

contrary to the form of the of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 7

That the Defendant, DANIEL LIVINGOOD, in Minnehaha County, State of South Dakota, on or between DECEMBER, 2014 AND MARCH, 2015, did cause or knowingly permit a minor, namely O.G., whose date of birth is 01/01/2005, to engage in an activity that:

- ☐ is harmful to minors, or in the simulation of such an activity;
- ☒ involves nudity, or in the simulation of such an activity, or
- ☐ is obscene, or in the simulation of such an activity

and thereby committed the offense of Sexual Exploitation of a Minor, in violation of SDCL 22-22-24.3, a Class 6 felony. Consent to performing these proscribed acts by a minor or a minor's parent, guardian or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section, contrary to the form of the of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 8

That the Defendant, DANIEL LIVINGOOD, in Minnehaha County, State of South Dakota, on or between DECEMBER, 2014 AND MARCH, 2015, did cause or knowingly permit a minor, namely E.G., whose date of birth is 01/01/2002, to engage in an activity that:

- ☐ is harmful to minors, or in the simulation of such an activity;
- ☒ involves nudity, or in the simulation of such an activity, or
- ☐ is obscene, or in the simulation of such an activity

and thereby committed the offense of Sexual Exploitation of a Minor, in violation of SDCL 22-22-24.3, a Class 6 felony. Consent to performing these proscribed acts by a minor or a minor's parent, guardian or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section, contrary to the form of the of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 9

That the Defendant, DANIEL LIVINGOOD, in said Minnehaha County, State of South Dakota, on or between DECEMBER, 2014 AND MARCH, 2015, did commit any act, or was in any manner responsible therefore, which conduct caused, encouraged, or contributed to the abuse, the neglect, or the delinquency of a child as such phrases are defined in SDCL Title 26, which child is identified as E.G., whose birth date is 01/01/2002, and thereby committed the offense of contributing to the abuse, neglect, or delinquency of a child in violation of SDCL 26-9-1, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 10

That the Defendant, DANIEL LIVINGOOD, in said Minnehaha County, State of South Dakota, on or between DECEMBER, 2014 AND MARCH, 2015, did commit any act, or was in any manner responsible therefore, which conduct caused, encouraged, or contributed to the abuse, the neglect, or the delinquency of a child as such phrases are defined in SDCL Title 26, which child is identified as O.G., whose birth date is 01/01/2005, and thereby committed the offense of contributing to the abuse, neglect, or delinquency of a child in violation of SDCL 26-9-1, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

Dated this 24 day of March, 2016.

A True Bill
"A True Bill"

This Indictment has the concurrence of 6 members of the Minnehaha County Grand Jury.

Merle A. Frost
Foreman
Minnehaha County Grand Jury

WITNESSES WHO TESTIFIED FOR THE GRAND JURY IN THIS MATTER:

✓ DET. J. CARDA, SFPD #609
✓ M.G. (JUVENILE)

✓ DET. C. MCCLURE, SFPD #817
✓ E.G. (JUVENILE)

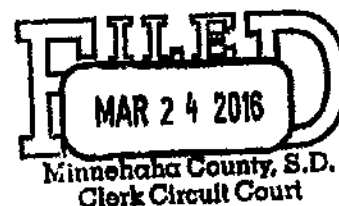
DANIEL LIVINGOOD, 05/07/1967, 318 N. SPRING AVE., SIOUX FALLS, SD

DEMAND FOR NOTICE OF ALIBI

The undersigned (deputy) State's Attorney states that the charged offense is alleged to have occurred on the _____ day of _____, 20____, at or about _____ o'clock ____M.. _____.

Pursuant to SDCL 23A-9-1 demand is hereby made upon defendant and defendant's counsel to give notice of intent to offer a defense of alibi.

(Deputy) State's Attorney



1CC-2C-3A6
1CC-JAIL

STATE OF SOUTH DAKOTA)
) : SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

SFPD 201615140

STATE OF SOUTH DAKOTA,
Plaintiff,

+

49CRI16001794

vs.

+

JUDGMENT & SENTENCE

DANIEL ANTHONY LIVINGOOD,
Defendant.

+

An Indictment was returned by the Minnehaha County Grand Jury on March 24, 2016, charging the defendant with the crimes of Count 1 Rape 1st Degree-Victim Less Than 13 Years Old on or about August 2015 through March 2016; Count 3 Sexual Contact with Child Under 16-Actor More Than 3 Yrs Older on or about August 2015 through March 2016; Count 4 Sexual Contact with Child Under 16-Actor More Than 3 Yrs Older on or about August 2015 through March 2016; Count 5 Sexual Exploitation on or about December 2014 through March 2015; Count 6 Sexual Exploitation on or about December 2014 through March 2015; Count 7 Sexual Exploitation on or about December 2014 through March 2015; Count 8 Sexual Exploitation on or about December 2014 through March 2015; Count 9 Contribute to Delinquency/Dependency of a Minor on or about December 2014 through March 2015; Count 10 Contribute to Delinquency/Dependency of a Minor on or about December 2014 through March 2015, and a Part II Information was filed. The defendant was arraigned upon the Indictment and Information on March 29, 2016, Mike Butler appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. The case was regularly brought on for trial, Lori Ehlers and Elizabeth Ebert, Deputy State's Attorneys appeared for the prosecution and Mike Butler appeared as counsel for the defendant. A Jury was impaneled and sworn on June 5, 2017 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on June 12, 2017 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, DANIEL ANTHONY LIVINGOOD, guilty as charged as to Count 5 Sexual Exploitation (SDCL 22-22-24.3) (Verdict Form Count 4), guilty as charged as to Count 7 Sexual Exploitation (SDCL 22-22-24.3) (Verdict Form Count 6) and guilty as charged as to Count 10 Contribute to Delinquency/Dependency of a Minor (SDCL 26-9-1) (Verdict Form Count 9)." The defendant was acquitted as to Count 1 Rape 1st Degree (Verdict Form Count 1), Count 3 Sexual Contact with Child Under 16 (Verdict Form Count 2), Count 4 Sexual Contact with Child Under 16 (Verdict Form Count 3), Count 6 Sexual Exploitation (Verdict Form Count 5), Count 8 Sexual Exploitation (Verdict Form Count 7), and Count 9 Contribute to Delinquency/Dependency of a Minor (Verdict Form Count 8). The Sentence was continued to September 27, 2017, after completion of a presentence investigation.

Thereupon on September 27, 2017, the defendant was re-advised as to the Part II Information by the Court to which the defendant admitted to the Part II Information (SDCL 22-7-8.1). The defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

DANIEL ANTHONY LIVINGOOD, 49CRI16001794

Page 1 of 3

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AS TO COUNT 5 SEXUAL EXPLOITATION-HABITUAL OFFENDER : DANIEL ANTHONY LIVINGOOD shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with the sentence suspended with credit for five hundred sixty eight (568) days served concurrent with Counts 7 & 10 on the following conditions:

1. That the defendant sign and abide by the standard probation agreement with the Court Services Department for ten (10) years.
2. That the defendant pay \$104.00 court costs by the end of probation. Attorney fees shall be converted to a civil lien in favor of Minnehaha County.
3. That the defendant submit to random blood, breath and urine testing as requested by any Court Services Officer, the Court or Law Enforcement.
4. That the defendant submit your person, place of residence, vehicle and personal effects to search and seizure at any time of the day or night without the necessity of a search warrant whenever requested to do so by any Peace or Court Services Officer or the Court.
5. That the defendant not possess nor consume alcoholic beverages nor enter establishments where alcohol is the primary item for sale.
6. That the defendant not participate in games of chance or enter establishments where gambling is present.
7. That the defendant neither use nor possess any marijuana or controlled drugs or substances or be present where such substances are being used.
8. That the defendant complete any evaluation, counseling, treatment or aftercare as directed by the Court Services Officer.
9. That the defendant commit no class one misdemeanors or greater for ten (10) years.
10. That the defendant have no contact with O.G. dob 1-1-2005 or family.

