No. 07-2136

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA, Appellee,

v.

STEVE CERNO, Appellant.

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On Appeal from the United States District Court
for the District of New Mexico CR-05-1603
the Honorable United States District Court Judge C. LeRoy Hansen,

———————

APPELLANT'S OPENING BRIEF

Oral Argument Is Requested
(Attachments in scanned PDF format)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

STATEMENT REGARDING PRIOR OR RELATED APPEALS

There have been no prior or related appeals.

JURISDICTIONAL STATEMENT

Steve Cerno appeals his conviction by jury and the sentence he received in the United States District Court for the District of New Mexico. Following his trial, the Honorable United States District Court Judge C. LeRoy Hansen sentenced Mr. Cerno to life imprisonment in a Judgment filed May 7, 2007. (Record on Appeal, Document ("Doc.") 73 (Attachment ("Att.") A).) Mr. Cerno filed a timely Notice of Appeal on May 15, 2007. (Doc. 74.)

The district court had jurisdiction of this case under 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3742(a), and Federal Rule of Appellate Procedure 4(b).

ISSUES PRESENTED FOR REVIEW

I. Mr. Cerno was convicted of five counts of aggravated sexual abuse in violation of 18 U.S.C. § 2241(a). The victim was sixteen-years-old, not a minor for purposes of Chapter 109A of Title 18, which implicitly defines minor as under the age of sixteen, the age of consent under federal law. The enhancement also requires that the government demonstrate a "pattern of activity involving prohibited sexual conduct." At sentencing, the district court applied U.S.S.G. § 4B1.5(b)(1) (**Repeat and Dangerous Sex Offender Against Minors**), which defines minor as under the age of eighteen, in determining Mr. Cerno's offense level. There was no showing of a pattern of conduct involving prohibited sexual

conduct. Did the district court err in applying the guideline to enhance an offense level for conviction of offenses against an adult and without satisfying the requirement of showing a pattern of activity involving prohibited sexual conduct?

II. Did the district court impose an unreasonable sentence in sentencing Mr. Cerno to life imprisonment?

III. Did the trial court abuse its discretion by admitting, in contradiction of its original ruling, evidence that Mr. Cerno, believing he was alone for the night, viewed a pornographic video, during which he passed out with his penis exposed, as evidence used to impeach his testimony that he did not experience blackouts or severely impaired judgment when drinking and that he engaged in sexual activities when drinking?

STATEMENT OF THE CASE

In an indictment filed July 27, 2005, Mr. Cerno was charged with five counts of aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a) and two counts of sexual contact, in violation of 18 U.S.C. § 2244(a)(1). (Doc. 9.) Prior to trial, Mr. Cerno moved to exclude admission of pornographic videotapes and evidence that the victim saw him passed out in front of one of them with his penis exposed. The district court granted the motion. (Doc. 43 (Att. C).)

Mr. Cerno proceeded to trial and was convicted of five counts of aggravated sexual abuse and acquitted of two counts of sexual contact. Mr. Cerno moved for

a judgment of acquittal or new trial. The district court denied his motion. (Doc.60 (Att. B).) Mr. Cerno filed a Sealed Sentencing Memorandum and Request for Reasonable Sentence. (Doc. 67.) Mr. Cerno also filed Sealed Objections to the Presentence Report. The district court imposed a sentence of life imprisonment. Mr. Cerno was sentenced in a Judgment filed May 7, 2007. (Doc. 73 (Att. A).) He filed a timely Notice of Appeal on May 15, 2007. (Doc. 74.)

STATEMENT OF THE FACTS

Proceedings Regarding Videotape Evidence

Prior to trial, the government announced its intention to introduce evidence that Mr. Cerno, believing he was alone in his mother's home for the entire night, fell asleep while viewing an adult pornographic video with his pants down. When his mother and Tyler returned unexpectedly from what was to have been an all night wake, they briefly viewed Mr. Cerno in front of the television on the couch where he slept after giving his room to Tyler. The government sought to have admitted not only testimony describing Mr. Cerno's conduct on this one occasion but also four x-rated videotapes found in Mr. Cerno's closet. (Doc. 31.)

Mr. Cerno objected that the videotapes had no connection to the charges against him – there was no evidence that Tyler ever viewed them and no evidence that they were used to entice her sexually. Introduction of them therefore would violate Rule 401 of the Federal Rules of Evidence, which excludes irrelevant

evidence, and Rule 403, which excludes evidence that is more prejudicial than probative. (Doc. 29.)

The district court granted Mr. Cerno's motion to exclude evidence of the videotapes. (Doc. 43 (Att. B).) The district court described the evidence the government intended to present in some detail:

> The government intends to introduce at trial evidence of four x-rated videotapes containing adult pornographic scenes found in Defendant's bedroom closet. The government also intends to present the testimony of Jane Doe, the victim in this case, in which she observed pornographic movies in a box in Defendant's closet which disturbed her and prompted her to report to a family member that she thought Defendant was a pervert. The United States argues that introduction of the pornographic videotapes is relevant evidence to corroborate the victim's testimony, the credibility of which is a central issue in this case.
>
> Additionally, the United States wishes to introduce testimony that "one time" after the victim and other family members returned home from a wake, they walked into the living room and observed Defendant passed out drunk with his penis exposed from his pants while a pornographic videotape was playing. Jane Doe also intends to testify that she found the association between Defendant and pornographic videotapes disgusting. The United States contends that this testimony is relevant to show that Defendant disgusted the victim and that she actively attempted to physically reject him, which will help prove the use of force necessary to prove Aggravated Sexual Abuse under 18 U.S.C. § 2241(a).

(Doc. 43 (Att. B) at 1-2.) The district court reasoned that the evidence was inflammatory and would distract the jury from the charges, in violation of Rule 403 of the Federal Rules of Evidence; that the evidence had only "slight probative value to the question of Defendant's guilt of the charged crimes"; and that the

evidence "had minimal relevance to the issue whether Defendant used force against her." (Doc. 43 (Att. B) at 2-3.)

Trial Proceedings

As the district court noted in its Order granting Mr. Cerno's motion to suppress the videotape evidence, Tyler's credibility was a central issue at trial. The government presented no eyewitness to the charges against Mr. Cerno, nor did it present any physical evidence other than a photograph of a faded scar approximately half an inch in length on Tyler's breast that she claimed Mr. Cerno inflicted upon her. Mr. Cerno steadfastly denied the charges against him, contending that Tyler had fabricated the claims of abuse in order to escape her restrictive living situation in her grandmother's home at Acoma Pueblo and live instead with the more permissive Matt and Janice Cerno, Tyler's great uncle and his wife, who lived in Grants, New Mexico.

