Case A-24-480

NEBRASKA SUPREME COURT/COURT OF APPEALS

State of Nebraska
Plaintiff/Appellee

v.

Travis Belina
Defendant/Appellant

Appeal from the District Court of Madison County
Hon. Mark A. Johnson

Brief of Appellant

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On behalf of Appellant

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Basis of Jurisdiction

The district court entered judgment on July 1, 2024. (T279). Belina timely filed his Notice of Appeal and paid the docket fee on June 27, 2024

after pronouncement of sentence. This Court exercises jurisdiction pursuant to *Neb Rev Stat* §25-1911 *et seq*.

Statement of the Case

This is a felony criminal case. The case was tried on Counts I through X of an Amended Information on the issue of whether the State's evidence was sufficient to support a verdict of guilt beyond a reasonable doubt. (T,205). The district court dismissed counts III and VII on motion of Appellant at the close of evidence, finding the State failed to meet its burden on those two counts. (780:13-781:4). On the remaining eight counts, the district court entered judgment of conviction sentencing Belina to an aggregate term of 12 years in prison. (T279-80). The Court reviews for errors appearing on the record.

Assignment of Errors

I. The district court erred by entering judgment conviction on Count VI, alleging Third Degree Sexual Assault of B.C., despite insufficient evidence B.C., who was the age of consent, was coerced to allow sexual contact.

II. The district court erred by instructing the jury, on Counts II and VI that "coercion" for purposes of sexual assault includes "economic force" or "moral force" without defining the terms.

III. The district court erred by entering judgment of conviction Counts II and VI because Sections 28-320 and 28-318(8)(a)(i), by failing to define coercion, are unconstitutionally vague as applied.

IV. The district court erred by refusing to instruct the jury that for purposes of Third-Degree Sexual Assault, in a case where the alleged victims were over fourteen as charged in Counts II and VI, that a person over fourteen may consent to sexual contact.

V. The district court erred by entering judgment of conviction on Counts IV, VIII and IX, Solicitation of a Minor for Prostitution, in the absence of sufficient evidence Belina solicited sex.

VI. The district court erred by failing to provide a limiting instruction after allowing, over objection, Carrie Knull to testify to the details of Chase's "first report."

VII. The district court committed reversible error by overruling Belina's objections and allowing Deb Milligan to give expert testimony validating the truth of C.K.'s and B.C.'s allegations.

VIII. The district court committed reversible error by overruling Belina's objections and allowing Investigator Jon Downey to give expert testimony validating the truth of C.K.'s and B.C.'s allegations.

IX. The district court committed reversible error by overruling Belina's objections and allowing Dana Kubo to give expert testimony validating the truth of C.K.'s and B.C.'s allegations.

X. Trial counsel committed ineffective assistance by failing to object and/or move to strike inadmissible expert testimony from Dana Kubo bolstering B.C.'s credibility.

XI. The district court erred by allowing the prosecutor to argue during closing arguments that defense lawyers are bad people that do "bad stuff" and that defense counsel intentionally attempted to "confuse," "trick," "fool" and mislead the alleged victims and jurors.

Propositions of Law

1. Conduct shall not be considered a "substantial step" toward commission of an offense "unless it is strongly corroborative of the defendant's criminal intent." *Neb Rev Stat.* §28-201; *State v. Cruz,* 23 Neb. App. 814 (2016).

2. Strict construction of criminal statutes is based on the "need to provide fair warning of what conduct is criminal and to ensure that the legislature rather than the courts define criminal behavior." *State v. Douglas*, 222 Neb. 833 (1986).

3. A conviction for criminal solicitation requires proof of actus reus, that is, proof the accused expressly asked or offered something of value to another in exchange for sexual activity. *State v. Papillon*, 173 N.H. 13, 236 A.3d 839 (2020); *State v. Thoman*, 2021 S.D. 10, 955 N.W.2d 759 (2021).

4. Though coercion can be accomplished through non-physical force, the existence of an employment relationship alone insufficient to establish an employee was "coerced" by the employer for purposes of proving sexual assault. *State v. McCurdy*, 301 Neb. 343 (2018).

5. A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *State v. Garcia*, 311 Neb. 648 (2022).

6. A jury instruction is improper and constitutes error when it uses terms that are vague and thereby encourage "arbitrary and discriminatory enforcement." *State v. Beyer*, 260 Neb. 670 (2000); *State v. Caddy*, 262 Neb. 38 (2001).

7. The void for vagueness doctrine bars enforcement of the statute which either forbids or requires the doing of an act in terms so vague that persons with common intelligence must necessarily guess at its meaning and differ as to its applications. *State v. Caddy*, 262 Neb. 38 (2001); *United States v. Lanier*, 520 U.S. 259 (1997).

8. The victim of a sexual assault may testify to a complaint regarding a sexual assault made within a reasonable time after it occurs, but not as to the details of the complaint; when such testimony is allowed, a limiting instruction should be given to advise the jury that testimony regarding the complaint is not to be considered as substantive evidence that the assault occurred. *State v. Ford*, 279 Neb. 453 (2010).

9. When expert testimony in a case involving minors goes beyond explaining the child's behavior and asserts, directly or indirectly, that the child has in fact been abused or that the child is telling the truth, such evidence goes too far and its admission constitutes reversible error. *State v. Doan*, 1 Neb. App. 484 (1993); *State v. Muhannad*, 286 Neb. 567 (2013).

10. Ineffective assistance of counsel may be established by counsel's failure to object to expert witness testimony which improperly bolsters the credibility of another witness. *Chappell v. State*, 429 S.C. 68 (Ct. App. 2019); *Minton v. Sec'y*, DOC, 271 F. App'x 916 (11th Cir. 2008); *Dorsey v. Chapman*, 262 F.3d 1181,1186 (11th Cir. 2001).

11. Personal attacks on defenses counsel for performing their defense function are improper and violate due process. *United States v. Young*, 470 U.S. 1 (1985).

12. Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process. *State v. Dubray*, 289 Neb. 208, 222-23 (2014).

13. On appeal from a criminal conviction, the Court may address the prosecutor's conduct for plain error evident from the record and may reverse if such error is "of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process." *State v. Barfield*, 272 Neb. 502, 511 (2006).

