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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-4125

UNITED STATES OF AMERICA,

Appellee,

v.

DUANE BERCIER,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION
HONORABLE PATRICK A. CONMY
SENIOR UNITED STATES DISTRICT JUDGE

APPELLANT'S BRIEF

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SUMMARY OF THE CASE

The decision in this case must be reversed for several reasons. First, numerous legal errors tainted the trial, denying Appellant the due process of law guaranteed by the Fifth Amendment. The prosecution: (1) presented inadmissible hearsay to bolster key contested testimony; (2) explicitly vouched for the credibility of a prosecution witness during closing argument; and (3) made a prohibited "golden rule" appeal to the jury asking jurors to put themselves in the complaining witness's position. In addition, the jury improperly convicted for both a greater offense and a lessor included offense, and the lower court imposed sentences on each conviction, in direct violation of the Fifth Amendment's Double Jeopardy Clause. Finally, the lower court should have granted a judgment of acquittal under FED. R. CRIM P. 29(a) because the evidence failed to prove an essential element of the charges. There was insufficient evidence of the required actual force necessary to satisfy the standard identified by this Court in *United States v. Allery*, 175 F.3d 610, 612 (8th Cir. 1999). The above errors singularly or in combination denied Appellant a fair trial and, thus, require reversal and remand with instructions to dismiss the Indictment or, in the alternative, for a new trial.

REQUEST FOR ORAL ARGUMENT

Appellant requests twenty (20) minutes of oral argument to assist the Court in accurately understanding the record, and in identifying the controlling statutory and case law to resolve the important issues presented on appeal.

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PRELIMINARY STATEMENT

Throughout this brief the Appellant, Duane Philip Bercier, will be referred to as "Bercier." The Appellee, United States, will be referred to as "the prosecution." The sole complaining witness, Cheryl Blue, will be referred to as "Blue." The trial transcript will be referred to as "TT," and the sentencing transcript will be referred to as "ST," each to be followed by the appropriate page number(s). Documents in the Addendum will be referred to by "Add.," followed by the appropriate page number. The Clerk's Record will be referred to as "CR," followed by the appropriate docket number. References to the presentence report will be prefaced "PSR," followed by the appropriate paragraph number of the report.

JURISDICTIONAL STATEMENT

The Decision Appealed: Bercier appeals from the lower court's verdict handed down on September 12, 2006, (CR 31), and from the court's Judgment in a Criminal Case entered December 8, 2006, (CR 35; Add. 1).

District Court Jurisdiction: The lower court asserted original jurisdiction over this federal criminal prosecution pursuant to 18 U.S.C. §§ 2241(a)(1), 2244(a)(1), and 1153 (offenses committed in Indian country).

Appellate Court Jurisdiction: This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. "The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

Notice of Appeal: Bercier timely filed a Notice of Appeal on December 13, 2006. (CR 36).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE ADMISSION OF IMPROPER HEARSAY EVIDENCE REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL .

1. THREE WITNESSES IMPROPERLY VOUCHED FOR BLUE'S CREDIBILITY BY REPEATING HEARSAY ALLEGATIONS CONTRARY TO FED. R. EVID. 802 AND THIS COURT'S HOLDING IN *MAURER v. DEPARTMENT OF CORRECTIONS*.

Authorities

1. *Tome v. United States*, 513 U.S. 150 (1995)
2. *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005)
3. *United States v. Kenyon*, 397 F.3d 1071 (8th Cir. 2005)
4. *Maurer v. Dep't of Corr.*, 32 F.3d 1286 (8th Cir. 1994)

2. EXHIBIT 6 SHOULD HAVE BEEN EXCLUDED IN WHOLE OR REDACTED IN PART BECAUSE IT WAS INADMISSIBLE HEARSAY AND CONTAINED MULTIPLE PREJUDICIAL DOUBLE HEARSAY ALLEGATIONS.

Authorities

1. *United States v. Turning Bear*, 357 F.3d 730 (8th Cir. 2004)
2. *United States v. Riley*, 236 F.3d 982 (8th Cir. 2001)
2. *United States v. Whitted*, 11 F.3d 782 (8th Cir. 1993)
3. *United States v. Hitt*, 981 F.2d 422 (9th Cir. 1992)

II. CONVICTION OF BOTH A GREATER OFFENSE AND A LESSOR INCLUDED OFFENSE BASED UPON A SINGLE TRANSACTION VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

Authorities

1. *Brown v. Ohio*, 432 U.S. 161 (1977)
2. *Milanovich v. United States*, 365 U.S. 551 (1961)
3. *United States v. No Neck*, 472 F.3d 1048 (8th Cir. 2007)
4. *United States v. Jones*, 418 F.2d 818 (8th Cir. 1969)

III. A RULE 29 JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN ORDERED BECAUSE THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE OF FORCE AS REQUIRED BY *UNITED STATES v. ALLERY*.

Authorities

1. *Jackson v. Virginia*, 443 U.S. 307 (1979)
2. *United States v. Allery,* 175 F.3d 610 (8th Cir. 1999)
3. *United States v. Crow*, 148 F.3d 1048 (8th Cir. 1998)
4. *United States v. Fire Thunder,* 908 F.2d 272 (8th Cir. 1990)

IV. THE PROSECUTOR'S CLOSING ARGUMENT DENIED BERCIER A FAIR TRIAL BY VOUCHING FOR A PROSECUTION WITNESS AND BY IMPROPERLY USING A "GOLDEN RULE" ARGUMENT.

Authorities

1. *United States v. Palma*, 473 F.3d 899 (8th Cir. 2007)
2. *United States v. Holmes*, 413 F.3d 770 (8th Cir. 2005)
3. *United States v. Cannon*, 88 F.3d 1495 (8th Cir. 1996)
4. *United States v. Jones*, 865 F.2d 188 (8th Cir. 1989)

STATEMENT OF THE CASE

Nature of the Case: This is a prosecution alleging aggravated sexual abuse and abusive sexual contact during a single encounter between adults. The jury ultimately accepted the allegations of the sole complaining witness and convicted Bercier of two counts. The lower court imposed a concurrent prison sentence on each count, followed by a term of supervised release, and a special assessment.

Bercier appeals the conviction and seeks either a judgment of acquittal under FED. R. CRIM P. 29(a) on one or both counts or, in the alternative, a new trial. The appeal is justified for several reasons. First, the prosecution failed to present sufficient evidence of force on either count. Second, the prosecution introduced improper hearsay evidence to bolster the accuser's credibility, while explicitly vouching for a witness during closing argument and telling the jurors to put themselves in the shoes of the accuser. Third, count two is a lessor included

offense to count one, yet the jury was told these were separate offenses, and entered judgment on both counts instead of just one count. The trial court then imposed two sentences upon Bercier, violating the Fifth Amendment prohibition against double jeopardy by punishing Bercier twice for a single offense.

Procedural History: An Indictment filed on March 24, 2006, charged Bercier with two counts. Count one alleged a violation of 18 U.S.C. § 2241(a)(1), aggravated sexual abuse alleging "penetration of her genital opening, with his finger, by the use of force against her, with an intent to abuse, humiliate, harass, degrade, and arouse and gratify the sexual desire of any person . . . ." Count two alleged the lessor included offense of violating 18 U.S.C. § 2244(a)(1), abusive sexual contact by "the intentional touching, directly and through the clothing, of the genitalia, groin, breast, and inner thigh, . . . , by the use of force against her, with an intent to abuse, humiliate, harass, degrade, and arouse and gratify the sexual desire of any person." (CR 2). A jury trial commenced on September 11, 2006, and concluded on September 12, 2006, with adverse verdicts on both counts. (CR 29). On December 7, 2006, the district court, Honorable Patrick A. Conmy presiding, imposed concurrent sentences of 168 months on count one and 120 months on count two, followed by concurrent five year terms of supervised release on each count, and a special assessment of $100 on each count, totaling

$200. (CR 33, 34; Add. 1). Bercier timely filed his Notice of Appeal on December 13, 2006. (CR 36).