AS TO COUNT 7 SEXUAL EXPLOITATION-HABITUAL OFFENDER : DANIEL ANTHONY LIVINGOOD shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years, with the sentence suspended with credit for five hundred sixty eight (568) days served concurrent with Counts 5 & 10 on the following conditions:

1. That the defendant sign and abide by the standard probation agreement with the Court Services Department for ten (10) years.
2. That the defendant pay \$104.00 court costs by the end of probation. Attorney fees shall be converted to a civil lien in favor of Minnehaha County.
3. That the defendant submit to random blood, breath and urine testing as requested by any Court Services Officer, the Court or Law Enforcement.
4. That the defendant submit your person, place of residence, vehicle and personal effects to search and seizure at any time of the day or night without the necessity of a search warrant whenever requested to do so by any Peace or Court Services Officer or the Court.
5. That the defendant not possess nor consume alcoholic beverages nor enter establishments where alcohol is the primary item for sale.
6. That the defendant not participate in games of chance or enter establishments where gambling is present.
7. That the defendant neither use nor possess any marijuana or controlled drugs or substances or be present where such substances are being used.

006

8. That the defendant complete any evaluation, counseling, treatment or aftercare as directed by the Court Services Officer.
9. That the defendant commit no class one misdemeanors or greater for ten (10) years.
10. That the defendant have no contact with O.G. dob 1-1-2005 or family.

It is ordered that the defendant shall immediately report to the Minnehaha County Jail, located in Sioux Falls, South Dakota, to provide a DNA sample pursuant to SDCL 23 - 5A - 5. The Minnehaha County Jail or the agency supervising the person shall determine the time for the collection of the DNA sample provided the defendant has not previously done so at the time of arrest and booking for this matter.

AS TO COUNT 10 CONTRIBUTE TO DELINQUENCY/DEPENDENCY OF A MINOR : DANIEL ANTHONY LIVINGOOD shall serve three hundred sixty (360) days in the Minnehaha County Jail, located in Sioux Falls, South Dakota with credit for time served. The defendant shall pay \$84.00 court costs by the end of probation and have no contact with O.G. dob 1-1-2005 or family.

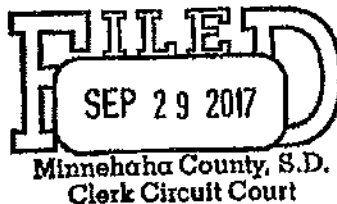
Dated at Sioux Falls, Minnehaha County, South Dakota, this 29 day of September, 2017.

BY THE COURT:

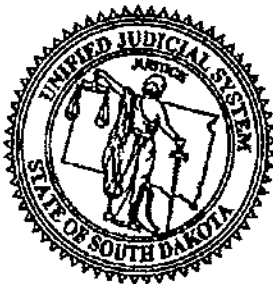
ATTEST:

ANGELIA M. GRIES, Clerk

By: M. Miles
Deputy




JUDGE ROBIN J. HOUWMAN
Circuit Court Judge



IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28422

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANIEL LIVINGOOD,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed October 17, 2017

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28422

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANIEL LIVINGOOD,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, the State of South Dakota, Plaintiff and Appellee, calls itself “State.” The State calls Daniel Livingood, Plaintiff and Appellee, “Defendant.” The State refers to the victim as “O.G.”

The State refers to Defendant’s brief on appeal as “DB.”

References to the settled record will be by the settled record number, and this includes all transcripts as well as all filed documents and exhibits.

JURISDICTIONAL STATEMENT

In this criminal appeal, Defendant appeals from a Judgment and Sentence signed, filed and attested September 29, 2017. The Judgment and Sentence found him guilty of two counts of Sexual Exploitation of A Child and one count of Contributing to Delinquency/Dependency of A Minor. SR 499-501. Defendant signed, filed and served his Notice of

Appeal October 17, 2017. SR 685-86. Jurisdiction in this Court arises under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WAS THE EVIDENCE SUFFICIENT TO SUSTAIN THE TWO CONVICTIONS FOR SEXUAL EXPLOITATION OF A CHILD AND THE SINGLE CONVICTION FOR CONTRIBUTING TO DELINQUENCY/DEPENDENCY OF A MINOR?

The trial court denied Defendant's Motion for Judgment of Acquittal.

State v. Uhing, 2016 S.D. 93, 888 N.W.2d 550

State v. Muhm, 2009 S.D. 100, 775 N.W.2d 508

State v. Bingham, 2017 S.D. 14, 894 N.W.2d 389

SDCL 22-22-24.3

SDCL 26-9-1

SDCL 26-8A-2(8)

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

This is a criminal case before the circuit court for the Second Judicial Circuit, Minnehaha County, South Dakota. The case proceeded before the Honorable Robin Houwman, Circuit Court Judge. The initial Complaint, SR 1-2, charged two counts of First Degree Rape of M.G., taking place between August 2015 and March 2016, together with two counts of Sexual Contact with the same victim. The Indictment, which forms the basis of this prosecution, was later entered by a Minnehaha County grand jury on March 24, 2016. SR 15. This

Indictment charged a total of ten counts, including two counts of First Degree Rape and two counts of Sexual Contact with A Child Under Sixteen, the same charges as the original Complaint. In addition, the Indictment added four counts of Sexual Exploitation of A Child and two counts of Contributing to Delinquency/Dependency of A Minor. These counts were alleged to have been committed against victims O.G. and E.G., during a time period of December 2014 through March 2015.

After motions, the court held a trial on June 6 through 12, 2017. See trial transcript, SR 821-1383. After trial, the jury found Defendant not guilty on Verdict Form Counts 1, 2, 3, 5, 7 and 8. These corresponded to Indictment Counts 1, 2, 3, 6, 8 and 9. The not guilty verdict counts pertained to victims M.G. and E.G. The jury found Defendant guilty on Verdict Form Counts 4, 6 and 9, pertaining to victim O.G. SR 1378-80. As the court set out in its Judgment of Conviction, the counts of which Defendant was found guilty in the Verdict Form corresponded to Counts 5, 7 and 10 of the Indictment. Verdict Form Count 4 corresponded to Indictment Count 5, Sexual Exploitation. Verdict Form Count 6 corresponded to Indictment Count 7, Sexual Exploitation, and Verdict Form Count 9 corresponded to Indictment Count 10, Contributing to Delinquency/Dependency of A Minor. See Judgment and Sentence, SR 499. The guilty verdicts were all on counts pertaining to victim O.G.

Based upon the jury verdict, the court sentenced Defendant to ten years in the state penitentiary, with the sentence suspended and credit for 568 days served, with various conditions of probation on Count 5. On Count 7, the court likewise sentenced Defendant to ten years in the state penitentiary with the sentence suspended and credit for 568 days served and the sentence to run concurrent with the other counts. On Count 10, Contributing to Delinquency/Dependency of A Minor, the court sentenced Defendant to serve 360 days in the Minnehaha County Jail, with credit for time served. The court's sentence resulted in Defendant being immediately released as of the time of sentencing. See Judgment of Conviction and Sentence, SR 499-501; Sentencing Transcript, SR 791-94, 797.