Statement of Facts

Belina was accused of non-consensual sexual contact by high school students he employed at a feedlot he owned and operated in Madison County. His theory of defense was that each of the alleged victims were the age of consent and that the kids fabricated their claims after he "cracked

down" on the work crew and posted a harsh message about their performance on a whiteboard hung in the vet shack, a building where the crew clocked in and often met before and after work. The message threatened "major pay cuts" or termination. (Ex. 103, p. 336; 335:6).

The theory was supported by a lack of evidence regarding force, threats, or deceit; admissions by C.K. he had discussed his allegations with other employees before he and B.C. made the allegations to law-enforcement, where they were interviewed together in the same room; knowledge at least one other employee had been fired; and knowledge that someone had vandalized one of Belina's porta potties. (331:3; 341:23; 344:2; 345:18).

C.K. – Counts I, II and IV

C.K. Began working at the feed lot when he was fifteen washing water tanks, feeding cattle and doing other chores. (276: 13). He testified there was always beer available in a refrigerator in the vet shack. and that the teenage employees were allowed to consume beer (278: 12).

C.K. testified to six occasions involving sexual contact between him and Belina. C.K. provided generally that sometimes he would tell Belina to stop. (281:18- 282:14; 289:1).

On the first occasion, C.K. testified, Belina picked him up in his wife's suburban to go check. cows. (282: 17). Belina eventually stopped the vehicle and asked if C.K. wanted a back rub. C.K. said no and tried to get out of the vehicle, but Belina kept locking the door. (283:1-5). C.K. says he then climbed over the back seat and got in back, at which time Belina laid down and told C.K. how he wanted his back rubbed and then forcibly took his hand, initially using it to rub C.K.'s neck, before putting Belina's hand in his waistband and grabbing his penis. (283:5-284:6). C.K. testified that after the incident he got out of the vehicle to close the gate as they were leaving and when he returned to the vehicle there was a $100 bill waiting for him and Belina told him not to tell anyone. (286: 15). When C.K.

arrived home he told his parents he had received $100 for checking cows. (288: 10).

C.K. testified he told his friend B.C. about the event at school the next day and warned B.C. about going to the pasture, but B.C. did not believe him. (290:21-291:14; 350:14; 350:1). C.K. testified he showed B.C. the money that had been given to him. (372:25).

C.K. testified that after that alleged incident both he and B.C. went with Belina to the pasture. When they arrived at the pasture, Belina told B.C. to drive around and check the fence. (292:18). About five minutes later, Belina told C.K. to get in the back of the vehicle and Belina got in the back. with him, began rubbing up on him, grabbing his neck, scratching his head and telling C.K. to scratch his head and rub his back. (292:10-294:2). He testified Belina eventually put his hand in C.K.'s waistband and played with C.K.'s penis and wanted C.K. to play with his penis. (292:2-294:4). After that, C.K. switched spots with B.C. and Belina gave them $200 and told them to keep quiet. (294:10).

C.K. testified that on a third occasion Belina took C.K. to check the bales and Belina tried to touch him. When C.K. expressed unwillingness Belina tried "going in [C.K.'s] coveralls" and then began undressing. Belina "made" C.K. touch Belina's penis, then a pickup came down the road to drop off bales, so Belina told him to get out and go home. (295:10-298:4).

C.K. testified that on another occasion he travelled with Belina to pick up a pickup near Albion. B.C. and another teenager, T.S., were with them. (298:15). Belina brought beer and all four were drinking. (301:1). On the way back with the pickup, C.K. rode in the back with Belina while B.C. drove. (303:17). C.K. testified that Belina again asked C.K. to rub his neck, head and back, then put his hand down C.K.'s pants and fondled his genital as C.K. was telling him no. (304:2-16). C.K. then "jacked Belina off" util

Belina ejaculated on his hand while the other two were in the front seat. (305:10).

C.K. testified the foregoing events affected his daily thoughts and that he ultimately obtained a handful of pills and attempted suicide. (311:5-314:3).

C.K. was asked to testify about counseling with a therapist named Deb Milligan and said he told her about more incidents, including one by a silage pile. He testified that after the two wrestled for fun, Belina began rubbing his shirt and pressing his "dick" against C.K.'s back (316:10); as well as a time in Norfolk when they were in the basement of Belina's home alone and they ended up on the ground, rubbing one another and, after C.K. again said he did not want to do it, Belina took C.K.'s hand and put it in Belina's pants to " jack [Belina] off" and then asked C.K. to "give [Belina] head." (319:11).

C.K. testified that on July 27, 2022, Belina began touching C.K. again. C.K. became upset and Belina said "you are not going to do nothing about it," and C.K. responded that he would and told Belina "his day is coming." (329:11). C.K. then went home and reported the sexual activity to his parents. (319:19- 323:22). The next day C.K. met with an investigator for the Sheriff's office, John Downey. (325:23).

Prior to calling C.K. as a witness, the prosecutor introduced testimony from C.K.'s therapist, Deb Milligan. Over objections regarding her qualifications, and other objections discussed below, Milligan was allowed to testify regarding delayed disclosure by adolescents. (237:4-239:12). She was allowed to testify regarding her experience with "gradual disclosure" and developing a "therapeutic alliance" to facilitate disclosure. (240:18-242:25).

Milligan was also asked, and allowed to testify over objection of defense counsel, regarding "behaviors you look at or that you look for" that may be indicative of mental trauma, disorder, illness "or related to sexual

trauma," including depression, anxiety, difficulty coping, difficulty sleeping, not eating, lack of joy and enjoyment, specifically referring to suicidal ideation and self-harm. (241:17-242:10).

The prosecutor then asked Milligan if she is licensed to make a mental health diagnosis and if she does so. The prosecutor followed those questions by asking what C.K. had disclosed in a therapeutic setting, including statements consistent with the trial testimony later provided by C.K. (250:3-252:5). The prosecutor then asked:

> Q: And we've talked some earlier about what counselors look for in behaviors. Did you observe in your very many meetings [with C.K.] or did he relate to you events, thoughts, those types of things, that may have indicated to you or that were consistent with mental illness or disorder?

(252:6). After defense counsel objected, and the parties were heard at the bench, the prosecutor asked:

> Did you observe behaviors or did the boy relate to you behaviors that were significant to you as a mental health professional?