STATEMENT OF FACTS

For several months during the winter and spring of 2005, Bercier lived with his adult sister, Joyce Poitra (hereinafter Poitra), in Belcourt, North Dakota. In March 2005, Poitra and her husband Lewis, also shared their home with their adult foster daughter Blue, Poitra's daughter Stacy, and Poitra's granddaughter, baby Jersey. (TT 77-78). Bercier stayed outside in a tent for several months until cold weather set in, although Poitra indicated he was welcome in the house any time. During the winter he moved into a bedroom in Poitra's basement that Blue had formerly occupied. (TT 13-14, 73-74, 108-09, 111). Blue moved upstairs and stayed in Poitra's bedroom with Poitra and the baby (Jersey). (TT 14, 35, 74-75). Poitra's husband Lewis, who is disabled, slept in the living room next to the stairway. (TT 36, 79, 97-98).

Bercier, who was in his early forties, had known Blue most of her life, yet prior to March 12, 2005, (TT 109), there is no evidence in the record that Blue ever accused Bercier of any misconduct. Instead, there is testimony that Blue tended to initiate contact with Bercier from time-to-time while he lived outside in the tent, and she often frequented the downstairs bedroom after Bercier moved in

to smoke cigarettes, play video games and access her personal "stuff." (TT 109-10, 115-16, 163-64). Blue had recently started using alcohol and she would also ask Bercier to give her beer. (TT 115, 153-54).

Poitra, however, did not want Blue drinking alcohol or smoking cigarettes in Poitra's home. (TT 16, 33, 35, 40, 154). Blue got around this rule by going down to Bercier's bedroom to smoke her cigarettes. (TT 17-18). Blue also lied to Poitra about drinking. (TT 40). Blue got in trouble for one such lie when she came home intoxicated on her eighteenth birthday. (TT 44, 161-62). Blue also admitted telling a BIA investigator that Poitra was drunk on March 13, although at trial Blue testified that Poitra was not, in fact, drunk. (TT 165).

Early in the day on March 12, 2005, Blue obtained a can of beer from Bercier, and she drank some Jack Daniels whiskey. (TT 15-17). Blue claimed she threw this first can of beer away without drinking it, but then she later claimed Bercier had forced her to drink the beer by telling her to "quit being a pussy and take a drink." (TT 165-66). Blue testified that Bercier gave her three more cans of beer, and that she drank two cans of Budweiser that evening. (TT 18-37).

Shortly after midnight, in the early morning hours of March 13, 2005, Bercier came home with a female friend, Donna Beston (hereinafter Beston), and they retreated to Bercier's downstairs bedroom. (TT 37, 120). It was winter and

they had walked home because of car trouble. (TT 20, 129-30). They were very cold. Meanwhile, Blue testified that she had decided to go to the downstairs bedroom to smoke cigarettes and drink beer before Bercier and Beston arrived. (TT 19, 38). When they came in, Blue said she was drinking beer and playing a video game. (TT 18-19).

Blue got Beston a blanket because she was cold, and then Blue and Bercier played some video games together. Beston laid down on the bed to warm up. (TT 20). Shortly thereafter, Blue heard Poitra drive up as she returned from work. In an effort to avoid getting caught drinking alcohol again, Blue quickly put out her cigarette and went upstairs and drank some coffee before Poitra came into the house. (TT 20). Bercier also came upstairs, and Poitra argued with him over a van that Bercier said he traded for another vehicle earlier in the evening. (TT 21) Poitra then said she was going to bed and asked Blue to come to bed. Blue, however, declined. Instead, she returned to Bercier's downstairs bedroom to smoke cigarettes and play more video games with Bercier. (TT 21).

After they finished playing video games, Blue and Bercier started watching a movie together while Beston rested in the bed next to them. (TT 21). At one point, Blue said she was ready for bed, but Bercier asked her stay a little longer and began speaking romantically to her. (TT 22). They discussed Poitra's

restrictions on Blue, and whether she should simply run off somewhere with Bercier. (TT 22). Blue said she declined and started to leave, but Bercier took her by the arm and sat her back down on the bed. (TT 23). Blue then said that Bercier started rubbing her arm and kissed her. (TT 23). Blue protested because she thought of Bercier like an uncle, but he sat her on his lap and asked her if she wanted to "jab," meaning have sexual intercourse. (TT 24). Blue declined and Bercier pushed her off his lap, but placed her hand on his penis. She said she did not like this, and removed her hand. (TT 24-25).

Blue said she told Bercier that she was going to bed, but that he began kissing her again, and put his hand up her shirt. (TT 25). Blue said she hid her face from Bercier, and when he asked if she liked what he was doing, she said no. (TT 25). Bercier next told Blue he knew how to do something she would like and he put his hands between her legs and began rubbing her crotch. (TT 25). Blue did not say anything, and Bercier put his face between her legs and began licking her. (TT 26). She did nothing to try to get away, but she was crying. She said that when Bercier saw her reaction, he pushed her away and told her to go to bed. (TT 26-27).

Blue testified that she did not cry out, or try to get away even though her foster parents were right upstairs. (TT 26-27). Blue gave two reasons. First, she

said on direct examination that "I was in shock, I suppose. I was scared." (TT 27) She said she was afraid of Bercier and did not know how he might react if she resisted or refused his advances. (TT 27). She did not explain the reasons for her fear, and there is nothing in the record to suggest that Bercier ever threatened her in any way. Instead, Blue revealed that she had other, apparently more compelling concerns.

Blue testified that she did not cry out because she had been drinking beer and smoking cigarettes and she feared Poitra's reaction. (TT 33, 39-40). Blue testified that Poitra's husband, Lewis, was only a few feet away at the top of the stairs the whole time either watching TV or sleeping. Blue said she did not yell or cry out because she knew she smelled of alcohol and cigarettes. She did not want to get in trouble for drinking alcohol, and so rather than getting in trouble for alcohol, she decided not to protest. She was afraid that Poitra might kick her out of the house, because in October 2004, Poitra was quite upset when she caught Blue lying and getting drunk on her eighteenth birthday. (TT 33, 40, 44). Poitra testified that she had difficulties with Blue in the past over "some whopper lies" that Blue had told her, confirming that Blue had been caught drinking outside the home on her last birthday. (TT 89, 91)

Bercier perceived the encounter with Blue somewhat differently from the way she described it, although Bercier confirmed that Blue neither protested nor offered any significant physical resistence to his advances. Bercier indicated that earlier that year Blue had frequently come to Bercier's tent and that he would have to make her leave "probably two or three times a day." (TT 109-10). He recalled that Blue had asked for a beer about 4 or 4:30 p.m. on March 12, 2005, and he gave her one. (TT 115-16). Bercier then went out for the evening and met an old friend, Beston, who later came home with him. (TT 120-22).

Beston and Bercier went to his bedroom and wrapped up in blankets to warm up. He brought some beer home with him and they each took one. Soon, Blue came into the room and asked for some beer, so Bercier gave her one too. (TT 123-24). Blue then went upstairs and warmed up some food for all three to eat. After they ate, Blue came back downstairs and drank with them until she heard Poitra drive up. Blue quickly put out her cigarette and ran upstairs so Poitra would not catch her smoking and drinking. Bercier followed and talked with Poitra, who became angry about the van. (TT 127-28). Bercier returned to the downstairs bedroom and Blue followed shortly afterwards. (TT 129).

While downstairs in Bercier's bedroom, Blue criticized Poitra's angry behavior, and talked about the fact that Bercier had split up with his spouse. (TT

131-32). Blue also complained that her own boyfriend, Andrew "A.J." Newcomer, mistreated her. Blue suggested that she and Bercier get together because Blue was now an adult, and she knew that Bercier was not related to her by blood. They began kissing and hugging, and then engaged in some foreplay. Bercier confirmed that Blue did not protest, nor leave the room. (TT 134-35). When Bercier asked Blue if she wanted to have intercourse, Blue declined because she was having her period. (TT 135-36). Blue then started upstairs, but she turned around and came back into the bedroom and kissed Bercier goodnight, and told him she would see him in the morning. Bercier then went to sleep. (TT 137-38).