B. *Statement of Facts.*

Defendant first came into contact with the Gambu family in 2015. SR 1147; Trial Transcript 327 (interview with Agent Darin Cunningham and Defendant). The family was "on the street looking for a place to live." *Id.* Defendant was working on an apartment, but lived in a small house in Sioux Falls, a single story house, with a basement. *Id.* 1147-48. The family moved into the main floor, consisting of a bathroom, bedroom, and kitchen. Defendant lived in the unfinished basement. *Id.*

While the family lived in that house, O.G., 10 years old at the time, slept with her younger sister, M.G. and her older sister, E.G. SR 881, Trial Transcript 61 (testimony of O.G.). O.G. testified that

Defendant lived in the basement, and that she was down there “a couple of times.” It had a lot of junk and a bed and a television in it. She could see downstairs from the upstairs, but she could just see the television and the bed. *Id.*

O.G. described inappropriate behavior by Defendant. She stated that when he was by the microwave oven, close to the steps, he would be sitting down. He would “get a bottle of lotion from my bathroom and use his hand to touch his dick.” SR 882. She saw him do this more than once. She was in the house when she saw this happening, and in the kitchen. He was in the kitchen touching himself and she was also in the kitchen. SR 882-83.

O.G. also described other times when she was in the kitchen and Defendant would be on his bed touching himself. She was not on the steps, but could still see him. SR 883. O.G. stated that she was able to see Defendant’s penis. He would have a shirt on, but no underwear or pants. SR 884. O.G. also testified that she was able to watch a boy and a girl having sex on Defendant’s television screen while Defendant was apparently watching pornography. This took place from the steps leading down into the basement, which led to another outside door. SR 885-86. O.G. was standing by this outside door when she viewed the pornography. SR 886.

O.G. was also able to describe other instances when she spoke with Robin Niewenhuis, who was a forensic interviewer for Child’s Voice

in Sioux Falls. See SR 1005 and following (Trial Transcript 185); Exhibit 11, digital video disk of the interview. O.G. talked about Defendant putting lotion on his penis and also walking around with his clothes off, including saying that he would come upstairs naked sometimes. SR 1006. She stated that he would touch his penis with hand, put lotion all over it, and keep putting lotion on it and spraying it on. *Id.* She also referred to seeing pornography on Defendant's television. SR 1007.

In addition, O.G. said that Defendant showed her a picture of his penis on his phone four times. SR 1008. These incidents all occurred while the family lived in the smaller house on Bailey Street and Defendant lived in the basement of that house.

As Defendant notes in his brief, the family later lived in another home. Defendant had an apartment in the same building above that of O.G.'s family. See DB 3-4. Further allegations in the Indictment arose out of occurrences at this house in 2016. The jury acquitted Defendant of all charges arising from this later time period, as Defendant notes. DB 5.

ARGUMENT

THE EVIDENCE IS SUFFICIENT TO PROVE SEXUAL
EXPLOITATION AND CONTRIBUTING TO ABUSE OR
NEGLECT OF A CHILD.

A. *Introduction.*

Defendant raises the sole issue of sufficiency of the evidence to support his convictions below. Therefore, the issues on appeal are about the interpretation of the statutes involved and the evidence that exists on the record to show the elements of the offenses.

B. *Standard of Review.*

“The standard of review for denial of a motion for judgment of acquittal is de novo.” *State v. Uhing*, 2016 S.D. 93, ¶ 10, 888 N.W.2d 550, 553 (citing *State v. Doap Deng Chuol*, 2014 S.D. 33, ¶ 36, 849 N.W.2d 255, 264). When reviewing the sufficiency of the evidence this Court determines “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Uhing*, 2016 S.D. 93, ¶ 10, 888 N.W.2d at 554 (quoting *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 765). “If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside.” *Uhing*, 2016 S.D. 93, ¶ 10, 888 N.W.2d at 554 (quoting *State v. Hauge*, 2013 S.D. 26, ¶ 12, 829 N.W.2d 145, 149).

Finally, “[this Court] will not resolve conflicts in the evidence, assess the credibility of witnesses, or reevaluate the weight the evidence.” *State v. Riley*, 2013 S.D. 95, ¶ 14, 841 N.W.2d 431, 436 (quoting *Hauge*, 2013 S.D. 26, ¶ 12, 829 N.W.2d at 149) (internal quotations marks omitted).

C. *The Evidence Was Sufficient to Sustain Defendant’s Convictions for Sexual Exploitation of A Minor.*

Defendant’s argument proceeds along two tracks, one legal and the other factual. As to the factual, Defendant argues from those facts on the record that are helpful to him, as they are favorable to the defense. This is contrary to the settled law in this Court, which calls for the facts to be interpreted in the manner most favorable to the party that prevailed before the jury, in this case the State.

Defendant also deals with only two of the factual bases that could support the convictions. Other facts appear of record that could also support the convictions. The jury could well have found that these other facts, with which Defendant does not deal, supported the convictions. In such instances, this Court requires that the State either elect specific instances (which was not done in this case), or that the trial court give a specific instruction calling for jury unanimity and agreement on the specific facts supporting conviction. *See State v. Muhm*, 2009 S.D. 100, ¶¶ 32-33, 775 N.W.2d 508, 518-20. This “either or rule” requires that the court either force the State to select one act,

or give the unanimity instruction. In this instance, the court gave the unanimity instruction. Instruction 34, SR 395; Instruction 39, SR 397. Therefore, the jury was appropriately instructed that it needed to agree on which act or acts were the ones committed so as to prove Defendant's guilt.

But the State could and did prove a number of acts. Thus, the State was not limited to the two acts that Defendant may choose to discuss on appeal. Any of the acts sufficiently proved in the evidence may support this conviction, as the unanimity instruction was appropriate and was given. *Muhm*, 2009 S.D. 100, ¶¶ 32-33, 775 N.W.2d at 518-20. *See also State v. Brende*, 2013 S.D. 56, ¶ 14, 835 N.W.2d 131, 138; *State v. White Face*, 2014 S.D. 85, ¶ 20, 857 N.W.2d 387, 394.

The acts shown included Defendant's masturbation in the kitchen, while sitting on the floor, in clear view of the girls, as O.G. testified. O.G. testified this took place more than once while Defendant was sitting in the kitchen. She also saw Defendant doing the same, touching himself on his bed. SR 882-83. She was able to see this from the kitchen, not while she was on the steps. She further elaborated that he was doing this with her family's lotion. She was able to see his penis even though he had a shirt on. He had no pants or underwear on. SR 884.

She also saw pornography, “a boy and a girl having sex” on Defendant’s television while she was going down the steps. SR 885-86. O.G. was able to confirm details of these encounters to which she testified in her Child’s Voice interview as well. See SR 1003, 1005-06. The details included Defendant sitting at the top of the stairs masturbating at a time when O.G. could see him. O.G. also told Child’s Voice interviewer Niewenhuis about seeing pornography on Defendant’s television. *Id.*

In addition, O.G. also stated that Defendant showed her pictures of his penis on his phone four times. SR 1008; Exhibit 11, Interview with Robin Niewenhuis. O.G. did not testify to this, but the interview and Niewenhuis’s testimony were admitted as substantive evidence without condition.

Defendant’s legal attack argues that these facts are insufficient to show him guilty of the offense of Sexual Exploitation of A Child. SDCL 22-22-24.3 provides:

A person is guilty of sexual exploitation of a minor if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that:

- (1) Is harmful to minors;
- (2) Involves nudity; or
- (3) Is obscene.