(253:19). Defense counsel objected again.

After eliciting testimony about what happens during therapeutic sessions, including where the therapist and patient are seated and how well the therapist can observe the client's emotions, as well as C.K.'s report of suffering from intrusive thoughts, the prosecutor asked:

> So I'll ask you, during that clinical meetings once a week for almost a year and a half at least, did you observe or did the boy relate to you things that were significant to you as a mental health professional?

(255:21). Milligan responded in the affirmative and described symptoms she observed in C.K.. including anger, nightmares, and suicidal thoughts. (256:1-259:10).

The prosecutor then asked: “So why are you still seeing [C.K.] after a year and a half?” Milligan responded, “he still has symptoms.” (259: 11). Milligan also opined, this time over objection, that “it's generally harder for male children who have been sexually assaulted by another male to come forward and talk about that.” (260:10).

On redirect, the following colloquy occurred between the prosecutor and Milligan:

> Q: We have talked about people who have something happen to them as adolescent children and you treat them, what, years later? Is that what you told me?
>
> A. Yes.
>
> Q. Why is that? How would that ever occur?
>
> A. They come in because they're still having symptoms of re-experiencing nightmares, intrusive memories, physiological, psychological reactivity to things that remind them of the person or the event.
>
> Q: Same type -- is that the same type of stuff that Chase has relayed to you?
>
> [Objection overruled].
>
> Q. Go ahead, ma'am.
>
> A. Yes.

(273:3).

B.C. – Counts V, VI and VII

B.C. testified he worked at the feed lot checking, treating and feeding cows. (630: 18). B.C. testified he and the others were allowed to drink alcohol at the feedlot, though he was fourteen or fifteen years of age. (631:21-632:10).

B.C. testified about the incident described by C.K. where the three went to the pasture after C.K. told B.C. about his first sexual interaction with Belina in the pasture. B.C. testified he was directed to drive while C.K. and Belina were in the back seat. (633:6). B.C described eventually getting in the back seat with Belina because C.K. was going to drive. (634: 12). He testified Belina asked for a back massage and that he rubbed Belina's shoulders for a couple of seconds before Belina moved closer to B.C. and started rubbing his leg and eventually undid B.C.'s belt buckle and "reached in and started trying to jack off" B.C. for five minutes. (635:20; 637:4; 668:9; 669:4-12). Belina, who was the age of consent, described no expressed lack of consent and no threats or coercion.

B.C. did not describe any awareness of sexual activity between Belina and C.K. while he was driving. (634:3; 638:12). Also contrary to C.K.'s testimony, B.C. did not describe receiving any money from Belina that day. Likewise, C.K.'s testimony regarding the alleged incident did not describe any awareness of sexual activity between B.C. and Belina when B.C. was in the back seat. (294:5). In contrast to C.K.'s testimony, B.C. testified that C.K. had told him about Belina touching C.K. after the incident he described. (638: 20).

B.C. testified that Belina attempted to have sexual contact with him on other occasions. (640: 7). On one occasion, he testified he and Belina were driving to a manure field and Belina started rubbing his leg but stopped when Belina momentarily drove the truck off the edge of the road. (642: 2). On another occasion, B.C. testified, he was in the vet shack

putting away drugs and Belina came in, closed the door, and started rubbing his shoulders and his side. B.C. pushed Belina away, clocked out, and went home. (643:3). B.C. did not describe being offered or receiving money on either of these occasions.

After being prompted by the prosecutor, B.C. also testified about the trip near Albion. (643: 12). B.C. confirmed that Belina brought beer which they all consumed (647: 1). He testified that when they were driving back and C.K. and Belina were in the back seat he and Tanner heard some "tinging" and movement in the back seat and that is sounded like a belt buckle. (652: 15; 654: 4). When the three returned to the feed lot, Belina gave him and C.K. around $150 or $200, but did not say anything connecting it to the alleged sexual contact. (669:25; 670:7).

Prior to B.C. testifying, the State called his therapist, Dana Kubo, a licensed independent mental health practitioner who works as a mental health therapist at Good Life counseling and support. After qualifying Kubo as an expert, the prosecutor established that B.C. was her client but that he "quit coming to therapy because he was not ready to deal with the emotional trauma of what had taken place." No objection was asserted. (597:1-24). Again, without objection, the prosecutor also introduced testimony from B.C. that that his discontinuing treatment was "against therapist's advice," or "ATA." (657: 17).

Kubo testified that treatment begins with an initial diagnostic interview and that during the third or fourth session her and the client develop a treatment plan. (600:12- 602:1). She talked about the details of the statements made to her by B.C. during the initial diagnostic interview. (603:7). She was asked to describe observations of behavioral, mental health issues and whether based upon her training, experience and education the behaviors she described were significant "in a mental health kind of way." (604: 11; 603: 20). She then described B.C tearing up and crying during therapy. After being asked to describe the way adolescents report sexual trauma (607:7), Kubo testified B.C did not disclose

everything the first day and was able to share more as time progressed. (611: 20-612:14). Counsel did not object or request a limiting instruction.

After Kubo testified that B.C. discontinued his participation in the counseling, the prosecutor asked whether his decision was "against medical advice" or, as Kubo explained, "against therapeutic advice." (617: 2). Kubo further testified that she attempted to persuade B.C. to return to treatment to "help him explore the trauma that he experienced while he was at work and each time he got shut down more and more until he finally quit coming." (617: 24). Again, counsel failed to object.

T.S. – Count IX

T.S. Testified that on a winter night when he was seventeen Belina asked T.S. to come to Belina's house to give him a back rub. T.S. responded, "No, I'm going home." (720: 24- 721:5). There was no mention of money. (729:4).

T.S. testified that on a second occasion Belina offered him $100 to come into his camper and give him a "back rub." Again, T.S. said, "No" and told Belina to take him home. (721: 4-13). When he said "No" that was the end of it and nothing more happened. (744: 8).

Over objection, T.S. testified that he believed that had he gone inside it would have included more than a back rub. (725: 10). On cross-examination, he acknowledged, however, that Belina was living with his wife and three young children and to his knowledge they would have been sleeping inside the camper and that he did not know what might have happened had he gone in. (729: 16).