Blue testified that after she came upstairs, she did not mention anything to Poitra or Lewis. Instead, Blue telephoned her boyfriend, A.J. (TT 27-28). Blue said A.J. got angry and said he was coming right over. Blue got dressed and waited outside for A.J. While she waited, Blue said she became hysterical and was crying when A.J. arrived. (TT 28-29). They went to the local hospital, and Blue now alleged that she had been raped. Someone called the police and hospital personnel conducted a rape kit. (TT 29-30; 65-66). The doctor reported finding a small area of abrasion on Blue's labia and the vulva, but then testified that this was consistent with either "unconsented sex," or could have been "caused by

consensual sexual contact." (TT 67-68, 69-71, 72). Police took pictures of some scratches that Blue inflicted upon herself. Blue said she did this by squeezing her own wrists tightly during her encounter with Bercier. (TT 30-31)

Meanwhile, the next morning Poitra woke up to discover that Blue was not at home. She asked Lewis to call A.J.'s house to see if Blue had stayed there, and someone told Lewis that Blue had been raped. (TT 79-80). Lewis told Poitra who then went downstairs and asked Bercier if he had raped Blue. Bercier immediately denied this allegation. (TT 79-80, 140-41). Poitra calmed down when she saw Beston in the bed, and went back upstairs. Bercier followed and told Poitra that he did not rape Blue. (TT 87-88, 141-42). Meanwhile, the police arrived and immediately arrested Bercier before he could tell Poitra the rest of the story of what really happened. (TT 79-80, 141-42).

Further facts will be developed as necessary in the argument sections.

SUMMARY OF THE ARGUMENT

The outcome of the trial in this case was affected by the admission of multiple hearsay statements, a double hearsay document, failing to properly instruct the jury when submitting a greater offense and a lessor offense as separate counts, prosecutorial witness vouching, and use of the "golden rule" argument during closing. These mistakes, singly, or in combination, affected the verdict

because the prosecution's case was very weak and depended entirely upon whether the jury accepted Blue's uncorroborated claims.

First, the jury had to decide whether to believe Blue's allegations or Bercier's testimony. The prosecution introduced several hearsay statements by Blue that, in effect, bolstered her credibility. The admission of these statements violated Bercier's due process rights to a fair trial. The lower court acknowledged that the statements were hearsay, but identified no exception for admitting the statements, nor made any findings under Rule 403, despite Bercier's specific Rule 403 objection to a very damaging hearsay and double hearsay document.

In addition, the conviction and sentence punished Bercier for both a greater offense and a lesser included offense, violating the Fifth Amendment against double jeopardy. In this Circuit, "abusive sexual contact is a lesser-included offense of aggravated sexual abuse." *United States v. No Neck*, 472 F. 3d 1048 (8th Cir. 2007). Here, the prosecution indicted and tried Bercier for both aggravated sexual abuse and abusive sexual contact based upon a single transaction on March 13, 2005. The jury was misinformed that Bercier was accused of two offenses, rather than a single offense, and responded with two guilty verdicts, even though only one verdict is permissible under the law.

Despite the above errors, this case never should have gone to the jury because the prosecution failed to prove the "force" element in either count. Bercier testified, consistent with many of the objective undisputed facts, that after drinking some beer Blue and Bercier engaged in some consensual foreplay, which stopped when Blue declined to go further. Blue's testimony is consistent in all material respects. She agreed that she had been drinking beer. She agreed that she did not comply with Poitra's request to come to bed. Instead, she voluntarily went back into Bercier's bedroom, where she drank, smoked, and played video games with Bercier. She testified that she was wearing very loose fitting pajamas. She agreed that the two started watching movies, and that Bercier told her he cared for her, and was attracted to her. She acknowledged that she did not call out, nor fight with Bercier when he kissed and hugged her. Although she claimed that she did not consent to his advances, her testimony reveals that Bercier used no force on her, and that he stopped his advances when she told him she did not want to continue the foreplay or have intercourse. Under these circumstances, viewing the evidence in a manner most favorable to the verdict, the record does not contain the necessary quantum of evidence of force necessary to cross the threshold required for proving force identified by this Court in *United States v. Allery,* 175 F.3d 610, 612 (8th Cir. 1998).

Finally, the prosecutor misused the rebuttal closing argument in two respects. First, the prosecutor explicitly vouched for the credibility of a prosecution witness, by telling the jury that the prosecutor had instructed the witness how to testify. Second, the prosecutor used the prohibited "golden rule" argument by telling the jurors to put themselves in Blue's shoes.

Under the above circumstances, the convictions must be reversed. This Court should remand with instructions to dismiss the indictment because the prosecution failed to prove force. In the alternative, this Court should order a new trial. The prosecution's case was very weak, consisting of a swearing contest between two witnesses, with no material evidence to corroborate the allegation of force. In these circumstances, the improper admission of hearsay to bolster Blue's credibility affected the jury's evaluation of the testimony. The failure to properly instruct on the two counts, also likely had a profound psychological affect on the jury by improperly presenting the accused as a multiple offender. The prosecution's improper closing argument also misled the jury and gave them a basis for deciding the case on improper grounds. All of these mistakes either separately, or in combination, mean that the case must be remanded for a new trial under this Court's holding in *Maurer v. Dep't of Corr.*, 32 F.3d 1286 (8th Cir. 1994).

ARGUMENT

I. THE ADMISSION OF IMPROPER HEARSAY EVIDENCE REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL.

A. Standard of Review.

This Court reviews a trial court's conclusions of law *de novo* and its findings of fact for clear error *United States v. Turning Bear*, 357 F.3d 730, 732 (8th Cir. 2004). The "interpretation and application of most rules of evidence are matters of law. Of course, an error of law can always be characterized as "an abuse of discretion," *United States v. Weiland*, 284 F.3d 878, 882 (8th Cir. 2002), but our review in cases like the present one is more accurately characterized as *de novo*." *United States v. Blue Bird*, 372 F.3d 989, 991 (8th Cir. 2004).

This Court accords deference to the trial court on its application of rules of evidence that "require a balancing of how particular evidence might affect the jury," such as FED. R. EVID. 403. *Id*.

B. Merits

1. Three witnesses improperly vouched for Blue's credibility by repeating hearsay allegations contrary to FED. R. EVID. 802 and this court's holding in *Maurer v. Department of Corrections*.

"Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802. Despite this prohibition, and over the objection of counsel, three witnesses were permitted to repeat to the jury out-of-court statements by Blue accusing Bercier of this offense. Since the jury had to decide whether to believe either Blue or Bercier, admission of Blue's out-of-court statements only served to improperly bolster Blue's credibility. This Court has granted habeas relief to a petitioner in similar circumstances, and has reversed sexual abuse convictions in similar cases.

In *Maurer v. Dep't of Corr*., 32 F.3d 1286 (8th Cir. 1994), this Court set aside petitioner's rape conviction in a trial that "was essentially a credibility contest" between the petitioner and the complaining witness. *Id*., 32 F.3d at 1288. Just as in the case at bar, the "two versions of what happened . . . are remarkably similar." *Id*. L.S. and Maurer enjoyed each other's company at a dance, and L.S. voluntarily accompanied Maurer to his home. "He and L.S. began kissing on the couch. L.S. reminded Maurer that she wanted to go home and that he had promised her a ride home. L.S. told Maurer "that kissing was fine, but [she] did [not] want to go any further," to which Maurer replied she "would like it." Maurer disrobed L.S. while she again told him that she wanted to go home." *Id*. Instead

of stopping at L.S.'s request, "Maurer pulled L.S. on top of him, and they had intercourse . . . ." *Id*. L.S. testified that "although she did not want to have intercourse, she did not seriously resist Maurer . . . . and was afraid Maurer would hurt her if she made him angry by resisting." *Id*. At trial, the only dispute was "whether their ensuing intercourse was consensual . . . ." *Id*.

L.S. called a taxi for a ride home, and "testified that she was hysterical and told the cab driver that she had been raped." *Id*. L.S. then told two of her friends, Sperl and Eisel, "that Maurer had raped her." *Id*. She then gave similar accusatory statements to two police officers. At trial, "the prosecution, over the defense's continuing objections, asked . . . four prosecution witnesses to whom L.S. complained of rape whether L.S. seemed sincere when she said she was raped." *Id*., 32 F.3d at 1288-89.

The case at bar has some very similar facts. The prosecution introduced three of Blue's out-of-court statements to various individuals over Bercier's hearsay objections. First, the prosecution asked Blue's boyfriend what Blue claimed happened. Bercier objected to hearsay, but the lower court overruled the objection, explaining, "I'm going to let the witness answer. This is preliminary and the witness has, in fact, already testified." (TT 52). The boyfriend then told the jury that "She was crying . . . -- she was telling me things that -- what her uncle

had done to her . . . . Molesting her and touching her inappropriately, making her do things she didn't want to do or so she made it seem." (TT 52).