Consent to performing these proscribed acts by a minor or a minor's parent, guardian, or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section.

When interpreting statutes, this Court reads the plain words of the statute itself. *See State v. Bingham*, 2017 S.D. 14, ¶ 3, 894 N.W.2d 389, 390, where this Court states, “[w]hen the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.” (quoting *Hayes v. Rosenbaum Signs & Outdoor Advert., Inc.*, 2014 S.D. 64, ¶ 28, 853 N.W.2d 878, 885; *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611. Statutory interpretation is a question of law, which is reviewed de novo. *Bingham*, 2017 S.D. 14, ¶ 3, 894 N.W.2d at 390 (citing *State v. Liaw*, 2016 S.D. 31, ¶ 8, 878 N.W.2d 97, 100). Defendant’s acts are well within the words of the statute.

The statute states that a person is guilty of sexual exploitation if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that involves nudity (Indictment Count 7) or activity that is harmful to minors (Indictment Count 5). As charged in Count 7 of the Indictment, the activity involves Defendant’s nudity, as provided in the statute. The activities shown involved O.G. engaging in the activity of watching Defendant actively masturbating or in the activity of looking at pictures that Defendant was showing to her. The facts show that O.G. was able to observe his nudity, and thus was engaged in observing it. There is nothing in the statute that requires the minor to be actively involved in carrying out the activity herself.

Rather, the minor can be engaged in the activity by observing it. On the Count 5 conviction, the observation of Defendant's masturbation and nudity is harmful to O.G. The observation itself is both harmful to the minor and involves the nudity of the adult.

D. *Defendant's Conviction of Contributing to the Delinquency/Dependency of A Minor is Supported By the Evidence.*

Count 10 of the Indictment, SR 18, (Count 9 of the Verdict Form, SR 413), Judgment and Sentence, SR 499, accused and found Defendant guilty of violating SDCL 26-9-1, Contributing to the Delinquency/Dependency of A Minor. Contributing to abuse, neglect, or delinquency is defined in SDCL 26-9-1 as follows:

Any person who, by any act, causes, encourages, or contributes to the abuse, the neglect, or the delinquency of a child, or any person, other than a parent who, by any act, causes a child to become a child in need of supervision, as such phrases with reference to children are defined by chapters 26-7A, 26-8A, 26-8B, and 26-8C
. . . .

A child who is subject to abuse or neglect is defined in SDCL 26-8A-2(8) as a child who is subject to sexual abuse, sexual molestation, or sexual exploitation by a child's parent, guardian, custodian or any other person responsible for the child's care. The act involved is that of sexual exploitation. Defendant's acts of masturbating in front of O.G. where he could be observed, playing pornography where O.G. could observe it, and showing her pictures of his penis fit within the definitions of this statute as well as the sexual exploitation statute.

The conviction under the dependency, neglect or delinquency should, therefore, be affirmed as well.

CONCLUSION

The State respectfully requests that Defendant's judgment and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 2,610 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 14th day of June, 2018.

/s/ Craig M. Eichstadt
Craig M. Eichstadt
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of June, 2018, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Daniel Livingood* was served via electronic mail upon Michael J. Butler, mike.butlerlaw@midconetwork.com.

/s/ Craig M. Eichstadt
Craig M. Eichstadt
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28422

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANIEL LIVINGOOD,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN

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NOTICE OF APPEAL WAS FILED OCTOBER 17, 2017

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PRELIMINARY STATEMENT

Appellant's brief cites to the trial transcript by using the designation "T" followed by the page number(s). Appellee's brief refers to the trial transcript both by reference to the Settled Record (SR) and at times to the transcript page number as well as SR. Defendant was acquitted on all counts of the indictment pertaining to minors "EG" and "MG" and convicted on two counts of *sexual exploitation* and a single count of *contributing to the delinquency of a minor* as to minor "OG." To aid this Court's review of OG's trial testimony, it is attached in full to this brief and designated as *APPENDIX*. Appellee's brief, when cited, will be referred to as AB followed by the relevant page number(s).

APPELLEE'S STATEMENT OF FACTS

In addition to citing the trial testimony of OG, Appellee also references portions of the testimony of Child's Voice interviewer Robin Niewenhuis in its rendition of the facts. AB 5-6. Niewenhuis had interviewed OG in April of 2015. T 176. In her trial testimony, she said OG told her Daniel showed her a picture of his penis on his phone four times. T 188; (SR 1008); AB 6. At trial, however, OG testified Daniel never showed her his phone:

Q. (Prosecutor) ...Oroma, do you remember if Daniel ever showed you a picture?

A. No.

Q. Do you remember if he ever showed you his phone?

A. No.

T 68; (SR 888).

Similarly, Appellee cites to Niewenhuis' interview for the factual assertion that O.G. saw Daniel walking around with his clothes off, including he would come upstairs naked. T 186; (SR 1006). This particular allegation contained in Appellee's statement of facts was not confirmed by O.G. at trial.

ARGUMENT

The jury was instructed that it had to unanimously agree upon the act or acts supporting its verdict. (SR 395). Appellee argues that among the acts the jury could have based its verdict was the testimony of Robin Niewenhuis, who testified OG advised her during the forensic interview, Daniel showed her a picture of his penis on his phone four times. T 188; (SR 1008); AB 10. At trial, O.G. had no recollection of this occurring. T 68; (SR 223).

A similar argument was made to this Court in *State v. Brende*, where State argued on appeal that certain out of court statements made to a forensic interviewer but denied or recanted at trial by the alleged victim, could be considered as substantive evidence when assessing the sufficiency of the evidence on appeal. 2013 SD 56, ¶ 27-28, 835 N.W. 131, 142-43:

Under the circumstances of this case, we conclude that no rational trier of fact could have found Brende guilty of first-degree rape beyond a reasonable doubt upon C.I.'s statement that Brende made him put his penis in Brende's butt, which C.I. alleged during the forensic interview but then recanted at trial. First, at the time C.I. made these statements during the forensic interview, he was not subject to cross-examination, nor was he under oath. Next, as opposed to a situation in which a witness qualifies prior statements or partially recants them, in this case C.I. completely recanted his prior allegation...Additionally, there was no Evidence that C.I. recanted this allegation due to intimidation or coercion,

nor was any other evidence presented that would have explained C.I.'s recantation. *See United States v. Bahe*, 40 F. Supp. 2d 1302, 1310 (D.N.M. 1988) ("The central difficulty with basing a conviction on nothing more than an out-of-court statement which has been recanted at trial is that the fact finder has no logical basis for determining which statement is true[.]"); *State v. Pierce*, 906 S.W.2d 729, 736 (Mo. Cr. App. 1995) (recognizing the danger of allowing a conviction to be based solely upon a prior statement recanted at trial, stating "[w]hen the trier of fact decides to believe a witness' prior statement rather than the in-court contradiction, that decision often is based solely on guess or intuition, not credible facts."). *See Also*, Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. Rev 1, 38 (1986) ("[W]ithout a specific factual basis in the record to justify believing the prior accusation over the present testimony, a verdict based solely on the prior statement would be supported only by suspicion, hunch, guess, or intuition...[which] does not satisfy due process.").