W.H. - Count X

W.H. testified that when he was fourteen and working at the feed lot Belina started rubbing his back, put his hand on W.H.'s thigh above his knee, and then ran it up toward his crotch until W.H. moved it away and

said he would quit if Belina ever did it again. (530:10-531:15). Belina did not do anything else and W.H. continued working at the feedlot until the following July. W.H. said Belina's hand reached up as far as "the pubic hair would have been" before he moved it away, but did not provide details on that issue. (531:10-12).

414 Witnesses

The prosecutor also introduced testimony regarding alleged prior an alleged prior sexual assault of Belina.

Derek Renner testified that when he and Belina were on the high school basketball team Belina inappropriately touched him in 2014 while they shared a room at the State high school basketball tournament (423:12-427:18). Renner testified C.K. called and asked him to testify in this case. (430:5).

Ryan Stussey testified that he worked at the feed lot and one time he and Belina were wrestling for fun and Belina "went in for a shot and his hand ended up like the upper right side of my crotch." (583: 17).

404 Witnesses

Morgan Grashorn testified that in 2019 when she was seventeen years of age Belina Snapchatted her from outside her home a half-naked picture of himself and then a picture of him holding several $100 bills and asked that they sneak out and go to McDonald's or to a feed lot for a back massage in exchange for money. (440:21-446:5).

Makenna Taake testified that in 2019, when she was seventeen years of age, Belina sent her Facebook messages or Snapchats late at night asking her to sneak out and suggesting they could "do anything and everything." (497:14-500: 23).

Allison Long testified when she was fifteen Belina sent her messages offering alcohol, vapes or a ride home if she needed it, including a "winky" emoji with the invitation. (18:14-519:23).

Summary of Argument

The Madison County attorney overreached in charging Belina, intentionally introduced expert testimony implicitly validating witness testimony in violation of *State v. Doan*, 1 Neb. App. 484 (1993) and, through premeditated design, committed misconduct during closing arguments by repeatedly suggesting defense counsel do "bad stuff" and that, in this case, defense counsel intentionally attempted to "confuse", "trick.", "fool" and mislead the alleged victims and the jurors.

The evidence presented by the prosecutor was sufficient to convict Belina of child abuse and third-degree sexual assault involving C.K., Count V, child abuse of B.C., and Count X, attempted assault of W.H., but nothing more. The evidence offered in support of the remaining counts was insufficient as a matter of law. As one example, the prosecutor won a conviction on the allegation Belina has non-consensual sexual contact with B.C. on the theory the mere employment of B.C. supported the element of coercion.

Though the evidence was sufficient on other charges, the convictions must be reversed because the trial court committed error, by instructing the jury "coercion" includes "economic or moral force"; by failing to instruct the jury the age of consent was fifteen though other instructions allowed them to find Belina guilty of other charges based upon the alleged victims being under the age of eighteen or nineteen; by allowing expert opinions validating and bolstering the testimony of C.K. and B.C.; and by allowing the prosecutor to commit misconduct during closing arguments. Further, because the child abuse conviction of B.C. depended upon his presence during the alleged assault of C.K. in the pasture, the conviction must be reversed for the same reasons.

Standard of Review

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court 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. *State v. Osborne,* 20 Neb. App. 553 (2013).

In reviewing a claim of prejudice from jury instructions given or refused, the appellant has the burden to show that the allegedly improper instruction or the refusal to give the requested instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Milton*, No. A-16-289, 2017 Neb. App. LEXIS 34 (Ct. App. Feb. 14, 2017)(*citing State v. Gonzales*, 294 Neb. 627 (2016)).

In a jury trial of a criminal case, an evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. State v. Ward, 1 Neb. App. 558 (1993).

An appellate court may find plain error on appeal when an error unasserted at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. State v. Mrza, 302 Neb. 93 (2019).

Argument

I. The district court erred by entering judgment conviction on Count VI, alleging Third Degree Sexual Assault of B.C., despite insufficient evidence B.C., who was the age of consent, was coerced to allow sexual contact.

Belina moved for a judgment of acquittal on all counts, including Count VI, arguing insufficient evidence of coercion. (774:22). The district court overruled the motion and entered judgment of conviction. (779:24).

A motion to dismiss at the close of all the evidence has the same legal effect as a motion for a directed verdict. *State v. Payne*, No. A-23-510, 2024 Neb. App. LEXIS 255 (Ct. App. Apr. 16, 2024)(*citing State v. Dixon*, 306 Neb. 853 (2020). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Id.*

B.C. was old enough to consent. Thus, to prove Belina had non-consensual sexual contact with him it was required to prove that either (1) the defendant compelled the victim to submit due to the use of force or threat of force or coercion, (2) the victim expressed a lack of consent through words, (3) the victim expressed a lack of consent through conduct, or (4) the defendant used deception to obtain consent. *State v. McCurdy*, 301 Neb. 343 (2018).

When describing the alleged incident in the truck with C.K., B.C. provided no testimony Belina used force or a threat of force; that he expressed a lack of consent or conduct; or that he was deceived by Belina.

Consequently, the prosecutor was relegated to a theory of "coercion." In *State v. McCurdy*, 301 Neb. 343 (2018), this Court held that "coercion" includes "nonphysical force." 301 Neb. at 358. In concluding the evidence was sufficient to prove a lack of consent in that case, the Court noted evidence regarding a history of the defendant's sexual abuse of the victim, "as well as evidence regarding the defendant's "position of authority and dominion within the victim's life and household." 301 Neb. at 358. The opinion expressly holds as follows:

> We therefore stated that "under a totality of the circumstances analysis, coercion *within the context of a family or household relationship* between a minor and an adult authority figure can support a finding that a defendant compelled a victim to submit to sexual penetration by the use of 'coercion.

Id. at 363 (*emphasis* added).

This case does not involve a family or household relationship. And whether or not "coercion" includes non-physical force in this case, Belina finds no authority establishing an employment relationship alone can amount to "economic force" meeting the statute's requirement of "coercion". Rather, other Nebraska cases addressing the sufficiency of evidence of coercion normally requires more. *E.g., State v. Bershon*, 313 Neb. 153 (2023)(evidence that victim's "immature mentality" was similar to that of a minor, and therefore the evidence of the dynamics of the familial and household relationship between defendant as stepfather and the victim and step-child could support a finding of coercion); *State v. Kandler*, No. A-19-720, 2020 Neb. App. LEXIS 218 (Ct. App. July 28, 2020) (Similar to the facts in *McCurdy*, Kandler had been in A.T.'s life for as long as she could remember and Kandler exhibited authority as an adult in A.T.'s household, including being the main disciplinarian when she was growing up.)