In all, the government presented four witnesses, George and Carolyn Concho, Tyler's father and stepmother; Tyler; and the investigating agent. Mr. Concho testified that Tyler came to live with him and his wife after Tyler's mother died in 2003 following a lengthy illness. Tyler later moved in with Mr. Concho's mother. Tyler first accused Mr. Concho's brother, Mr. Cerno, of sexual assault in May, 2004, Mr. Concho believed. He recalled that Acoma Pueblo was celebrating McCarty's Feast. Counsel for the government corrected Mr. Concho, stating that

the date was May 31, 2005, a little over a year ago. Mr. Concho insisted that Tyler made the accusations in 2004 (Trial Transcript ("Trial Tr."), Vol. I, at 134-135.), but later admitted he was not sure if it were 2004 or 2005 (Trial Tr., Vol. I at 138, 140-141).

Counsel for the government then asked Mr. Concho how he was told of the abuse claims. Mr. Concho testified that Janice Cerno, his uncle's wife, telephoned him to tell him that "Tyler had stated to her that Steve had been touching her." Mr. Concho thought Tyler must have made the accusations when she was helping Janice Cerno paint the Cerno's trailer. Five weeks later, Mr. Concho telephoned a social worker "and let her know what Tyler was accusing my brother, Steve, of." Mr. Concho never met with the social worker. He tried to talk to Tyler, who refused to discuss it and was "a little upset." (Trial Tr., Vol. I, at 136-137, 142-.)

Mr. Concho testified that Tyler had been living with him and his wife after her mother's death. However, it was overcrowded after Tyler moved in, and he readily agreed to his mother's offer to have Tyler live with her. Mr. Concho testified that there were other problems when Tyler lived in his home. Tyler resented and refused to follow rules the Conchos set for her. Tyler was not allowed to use the phone to call her friends in Los Lunas, where she had lived with her mother. She was not allowed to drive or get a driver's license, although she had driven her mother's car in Los Lunas. She did not get along with the

Conchos' son, who was the same age. She was required to dress conservatively. She did not like attending Laguna-Acoma High School, nor did she like associating only with Native Americans. Mr. Concho allowed Tyler to transfer to Grants High School after a year at Laguna-Acoma High School. Perhaps most difficult for Tyler was her father's insistence that she terminate her relationship with her boyfriend – Tyler was not allowed to visit or see her boyfriend who lived in Los Lunas. (Trial Tr., Vol. I, at 145-151.)

Mr. Concho testified that Tyler and his wife often argued about Tyler's refusal to follow rules. Tyler also lied, another problem that led ultimately to Mr. Concho's decision to accept his mother's offer to have Tyler live with her. (Trial Tr., Vol. I, at 154-155.) Mr. Concho testified that he would have sent Tyler to boarding school or into foster care if his mother had not offered to take her. (Trial Tr., Vol. I, at 157-158.)

Mr. Concho testified that he visited Tyler two or more times a week while she lived with his mother and that Tyler occasionally spent a weekend at his home. His mother, who makes and paints pottery at home, was usually in her home, and Tyler's cousin Tatiana often stayed there as well. Throughout the period of time that Tyler lived with her grandmother, Mr. Concho saw nothing suspicious, nor did Tyler ever appear different from her usual herself or say anything that would have aroused his suspicion. (Trial Tr., Vol. I, at 152-154.)

Carolyn Concho was certain that she and her husband were told of Tyler's accusations against Mr. Cerno during McCarty's Feastday, May 1, 2005. Janice Cerno telephoned Mr. Concho and told him that she needed to speak to them about Tyler and wanted to talk to them in person. Ms. Concho testified that when they arrived at Matt and Janice Cernos' home, Tyler was sitting on the couch crying. She said she needed to tell them something, "and she just said that Steve had been touching her." (Trial Tr., Vol. I, at 162-163.) Ms. Concho hugged Tyler and asked if she wanted to come home. At first Tyler said yes, but then changed her mind and decided to stay with Janice and Matt Cerno. The Conchos and Cernos then took Tyler to her grandmother's house to gather some of her things. Ms. Concho testified that she also "really wanted to ask some questions and really find out what was going on." (Trial Tr., Vol. I, at 164-165.)

The Concho's were contacted on June 21, 2005, by the Federal Bureau of Investigation ("FBI"). At that time, Ms. Concho recalled seeing on Tyler's breast a "little white scar that was probably about a quarter of an inch." Tyler told her that was where Steve bit her. (Trial Tr., Vol. I, at 165-166.) Ms. Concho recalled that the FBI agents did not photograph the scar until a year later in May, 2006. (Trial Tr., Vol. I, at 177-178.) Ms. Concho recalled that she saw a hickey on Tyler in the past and was upset with Tyler for allowing that to happen. (Trial Tr., Vol. I, at 183.)

Ms. Concho testified that Tyler often stayed with Matt and Janice Cerno while she lived with her grandmother, and that Tyler lived with the Cernos after Tyler accused Mr. Cerno of touching her. Tyler had her own room at the Cernos' home, which they were remodeling. (Trial Tr., Vol. I, at 169-171.) Tyler lived there until August, 2005, when the Cernos moved to Alabama where Janice Cerno had grown up. Tyler, against her wishes, then had to move back in with her father and stepmother. (Trial Tr., Vol. I, at 182-183.)

Tyler testified that after the death of her mother, for whom she was primary caretaker during her mother's illness along with her maternal grandparents who lived nearby, she moved in with her father and stepmother, George and Carolyn Concho, and Tyler's fourteen-year-old sister Stevie went to live with her father. Tyler would have preferred to live with the Pinos, who lived nearby, but that did not work out. She did not immediately move into her father's home. For a month or so after her mother died, she lived with her seventeen-year-old friend Marlene and Marlene's boyfriend who lived down the road.

Tyler had been given a great deal of freedom when she lived with her mother; she drove her mother's car to take care of errands associated with her mother's care and to visit her friends; she registered herself for home-schooling and did not attend school; and she was not required to answer to anyone, including her father whom she saw only rarely. Tyler's father lived on the

reservation and Tyler, who was half Acoma and half Anglo, found it hard to live in that environment. In addition to cultural differences, she no longer had the freedom and independence she had when she lived with her mother. She had to attend a high school she did not like, she could not drive, she could not use the phone, and she had to sleep on the couch in the living room. Tyler testified that if the decision were hers, she never would have chosen to live with her father. (Trial Tr., Vol. I, at 186-189, 210-221.)