Id. O.G.'s trial testimony T 68, is irreconcilable with the purported out-of-court statement made to Niewenhuis. Moreover, it was the prosecutor who made the inquiry at trial regarding the phone eliminating any notion of coercion by cross-examination. Nor was there any evidence introduced at trial corroborating the out-of-court statement. (Defendant's cell phone was seized at the time of his arrest). Finally, at a pretrial hearing to determine the admissibility of O.G.'s testimony, she was not asked about the phone and pictures, and O.G. did not volunteer this information either. (SR 190-214). Finally, regarding this specific allegation, the State did not, in its closing argument, argue this allegation in support of guilty verdict.

In support of the requirement that the defendant must "knowingly cause or permit" the minor to "engage in an activity" the Appellee cites no evidence from the trial transcript that Daniel Livingood was aware that he was ever seen engaging in the alleged act of masturbation. O.G. gave details of two specific instances where she claimed she saw Daniel "touching himself." Once, where he was seated at the top of the stairs late at

night in the dark. O.G. entered the kitchen and apparently observed Daniel. T 69. (SR 889) He did not see her, however. *Id.* Nor did she see his penis. T 70; (SR 890). The occasion where she observed him in his room in the lower level of the home, she went half way down the stairs and was able to look into his room. Again, O.G. testified Daniel did not see her. T 70-71; (SR 890-91):

Q. So the two times in that house where you say you saw - - you never actually saw his penis, right?

A (O.G.) Yes.

Q. Yes, you didn't see it?

A. Yes.

T 73 (SR 893).

In her closing argument, the prosecutor told the jury that Livingood knew he was being watched referring to Linvingood's interview with Agent Cunningham. In this interview, Livingood acknowledged he had masturbated in his private living area, but denied doing so at the top of the stairs. When asked if he was seen he said it was only possible if the girls looked into his living area downstairs. T 339. (SR 1159):

Q. And Mr. Livingood was pretty adamant that he had essentially a right to privacy in his own living space?

A. I would say that, yes.

...

Q. He said it was - - if he was seen, the kids would have to come downstairs into his area.

A. I believe that is what he said, yes.

Id.

The statute requires proof beyond a reasonable doubt Daniel Livingood knowingly permitted O.G. to engage in an activity or the simulation of an activity *harmful* to minors (Count 5 of the Indictment) and involved nudity. S.D.C.L. 22-22-24.3 (Count 6 of the Indictment), and committed an act which *caused, encouraged, or contributed to the abuse, neglect, or delinquency of* O.G. (Count 10 of the Indictment).

Appellant submits the absence of proof that Livingood was cognizant of being seen, or ever intended to be seen, in his living area in the lower level of the home, or at the top of the stairs, in the dark late at night, is itself insufficient to sustain any of the three verdicts of guilty. O.G. herself provided the critical testimony, Daniel did not see her, or put another way, he did not knowingly cause her to engage in the harmful activity involving nudity.

CONCLUSION

For the reasons set forth in Appellant's initial brief to this Court, and this reply brief, he respectfully requests his convictions be reversed and vacated.

Dated this 13th day of August, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing Appellant's Reply Brief and all appendices were served via electronic mail to the following:

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CERTIFICATE OF COMPLIANCE

In accordance with S.D.C.L. §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 1462 words from the Statement of the Case through the Conclusion. I have relied on the word count of the word-processing program to prepare this certificate.

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DIRECT EXAMINATION

1
2 BY MS. EBERT:

3 Q. Oroma, can you pull that microphone up to your mouth,
4 please? Thank you. Would you state your full name for the
5 record, please?

6 A. Oroma Gambu.

7 Q. Can you spell that out?

8 A. O-R-O-M-A G-A-M-B-U.

9 Q. And how old are you?

10 A. I'm twelve.

11 Q. When is your birthday?

12 A. January 1.

13 Q. Do you know of what year?

14 A. 2005.

15 Q. Are you still in school right now?

16 A. (Witness nodding.)

17 Q. What school is that?

18 A. Hawthorne.

19 Q. What grade are you in?

20 A. Fifth.

21 Q. Is fifth grade a grade where you have multiple teachers
22 or is it just one?

23 A. Just one.

24 Q. What's your teacher's name?

25 A. Miss Hagger.

1 Q. And do you have a favorite subject?

2 A. It is gym.

3 Q. You like gym class. What other classes are you in,
4 though?

5 A. I go to art and library and music. And that's all we
6 have.

7 Q. You don't have math or English?

8 A. Oh, we do.

9 Q. And, Oroma, do you know the difference between the truth
10 and a lie?

11 A. Yes.

12 Q. What is the difference?

13 A. The difference about a lie is you're not being honest.
14 And the truth is being really honest and telling what's
15 positive.

16 Q. So, if I told you that my dress was white, would that be
17 the truth or would that be a lie?

18 A. A lie.

19 Q. And why is that a lie?

20 A. Because you're actually wearing a red dress.

21 Q. Do you know why you're here today, Oroma?

22 A. Yes. To talk about what Daniel did to us.

23 Q. Do you see Daniel in the courtroom today?

24 A. (Witness nodding.)

25 Q. Can you point him out?

1 A. (Witness indicating.)

2 Q. What is he wearing?

3 A. He's wearing a suit with a tie.

4 Q. And what color is his shirt?

5 A. Blue.

6 MS. EBERT: Let the record reflect the witness identified
7 the defendant.

8 THE COURT: It will so show.

9 BY MS. EBERT:

10 Q. Who do you live with right now?

11 A. My mom and dad and my brother and Manne.

12 Q. And do you remember where you lived before where you live
13 now?

14 A. First, I lived with a foster care. And then I moved in
15 with Kirsten. Then my big sister Kumi. Now I'm with my mom
16 and dad.

17 Q. Okay. And so the last -- before all of that, before the
18 last time you lived with your parents, do you remember where
19 that was? Do you remember where that was before you went into
20 foster care?

21 A. In a white house.

22 Q. Okay. And do you know where that was or maybe what
23 street it was on?

24 A. It is kind of near here. But, it is up the hill.

25 Q. Okay. And did you say what color it was?

- 1 A. It was white.
- 2 Q. And how many rooms did this white house have?
- 3 A. Three.
- 4 Q. Did you get one of them?
- 5 A. Yes.
- 6 Q. Did you have to share it with anyone?
- 7 A. Yes. My sisters.
- 8 Q. And your sisters' names?
- 9 A. Elsa and Manne.
- 10 Q. And how old were you when you lived there?
- 11 A. I was 11.
- 12 Q. And who would sleep in the other rooms?
- 13 A. My mom and my dad. And then my brother would take the
- 14 other one.
- 15 Q. Okay. Would Manne always sleep with you and Elsa?
- 16 A. Yeah.
- 17 Q. She would never sleep in another room?
- 18 A. (Witness shakes head to the negative.)
- 19 Q. Do you know where Daniel lived when you lived in the
- 20 white house?
- 21 A. Upstairs.
- 22 Q. Do you know if Daniel had keys to your guys's place?
- 23 A. Yes.
- 24 Q. How do you know that?
- 25 A. Because the manager of the house, like he fixes things.