Next, the prosecution asked both a nurse and a doctor to repeat Blue's allegations. Bercier first objected to the nurse's testimony, but the lower court overruled the objection, commenting, "Yes, the statements probably qualify as hearsay, but they're the same statements which the jury has already heard, so I see really no problem with admitting and letting the continuity of testimony flow, so I will overrule your objection." (TT 59-60). The nurse then told the jury that, "When she came into the emergency room, she stated that she had been assaulted." (TT 60).

Bercier also objected to the doctor's hearsay testimony, but the lower court again overruled the objection. (TT 68). The doctor then repeated multiple hearsay statements to the jury:

> She came in appearing extremely emotionally traumatized and stated that her Uncle Manny [Bercier] had -- had sexually assaulted her, and she said that he had gone -- gone down on her, and she described in detail the night, what had happened . . . .
>
> She said that he had come in and out of the house that night and had come back around midnight, and she was playing Nintendo and he came into a room where there's a TV and beckoned her to sit by him, and that he started kissing her ear and her breasts and doing gross stuff, and that she -- that he started to have oral sex with her. And she pushed him away and said no, and that he didn't seem to understand that she was

> saying no. And she kept pushing him away, eventually was able to get him to stop, that she was terrified . . . .

(TT 68). The combined effect of the boyfriend's statement, with statements by a professional nurse and a doctor upon a lay jury, resulted in improper bolstering of Blue's earlier testimony. Although the lower court appeared to recognize that each statement was inadmissible hearsay, the lower court nevertheless overruled Bercier's objections on the sole ground that Blue herself previously testified. This clearly violated Rule 802 and is grounds for reversal.

Under the very similar facts in *Maurer*, this Court granted the requested habeas relief, holding that "the evidence was extremely close and the jury's determination of whose story to believe was, by necessity, based largely, if not exclusively, on the determination of Maurer's and L.S.'s truthfulness . . . . The importance of the credibility determination justifies enhanced scrutiny of the testimony concerning L.S.'s sincerity." *Maurer*, 32 F.3d at 1290. This Court also pointed out that "When the evidence is close, it is more likely that evidentiary error will infect a trial with fundamental unfairness." *Id.*, 32 F.3d at 1289.

Likewise, again under similar circumstances, this Court reversed a sexual abuse conviction in *United States v. Kenyon*, 397 F.3d 1071 (8th Cir. 2005), precisely because the trial court erroneously overruled Kenyon's objections to hearsay statements by a physician's assistant, and permitted the assistant to repeat

allegations of abuse by the complaining witness. This testimony paralleled the doctor's testimony in the case at bar. The physician's assistant described a specific alleged sexual act and other specific details about the "alleged touching incidents." *Id*., 397 F.3d at 1081. This Court reversed and remanded for a new trial. "In this case, A.L.'s testimony was the sole basis for conviction . . . . Kroupa's testimony had the potential to bolster A.L.'s credibility through an articulate description of the alleged abuse, and to augment A.L.'s testimony with additional detail in certain areas." *Id*., 397 F.3d at 1082. This Court also pointed out that "sufficiency of the evidence and harmlessness of an error are different questions . . . . Giving the benefit of the doubt to the defendant in accord with our precedents, we conclude that the erroneous admission of Kroupa's testimony as substantive evidence affected Kenyon's substantial rights." *Id*.

This Court also held that admission of three similar hearsay statements constituted error in *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005). As in the case at bar, "three female witnesses . . . testified to out-of-court statements made to them by A.W.H. about alleged sexual abuse. The [lower] court ruled that the statements were not hearsay . . . ." *Id*., 400 F.3d at 557. This Court disagreed

and again held, "We conclude that the out-of-court statements were hearsay and the district court should have excluded them." *Id*.

The three hearsay statements admitted in this case improperly bolstered Blue's credibility, thereby affecting the jury's evaluation of her allegations against Bercier. The prosecution used a nurse and a doctor to repeat her statements, which must have added significant weight to the allegations in the minds of the jury, in a manner quite similar to *Kenyon*.

The prosecution also did not argue that these statements were admissible under any particular hearsay exception, and the lower court did not identify any such exception. Instead, the lower court erroneously concluded that the hearsay could be presented to the jury because it repeated some of Blue's earlier testimony. There is no such exception to the hearsay rule.

The prejudice to Bercier is quite evident in a credibility contest. *See*, *e.g.*, *Tome v. United States*, 513 U.S. 150, 166 (1995) ("the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount [the complaining witness's] detailed out-of-court statements to them."). Under these circumstances, reversal and remand for a new trial is required under *Bordeaux*, *Kenyon* and *Maurer*.

2. Exhibit 6 should have been excluded in whole or redacted in part because it was inadmissible hearsay and contained multiple prejudicial double hearsay allegations.

In addition to the above testimony recounting inadmissible hearsay statements, the lower court also incorrectly overruled Bercier's objections to a written hearsay document designated as Exhibit 6. (Add. 2). Four pages of the document are titled "PCC Ambulatory Encounter Record," with no other identifying information about the origin or source of the pages. One page of Exhibit 6 is titled "Treatment Record," on one side, and "Quentin Burdick Hospital Emergency Department" on the other side. There is no testimony in the record using the name "Quentin Burdick." All five pages of Exhibit 6 contained highly prejudicial double hearsay statements, some purporting to repeat detailed allegations by Blue, and other statements making accusations without identifying the source of the allegation.

Bercier objected to the introduction of these statements prior to trial, citing Rule 403, and pointing out that "the information contained therein is not for the purpose of diagnosis and treatment, and claims substantial extraneous material that's -- prejudicial nature far exceeds its probative value." (TT 8-9). The lower court deferred ruling, stating "All right. I will look this over and keep it in mind to when that point comes up." (TT 9).

The first reference to "Exhibit 6" occurs during the testimony of Nurse Phylomine Houle.

Q. I'm going to show you what's been marked as Government's Exhibit 6 for identification. Do you recognize this document?

A. Yes.

Q. Okay. You can hold it there for reference. Is that your writing on that document?

A. Yes. As one of the nurses working for that shift, I sign my initials and my code, and then I wrote my name on the side.

(TT 59). There follows some discussion about the contents of Exhibit 6.

The next explicit reference to Exhibit 6 comes during testimony by Dr. Angela Erdrich, who testified that she was "working at Belcourt Hospital on March 13, 2005." (TT 64). Dr. Erdrich testified,

Q. I'm going to show you what's been marked as the Government Exhibit 6 for identification purposes. Do you recognize the document?

A. Yes.

Q. And is that your handwriting?

A. Yes.

Q. And there's other handwriting on there, is that correct?

A. Other people's, you mean?

Q. Other people's handwriting.

A. The nurse's.

(TT 69). There again followed some discussion about the contents of Exhibit 6, after which Exhibit 6 was offered and received over Bercier's objection. The lower court stated, "Your objection is overruled. You have preserved your record." (TT 72).

At the conclusion of the testimony, the lower court again indicated that Exhibit 6 should be again formally offered and received, stating that all of Bercier's objections were overruled, and his record preserved.

THE COURT: All right. And while you're about it, were you going to formally offer Exhibit 6?

[Prosecutor] MS. MORLEY: Yes, Your Honor.

THE COURT: Okay. And you were going to object to it, so -- that's the hospital records.

MR. SCHMITZ: Yes, Your Honor.

THE COURT: You're going to object to the statements it contains on an hearsay basis.

MR. SCHMITZ: And 403.

THE COURT: All right. And I'm going to overrule your objection. I'm going to receive Exhibit 6, well, for whatever reasons, and your record is preserved. Yes.

(TT 169-70).

Since the record shows that neither the prosecution nor the lower court identified any exception to the hearsay rule that would permit receipt of the evidence, the document was not admissible under Rule 802. Likewise, the court did not identify, nor weigh, the probative value of Exhibit 6 against the prejudice of the double hearsay allegations written in the document. Thus, the record does not contain Rule 403 findings.