In July, 2004, she moved to the home of her paternal grandmother, Rachel Cerno. The move meant Tyler could transfer to Grants High School, which she preferred over the school she attended when she lived with her father. Steve Cerno gave Tyler his room when she moved into his mother's home and slept on the couch. He kept his belongings in one half of his old closet and gave Tyler the other and did the same with the dresser. Mr. Cerno often helped Tyler with her homework and was concerned that she do well in school. Tyler testified that her grandmother, who was teaching her to make pottery, was usually at home, and that family members would visit frequently. Her cousin Tatiana stayed with Rachel Cerno three or more times a week. Tyler testified that Mr. Cerno usually was absent, working odd jobs or out in the field. (Trial Tr., Vol. I, at 223-226.)

The restrictions, however, were as all-encompassing as they were when Tyler lived with her father. Tyler could call only her father, stepmother, and

sister. She did not have friends over. Her grandmother's home was in an isolated area of the reservation without any recreational activities for teenagers nearby. She was required to dress conservatively. Shorts and tank tops were prohibited. When Tyler's grandmother saw the bite mark or hickey that a boyfriend in Grants had given her, she imposed further restrictions. (Trial Tr., Vol. I, at 226-229.)

Tyler first saw Matt and Janice Cernos' home in March, 2005, when Janice Cerno asked Tyler and another granddaughter if they would help paint the interior of their home which they were remodeling. The Cernos, who lived alone, had a double-wide trailer with four bedrooms. During March and April, 2005, Tyler stayed several times with the Cernos. Tyler's room in the Cernos' home was larger and more pleasant than the room she had at her grandmother's. As Tyler drew closer to the Cernos, she began to refer to Matt and Janice Cerno as her grandparents. During March or April, 2005, the Cernos invited Tyler to come and live with them. Tyler never mentioned to them or to anyone during this time period that Mr. Cerno was touching her. On May 1, 2005, after the Cernos had invited Tyler to live with them, Tyler told Janice Cerno that her uncle Steve Cerno was touching her. (Trial Tr., Vol. I, at 204; 229-240.)

At trial, Tyler described Mr. Cerno's conduct toward her in some detail. She testified that the abuse occurred in March and April, 2005, approximately eight months after she moved in with her grandmother. She stated that she started to

see Mr. Cerno change at that time. (Trial Tr., Vol. I, at 191.) Before that, in December, 2004, Tyler recalled that Mr. Cerno tried to kiss her while sitting next to her on her bed. She said that it made her uncomfortable and she simply got up and left. In March, 2005, Tyler testified that she and Mr. Cerno drove to the laundromat together, returned home, and began putting their clean clothing away in the closet and dresser which they shared. Tyler sat on the bed while Mr. Cerno continued to put his laundry away. Tyler stated that Mr. Cerno gave her "this like weird look" and began touching her on the outside of her clothing. She told him to stop because he was her uncle and it was not right. As she tried to lean away from him, he pulled down her pants and underpants. She testified that she did not know what to do. She tried to push herself closer to the wall and kicked her legs, but felt "powerless, like I couldn't do anything." (Trial Tr., Vol. I, at 193-195.)

Tyler stated that Mr. Cerno forced her legs open, got down on his knees, and began touching and licking her and put his fingers in her vagina. Mr. Cerno stopped when he heard her grandmother's truck pull into the driveway. She said the same situation occurred about a week later. She tried to push him away, but again felt "powerless." Mr. Cerno stopped when he heard Tyler's cousin Tatiana approach the room. Tyler said Mr. Cerno often told her she looked pretty and beautiful and that he loved her. She stated that "[t]he way he said it was like

really weird, like more like a boyfriend-girlfriend kind of way." (Trial Tr., Vol. I, at 195-198.)

Tyler testified that Mr. Cerno told her he would try to get her in trouble with her parents if she told anyone. In late April, 2005, Mr. Cerno came into her room and sat on her bed. He put his hand up her shirt and began touching her breasts. She told him to stop, but he pushed her bra up and the bra snapped. Tyler testified that Mr. Cerno put his mouth on her breast and "like bit me." She said it hurt and the spot bled and left a mark. Tyler stated that Mr. Cerno pulled his pants down and made her touch his penis. Counsel for the government then moved to admit a photograph of the scar on Tyler's breast taken on May 4, 2006, over a year after the incident described by Tyler. Counsel for Mr. Cerno objected that the photograph was too far removed in time from the alleged incident to be reliable and relevant. The district court admitted the photograph and allowed counsel to publish the photograph to the jury with Tyler pointing to the scar. (Trial Tr., Vol. I, at 195-202.)

Tyler testified that she reported Mr. Cerno's actions to Matt and Janice Cerno while she was visiting at their home in Grants on May 1, 2005. She waited until then, rather than reporting it in March or April, because "she was scared and didn't know how to tell anybody." (Trial Tr., Vol. I at 204.)

Investigating FBI agent Jenifer Sparks testified that the case was referred to the FBI by the tribal police on June 9, 2005, the date Tyler's father may have reported Tyler's May 1st allegations to a social services worker. Agent Sparks did not interview Tyler until June 21, 2005. She spoke with Tyler and with George and Carolyn Concho. Agent Sparks spoke again with Tyler on June 29, 2005. She never spoke with Matt and Janice Cerno, to whom Tyler reported the abuse. She did not speak with Tatiana, Tyler's cousin who lived with Tyler at Tyler's grandmother's home, nor did she speak with Tyler's grandmother, who refused to cooperate with the investigation. Agent Sparks made no attempt to locate any counselor or therapist whom Tyler may have seen. (Trial Tr., Vol. II, at 281-291.)

In addition to speaking with Tyler a second time on June 29, 2005, Agent Sparks also spoke with Mr. Cerno. Agent Sparks advised him of his rights, and Mr. Cerno agreed to talk to her. Mr. Cerno denied all of Tyler's accusations. (Trial Tr., Vol. II, at 295-296.) Agent Sparks did not have Tyler go to a doctor to have the mark on Tyler's breast examined. She had no knowledge of Tyler having seen a doctor at all following her allegations. The only physical evidence, Agent Sparks testified, was the photograph of the mark on Tyler's breast which Agent Sparks obtained over a year after the allegations and just before trial. (Trial Tr., Vol. II, at 291-294.)