- 1 So he gave him a key, I think.
- 2 Q. When you say he fixes things, who is he?
- 3 A. Daniel.
- 4 Q. Would you ever go up to his place?
- 5 A. Sometimes.
- 6 Q. Why would you go up there?
- 7 A. To go look for my sisters.
- 8 Q. When you would go up there, do you remember if the door
- 9 was open or shut or something else?
- 10 A. Sometimes it is locked and sometimes it is open.
- 11 Q. And when you say open, does that mean it is just -- is it
- 12 closed unlocked or is it wide open?
- 13 A. It is halfway open.
- 14 Q. Do you remember where you lived before this white
- 15 house?
- 16 A. Yes. Where Chelsea used to live.
- 17 Q. Okay. Do you remember maybe the street or what the house
- 18 looked like?
- 19 A. It was small and it had two doors.
- 20 Q. Two outside doors?
- 21 A. (Witness nodding.)
- 22 Q. Okay. Do you remember how many rooms were inside?
- 23 A. Two.
- 24 Q. Okay. And did anybody sleep in those rooms?
- 25 A. No.
- 5

- 1 Q. Where would people sleep?
- 2 A. We usually just sleep in the living room.
- 3 Q. Do you remember any furniture that was in the living
- 4 room?
- 5 A. A chair and couches and a pull-out bed.
- 6 Q. A pull-out bed?
- 7 A. (Witness nodding.)
- 8 Q. Who was sleeping in the living room with you?
- 9 A. My mom and my two sisters.
- 10 Q. And where would people sleep?
- 11 A. It would usually be us four until my dad comes home.
- 12 Q. On what piece of furniture would you sleep on?
- 13 A. Me and my sister would sleep on the pull-out couch.
- 14 Q. Which sister would sleep with you there?
- 15 A. Elsa and Manne.
- 16 Q. Do you have a TV in the living room?
- 17 A. Yes.
- 18 Q. Did you know Daniel when you lived in that house?
- 19 A. Yes.
- 20 Q. Where would he stay?
- 21 A. He was in the basement.
- 22 Q. Had you ever been down there?
- 23 A. Couple of times.
- 24 Q. Do you remember what it looks like?
- 25 A. It had lots of junk and a bed and a TV.
- 6

1 Q. Do you remember, if you're upstairs, can you see
2 downstairs?

3 A. Yes.

4 Q. What can you see when you look down there?

5 A. Normally you would just see the TV and the bed.

6 Q. So, when you lived in that house where Daniel lived in
7 the basement, do you remember Daniel doing anything
8 inappropriate?

9 A. Yes.

10 Q. Can you describe that?

11 A. Like his -- he would get a bottle of lotion from my
12 bathroom and use his hand to touch his dick.

13 Q. And, do you remember -- well, did he do this once or more
14 than once?

15 A. More than once.

16 Q. Do you remember where he was at least one of the times
17 that he would do this?

18 A. By the microwave.

19 Q. Is the microwave anywhere close to the steps?

20 A. Yes.

21 Q. Do you remember if he was standing or sitting?

22 A. Sitting.

23 Q. And where were you when this was happening?

24 A. I was in the house.

25 Q. Do you remember what room of the house?

1 A. In the kitchen.

2 Q. So he was in the kitchen touching himself and you were in
3 the kitchen?

4 A. (Witness nodding.)

5 Q. Do you remember any other instances where he would touch
6 himself?

7 A. In the middle of the night.

8 Q. And where would he be in the middle of the night touching
9 himself?

10 A. The same place as usual.

11 MR. BUTLER: Could you say that again, please?

12 THE WITNESS: The same place. Sometimes on his bed, too.

13 BY MS. EBERT:

14 Q. So, when he was on his bed, where were you when he was
15 doing that?

16 A. I was in the kitchen and going to go get food.

17 Q. So were you on the steps at all?

18 A. No.

19 Q. So you could see him from your kitchen?

20 A. Yes.

21 Q. Do you remember any other times where you saw him
22 touching himself?

23 A. No.

24 Q. You said that he was using lotion. Did you say that he
25 was using your lotion?

8

1 A. Yes.

2 Q. How do you know it was your lotion?

3 A. It is ours because we buy it every time he finishes it.

4 Q. Would he be wearing anything when he was touching
5 himself?

6 A. Just a white shirt.

7 Q. Were you able to see -- I think you called it his dick.

8 Were you able to see his dick when his shirt was on?

9 A. Yes.

10 Q. Did he have pants on?

11 A. No.

12 Q. Did he have underwear on?

13 A. No.

14 MS. EBERT: Your Honor, may I approach the witness?

15 THE COURT: You may.

16 BY MS. EBERT:

17 Q. Oroma, I am going to show you a picture here. Do you
18 know what that's of?

19 A. Yes.

20 Q. It is a picture?

21 A. Picture of a boy and showing his butt and his dick.

22 Q. Okay. So, when you say butt, can you circle that area
23 for me? And can you draw a line to it and spell what you
24 would call it? And when you said his dick, can you circle
25 that area on the picture? Can you label that? And can you

1 write your name at the top, please? Thank you.

2 MS. EBERT: The State offers Exhibit 3.

3 MR. BUTLER: No objection.

4 THE COURT: Exhibit 3 is received.

5 (Whereupon, State's Exhibit No. 3 was received.)

6 BY MS. EBERT:

7 Q. Oroma, do you remember if Daniel ever said anything
8 inappropriate to you or something that might have bothered
9 you?

10 A. No.

11 Q. You had mentioned that you were able to hear his TV.
12 Could you also see his TV?

13 A. Sometimes.

14 Q. Do you remember him watching anything inappropriate or
15 something that made you feel uncomfortable?

16 A. Yes.

17 Q. Do you remember what you saw?

18 A. A boy and a girl having sex.

19 Q. Did the boy and the girl have clothes on?

20 A. No.

21 Q. Did you see the boy and the girl touching each other?

22 A. Yes.

23 Q. Could you hear this movie?

24 A. Um-hmm.

25 Q. Did you see or hear this type of movie once or more than

1 once?

2 A. Once.

3 Q. And where were you when you could see it?

4 A. By where the stairs, like the door.

5 Q. Describe that for me.

6 A. Like when you go downstairs, there is an outside door.

7 So when you open it, you go outside.

8 Q. Do you have to go all the way down to his room to get to
9 the door?

10 A. No.

11 Q. So it is halfway down the steps?

12 A. (Witness nodding.)

13 Q. And when you heard it, where were you when you were able
14 to hear the movie?

15 A. Beside the door.

16 Q. Oroma, do you know if your parents have jobs?

17 A. Yes.

18 Q. Where do they work?

19 A. My mom works at John Morrell and my dad works in
20 Worthington.

21 Q. Okay. And are there sometimes where they are both at
22 work at the same time?

23 A. No. My mom leaves in the morning at 5:00 and my dad
24 leaves at 2:00.

25 Q. 2:00 p.m. or 2:00 a.m.?

//

1 A. P.M.

2 Q. When would your mom get back from work?

3 A. At 2:00 -- I mean, at 3:00 or 4:00 sometimes.

4 Q. So between 2:00 and 4:00 there might be some hours where
5 your parents aren't around?

6 A. Yes.

7 Q. So these things that were happening to Daniel, did you
8 tell anybody about it?

9 A. I told my sisters about it.

10 Q. Did you tell Chelsea?

11 A. No.

12 Q. Did you tell Kirsten?

13 A. No.

14 Q. Do you remember going to that castle-type building with
15 the dry erase board on the wall?

16 A. Yes.

17 Q. You were talking to a lady there?

18 A. Yes.

19 Q. How many times did you go there?

20 A. Once.

21 Q. Do you remember when you went there? What house were you
22 living in when you went there?

23 A. In the same house, the white house.

24 Q. Do you remember if you had to go when you lived in that
25 smaller house when Daniel lived in the basement?

1 A. No.

2 Q. You don't remember that. Oroma, do you remember if
3 Daniel ever showed you a picture?

4 A. No.

5 Q. Do you remember if he ever showed you his phone?

6 A. No.

7 Q. Do you remember if he ever used the "F" word around
8 you?

9 A. Yes.

10 Q. Did he use it with any other bad words?

11 A. No.

12 Q. Do you know what that "F" word was?

13 A. Yes. It was fuck.

14 Q. Do you remember what he said when he said that?

15 A. No.

16 MS. EBERT: Oroma, that's all the questions I have for
17 you. Thank you.

18 MR. BUTLER: Mr. Butler.

19 CROSS-EXAMINATION

20 BY MR. BUTLER:

21 Q. Oroma, is that the correct way to pronounce it?

22 A. Yes.

23 Q. You were asked at a prior proceeding did you ever see
24 Daniel use the bathroom upstairs in your first house where he
25 lived down below. Because you guys only had one bathroom?