The document marked Exhibit 6 is not admissible as an exception to the hearsay rule under this record. This written document is not admissible under Rule 803(6) (business record exception) because there was no testimony from a custodian or other qualified person that Exhibit 6 was prepared and kept in the course of a regularly conducted business activity. *United States v. Riley*, 236 F.3d 982 (8th Cir. 2001) (conviction reversed because crime-lab reports were admitted without proper foundation under 803(6)). None of the prosecution's witnesses claimed to be a custodian of this record, nor a person otherwise qualified to testify about the hospital's record keeping policies. Since no witness testified that Exhibit 6 was prepared and kept in the course of a regularly conducted business activity, the document is not admissible under Rule 803(6). Inadmissibility of the entire document under Rule 803(6) necessarily means the document's contents, including the double hearsay, are not admissible.

Moreover, there is a second reason the double hearsay statements within the document are not admissible. The record does not support application of the Rule 803(4) (medical diagnosis) exception. This exception requires the record to show that, "first, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." *United States v. Turning Bear*, 357 F.3d 730, 738 (8th Cir. 2004).

The record in this case, however, contains no testimony about Blue's motive in making the accusatory statements. Likewise, most of the double hearsay statements in Exhibit 6, do not describe symptoms nor are they the type of statements that a physician would reasonably rely upon in treatment or diagnosis. Presumably, that is why the prosecution introduced no such testimony. Instead, the double hearsay statements written in Exhibit 6 are nothing more than Blue's testimony "dressed up and sanctified" as an official court exhibit. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987).

Thus, such double hearsay statements in Exhibit 6 have absolutely no probative value. Instead, to paraphrase this Court's analysis in a related case, Blue's accusations repeated by Exhibit 6 "significantly enhanced [her] believability, and unfairly tilted the scales in her favor. The [document]

corroborated [her] story under the guise of [being a medical exhibit] and effectively told the jury that [Bercier] had committed a crime." *United States v. Whitted*, 11 F.3d 782, 787 (8th Cir. 1993). *Whitted* reversed a sexual abuse conviction because a doctor relied upon the accuser's statements to form his opinion about what had transpired. Just as in the case at bar, the "case against Whitted was not overwhelming. As the Government admits, the case boiled down to a believability contest between L. and Whitted. The Government heavily relied on Dr. Likness's testimony." *Id*. In the case at bar, permitting multiple witnesses to repeat Blue's allegations, and permitting a jury to have a written exhibit that also repeated these allegations, unfairly stacked the deck against Bercier by creating an aura of credibility through the improper use of medical testimony and records.

Finally, even if the document and/or the double hearsay had been admissible under a hearsay exception, Rule 403 requires relevant evidence to be "excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair

prejudice or a small risk of misleading the jury." *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). (Reversing conviction because the lower court failed to exclude prejudicial evidence with only marginal relevance).

In this case, the hearsay statements merely repeated Blue's allegations over and over. Thus, they had no independent probative value on any issue. The prejudicial impact, however, was significant. Jurors seeing Blue's allegations repeated in an official document or record would naturally, but incorrectly, reason that the statements would not have been written down unless Blue was credible. Therefore, Rule 403 also required that Exhibit 6 be either excluded, or redacted to eliminate the double hearsay allegations.

II. CONVICTION OF BOTH A GREATER OFFENSE AND A LESSOR INCLUDED OFFENSE BASED UPON A SINGLE TRANSACTION VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

A. Standard of Review

This Court reviews double jeopardy issues *de novo*. *United States v. Carpenter*, 422 F.3d 738, 747 (8th Cir. 2005)*; United States v. Chipps,* 410 F.3d 438, 448-49 (8th Cir. 2005)*; United States v. Roy,* 408 F.3d 484, 491 (8th Cir. 2005); *United States v. Dixon*, 921 F.2d 194, 196 (8th Cir. 1990).

Bercier did not raise this issue in the lower court. When these issues are not raised in the trial court, this Court reviews for plain error. *United States v. Sickinger*, 179 F.3d 1091, 1092-93 (8th Cir. 1999).

B. Merits.

The "Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The law has been settled for 30 years that the double jeopardy clause bars convictions for both a greater offense and a lesser-included offense, based upon a single transaction. *Brown*, 432 U.S. at 166 ("we conclude today that a lesser included and a greater offense are the same" under *Blockburger v. United States*, 284 U.S. 299 (1932)). Likewise, without the explicit direction of Congress, neither the courts nor prosecutors may create multiple offenses out of a single transaction by attempting to divide a single transaction into separate units. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id*., 432 U.S. at 169.

Likewise, the law has been settled for nearly twenty years in the Eighth Circuit that, "abusive sexual contact is a lesser-included offense of aggravated sexual abuse." *United States v. No Neck*, 472 F.3d 1048, 1054 (8th Cir. 2007),

citing *United States v. Two Bulls*, 940 F.2d 380, 381 (8th Cir. 1991); *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997); *United States v. Demarrias*, 876 F.2d 674, 676 (8th Cir. 1989). Other circuits agree that when the greater offense alleges digital penetration as defined by 18 U.S.C. § 2246(2)(C), as in the case at bar, a charge of abusive sexual contact pursuant to 18 U.S.C. § 2244(a)(1) is a lessor-included offense. *See, e.g. United States v. Torres*, 937 F.2d 1469 (9th Cir. 1991), citing *United States v. Demarrias*, 876 F.2d 674, 676-77 (8th Cir. 1989), for the holding that "abusive sexual contact is a lesser-included offense" to "aggravated sexual abuse by digital penetration under 18 U.S.C. § 2241(c) . . . [because] 'the elements of the lesser offense are a subset of the elements of the charged offense.'"

Although the general rule is that the prosecution may not charge two separate offenses based on a single transaction, the prosecution is permitted to charge both a greater offense and a lessor-included offense in an indictment, so long as the jury is properly instructed that they cannot convict on both offenses. "It has long been customary . . . that the [greater] offense . . . may be charged in the indictment along with the lesser charge . . . . Where the evidence, if believed, supports the commission of the greater crime, the jury may so find. On the other

hand, the jury may find the defendant guilty only of the lesser charge." *United States v. Jones*, 418 F.2d 818, 825 (8th Cir. 1969) (citations omitted).

It is critical, however, that "*the jury must be told that the defendant cannot be guilty of both crimes*, since the intent of Congress was not to pyramid multiple punishments for the same acts." *Id*., citing *Milanovich v. United States*, 365 U.S. 551 (1961). *See also United States v. Dixon*, 507 F.2d 683, 684 (8th Cir. 1974) ("It is, of course, hornbook law that where [the greater offense] and the lesser offense . . . are charged in the indictment, the jury must be told that the defendant cannot be guilty of both crimes."). The trial court has a duty to assure that "these procedural rules cannot allow the jury to speculate as to whether or not the aggravated crime was committed when the inference from the circumstances proven is as consistent with the lesser offense." *Jones*, 418 F.2d at 825.

In the case at bar, the indictment charged Bercier with the greater offense of aggravated sexual abuse by digital penetration contrary to 18 U.S.C. § 2241(c), and abusive sexual contact contrary to 18 U.S.C. § 2244(a)(1). (CR 2). Bercier could not move to dismiss the indictment pre-trial because the prosecution is permitted to join a greater and lessor included offense in a single indictment. *Jones*, 418 F.2d at 825. Once the evidence had been presented at trial, the lower court then had the duty to inform the jury that it could not convict on both counts.

Jones, *supra*, and *Dixon,* 507 F.2d at 684. The trial court's failure to so instruct the jury required a new trial in *Milanovich v. United States*, 365 U.S. 551, 554-55 (1961). The Supreme Court ordered a new trial because the trial "judge should have instructed the jury that a guilty verdict could be returned upon either count but not both" counts of larceny and receiving. Similarly, in this case, the lower court did not instruct the jury as required. This mistake constitutes plain error under current and longstanding law. (CR 28).

Bercier was prejudiced by the lower court's omission in several ways. First, and most obviously, the jury convicted him, and the lower court sentenced him, for both the greater offense and the lessor-included offense contrary to the double jeopardy clause, prohibition against multiple punishments for a single offense. (CR 31, 34). At a minimum, this should require reversal with instructions to vacate one conviction. *See Carpenter*, 422 F.3d 738; *Chipps,* 410 F.3d 438; *Roy,* 408 F.3d 484; and *Dixon*, 921 F.2d 194. In this case, however, a new trial is a more appropriate remedy because of the weakness of the prosecution's case.