Mr. Cerno testified in his own defense. He described himself as an alcoholic who has been hospitalized in the past due to excessive drinking and who has attended rehabilitation programs. At the time of trial, he had been sober for some time, was regaining his health, and was employed as an electrician's apprentice. (Trial Tr., Vol. II, at 318-323.) When Tyler lived at Mr. Cerno's mother's home, he was drinking, but he was not experiencing black-outs. He spent his days working odd jobs for people and farming a field he owned with his brother. (Trial Tr., Vol. II at 323-325.)

Mr. Cerno testified that his mother was home most of the time, working on her pottery. His niece Tatiana often stayed with them, and relatives and other potterers often dropped by. When he was not working, he was usually outside drinking beer, which his mother did not allow in the house. Mr. Cerno testified that his mother expected Tyler to help around the house. His mother also objected to Tyler's style of dressing and required her to dress more modestly. She wanted Tyler to do her schoolwork, limit her phone calls, and avoid their neighbor. Neither his mother or brother, Tyler's father, wanted her to go to the neighbor's home. Mr. Cerno testified that Tyler hated the restrictions and told him that she could not wait until she was old enough to leave. (Trial Tr., Vol. II at 334-340.)

Mr. Cerno testified that he never engaged in any sexual contact with Tyler or touched her inappropriately. He did not bite her breast, threaten her, or force

her to do anything. He did not make a bite mark on Tyler's breast because he was missing two teeth and could not have done so. He testified that he found out about Tyler's accusations from his mother, who told him that Tyler said he had molested her. Mr Cerno said he was surprised, angry, and upset. He thought Tyler disliked him because he was an alcoholic and that she could use him to get out of her grandmother's home. He testified that the end of the school year meant a long, boring summer, and that Tyler had become close to his aunt and uncle in Grants, where there was more to do. (Trial Tr., Vol. II, at 341-344; 387.)

At the end of Mr. Cerno's direct testimony, counsel for the government renewed the government's motion to admit as evidence the x-rated videotapes Mr. Cerno was watching one evening when he thought he had the house to himself. Counsel argued that the tapes should come in to impeach Mr. Cerno's testimony that Tyler used his alcoholism as a reason to move out of her grandmother's home. The district court continued to rule that the tapes were more prejudicial than probative because there was no nexus established between Mr. Cerno's viewing the tapes and his conduct toward Tyler. (Trial Tr., Vol. II, at 346-350.)

During cross-examination, counsel for the government raised the issue of Mr. Cerno's condition while watching the videotape once again. The district court ruled, over an objection by the defense, that it would permit admission of testimony describing Tyler's glimpse of Mr. Cerno passed out on the couch in front

of the television for impeachment purposes. The court reasoned that Mr. Cerno testified that he was completely in control of his senses and did not lose his judgment, which was contradicted by his conduct in passing out in his mother's living room with exposed penis while drinking and watching an x-rated video. (Trial Tr., Vol. II, at 376-378.)

Counsel for the government then questioned Mr. Cerno as to his recollection of the incident and whether he thought his judgment was impaired when he decided to watch a pornographic videotape while drinking. He responded that his judgment was not impaired, that he knew what he was doing, that he believed he had the house to himself for the entire night, and that he clearly remembered watching the tape and passing out while doing so. (Trial Tr., Vol. II, at 378-381.)

The jury convicted Mr. Cerno of the five counts of aggravated sexual abuse and acquitted him of the two counts of sexual contact, which included the charge associated with the bite mark.

Post-Trial Proceedings

Following trial, Mr. Cerno moved for a judgment of acquittal or a new trial, renewing his objection, *inter alia*, to the admission of Mr. Cerno's conduct in viewing the pornographic videotape. The district court issued a detailed Memorandum Opinion clarifying its ruling concerning the videotape incident. The court stated:

> The Court found, following the completion of the government's cross-examination of Defendant, that there was significant probative value for impeachment purposes of the testimony regarding Defendant passed out drunk, exposed, in front of a pornographic video playing on the television. The testimony at issue impeaches Defendant's claims that drinking did not impair his judgment and that he knew what he was doing when he drank. The testimony also impeaches Defendant's statements that he would sit down and not do anything when drinking. The challenged testimony indicates that Defendant, when drinking, did engage in activities of a sexual nature, contrary to what his testimony represented.

(Doc. 60 (Att. C) at 10.)

Prior to sentencing, Mr. Cerno filed a Sealed Sentencing Memorandum and Request for Reasonable Sentence. (Doc. 67.) In it, he asked that the Court consider the evidence of force, which was weak and established only through Tyler's testimony, and sentence more leniently in view of the minimal level of force. Mr. Cerno stressed his rehabilitation and sobriety, his ongoing health issues, and his successful employment as an electrician's apprentice while at the halfway house awaiting trial and sentencing. Although he realized he faced a potential life sentence, he contended that his compliance with his conditions of release, which included counseling, his sobriety, and the lack of any substantial criminal history all weighed against imposition of a life sentence and in favor of a lesser sentence which would satisfy the "sufficient but not greater than necessary" mandate of 18 U.S.C. § 3553(a). The government responded that alcohol abuse was not a mitigating factor and that a life sentence, as prescribed by the guidelines, was appropriate in Mr. Cerno's case. (Doc. 69.)

The Presentence Report ("PSR") recommended a base offense level of 30, increased by four levels pursuant to U.S.S.G. § 2A3.1(b)(1), by two levels pursuant to U.S.S.G. § 2A3.1(b)(3)(A), by five levels pursuant to U.S.S.G. § 3D1.4, and by five levels pursuant to U.S.S.G. § 4B1.5(b)(1), for a total offense level of 46. The PSR recommended a criminal history category of I. The PSR recommended a life sentence, which was the advisory guideline sentence. Mr. Cerno objected *inter alia* the five-level increase pursuant to U.S.S.G. § 4B1.5(b)(1), based on the fact that under Chapter 109A of Title 18 of the United States Code, Tyler was an adult, not a minor, and the offenses of conviction therefore were not "covered sex crimes" for purposes of the guideline. (Doc. 66.)

Mr. Cerno renewed his objections at sentencing. (Sentencing Transcript ("Sent. Tr.") at 10-20.) The district court rejected Mr. Cerno's request for a more lenient sentence. With regard to Mr. Cerno's arguments that the nature of force involved in the case could be considered a mitigating factor in the sense that it was minimal, established only through Tyler's testimony, and did not result in physical harm, the court stated: "As I said, the court is not permitted to use a comparative analysis to say, well, this is not as great a force as many other sex abuse cases include. That's not the standard that is set forth in the law. I am prescribed to apply the law as it is written and not in a comparative sense" (Sent. Tr. at 12.) With regard to factors which Mr. Cerno presented is support of a more

lenient sentence, the court stated: "I struggled to find something that is mitigating that I could use to reduce the sentence level. I didn't find anything that would justify a reduction in the term." (Sent. Tr. at 35.) The court sentenced Mr. Cerno to life imprisonment, believing it to be a "reasonable" and "just punishment." (Sent. Tr, at 35.)