1 A. Yes.

2 Q. Did you ever see him use the bathroom upstairs?

3 A. Yes.

4 Q. And you were asked if he always had his clothes on. Do
5 you remember being asked that?

6 A. Yes.

7 Q. Do you know what you said?

8 A. No.

9 Q. You said he did. You were asked would he always have his
10 clothes on when he did that, use the bathroom at night, and
11 you said yeah. Do you remember that now?

12 A. Sort of.

13 Q. Okay. Would that have been the truth?

14 A. Yes.

15 Q. Where did you sleep in that house?

16 A. I slept on the pull-out couch.

17 Q. And that's -- who all slept on that pull-out couch?

18 A. Just me and my two sisters.

19 Q. The time that you say Daniel was up sitting up, was he
20 sitting on the basement steps by the microwave?

21 A. Yes.

22 Q. And you previously said that it was dark?

23 A. Um-hum.

24 Q. And that you don't think he saw you?

25 A. No.

1 Q. And you say your sisters were watching TV?

2 A. Yes.

3 Q. Now, was he wearing his T-shirt?

4 A. Yes.

5 Q. And you've never said you actually saw him, saw his penis
6 in his hand, did you?

7 A. No.

8 Q. You were asked before where in the house would he be if
9 he touched his privates. Do you remember saying in the
10 basement probably?

11 A. Um-hmm.

12 Q. That's a yes?

13 A. Yes.

14 Q. And you say you can stand upstairs in your kitchen and
15 see his TV set and his bed?

16 A. Yes.

17 Q. At the time you said you saw him downstairs, you went
18 down a few stairs because you were using the door to go
19 outside; is that right?

20 A. Yes.

21 Q. How many stairs did you go down?

22 A. Three.

23 Q. And then are there more stairs after that to get down?

24 A. Yes.

25 Q. How many more?

1 A. I don't know.

2 Q. So when Daniel was watching this TV down there, you saw
3 inappropriate stuff. Did he know you were looking?

4 A. No.

5 Q. And you didn't look very long, did you?

6 A. Yes.

7 Q. Did you stay for awhile and watch or did you leave?

8 A. No. I left.

9 Q. Now, you had a different way that your family could go in
10 and out of the house; isn't that right?

11 A. Yes.

12 Q. Through the front door?

13 A. Yes.

14 Q. Daniel always used the side door?

15 A. Yes.

16 Q. Why were you going out his door?

17 A. Because it was closer to get down to my friend's house.

18 Q. Now, you would go down in Daniel's room when he was not
19 there, wouldn't you?

20 A. No.

21 Q. Well, that's how you found the lotion downstairs, isn't
22 it?

23 A. I said it would be on his bed.

24 Q. Did you go down into his room when he wasn't there?

25 A. No.

1 Q. Did he watch movies upstairs with you and your sister and
2 your mother?

3 A. No.

4 Q. He never did?

5 A. No.

6 Q. Do you remember talking about the time that he was
7 upstairs and he pulled a chair up next to Elsa and touched her
8 leg or hit her leg or something? Do you remember talking
9 about that?

10 A. Yes.

11 Q. So you sat in the chair next to the couch?

12 A. Yes.

13 Q. Was the sofa out?

14 A. Yes.

15 Q. Were you guys laying in the sofa watching a movie?

16 A. We were sleeping.

17 Q. So if Elsa says the TV was on, you don't remember that?

18 A. No.

19 Q. Okay. And he sat in the chair next to the bed or the
20 sofa?

21 A. Yes.

22 Q. And then he left after that?

23 A. Yes.

24 Q. And you're sure the TV wasn't being watched?

25 A. Yes.

1 Q. So the two times in that house where you say you saw --
2 you never actually saw his penis, right?

3 A. Yes.

4 Q. Yes, you didn't see it?

5 A. Yes.

6 Q. And he didn't see you?

7 A. Yes.

8 Q. Now, the second house that you lived in, he had his own
9 apartment upstairs, right?

10 A. Yes.

11 Q. And you say you went up to his apartment?

12 A. Yes.

13 Q. To get up to his apartment, you have to walk out your
14 door, turn, go through another door and up some stairs.

15 Right?

16 A. Yes.

17 Q. Then you get to the top of the stairs, you have to turn
18 and go up some more steps?

19 A. No.

20 Q. Are you sure about that?

21 A. Yes.

22 MR. BUTLER: May I approach?

23 THE COURT: You may.

24 BY MR. BUTLER:

25 Q. I'm going to show you a picture. Tell me if that looks

1 familiar to you.

2 A. What are you talking about, the outside?

3 Q. This is the outside, 318. Does that look like the front
4 door of where you lived on Spring Avenue?

5 A. Yes.

6 Q. Okay.

7 MS. EHLERS: Your Honor, could we approach for just one
8 second?

9 THE COURT: Yes.

10 (Off the record bench conference.)

11 BY MR. BUTLER:

12 Q. I'm going to show you -- for the record, it is marked
13 Defendant's Exhibit A. It is the same picture. What does
14 that look like to you?

15 A. The stairs going up into the house.

16 Q. Okay. And your number was 318. Does that sound right?

17 A. Right.

18 MR. BUTLER: I'm going to offer Defendant's Exhibit A.

19 THE COURT: Any objection?

20 MS. EBERT: No objection.

21 THE COURT: Exhibit A will be received.

22 (Whereupon, Defendant's Exhibit A was received.)

23 BY MR. BUTLER:

24 Q. Okay. Can you see that?

25 A. Yes.

1 Q. And that would be the front entrance to your place on
2 Spring Avenue?

3 A. Yes.

4 Q. Now I'm going to show you what's marked as Defendant's
5 Exhibit C and ask you if that kind of looks like the entryway
6 coming into your place?

7 A. Yes.

8 Q. There is a door here that says 316. Would that have been
9 your apartment?

10 A. Yes.

11 Q. This door open says 318?

12 A. Yes.

13 Q. That would be the door that opens to go up the stairs
14 where Daniel lived, right?

15 A. Yes.

16 MR. BUTLER: I'm going to offer Defendant's Exhibit C.

17 MS. EBERT: No objection.

18 THE COURT: Exhibit C is received.

19 (Whereupon, Defendant's Exhibit C was received.)

20 BY MR. BUTLER:

21 Q. Show you Defendant's Exhibit B. Does that look like the
22 stairwell going up to Daniel's place?

23 A. Yes.

24 Q. You've been up there before?

25 A. Yes.

1 MR. BUTLER: Offer Defendant's Exhibit B.

2 MS. EBERT: No objection.

3 THE COURT: Exhibit B is received.

4 (Whereupon, Defendant's Exhibit B was received.)