A new trial should be ordered because of a second form of prejudice that occurs when there is a failure to properly instruct the jury, especially when the evidence is weak. As Judge Friendly explained, the failure to separate offenses creates "the risk that the prolix pleading may have some psychological effect upon

a jury by suggesting to it that defendant has committed not one, but several crimes." *United States v. Ketchum*, 320 F.2d 3, 8 (2d Cir. 1963) (citations and internal quotes omitted). (Reversing a dismissal, and remanding with instructions to require the government to consolidate or elect from multiple counts). This Court also acknowledged that very problem in *United States v. Sue*, 586 F.2d 70 (8th Cir. 1978), but declined to grant a new trial there because of the strength of the government's evidence. In such circumstances, "there was no threat of generating an adverse psychological effect on the jury." *Id*., 586 F.2d at 73. In the case at bar, the evidence against Bercier was very slim, which substantially increased the likelihood that improper instructions affected the jury's verdict.

Since this case depended upon one person's word against another person, with no corroborating evidence, a new trial is the best remedy for the lower court's error. This Court has ruled that *Milanovich* does not necessarily *require* a new trial when a defendant is convicted of both a greater and lessor offense. *United States v. Belt*, 516 F.2d 873 (8th Cir. 1975) (vacating the conviction on the lessor-included offense). Yet, when the evidence is as weak as the evidence in this case, and requires the jury to decide whether to believe a single complaining witness, the likelihood of prejudice from an improperly instructed jury is exponentially increased.

Justice Stewart's comments in *Milanovich* bear special significance in this day and age of judicial restraint. The Court recognized that it had "no way of knowing whether a properly instructed jury would have found the wife guilty of [either charge] (or, conceivably, of neither). . . [The lower tribunal] "assumed, that the jury, if given the choice, would have rendered a verdict of guilty . . . But for a reviewing court to make those assumptions is to usurp the functions of . . . the jury. . . ." *Milanovich*, 365 U.S. at 555-56. Likewise, in Bercier's case, there is no way of knowing whether a properly instructed jury would have returned a verdict of guilt on either, or conceivably neither, charge. Therefore, justice and judicial restraint require that this case be remanded for a new trial in which a properly instructed jury can make its own decision in accordance with the Sixth Amendment.

Finally, the plain error in this case not only results in a miscarriage of justice through an unauthorized conviction, but, if left standing, the error would seriously affect the fairness, integrity, or public reputation of the judicial proceedings. The "Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors." *Brown*, 432 U.S. at 165. If this Court declines to correct a plain error by which a lower court exceeded a specific Constitutional restraint on its authority, then the integrity and public reputation of

the court system itself is jeopardized. To avoid such an unseemly outcome, this Court should grant plain error relief and remand this case for a new trial.

III. A RULE 29 JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN ORDERED BECAUSE THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE OF FORCE AS REQUIRED BY *UNITED STATES V. ALLERY*.

A. Standard of Review

"The denial of a motion for judgment of acquittal is reviewed *de novo* . . . . [A] challenge to the sufficiency of the evidence [must be sustained whenever] . . . a reasonable factfinder would have entertained a reasonable doubt about the government's proof of one of the offense's essential elements." *United States v. Water*, 413 F.3d 812, 816 (8th Cir. 2005); *United States v. Mendoza-Larios*, 416 F.3d 872, 873 (8th Cir. 2005); *United States v. Cruz*, 285 F.3d 692, 697 (8th Cir. 2002); *United States v. Plenty Arrows*, 946 F.2d 62, 64 (8th Cir. 1991). A criminal conviction must be reversed if it is not supported by substantial evidence. In evaluating whether there is substantial evidence, this Court considers the totality of the circumstances. *United States v. Kelton*, 519 F.2d 366, 367 (8th Cir.), *cert. denied*, 423 U.S. 932 (1975).

"The power of the factfinder . . . has never been thought to include a power to enter an unreasonable verdict of guilty . . . . Any such premises wholly belied by the settled practice of testing evidentiary sufficiency through a motion for

judgment of acquittal and a postverdict appeal from the denial of such a motion." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (citations omitted). "The standard of proof beyond a reasonable doubt . . . plays a vital role in the American scheme of criminal procedure, because it operates to give concrete substance to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Id*., 443 U.S. at 315 (citations and internal quotes omitted). "A 'reasonable doubt,' at a minimum, is one based upon 'reason' . . . 'which arises from the evidence or lack of evidence.'" *Id*., 443 U.S. at 317, n.9 (citations omitted).

"The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless . . . . Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Id*., 443 U.S. at 323-24. "Where the government's evidence is equally strong to infer innocence as to infer guilt, the verdict must be one of not guilty, and the court has a duty to direct an acquittal." *United States v. Jones*, 418 F.2d 818, 826 (8th Cir. 1969). *Accord United States v. Bolzer*, 367 F.3d

1032, 1035, n.1 (8th Cir. 2004) (harmonizing an apparent intra-circuit conflict on this point).

B. Merits.

The prosecution did not meet its burden of proving "force," as defined by this Court's controlling precedent. The reference to "force" in the context of sexual offenses originates in 18 U.S.C. § 2241(a), which is incorporated by reference by various statutes and sentencing guidelines. In this case, the indictment charged in count one a violation of § 2241(a), and charged in count two the lessor-included offense of a violation of 18 U.S.C. § 2244(a)(1), which incorporates § 2241(a) by reference. Without substantial evidence of either a threat of force, the use of a weapon, or the use of actual force sufficient to overcome, restrain, or injure Blue for each count, the prosecution could not satisfy the requisite burden of proof.

This Court clearly identified the required burden of proof in *United States v. Fire Thunder,* 908 F.2d 272 (8th Cir. 1990). Fire Thunder pled guilty to sexually abusing his seven-year-old stepdaughter. U.S.S.G. § 2A3.4(b)(1) required a nine level enhancement to the offense level "if abusive sexual contact was accomplished as defined in 18 U.S.C. § 2241. . . ." *Id*., 908 F.2d at 273. The lower court applied the enhancement for alternative reasons: (1) "Fire Thunder

threatened the victim's father," or (2) "because Fire Thunder was the victim's stepfather -- a fact that the district court held to presume the use of force under 18 U.S.C. § 2241(a)(1)." *Id.* This Court rejected the second reason.

"Section 2241(a)(1) envisions actual force." *Id.*, 908 F.2d at 274. Legislative history confirmed the point: "The requirement of force may be satisfied by a showing of the use, or threatened use, of a weapon; the use of such physical force as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim." *Id.*, citing, Sexual Abuse Act of 1986, H. Rep. No. 594, 99th Cong., 2d Sess., 14 n. 54a, reprinted in 1986 U.S. Code Cong. & Admin. News 6186, 6194 n. 54a. "The force requirement of § 2241(a)(1) is met when the sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact." *Id.*, 908 F.2d at 274 (citation and internal quotes omitted). Several later cases further defined the type of evidence needed to prove force under § 2241(a)(1).

In *United States v. Crow*, 148 F.3d 1048, 1050 (8th Cir. 1998), a ten-year-old testified that "that Crow removed her clothes, although she did not want him to, and sexually assaulted her, hurting her." *Id.,* 148 F.3d at 1050. This Court reversed the lower court's finding of force under § 2241(a)(1). This Court held

that the lower court committed clear error, because the record did not contain "any evidence regarding Crow's size in relation to the victim's, the victim's (perceived) ability to escape the sexual attack, or what exactly the victim meant when she stated Crow "hurt" her--i.e., whether Crow hurt her to compel her to submit to the sexual contact, or whether the contact itself hurt her." *Id*.

In *United States v. Allery*, 175 F.3d 610 (8th Cir. 1999) (*Allery* 2), this Court identified the bare minimum evidence necessary for a finding of force under § 2241(a)(1). In *United States v. Allery*, 139 F.3d 609 (8th Cir. 1998) (*Allery* 1), this Court reversed a Rule 29(a) dismissal. *Allery* 2 explained the reversal because the following evidence was sufficient to prove force under § 2241(a).

> Mr. Allery forced himself on his victim while she was asleep, and when she awoke she pushed him away and freed herself. We upheld the conviction on the ground that the jury was free to infer from the facts just recited that Mr. Allery "was physically restraining [the victim] by lying on top of her and resisting her attempts to push him away while at the same time he was having sexual intercourse with her." This, we held, was "sufficient to constitute force under the statute."