SUMMARY OF THE ARGUMENT

The district court sentenced Mr. Cerno to life imprisonment. Mr. Cerno had no substantial criminal record. He was assigned a criminal history category of I. Through a series of enhancements – one of which was legally inapplicable – the probation officer drafting the presentence report determined that Mr. Cerno should be assigned an offense level of 46, resulting in a guideline range of life imprisonment. The illegally applied enhancement is U.S.S.G. § 5B1.5(b)(1). The enhancement applies only to a "covered sex crime." By definition, as set forth in application note 2, a covered sex crime is the instant offense of conviction, which is limited in this case to an offense under United States Code, Title 18, Chapter 109A perpetrated *against a minor*. Mr. Cerno was convicted of violation of 18 U.S.C. § 2241(a), which does not involve a minor. Tyler B. was sixteen years old at the time of the events that led to the charges against Mr. Cerno. For purposes of Chapter 109A offenses, she was an adult, not a minor, and Mr. Cerno's instant

offenses of conviction, therefore, are not "covered sex crimes" to which U.S.S.G. § 4B1.5(b)(1) can be applied.

In addition, the enhancement requires that Mr. Cerno have engaged in a pattern of activity involving prohibited sexual conduct. "Prohibited sexual conduct," as defined in application note 4(A), is limited to an offense committed after a prior sex offense conviction, an offense involving the production of child pornography, or a second offense for trafficking in child pornography. The government did not establish – because it could not – that Mr. Cerno satisfied this definition of "prohibited sexual conduct." Therefore, the enhancement cannot be applied.

Mr. Cerno also challenges the reasonableness of his sentence of life imprisonment. The district court stated that it could not consider the nature of the force used in determining Mr. Cerno's sentence. While that may be true under the guidelines, the district court could have considered the nature of the force used in addressing the "nature and circumstances of the offense" under 18 U.S.C. §3553(a). In addition, the district court expressed a desire to find mitigating circumstances, while at the same time ignoring the mitigating circumstances presented by Mr. Cerno at sentencing. most obviously the fact that Mr. Cerno had no substantial criminal history. The district court's remarks at sentencing, indicating that it believed it had no discretion to consider the nature and

circumstances of the offense and that there were no mitigating circumstances when there were obvious mitigating circumstances, rebut the presumption of reasonableness that would be accorded the life imprisonment guideline range, if the court correctly calculated that range.

All agreed that this case rested on the credibility of Tyler B. and Mr. Cerno. There was much evidence to support Tyler's motive to lie about the events she claimed took place while she lived with her grandmother. Evidence also supported that Mr. Cerno was an alcoholic who was not allowed to bring his beer into his mother's home and who drank in various outdoor locations. The opportunity to engage in sexual activity was extremely limited, given the constant presence of people in Tyler's grandmother's home, and cast further doubt on Tyler's allegations that the abuse occurred at least thirty times in a two month period.

Prior to trial, the court excluded evidence that Mr. Cerno, believing he had the house to himself for the night, passed out on the couch with his penis exposed while viewing an x-rated videotape. The court reasoned that it was too prejudicial and inflammatory to be admitted. After Mr. Cerno testified as to his alcoholism, stating that his judgment was not impaired when he drank and that he did not have blackouts, the district court admitted the evidence for impeachment purposes and to demonstrate that Mr. Cerno engaged in sexual activities when drinking. In

so doing, the district court essentially acknowledged that it admitted the evidence to show action in conformity with, a prohibited purpose under Federal Rule of Evidence 404(b). The district court abused its discretion in admitting the evidence without recognizing that the jury would use it as probative of the charged offense. The court did not provide a limiting instruction. Given the fact that the trial was a credibility contest between Tyler B. and Mr. Cerno, the erroneous admission of the evidence was not harmless.

ARGUMENT

Issue I

Mr. Cerno was convicted of five counts of aggravated sexual abuse in violation of 18 U.S.C. § 2241(a). The victim was sixteen-years-old, an adult for purposes of Chapter 109A of Title 18, which defines a" minor" as a person under the age of sixteen years, the age of consent under federal law. At sentencing, the district court applied U.S.S.G. § 4B1.5(b)(1) (**Repeat and Dangerous Sex Offender Against Minors**), which defines a "minor" as a person under the age of eighteen years, in determining Mr. Cerno's offense level. The enhancement applies only to cases involving a "covered sex crime," which is an offense perpetrated against a minor, as an element in specified statutes, and to a pattern of activity involving "prohibited sexual conduct." The district court erred in applying the guideline to

enhance an offense level for conviction of offenses against an adult, which did not demonstrate a pattern of activity involving "prohibited sexual conduct."

A. Standard of review and preservation of the issue.

In interpreting the Sentencing Guidelines, this Court reviews the district court's legal interpretation of the Sentencing Guidelines de novo, its factual findings for clear error, and the sentence imposed for reasonableness. *United States v. Trotter*, 483 F.3d 694, 702 (10th Cir. 2007) (citing *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006)). Reasonableness review comprises both "procedural and substantive components." *United States v. Atencio*, 476 F.3d 1099, 1102 (10th Cir. 2007). "To impose a procedurally reasonable sentence, 'a district court must calculate the proper advisory Guidelines range and apply the factors set forth in [18 U.S.C.] § 3553(a).' " *United States v. Hildreth*, 485 F.3d 1120, 1127 (10th Cir. 2007) (quoting *Atencio*, 476 F.3d at 1102). Thus, the first step of this Court's reasonableness review is to "determine whether the district court considered the applicable Guidelines range. . . . A non-harmless error in this calculation entitles the defendant to a remand for resentencing." *United States v. Kristl*, 437 F.3d at 1055. Substantively, this Court's appellate review of the reasonableness of the sentence imposed "merely asks whether the trial court abused its discretion." *Rita v. United States*, — U.S. — , 127 S. Ct. 2456, 2465 (2007). This review does presume that within-Guidelines sentences are reasonable.

Kristl, 437 F.3d at 1054; *see Rita*, 127 S.Ct. at 2463-68 (holding a presumption of reasonableness is permitted, but not required).