Likewise, Belina finds no authority defining "moral force" or holding it is sufficient to establish "coercion" within the meaning of *Neb Rev Stat* §28-320.

In any event, the evidence does not support a verdict that any existing "economic or moral force" was sufficient to overcome a reasonable person's free will or destroy the free agency of B.C. It is not for this Court to determine that the mere employment of the witnesses, alone, provides sufficient "economic force" to support a verdict. The case does not involve a household relationship involving one exercising parental authority. Nor is there any evidence suggesting Belina exploited his power related to the employment relationship to accomplish sexual contact; for example, no threat of termination or pay cut made toward an employee who would suffer economic distress upon loss of his job.

For these reasons, insufficient evidence supports Belina's convictions on Counts VI and X and the convictions should be vacated.

II. The district court erred by instructing the jury, on Counts II and VI that "coercion" for purposes of sexual assault includes "economic force" or "moral force" without defining the terms.

Over Belina's objection, the district court instructed the jury on the sexual assault charges that "coercion" includes "economic or moral force." Specifically, the court instructed the jury, "Without consent" means the victim was compelled to submit due to the use of force or threat of force or coercion" (T261) and that "coercion" means overcoming free will by the use of physical force, threat of physical force, and/or other nonphysical forms of force such as economic or moral force." (T260). The district court did not provide the jury a definition of "economic force" or "moral force."

As acknowledged in the preceding argument the Court has held coercion may include nonphysical forms of force, and though the Court's decision in *McCurdy* acknowledges the definition of coercion found in Black's Law Dictionary references "physical, moral, or economic force," no definition of "moral or economic force" has been provided by the Legislature. Nor is such meaning established by our appellate precedent.

A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *State v. Garcia*, 311 Neb. 648 (2022). It seems likely to Belina the jury was confused by the term "moral or economic force" and had to guess as to its meaning. Further, by failing to define "moral force", or "economic force", the district court's instruction encourages "arbitrary and discriminatory enforcement," *e.g., State v. Beyer*, 260 Neb. 670 (2000), because "persons with common intelligence must necessarily guess at its meaning and differ as to its applications, in violation of due process. *E.g., State v. Caddy*, 262 Neb. 38 (2001).

For these reasons, Belina submits his conviction under Counts II and VI, if not vacated and dismissed, should be reversed based upon instructional error.

III. Sections 28-320 and 28-318(8)(a)(i) are unconstitutionally vague as applied by failing to define coercion.

The foregoing arguments reveal that the Legislature should amend the Section 28-318 to define the "coercion" sufficient to support a jury verdict.

The Nebraska and federal Constitutions both guarantee that no person shall be deprived of life, liberty, or property, without due process of law. Neb. Const. art. I, § 3. U.S. Const. amend. XIV, § 1. *State v. Matteson*, 313 Neb. 435 (2023).

The void for vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons with common intelligence must necessarily guess at its meaning and differ as to its applications. *State v. Caddy*, 262 Neb. 38 (2001)(*citing United States v. Lanier*, 520 U.S. 259 (1997)). "The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *E.g., State v. Beyer*, 260 Neb. 670 (2000).

Stated another way, the vagueness doctrine requires that criminal statutes protect the fundamental due process guaranty of notice by providing "sufficient warning that people may conduct themselves so as to avoid that which is forbidden," *Caddy*, 262 Neb. at 45, and protecting against "arbitrary, discriminatory enforcement" of the law by members of law enforcement, judges, or juries.

"There is a two-part test to determine whether a statute is void for vagueness. The statute, first, must provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement.*"* *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The same analysis is used for both federal and state due process challenges. *See Scofield v. State, Dep't of Natural Resources*, 276 Neb. 215 (Neb. 2008).

Nebraska's sexual assault statutes are unconstitutionally vague as applied to cases involving non-physical forms of coercion. Indeed, our appellate courts have already intervened to clarify that the definition of coercion includes "nonphysical force." *McCurdy.* The judiciary would have to intervene again to specifically hold "economic or moral force" is sufficient. And even then, citizens would be left to guess as to the meaning of those terms. Accordingly, the statute fails to provide "sufficient warning" and lends itself to arbitrary enforcement when applied to the facts of this case.

Belina respectfully submits his convictions on Count II and VI should be reversed on this basis.

IV. The district court erred by refusing to instruct the jury that for purposes of Third-Degree Sexual Assault, in a case where the alleged victims were over fourteen as charged in Counts II and VI, that a person over fourteen may consent to sexual contact.

The jury was necessarily instructed that a "minor child" is a person under the age of nineteen years for purposes of the charge of Child Abuse and under the age of eighteen years for the purpose of the charge of Solicitation of a Minor. (T246, 250).

To avoid confusion regarding the charge of Third-Degree assault, Belina requested the jury be advised as follows:

> The legal age where a person may legally consent to sexual contact in the State of Nebraska is 15 years old. However, attaining the age of 15 alone does not mean a person consented to sexual contact under the law, only that he or she has attained the age where he or she may choose to consent to sexual contact.

(E117; 802:2).

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the

tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Iromuanya*, 272 Neb. 178 (2006)(*citing State v. Mason*, 271 Neb. 16 (2006) and *State v. Wisinski*, 268 Neb. 778 (2004)).

Here, the instruction is a correct statement of the law. *State v. Bao,* 263 Neb. 439 (2002); *Neb Rev Stat* 28-320.01(1).

The instruction was warranted by the evidence because the alleged victims of Third-Degree Sexual Assault were over the age of fourteen when the alleged events occurred.

Belina was prejudiced because other charged offenses involving the same alleged victims involved age thresholds of eighteen (Solicitation of a Minor) and nineteen (Child Abuse) years. Belina was charged with each of these offenses as to both C.K. and B.C. He was charged with attempting to sexually assault W.H. (T205-08). Consequently, the court's instructions left an impermissibly grave risk that jurors would find Belina guilty of sexual assault believing the alleged victims could not consent simply by virtue of their age.