Allery 2, 175 F.3d at 612. This Court then held, "Although the amount of force that was used to commit the relevant crime was, as we held, sufficient to sustain a conviction under the statute, *it was, we think, virtually the least amount of force that could do so." Id.*, 175 F.3d at 612 (italics added).

Thereafter, this Court reversed a finding of force in *United States v. Blue*, 255 F.3d 609, 613 (8th Cir. 2001). Blue sexually abused a twenty-one-month-old child. The child's mother walked in on Blue after he had isolated the child in a bathroom and placed his penis in the child's mouth. *Id*., 255 F.3d at 611. The lower court enhanced the offense level for use of force because, "The victim in this case was 21 months old. There was a relationship between the victim and the defendant. The defendant was the only one present in the bathroom at that time. The [lower court concluded] . . . that there was sufficient force to overcome the will of this victim, albeit there was no physical injury as such." *Id*., 255 F.3d at 613. This Court reversed, holding, "The record shows an absence of evidence that Blue threatened the child in a physical or verbal manner. Indeed, the only factor suggesting use of force in this case is the size difference between Blue and the child. But size difference alone cannot establish use of force . . . ." *Id*.

In the case at bar, the testimony of the complaining witness herself establishes that Bercier did not use the requisite force described by either the legislative history to § 2241(a) or any of the above cases. There is no testimony in the record that Bercier ever threatened Blue, before, during, or after the incident, and there is no mention of any weapon.

Instead, Blue testified that she voluntarily went into Bercier's bedroom to drink beer, smoke cigarettes and play video games with Bercier. (TT 21). Then they sat on the bed together, with another woman in bed next to them, and began to watch a movie. When Blue said she was going to leave, Bercier asked her to stay awhile, Blue testified, "so I stayed, and he had told me how he felt about me." (TT 22). After some further discussion, Blue said she better go upstairs because "'My mom will be hollering for me if the baby wakes up.' And he said, 'No, she won't,' because I had stood up, and he grabbed me by -- grabbed my arm and sat me down on the bed." (TT. 23). It is clear from the context of what was happening that this gesture did not qualify as "physical force as is sufficient to overcome, restrain, or injure" Blue, nor did it constitute "a restraint upon [Blue] that was sufficient that [she] could not escape." *Fire Thunder,* 908 F.2d at 274.

Instead of restraining or injuring her, Blue testified that Bercier started "rubbing my arm, and stuff, and he had turned my face towards his and kissed me." (TT 23). Blue said she tried to get up another time, but Bercier "sat me on his lap" and asked if she wanted to "jab" (have intercourse). (TT 24). When Blue declined, she said Bercier then "he pushed me off his lap and he had grabbed my hand and put it between his legs and started moving my fingers around." (TT 24). Blue said Bercier asked her if she liked that and when she said no, he "let go of my

hand." (TT 25). Blue said she told Bercier that "I got to get to bed," and then "he pushed – pushed me back and started putting his hand up my shirt, and stuff." (TT 25). Blue said that Bercier again asked her if she liked that and when she said no, "he said, 'Well, you know, I know something that you will like,' . . . then he had moved down, put his hands between my legs and started -- had started touching me." (TT 25). Finally, Blue said that "I tried keeping my legs together, but he just used his arms and kept them apart and kept doing what he was doing." (TT 26). Blue never claimed that she was restrained, held down, injured, nor threatened in any way.

Although Blue said that she did not like what Bercier was doing with her, she testified, "I didn't say anything" to Bercier. (TT 26). As soon as Bercier realized Blue was not responding the way he hoped, "he quit doing what he was doing. I sat up and I was going to -- I was going to walk up to my mom's room and go to bed. Well, that's what he would told me to do. He had said -- he had grabbed me by my arm and told me to get to bed." (TT 26).

The prosecution asked Blue if she tried to get away from Bercier. Blue responded no, "Not while he was doing that. I just would keep my legs together or move or push his head down and just -- the only times I remember trying to get away was the times trying to avoid it before he actually started doing anything."

(TT 27). Blue did imply that she did not cry out because she was afraid of Bercier even though Poitra and Lewis were right upstairs. Blue said that she did not resist his advances because, "I was afraid that, you know, if he would have, you know, tried to hurt me if I tried to make a noise or, you know, try to fight back. I didn't know what to expect." (TT 27). This cannot constitute a threat under § 2241(a), however, because there is no evidence or testimony in the record alleging threatening words or conduct by Bercier that night or any other time. Blue did not testify that Bercier had ever physically harmed her, threatened her, nor even spoke harshly to her. Moreover, Blue later revealed that a key reason she did not yell out was because she was afraid she would get in trouble for drinking beer. (TT 40).

Blue's testimony described no threatening behavior, no weapons, and no use of any actual force to overcome, restrain, or injure her. At the very worst, Blue described a clumsy effort by Bercier at seduction, beginning with indiscrete romantic conversation, followed by somewhat awkward kissing, hugging and foreplay. The whole encounter then ended by Bercier telling Blue to go to bed when Blue declined intercourse. This conduct does not meet the standard of "actual force" identified in *Fire Thunder*, nor does it approach *Allery 2*'s description of "virtually the least amount of force that could" meet the burden of

proof for a criminal conviction under 18 U.S.C. § 2241(a). Therefore, Bercier's Rule 29 motion for acquittal on both counts was well founded in fact and in law, and should have been granted.

IV. THE PROSECUTOR'S CLOSING ARGUMENT DENIED BERCIER A FAIR TRIAL BY VOUCHING FOR A PROSECUTION WITNESS AND BY IMPROPERLY USING A "GOLDEN RULE" ARGUMENT.

A. Standard of Review.

Prosecutorial misconduct violates an accused's Fifth Amendment right to due process by undermining a fair trial. The standard of review on claims arising under the Constitution is *de novo*. *United States v. Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004). Thus, when a prosecutor's remarks exceed "permissible bounds and defense counsel raised a timely objection," a reviewing court may reverse an otherwise proper conviction if the error was not harmless. *United States v. Young*, 470 U.S. 1, 13, n.10 (1985), citing *United States v. Hasting*, 461 U.S. 499 (1983). The "remarks must be examined within the context of the trial to determine whether the Prosecutor's behavior amounted to prejudicial error." *United States v. Franklin*, 250 F.3d 653, 661 (8th Cir. 2001), citing *United States v. Nelson*, 988 F.2d 798, 807 (8th Cir. 1993), and *Young*, 470 U.S. 1, 11-12. Reversal is required if the misconduct "could reasonably have affected the jury's verdict" in light of the trial as a whole. *United States v. Holmes*, 413 F.3d 770, 774 (8th Cir. 2005).

"Three factors are used to assess the prejudicial impact on a defendant: (1) the cumulative effect of the misconduct; (2) the strength of the properly admitted evidence; and (3) the curative actions taken by the district court." *United States v. Johnston*, 353 F.3d 617, 624 (8th Cir. 2003), citing *United States v. Wadlington*, 233 F.3d 1067, 1077 (8th Cir. 2000).

B. Merits

The "role of the prosecutor is not merely to pursue convictions, but to pursue justice – 'the twofold aim of which is that guilt shall not escape or innocence suffer.' In pursuit of these dual goals, a government attorney may 'prosecute with earnestness and vigor . . . may strike hard blows . . . [but] is not at liberty to strike foul ones.'" *United States v. Holmes*, 413 F.3d 770, 775 (8th Cir. 2005), citing *Berger v. United States*, 295 U.S. 78, 88 (1935). Rather, "it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *United States v. Cruz-Padilla*, 227 F.3d 1064, 1069 (8th Cir. 2000).

1. <u>The prosecution improperly vouched for a witness during closing argument</u>.

It is a foul blow for the prosecutor to personally vouch for the credibility of witnesses. *United States v. Jones*, 865 F.2d 188, 191 (8th Cir. 1989) ("improper for the prosecutor to express his opinion that a defendant has lied on the witness

stand.") "The prosecutor has no authority to sit as a 'thirteenth juror' and cast a ballot on this issue." *United States v. Splain*, 545 F.2d 1131, 1134 (8th Cir. 1976). It is a foul blow to make an argument that "puts the prosecutor's own credibility before the jury or carries an inference of outside knowledge." *United States v. Williams*, 97 F.3d 240, 245 (8th Cir. 1996) (such an argument constitutes improper vouching).