5 BY MR. BUTLER:

6 Q. Now, when I was asking you, Oroma, when you get to the
7 top of the stairs, do you have to turn and go up a couple of
8 more stairs to get to his apartment?

9 A. Yes.

10 Q. Do you remember that now?

11 A. Yes.

12 Q. I'm going to show you Defendant's Exhibit E. I'm going
13 to ask you if that looks like the next few stairs you go up to
14 Daniel's apartment?

15 A. Yes.

16 MR. BUTLER: And I'll offer Defendant's Exhibit E.

17 MS. EBERT: No objection.

18 THE COURT: Exhibit E is received.

19 (Whereupon, Defendant's Exhibit E was received.)

20 BY MR. BUTLER:

21 Q. And this would be a picture taken going back down the
22 stairs, the first set of stairs from Daniel's apartment..
23 That's Exhibit F. Does that look familiar?

24 A. Yes.

25 Q. Then you get to there and you have to go back down?

1 A. Yes.

2 Q. Let's go through this with the jury so they understand.

3 MR. BUTLER: Offer Defendant's Exhibit F.

4 MS. EBERT: No objection.

5 THE COURT: Exhibit F is received.

6 BY MR. BUTLER:

7 Q. Okay. Can you see that, Oroma?

8 A. Yes.

9 Q. All right. The door going outside, that's actually the
10 door that comes into the building you live in, right?

11 A. Yes.

12 Q. And then we can see 316. That would be to the person's
13 right-hand side, that would be your apartment?

14 A. Yes.

15 Q. And this next door that's open, that's 318, and that
16 opens to the stairwell to go up to Daniel's place?

17 A. Yes.

18 Q. Okay. What does that look like there? Defendant's
19 Exhibit B?

20 A. The stairs going down.

21 Q. And you would have to walk all those, go up those stairs
22 to go toward Daniel's apartment; is that right?

23 A. Yes.

24 Q. And then right at the corner there, you can see the next
25 stairs that are going to go up a few more, can't you?

1 A. Yes.

2 Q. So then when you make that turn and go up the stairs,
3 that's the apartment with the door open to Daniel's place; is
4 that right?

5 A. Yes.

6 Q. That's Defendant's Exhibit B. Then I showed you
7 Defendant's Exhibit F, which would be a picture just turning
8 around from Daniel's apartment and looking down those first
9 few stairs as if you were leaving Daniel's place. Right?

10 A. Yes.

11 Q. So, to go up there, you have to leave your apartment, go
12 up a flight of stairs, turn and go up another set of stairs to
13 get to Daniel's place?

14 A. Yes.

15 Q. And did you go inside of his place?

16 A. Yes.

17 Q. How far inside would you go?

18 A. Halfway.

19 Q. And would you just go in without knocking?

20 A. No.

21 Q. You think you knocked?

22 A. Yes.

23 Q. What were you looking at when you went up there?

24 A. I was looking for -- like I said, I was looking for my
25 sisters.

1 Q. What sisters did you think would be up there?

2 A. Like my little sister, Manne.

3 Q. You thought Manne would be up there?

4 A. Yes.

5 Q. You've never said that before. I never read anywhere you
6 said that. Why are you saying you thought Manne was
7 upstairs?

8 A. At first I said my sister could probably be up there.

9 Q. Are you sure you weren't going up to ask Daniel for a
10 ride maybe?

11 A. No.

12 Q. Did he ever give you rides to places?

13 A. Yes.

14 Q. You're saying no, he never did?

15 A. He has.

16 Q. Daniel didn't invite you up to his apartment?

17 A. No.

18 Q. Do you remember saying before that you have lied about
19 things that are important in this case?

20 A. No.

21 Q. Okay. Remember me asking you would you lie about
22 important things? Do you remember that question?

23 A. Yes.

24 Q. What was your answer?

25 A. I always tell the truth and not lie.

1 Q. Okay. I want to show you a transcript. It was only a
2 few months ago. Do you remember being in court a few months
3 ago?

4 A. What?

5 Q. Do you remember being in a courtroom a few months ago?

6 A. Yes.

7 Q. I'm going to have you read something to yourself and then
8 I'm going to ask you a question. It is page 56. Read that
9 question to yourself and read that answer. I'm going to ask
10 you something. Tell me when you're done.

11 So I asked you, so sometimes would you lie about
12 stuff that's important. What did you say?

13 A. I said no.

14 Q. Can you see that on the screen?

15 A. Says sometimes you would lie about important things.

16 Q. And what was your answer?

17 A. Yes.

18 Q. So why did you keep saying no, when you knew that was on
19 that page?

20 A. Because I didn't know. I forgot.

21 MR. BUTLER: Nothing further with this witness, Your
22 Honor.

23 THE COURT: Ms. Ebert, redirect?

24 MS. EBERT: Yes. Thank you.

25 REDIRECT EXAMINATION

25

1 BY MS. EBERT:

2 Q. Oroma, do you remember those pictures that he just showed
3 you?

4 A. Yes.

5 Q. So, when you were describing that Daniel was at the top
6 of the steps touching himself, was it those steps?

7 A. No.

8 Q. It wasn't in that house, was it?

9 A. (Witness shakes head to the negative.)

10 Q. So, when he talked about the steps -- sorry. When he
11 asked you about the door going down the steps in that smaller
12 house, were you ever told that you couldn't use that door?

13 A. No.

14 Q. Do you remember you had said that Daniel's job was to fix
15 things around the house? So did he ever put up a door to
16 those steps?

17 A. No.

18 Q. Did he ever put up a curtain?

19 A. Yes.

20 Q. How many times did you see him touch himself before he
21 put up the curtain?

22 A. Twice.

23 Q. Oroma, you were asked about court the last time. Were
24 there a lot of things that were asked last time?

25 A. Yes.

26

1 Q. Are you telling the truth today?

2 A. Yes.

3 MS. EBERT: I have no other questions, Your Honor.

4 RECROSS EXAMINATION

5 BY MR. BUTLER:

6 Q. You say there was a curtain hanging down there?

7 A. Yes.

8 Q. That's in the first house?

9 A. Yes.

10 Q. And so the curtain was to block people's view?

11 A. No.

12 Q. Did you have to look around the curtain?

13 A. No.

14 MR. BUTLER: Okay. That's all I have, Your Honor.

15 REDIRECT EXAMINATION

16 BY MS. EBERT:

17 Q. So Oroma, where was the curtain?

18 A. It was hanging from the door.

19 Q. Was it at the top of the steps or at the bottom of the
20 steps?

21 A. Top.

22 Q. So when the curtain was up, could you still see
23 downstairs?

24 A. Yes.

25 Q. Did you have to move the curtain to do that?

1 A. No.

2 MS. EBERT: I have no other questions.

3 MR. BUTLER: Nothing else, Judge.

4 THE COURT: Thank you very much, Oroma. You may be
5 excused.

6 MS. EBERT: The State calls Elsa Gambu.

7 THE COURT: If anyone wants to stand and stretch their
8 legs before the next witness, please, feel free to do so.

9 Remain standing, young lady, and raise your right hand.
10 This gentleman will administer an oath.

11 ELSA GAMBU,
12 called as a witness herein, having been first duly sworn, was
13 examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MS. EBERT:

16 Q. Be sure to speak into that microphone. Would you state
17 your name?

18 A. Elsa Gambu.

19 Q. Can you spell that?

20 A. E-L-S-A G-A-M-B-U.

21 Q. How old are you?

22 A. Fifteen.

23 Q. Do you know your birthday?

24 A. 01-01-02.

25 Q. And what grade are you in?