Mr. Cerno's first issue involves procedural error in determining the Guideline range, specifically the district court's legal interpretation of U.S.S.G. § 4B1.5(b)(1), which this Court reviews under a de novo standard of review. He preserved the issue in presentence briefing (Doc. 67), objections to the PSR, and oral argument at sentencing (Sent. Tr. at 13-15).

B. The district court erred in applying U.S.S.G. § 4B1.5(b)(1) to enhance a sentence imposed for conviction of 18 U.S.C. § 2241(a), which involves sexual abuse of an adult and for failing to make a finding as to a pattern of activity involving prohibited sexual conduct.

Section 4B1.5(b)(1) states:

> **§ 4B1.5. Repeat and Dangerous Sex Offender Against Minors**
>
> **(b)** In any case in which the defendant's instant offense of conviction is a *covered sex crime*, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
>
> **(1)** The offense level shall be 5 plus the offense level determined under Chapters Two and Three. . . .

U.S.S.G. § 4B1.5(b) (emphasis added). Application note 2 to § 4B1.5 defines "Covered Sex Crime as Instant Offense of Conviction" as follows:

> For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (I) chapter 109A of title 18, United States Code; (ii) Chapter 110 of such title, not including trafficking in, receipt of, or

> possession of, child pornography, or recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual: or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(I) through (iii) of this note.

With respect to Chapter 109A offenses, a "covered sex crime as instant offense of conviction" must be a crime against a minor. The question is, which definition of minor applies: a person under the age of sixteen years, as defined by offenses set forth in Chapter 109A of Title 18 of the United States Code, or a person under the age of eighteen years, as defined by U.S.S.G. § 4B1.5? The answer lies in the clear language of the guideline: A minor is a person under the age of sixteen years, as understood in the crimes delineated in Chapter 109A.

This Court interprets the Sentencing Guidelines "as if they were a statute or court rule." *United States v. Gay*, 240 F.3d 1222, 1230 (10th Cir. 2001). As with all statutory interpretation, the analysis begins with the language of the guideline under scrutiny, " 'giving the words used their ordinary meaning.' " *United States v. Gacnik*, 50 F.3d 848, 852 (10th Cir. 1995) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). "Where the language is clear and unambiguous, it must be followed except in the most extraordinary situation where the language leads to an absurd result contrary to clear legislative intent." *United States v. Plotts*, 347 F.3d 873, 876 (10th Cir. 2003) (citing *United States v. Tagore*, 158 F.3d 1124, 1128 (10th Cir. 1998) (internal quotation omitted)).

The two terms of the guideline definition of offenses which may be enhanced by § 4B1.5(b)(1) are "covered sex crime" and "instant offense of conviction." The two terms are identical, as indicated by the connective word "as." "Covered sex crimes" are crimes that are covered by the enhancement. These are the only offenses to which the enhancement can be applied. "Instant offense of conviction" is the specific offense of which the defendant was found guilty, in this case 18 U.S.C. § 2241(a). The instant offense of conviction must be one of the offenses listed under the definition of "covered sex crime." If it is not listed, the enhancement cannot be applied.

Section 2241(a) does not have as an element a minor victim. 18 U.S.C. § 2241(a) states:

> **2241. Aggravated sexual abuse**
>
> **(a)** By force or threat.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly causes another person to engage in a sexual act –
>
> **(1)** by using force against that other person; or
>
> **(2)** by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
>
> or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

This is not an offense perpetrated against a minor. That offense under Chapter 109A is 18 U.S.C. § 2241(c), which was not an option in this case because Tyler was sixteen at the time of the abuse.

The guideline definition of "covered sex crime" is clear: The "instant offense of conviction" must be an offense perpetrated against a minor under Chapter 109A of Title 18, United States Code. The only Chapter 109A offenses which can be enhanced by § 4B1.5(b)(1) are 18 U.S.C. §§ 2241(c); 2243; 2244(a)(3), (4), (5); 2244(c). Chapter 110 explicitly defines minor as a person under the age of eighteen years. 18 U.S.C. § 2256. Chapter 117 of Title 18 defines a "minor" implicitly in setting forth the offense as a person under the age of eighteen years. 18 U.S.C. §§ 2423(f), (g).

In addition to the fact that Mr. Cerno's instant offense of conviction was not perpetrated against a minor, the enhancement pursuant to § 4B1.5(b)(1) cannot be applied to him because he did not engage in a pattern of activity involving *prohibited sexual conduct*. Application of § 4B1.5(b)(1) requires that the government show that "defendant engaged in a pattern of activity involving prohibited sexual conduct." "Prohibited sexual contact" is defined in application note 4(A) as follows:

> **4.** Application of Subsection (b). –
>
> **(A)** Definition. – For purposes of subsection (b), "prohibited sexual conduct" means any of the following: (i) any offense described in 18

> U.S.C. § 2426(b)(1)(A) or (B);[1] (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

Mr. Cerno's offenses of conviction do not satisfy this definition of "prohibited sexual conduct." The district court erred in interpreting this guideline enhancement as applicable to Mr. Cerno.

Upon close analysis, it is clear that U.S.S.G. § 4B1.5(b)(1) does not apply to Mr. Cerno. His instant offense of conviction is not a covered sex crime, because it did not involve a minor, as minor is used in Chapter 109A of Title 18, United States Code. In addition, Mr. Cerno did not engage in a pattern of prohibited sexual conduct, because his conduct did not satisfy the definition of "prohibited sexual conduct" set forth in the guideline. While there is no ambiguity here, if there were, the ambiguity would have to be resolved in Mr. Cerno's favor. Where a Sentencing Guideline is ambiguous, the rule of lenity requires the court to interpret it in favor of criminal defendants. *United States v. Gay*, 240 F.3d 1222, 1232 (10th Cir. 2001).

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[1] 18 U.S.C. § 2426 creates more severe penalties for repeat offenders. Mr. Cerno does not have any prior sexual offenses or offenses of any substantial nature. His criminal history category is I.

The district court relied on the guideline range of life which is applicable to a sentence based on an offense level of 46. (Sent. Tr. at 34.) The district court expressed willingness to sentence below life imprisonment if there were mitigating circumstances: "I struggled to find something that is mitigating that I could use to reduce the sentencing level. I didn't find anything that would justify a reduction in this case." (Sent. Tr. at 35.) A guideline range that was not life would provide the justification the district court struggled to find to reduce the sentencing level. Without the enhancement under U.S.S.G. § 4B1.5(b)(1), Mr. Cerno's sentencing range would be 324 to 405 months imprisonment, based on an offense level of 41 and criminal history category of I.