This is particularly true because the alleged victims did not voice a lack of consent through words or conduct, the case did not involve physical force or the threat of physical force placing the victim in fear of death or in fear of serious personal injury to the victim or a third person, and no alleged victim alleged they were deceived regarding Belina's identity or purpose, as those terms are defined by statute. *Neb Rev Stat* §28-318. Consequently, the State was left with the theory of coercion which was unsupported by sufficient evidence (*Arg. III., infra)* and determined in reliance upon erroneous jury instructions (*Arg. V*). As such, the record suggests the verdict on Counts II, VI and X resulted from confusion regarding the age of consent.

Finally, the prosecutor's habit of referring to the witnesses as "boys" or "the boy" further increased the possibility the jury would fail to critically examine whether the State presented sufficient evidence on the issue of coercion and find Belina guilty based solely on the witness's age.

Belina respectfully submits his convictions on Counts II, VI and X, if not vacated and dismissed, should be reversed on this basis.

V. The district court erred by entering judgment of conviction on Counts IV, VIII and IX, Solicitation of a Minor for Prostitution, in the absence of sufficient evidence.

The district court entered judgment against Belina on three counts of Solicitation of a Minor for Prostitution in the absence of evidence he explicitly offered or provided money in exchange for any sexual conduct with C.K., B.C., or T.S.

The statute provides: "Any person who solicits another person not his or her spouse to perform any act of sexual contact or sexual penetration . . . in exchange for money or other thing of value, commits solicitation of prostitution. *Neb Rev Stat* §28-801.01. Neither the statute, nor the court's jury instructions, defined "solicit". Merriam's definitions of "solicit" include "to approach (someone) with a request or plea; to try to obtain (something) by usually urgent request or pleas; to offer to engage in sex acts and especially sexual intercourse with (someone) in exchange for pay." (*Merriam-Webster Dictionary,* found at https://www.merriam-webster.com/dictionary/solicit on January 18, 2025).

Penal statutes must be construed. *E.g., State v. Douglas*, 222 Neb. 833 (1986) (*citing State v. Beyer,* 218 Neb. 33, 37 (1984). Strict construction of criminal statutes is based on "need to provide fair warning of what conduct is criminal and to ensure that the legislature rather than the courts define criminal behavior." *Id.* (*citing United States v. Speidel,* 562 F.2d 1129, 1131-32 n.4 (8th Cir. 1977).

The issue as to C.K, and B.C. is whether money paid after alleged sexual contact in the pasture, or after the Albion trip, supports the convictions. On those counts, the State's theory below is that it is not unusual to pay for services after they are provided. The issue as to T.S. is whether evidence of Belina's alleged offer to pay for a back rub is

sufficient. The State's theory on that count rested on the notion Belina intended that the back rub would turn into sexual activity between the two.

As to both issues, the reason the evidence is insufficient is that there is no proof of the requisite *reus* of solicitation: the solicitation of sexual contact. *See, State v. Papillon*, 173 N.H. 13, 236 A.3d 839 (2020)(holding criminal solicitation encompasses both *actus reus* of "solicitation" and the *mens rea* of having the requisite intent of a criminal act); *State v. Thoman*, 2021 S.D. 10, 955 N.W.2d 759 (2021); (act of "asking" another person to engage in specific criminal conduct is the *actus reus* of solicitation); *State v. Martinez*, 2006-NMCA-148, 140 N.M. 792, 149 P.3d 108 (2006) (the *actus reus* of solicitation is the solicitation itself and the crime is complete once the asking, enticing, or encouraging is done). Belina simply did not *solicit* anything of value to entice the participation of the witnesses.

Initially, Belina notes C.K. did not claim Belina offered him anything before the first event in the pasture and when C.K. arrived home after the first alleged encounter he told his parents he had received $100 for checking cows (288: 1). This testimony was introduced by the State and is admissible to prove C.K.'s understanding of the purpose of the payment. Further, B.C.'s account of whatever occurred in the pasture with Belina and C.K. did not include solicitation on the part of Belina. He provided no testimony he was offered or paid money in exchange for his participation. Likewise, B.C.'s account of Belina touching his leg before briefly driving off the edge of the road included no talk of money or exchange.

Perhaps due to the absence of evidence Belina solicited sexual contact, the prosecutor also argued during closing those the witnesses' continued employment or payment afterwards met the requirement, comparing it to a situation where an employer makes sex a condition of employment. (827:2-828:15). However, neither C.K., B.C., nor T.S. testified Belina ever threatened to terminate their employment. Similarly, there is no evidence Belina ever told any witness any payment of their

wage was in exchange for sexual conduct. The statute, by its plain terms, did not provide "fair notice" to Belina, or fair notice to any employer, that the statute reaches otherwise consensual sexual contact between consenting persons who may be in an employment relationship.

The State's solicitation theory in this case is also incompatible with its third-degree assault theory that sexual activity alleged to have occurred with C.K., B.C., or T.S. was non-consensual. Whatever the scant evidence establishes Belina did prior to any sexual contact, it is difficult to conceive that it was both coercive and a solicitation. There is no evidence Belina solicited illegal conduct and then nonetheless committed the conduct, in the absence of an exchange, after a solicited exchange was refused. Of course, if Belina solicited sexual contact (he didn't) and it was followed by consensual sexual activity, then Belina's witnesses would have engaged in conduct within the reach of *Neb Rev Stat* §28-801. Certainly, that is not the State's theory. Likewise, if the theory is Belina paid after sexual activity and thereby established the requisite exchange for the next encounter, then that takes us back to the same place.

Belina respectfully submits the evidence is insufficient to support the judgments entered on Counts IV, VII and IX and those convictions should therefore be reversed.

VI. The district court erred by failing to provide a limiting instruction after allowing, over objection, Carrie Knull to testify to the details of Chase's "first report."

The victim of a sexual assault may testify to a complaint regarding a sexual assault made within a reasonable time after it occurs, but not as to the details of the complaint. *State v. Ford*, 279 Neb. 453 (2010). When such testimony is allowed, a limiting instruction should be given to advise the jury that testimony regarding the complaint is not to be considered as substantive evidence that the assault occurred. *State v. Ford*, 279 Neb. 453 (2010); *State v. Daniels*, 222 Neb. 850 (1986)(syllabus).