In this case, the prosecutor put her own credibility before the jury during rebuttal. Bercier had questioned the accuracy of testimony by Poitra because of relatively long pauses before some of her answers. The prosecutor responded that she instructed Poitra to take these pauses. "And then he points out that Joyce makes some very long pauses. He makes it think like she's trying to come up with an answer. I instructed Joyce to do that. I told her, 'Don't answer a question unless you know the answer to that question.'" (TT 186). Bercier immediately objected. The lower court responded, "Yeah, it's close. Leave that one." (TT 186). The lower court took no other curative action, and since the improper vouching occurred during rebuttal, Bercier had no opportunity to respond to the jury.

This type of vouching for witnesses has long been condemned in this circuit. "The prosecutor may not place the prestige of the government behind a

witness, giving personal assurances of veracity; nor may the prosecutor suggest that information not introduced to the jury guarantees the accuracy of the witness's testimony." *United States v. Tate*, 915 F.2d 400, 401 (8th Cir. 1990). The prosecution strikes a foul blow "when the government indicates that it may know something about the veracity of a witness that the jury does not or that the government has independently verified a witness's testimony. . . . Impermissible vouching may also occur when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *United States v. Beasley*, 102 F.3d 1440, 1449 (8th Cir. 1996) (citation omitted). Here, the prosecutor put her own credibility before the jury during rebuttal by telling jurors that she instructed the witness how to act and testify.

"It is particularly disturbing [when such] comments [are] made during the rebuttal phase of closing argument." *Holmes,* 413 F.3d at 776, citing and quoting from *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996) (reversing a conviction based on a prosecutor's improper remarks during closing and noting, "Because the remark came during rebuttal arguments, defense counsel was unable to respond except by objection."); *United States v. Johnson*, 968 F.2d 768, 772 (8th Cir. 1992) (reversing a conviction based on prosecutor's improper comments

during the rebuttal phase of closing arguments); and *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001) (improper comments during rebuttal constituted "the last words from an attorney that were heard by the jury before deliberations."). *See also United States v. Boyce*, 797 F.2d 691, 694 (8th Cir. 1986) (condemning a prosecutor's statement to the jury that "If [a witness had] done anything else, he could have been in trouble with me."). In a close case such as the case at bar where the jury had to base its decision solely upon the credibility of the witnesses, the prosecutor's injection of her own credibility and instructions to witnesses into the mix "could reasonably have affected the jury's verdict." *Holmes*, 413 F.3d at 774.

2. <u>The prosecution improperly told the jurors to put themselves in the place of the complaining witness</u>.

It is a foul blow to encourage the jurors to decide the case upon some basis other than the evidence. The prosecutor may not attempt to exploit a juror's natural empathy in an effort to create an emotional reaction. One method of committing such a foul blow that has been universally condemned is the "golden rule" argument. "A so-called 'golden rule' argument which asks the jurors to place themselves in the position of a party 'is universally condemned because it encourages the jury to 'depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.'" *United States v.*

Palma, 473 F.3d 899, 06-1772, slip op at 6 (8th Cir. Jan. 18, 2007), citing *Lovett ex rel. Lovett v. Union Pac. R.R. Co.*, 201 F.3d 1074, 1083 (8th Cir. 2000) (quoting *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir. 1982)). In contrast to the case at bar, the government's case against Palma was quite strong, so a mistrial was not necessary. This Court emphasized, however, that "*If the case against appellant had been a weak one another course might have been justified*." *Palma*, 473 F.3d 899, slip op at 6-7.

In the case at bar, Bercier pointed out to the jury that Blue's actual behavior during her encounter with Bercier was quite inconsistent with her later accusations. Again during rebuttal, the prosecutor responded by telling the jury, "You have to put yourself in Cheryl's [Blue's] position to think what else could Cheryl have done, but it isn't a question of what she could have done." (TT 186). When the argument concluded, Bercier immediately moved for mistrial, "on the basis that during Ms. Morley's closing argument, she asked the jury to put themselves in the position of the complaining witness, which is highly improper. You cannot ask the jury to step into the shoes of anyone that's testifying during the trial." (TT 187). The lower court summarily denied the motion, and took no curative action. (TT 188).

As has been established throughout Appellant's brief, the case against Bercier was extremely weak. It involved two adults drinking together, playing video games together, watching a movie together while sitting on a bed in Bercier's bedroom, kissing, hugging, engaging in some sexual foreplay, but stopping short of intercourse when Blue declined. Blue claimed she did not consent to any of this, while Bercier testified Blue's participation was fully consensual. Blue never said a word to the people she considered her father and mother, although both of them were in the house at the time, with the father (Lewis) only a few feet away up the stairs in the living room. Everyone agrees that when Blue said she did not want to engage in sexual intercourse, Bercier accepted her decision and told her to go to bed. The medical evidence developed by the hospital showed a only a small abrasion on Blue's genitals, which the doctor testified was consistent with "consensual sexual contact." (TT 71). It has been demonstrated previously that there was no meaningful evidence of force. Under the totality of these circumstances, the prosecutorial misconduct most likely affected the jury verdict. Therefore, reversal and remand for a new trial is required. *Palma*, 473 F.3d 899; *Holmes*, 413 F.3d at 774.

CONCLUSION

In this extremely close case, a conviction was secured by unfair and improper means. The prosecution introduced multiple hearsay statements without identifying any exception to the hearsay rule. These statements had virtually no probative value except to improperly bolster the complaining witness's credibility by simply repeating her allegations over and over. The prosecution introduced a hearsay document, which contained mostly double hearsay statements, without identifying any exception to the hearsay rule. This document also repeated the complaining witness's accusations, creating another improper basis for a jury to judge credibility. The prosecutor used her rebuttal closing argument to explicitly vouch for one witness and then invoked the prohibited "golden rule" argument by telling the jurors to put themselves in the shoes of the accuser. All of these errors combined to deny Bercier a fair trial contrary to the Fifth Amendment due process clause.

The prosecution also introduced insufficient evidence to satisfy the element of force in each count. Therefore, Bercier's motion under Rule 29 for verdict of acquittal was well founded in fact and law. It should have been granted.

Finally, the jury convicted and the lower court sentenced Bercier for both a greater offense and a lessor-included offense contrary to the Fifth Amendment's

prohibition against double jeopardy. At a minimum, one of the convictions must be vacated. Under the circumstances in this particular case, a new trial is the more appropriate remedy given the scant evidence offered by the prosecution.

Wherefore, Bercier respectfully requests that this Court reverse the convictions and order judgments of acquittal on each count or, in the alternative, remand the case for a new trial.

Dated this 20th day of February, 2007.

Respectfully submitted,

Jeffrey L. Viken
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By: **/s/ *Orell D. Schmitz***

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CERTIFICATE OF SERVICE

I certify that I mailed two copies of this brief and a 3½-inch computer diskette containing the full document to Assistant United States Attorney Janice Morley, Attorney for Appellee, 655 1st Ave N, Ste 250, Fargo, ND 58102-4932, on the 20th day of February, 2007. The diskette has been scanned for viruses using Symantec Anti Virus Corporate Edition, and that scan showed the diskette is virus-free.

In addition, I certify that I mailed a copy of this brief to Appellant Duane Bercier, #04821-046, FCI Oxford, Federal Correctional Institution, P.O. Box 1000 Oxford, WI 53952, also on the 20th day of February, 2007.

By: /s/ *Orell D. Schmitz*
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Word Perfect X3 was used in the preparation of the foregoing Appellant's Brief and that the word count done pursuant to that word processing system shows that there are 12,328 words in the foregoing Appellant's Brief.

Dated this 20th day of February, 2007.

By: /s/ *Orell D. Schmitz*
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CERTIFICATE OF FILING

I certify that I filed ten copies of this brief and a 3½-inch computer diskette containing the full document to the Clerk of the United States Court of Appeals, Thomas F. Eagleton Courthouse, Room 24.329, 111 South 10th Street, St. Louis, Missouri 63102, by sending it via Federal Express on the 20th day of February, 2007. The diskette has been scanned for viruses using Symantec Anti Virus Corporate Edition, and that scan showed the diskette is virus-free.

By: /s/ *Orell D. Schmitz*
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ADDENDUM

1. Judgment in a Criminal Case - December 8, 2007 (CR 34)

2. Exhibit 6.