The error was not harmless. While the statutory range for Mr. Cerno's offenses of conviction was any term of years to life, the district court expressed its willingness to impose a more lenient sentence if there were mitigating circumstances. This brief discusses a mitigating circumstance, which the district court believed it had no discretion to consider under Issue II below. However, in view of the district court's expressed willingness to impose a sentence below the erroneously calculated range of life imprisonment, it is more than likely that Mr. Cerno would receive a more lenient sentence upon remand for resentencing. The district court's procedural error in calculating the guideline range is not harmless error. The correct calculation would result in a range less than life imprisonment,

and the district court stated that it would sentence Mr. Cerno to a more lenient sentence if it were justified.

Issue II

The district court imposed an unreasonable sentence in sentencing Mr. Cerno to life imprisonment.

A. Standard of review and preservation of the issue.

In reviewing a criminal sentence, this Court first determines whether the district court correctly applied the Guidelines to arrive at the applicable sentencing range, reviewing factual findings for clear error and legal determinations de novo. *United States v. Chavez-Calderon*, 494 F3d 1266,1268 (10th Cir. 2007) (citing *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) (per curiam)). If the district court correctly applied the Guidelines, this Court reviews the sentence imposed for substantive reasonableness in light of the factors contained within 18 U.S.C. § 3553(a). *Id.* (citing *United States v. Booker*, 543 U.S. 220, 261-62 (2005)). A sentence is reasonable so long as the district court does not abuse its discretion in imposing sentence. *Id.* (citing *Rita v. United States*, — U.S. — , 127 S.Ct. 2456, 2465-66 (2007). A correctly calculated applicable advisory Guideline range and sentence within that range is accorded a rebuttable presumption of reasonableness. *Id.* (citing *Kristl*, 437 F.3d at 1055; *Rita*, 127 S.Ct.

at 2462-63 (upholding the use of an appellate presumption of reasonableness for within-Guidelines sentences)).

Mr. Cerno requested a downward variance in his Sealed Sentencing Memorandum and Request for Reasonable Sentence (Doc. 67 at ¶¶ 6-8.) and in oral argument at sentencing (Sent. Tr. at 15-20.)

B. The life sentence imposed on Mr. Cerno was substantively unreasonable in light of the factors set forth under 18 U.S.C. § 3553(a).

Under 18 U.S.C. 3553(a), a district court must consider the following factors in sentencing a defendant:

> **(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for –

> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines–
>
> * * *
>
> (5) any pertinent policy statement – (A) issued by the Sentencing Commission . . .
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Mr. Cerno, through counsel, argued that a life sentence in Mr. Cerno's case was extreme. Counsel pointed out that such a sentence is usually reserved for individuals who are convicted of first degree murder or who are career offenders who have demonstrated no hope of rehabilitation. Counsel argued that a life sentence for an individual such as Mr. Cerno who had no substantial criminal record was an overly harsh penalty. Counsel highlighted Mr. Cerno's abstinence from alcohol, his scrupulous adherence to the rules required to be followed at the halfway house, and his very successful employment as an electrician's apprentice as evidence that he was not a risk as a recidivist. (Sent. Tr. at 15-18.) Counsel also argued that the nature of the force used was a factor the court could consider in determining the sentence. Counsel pointed out that the only evidence of force was Tyler's testimony, that it was minimal in nature, and that it did not result in physical injury. ((Sent. Tr. at 11-12.)

The district court responded that it thought about the element of force, but that the jury found force. Therefore, the court stated, it was not "permitted to use a comparative analysis to say, well, this is not as great a force as many other sex abuse cases include." (Sent. Tr. at 12.) While the district court may have been correct that it could not disregard the jury's finding of force, the district court could have considered the nature of the force used as part of its consideration of the "nature and circumstances of the offense" under 18 U.S.C. § 3553(a)(1). The court expressed a willingness to consider any mitigating circumstances and also that it considered Mr. Cerno's argument that the nature of the force was much less than that in other cases, but that it had no discretion to consider that as a mitigating factor.

The district court's understanding of its discretion in this regard was erroneous. The nature of the force used was part of the "nature and circumstances of the offense," which the court was required to consider under § 3553(a). It was not prohibited from considering the nature of the force and could have considered that a mitigating factor in sentencing Mr. Cerno.

The district court rejected all of Mr. Cerno's additional arguments in favor of a sentence below a life sentence, stating that it believed a life sentence to be reasonable and a just punishment for the offense. (Sent. Tr. at 35.) The sentence imposed by the district court ignores the fact that Mr. Cerno was not a career

offender, but rather was assigned a criminal history category of I; that the need for deterring an individual who demonstrated no risk of recidivism would be served adequately by a lower sentence; and that the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct required something less than a life sentence.

The court stated: "I struggled to find something that is mitigating that I could use to reduce the sentencing level. I didn't find anything that would justify a reduction in the term." (Sent. Tr. at 35.) The court either misunderstood its discretion to consider the nature and circumstances of the offense, which included the nature of the force, or unreasonably ignored obvious mitigating factors, such as Mr. Cerno's lack of criminal history and conduct since his conviction that indicated that he was not a recidivist risk. For these reasons, the case should be remanded for resentencing with instructions to the district court that it could and should consider the nature of the force and the other obvious mitigating factors that the court ignored, despite its expressed desire to find mitigating factors.

Issue III

The trial court abused its discretion by admitting, in contradiction of its original ruling, evidence that Mr. Cerno, believing he was alone for the night, viewed a pornographic video while drinking and passed out with his penis

exposed, as evidence used to impeach his testimony that he did not experience blackouts or severely impaired judgment when drinking.

A. Standard of review and preservation of the issue.

This Court reviews a district court's ruling on the relevance and potential prejudice of proffered evidence under an abuse of discretion standard. *United States v. Call*, 129 F.3d 1402, 1405 (10th Cir. 1997), *cert. denied*, 524 U.S. 906 (1998).

B. The district court abused its discretion in admitting evidence of Mr. Cerno's conduct in viewing the videotape for the purpose of demonstrating that Mr. Cerno engaged in acts of a sexual nature while drinking.