Here, the prosecutor elicited accounts of C.K.'s claims violating *Daniels* both Carrie Knull. Carrie Knull testified, over the hearsay objection of defense counsel, regarding C.K.'s claim Belina was rubbing up against him by a horse trailer that night and that C.K. said to him, "I told you I'm done. I ain't doing this no more." (201:20). The trial court gave no limiting instruction.

This was error.

VII. The district court committed reversible error by overruling Belina's objections and allowing Deb Milligan, Dana Kubo, and Investigator Jon Downey to give testimony designed to validate the truth of C.K.'s and B.C.'s allegations.

The prosecutor designed his direct examination of expert witnesses to elicit testimony validating the allegations made by C.K. and B.C. Because he succeeded, all counts based on their allegations must be reversed.

When expert testimony in a case involving minors goes beyond explaining the child's behavior and asserts, directly or indirectly, that the child has in fact been abused or that the child is telling the truth, such evidence goes too far, and its admission constitutes reversible error. *State v. Doan*, 1 Neb. App. 484 (1993); *State v. Muhannad*, 286 Neb. 567 (2013)(In *State v. Doan*, in contrast, the Court of Appeals held that the expert crossed the line when she testified that the victim's physical appearance and reactions while recounting the alleged abuse "'validat[ed]'" the victim's account of the abuse"); *State v. Roenfeldt*, 241 Neb. 30 (1992)(allowing testimony regarding generalities "without being familiar with the alleged victim").

a. Deb Milligan

Milligan was the State's third witness, called after C.K.'s parents testified about C.K.'s allegations that Belina abused him. As set forth in the Statement of Facts, Milligan testified she was an experienced expert regarding adolescents who have been sexually abused and how they disclose the abuse and that she looks for symptoms and makes a diagnosis.

As C.K.'s therapist, she then testified C.K.'s claims of abuse and his symptoms. The concluded by suggesting C.K. was a "[child] who had been sexually assaulted," that he was still suffering symptoms, and still needed treatment.

b. Jon Downey

From Captain Jon Downey, the State elicited testimony that he has investigated crimes for twenty-seven years including sexual assaults that he was initially assigned to investigate this case. (757:13-758:25). He testified he interviewed C.K. and B.C. for about an hour when they made their initial report, and that for months afterwards, he interviewed people for both inculpatory and exculpatory information to corroborate or impeach C.K. and B.C. (768:18).

After the district court sustained an objection as to whether their trial testimony was consistent with their initial interview (763:12), the prosecutor elicited on re-direct that Downey has worked with "adolescent males who have been sexually abused, that it is difficult and that it was difficult in this case. (769:9). The prosecutor then elicited, over objection, that at the end of his interview with C.K. and B.C. Downey recommended counseling for the witnesses because he was "concerned for the mental health and welfare of these two boys." (771:25).

If that was not enough, the prosecutor elicited testimony from Downey that the basis for his recommendation was the allegations, what he observed, and "years of seeing people damaged irretrievably –." (772:11-14). Defense counsel objected and the district court sustained defense counsel's motion to strike.

c. Dana Kuno

After qualifying Kubo as an expert, the prosecutor established that B.C. was her client but that he "quit coming to therapy because he was not ready to deal with the emotional trauma of what had taken place." (597:1-24). The prosecutor also introduced testimony from B.C. that that his

discontinuing treatment was "against therapist's advice" or "ATA." (657: 17). Similar to Milligan, Dana testified she conducts a diagnostic interview, identify significant behaviors, suggested that B.C.'s "disclosure" of more alleged abuse as time progressed was consistent with the way adolescents report sexual trauma.

As demonstrated above, each of the foregoing witnesses asserted "directly or indirectly, that the child has in fact been abused or that the child is telling the truth," requiring reversal under the rule established in *State v. Doan*, 1 Neb. App. 484 (1993).

This was error requiring reversal of all counts related to C.K. and B.C.

VIII. Trial counsel committed ineffective assistance by failing to object and/or move to strike inadmissible expert testimony from Dana Kuno bolstering B.C.'s credibility.

Defense counsel did not adequately object to the expert testimony of Dana Kuno or preserve error related thereto. This constituted ineffective assistance of counsel undermining confidence in the outcome of the trial. *E.g., State v. Rocha*, 286 Neb. 256, 266 (2013).

Courts have held that ineffective assistance of counsel may be established by counsel's failure to object to expert witness testimony which improperly bolsters the credibility of another witness. *Chappell v. State*, 429 S.C. 68 (Ct. App. 2019) (finding ineffective assistance by failing to object to expert testimony in a child sexual assault case and that failure was prejudicial because the outcome of the trial hinged on the jury's assessment of the victim's credibility); *Minton v. Sec'y*, DOC, 271 F. App'x 916 (11th Cir. 2008)(*citing Dorsey v. Chapman*, 262 F.3d 1181,1186 (11th Cir. 2001)).

Here, the record establishes counsel was aware of the opinions in *Doan, supra,* and made objections to protect against improper expert testimony from both Milligan and Kuno. (242:22; 604:20). Inexplicably,

however, defense counsel seemed to “throw in the towel” during Kuno’s testimony and failed to object or move to strike the inadmissible testimony complained of. As in *Rocha,* this error can be noticed on direct appeal because no reasonable strategic reason for counsel’s decision can be found. *Rocha*, 286 Neb. at 268. Accordingly, as in *Chappelle, supra,* this was ineffective assistance of counsel sufficiently prejudicial to warrant reversal.

IX. The district court erred by allowing the prosecutor to argue during closing arguments that lawyers are bad people that do “bad stuff” and that defense counsel intentionally attempted to “confuse,” “trick,” “fool,” and mislead the alleged victims and jurors.

Prosecutors "to refrain from improper methods calculated to produce a wrongful conviction. *United States v. Young*, 470 U.S. 1 (1985)." A personal attack by the prosecutor on defense counsel is improper. *United States v. Young*, 470 U.S. 1, 10 5 S. Ct. 1038 (1985).

During his closing argument, the person prosecuting Belina wove throughout his argument the theme that lawyers are bad, lawyers who are not prosecutors are worse, that lawyers who defend the accused do “bad stuff”, and that Belina’s lawyers intentionally attempted to “confuse”, “trick”, “fool”, and mislead the alleged victims and jurors. It went like this:

> I'm a lawyer, I admit it, and as you saw from Chase and you saw from Brayton, sometimes lawyers do things to confuse people. Sometimes it's easy, sometimes it's hard. Sometimes it gets caught. In this case more than once.
> ...
> It's a good thing you took notes. The reason you took notes, even though you're full-grown adults, you've all had jobs and that type of stuff so you can write down things so you can't be fooled. You can't be misled, at least it's harder to do it that way.
> ...
> Talking to lawyers, including me, I’m a lawyer. But being grilled, as you saw, by -- I will say at least growing up trial lawyers in my case.

> Growing old, but certainly I'm able to trick kids if I want to. Any of us could do that.
> ...
> All those kids that -- and some adults that put aside their life for a while so they could come and be subjected to a courtroom and lawyers, and I admit that I am one of them. I'm a lawyer at least.
> …
> And what do you say two years ago before lawyers and depositions and court hearings and all that bad stuff?

(815:19-23; 817:21-25; 818:10-14; 829:11-14; 840:1).

In his closing rebuttal, the prosecutor continued inviting animosity against defense counsel and their function:

> Downey is not a lawyer. His goal is not to trick people.

(860:4). Referring to evidence offered by defense counsel, he stated:

> That – pictures in car seats and stuff, that is not in the evidence. That's made up. That's lawyer talk.

(860:16).

Apparently referring to an instance when C.K. stood up during his testimony, the prosecutor argued

> . . . as a defense witness, Chase stood up for himself. Yes, I do. I have it here. You may have thought that was neat. Certainly you saw the person asking the questions sit down right afterwards.

(862:20).

Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process. *State v. Dubray,* 289 Neb. 208, 222-23 (2014).

Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole. *Id.* In determining whether a prosecutor's

improper conduct prejudiced the defendant's right to a fair trial, we consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction. *Id.*

Belina did not object or move for a mistrial. However, the Court may address the prosecutor's conduct for plain error evident from the record and may reverse if such error is "of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process." *State v. Barfield*, 272 Neb. 502, 511 (2006).

The prosecutor's argument was similar to that noticed as plain error in *Barfield*. As in that case, the prosecutor attacked defense counsel and their profession, even suggesting he was a different kind of lawyer, presumably a good one, than defense counsel, who do "bad stuff."

Applying the standard for determining prejudice, the comments had a tendency to mislead and prejudice the jury by suggesting defense counsel's performance of its duty to present a defense, and as part of that defense call into the credibility of witnesses and attempt impeachment of the witnesses, was "bad stuff" and meant they were trying to "confuse", "trick", "fool" and mislead the alleged victims and jurors.

The comments were not isolated, but rather persistently woven throughout the prosecutor's argument.

The comments were not invited by defense counsel. as most occurred during the prosecutor's initial closing.

There was no curative instruction given.

As discussed in more detail in Section XI below, the State's case was not overwhelming. Two charges were dismissed based upon insufficient evidence. Others should have been. As to C.K., B.C. did not corroborate his claim of sexual contact alleged to have occurred either when B.C. was with he and C.K. in the pasture or while returning from

Albion. There was no evidence of admissions or a confession by Belina. And C.K.'s conduct, remaining in Belina's employ and continuing to place himself in positions to be alone with Belina, is inconsistent with his claim of non-consensual sexual conduct.

Belina respectfully submits the district court erred by failing to remedy the prosecutor's misconduct. This requires reversal of the judgment on all counts not otherwise vacated based upon insufficient evidence.

X. The foregoing errors and misconduct are sufficiently prejudicial to require a new trial.

The State's charges depended on the credibility of C.K. and B.C. Indeed, they were the subject of eight of the ten charges and six of the eight convictions the district court entered judgment on.

There was no physical evidence, nor evidence of any confession or admission by Belina, who introduced evidence from which the jury could find the teenagers had a motive to fabricate their claims – not only because Belina cracked down at work but because they were embarrassed about what they had done.

Since the two were the age of consent, a central issue was therefore whether they were coerced to engage in sexual contact. As discussed above, evidence on this point was lacking.

A reasonable juror could find other evidence made their stories doubtful. On the first occasion, C.K. inexplicably climbed into the backseat with Belina rather than continuing to resist while other evidence supported a conclusion that Belina would accept a refusal to participate, including the alleged incident with B.C. in the vet shack (643:3); the two alleged occasions involving T.S. (720:24; 744:8); and the wrestling horseplay with W.H. (530:10). A jury could conclude from this evidence that since Belina heeded refusals when alone with others, then it is unlikely – doubtful – that he continued to lock the doors of the Suburban as C.K. claimed.

Based on the same evidence, a jury could conclude it was even more unlikely Belina persisted in his efforts when others were present, as B.C.

and C.K. claimed when describing the night at the pasture and the trip near Albion.

Likewise, the jury could also find it unlikely – and doubtful – that B.C. and C.K. would "freeze up" and not only allow but participate in sexual contact with one or more friends within arm's reach inside a vehicle, especially in the absence of any expressed threats or force on the part of Belina.

The 404 and 414 witnesses provided the jury little help on the issue of consent, or anything else. Belina's interactions with Grashorn, Taake and Long suggested only an interest in liaisons with younger female partners. Renner's allegation occurred eight years earlier while Belina was still in high school. Stussey's wrestling match allegation is dubious on its face, at least to anyone who has ever wrestled.

Conclusion

For the foregoing reasons, Counts I and II should be reversed and remanded for trial. All remaining counts should be remanded with directions to dismiss with prejudice.

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Certificate of Compliance

This Brief was prepared using Microsoft Word and is typeface compliant and consists of 10,180 words including cover page, table of contents, and table of authorities as well as signature blocks.

/s/Adam J. Sipple

Certificate of Service

I hereby certify that on Tuesday, January 21, 2025 I provided a true and correct copy of this *Brief of Appellant Belina* to the following:

State of Nebraska represented by Michael Thomas Hilgers (24483) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ Adam J. Sipple (20557)