Under the Federal Rules of Evidence, "[a]ll relevant evidence is admissible," subject to the limitations provided by the Federal Rules and other laws; any evidence "which is not relevant is not admissible." Fed. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even though evidence may meet the relevancy standard of Rule 401, a trial court still may exclude it on the grounds that its probative value – the evidence's probability of establishing a fact of consequence – is "substantially outweighed" by certain negative factors. *See* Fed. R. Evid. 403. Those factors include "unfair prejudice," "confusion of the issues," and "misleading the jury." *Id.*

The danger of "unfair prejudice" under Rule 403 is not simply the tendency of evidence to undermine a party's position. Rather, the prejudice that is "unfair" is prejudice arising from the tendency of proffered evidence to suggest to the jury that it should render its findings "on an improper basis, commonly, though not necessarily, an emotional one." *See United States v. McVeigh*, 153 F.3d 1166, 1190-91 (10th Cir. 1998) (citing Fed. R. Evid. 403, Adv. Comm. Notes (1972 Proposed Rules)), *abrogated on other grounds, Hooks v. Ward*, 184 F.3d 1206, 1227-1228 (10th Cir. 1999).

Rule 403 of the Federal Rules of Evidence requires the trial court to balance the probative value of proffered evidence against the likelihood of unnecessary prejudice to the defendant. "'Evidence is unfairly prejudicial if it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly or apart from its judgment as to his guilt or innocence of the crime charged.'" *United States v. Nevel*, 490 F.3d 800, 805 (10th Cir. 2007) (quoting *United States v. Leonard*, 439 F.3d 648, 652 (10th Cir. 2006)).

Mr. Cerno objected to the admission of evidence concerning his viewing of the videotape on two grounds: (1) it was irrelevant, and therefore its admission violated Rule 401 of the Federal Rules of Evidence; and (2) it was inflammatory, prejudicial, misleading, and confusing and therefore its admission violated Rule

403 of the Federal Rules of Evidence. (Doc. 29.) The government responded that the evidence would bolster Tyler's credibility, which was a primary issue in the case. The government also argued: "[T[here is a direct and defined sexual connection between the evidence proposed, the sexual abuse alleged, and the consciousness that the victim had for finding that sexual abuse both distasteful and for it giving meaningful breadth to her lack of consent to that sexual abuse." (Doc. 40 at 3-4.) Prior to trial, the district court ruled in favor of Mr. Cerno and prohibited admission of the videotapes or testimony concerning Mr. Cerno's having viewed one of them on the ground that the prejudice to Mr. Cerno outweighed any probative value. (Doc. 43.)

During trial, counsel for the government renewed its efforts to admit evidence concerning Mr. Cerno's viewing of the videotape to impeach Mr, Cerno's testimony that Mr. Cerno was a harmless alcoholic who, when he drank, had little energy to do anything but fall asleep. The district court admitted the evidence to impeach Mr. Cerno's description of himself as a harmless alcoholic. (Doc. 60 at 9-10.) In its Memorandum Opinion and Order denying Mr. Cerno's motion for a judgment of acquittal or new trial, the district court provided its clearest rationale for admitting the evidence:

> The Court found, following the completion of the government's cross-examination of Defendant, that there was significant probative value for impeachment purposes of the testimony regarding Defendant passed out drunk, exposed, in front of a pornographic video playing on the television.

> The testimony at issue impeaches Defendant's claims that drinking did not impair his judgment and that he knew what he was doing when he drank. The testimony also impeaches Defendant's statements that he would sit down and not do anything when drinking. The challenged testimony indicates that Defendant, when drinking, did engage in activities of a sexual nature, contrary to what his testimony represented.

(Doc. 60 (Att. C) at 10.)

The district court thus admitted the evidence, under the guise of impeachment, to prove that Mr. Cerno engaged in sexual activities while drunk. Rule 404(b) of the Federal Rules of Evidence prohibits the admission of evidence of other crimes, wrongs, or acts to demonstrate the bad character, moral turpitude, or criminal disposition of a defendant to prove he acted in conformity with the prior acts or events. The court's rationale in admitting the evidence violated Rule 404(b) in that the evidence was admitted to show that Mr Cerno engaged in sexual activity, such as watching pornographic films or sexually abusing Tyler B., when drinking. Mr. Cerno denied consistently that he engaged in any sexual activity with Tyler. He testified in some detail about his alcoholism. He stated that he drank outside in the field, barn, or his truck because his mother forbade it in the house. He described the health problems that have resulted from his drinking. He stated that, while he did not have blackouts, he often passed out from drinking too much. In response to this testimony, the district court reversed its ruling and allowed in evidence of Mr. Cerno's having passed out while drinking and watching a porno film with his penis exposed *to demonstrate that he engaged in sexual*

activities when he drank. The court thus condoned admission of Mr. Cerno's drunken sexual activity to show that he did precisely that with Tyler, contrary to his defense that Tyler was lying and that he never touched her sexually. The district court thus admitted the evidence to show that Mr. Cerno acted in conformity with this prior conduct when he committed the charged offenses.

The Supreme Court outlined the four procedural safeguards that govern admission decisions under Rule 404(b) in *Huddleston v. United States*, 485 U.S. 681 (1988): (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Federal Rule of Evidence 105, the trial court shall, upon request, instruct the jury that evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

While Federal Rule of Evidence 404(b) was never brought up during argument or in the court's rulings, it should have been the standard against which the court determined admission, in light of the evidence and the court's reasons for its admission. In this case, the court admitted it as a similar act that was probative of the charged offense, but never analyzed its prejudice as such evidence. Nor did the trial court give any limiting instruction to the jury.

The court erred in admitting the evidence under any rationale, due to its prejudicial impact in a case that was all about testing the credibility of two individuals. Even more egregious error occurred in admitting the evidence as impeachment evidence without recognizing its impact as essentially 404(b) evidence and without instructing the jury that it could not be considered as probative in any way of the charged offenses.

The error was not harmless. Everyone – the government, the defendant, and the court – acknowledged that this case rested entirely on the credibility of the witnesses. Substantial evidence supported that Tyler had a motive to lie: She was an emotionally fragile young woman who was forced into circumstances she hated and would do anything to escape. She was accustomed to a remarkable degree of independence and had boyfriends. Suddenly, she had to bow to authority figures and obey rules. Her relatives, Matt and Janice Cerno, extended an invitation to live with them, a very desirable alternative. Shortly thereafter, Tyler accused Steve Cerno of touching her, a sure – and immediate – escape from her grandmother's home. Furthermore, from her perspective, he was a drunken "pervert" whom she found "disgusting."

Balanced against this testimony was that of Mr. Cerno, who consistently and adamantly denied the accusations. He testified candidly about his drinking. He admitted to passing out, but denied reaching a point of blacking out without any

recollection of what he had been doing. His mother would not allow alcohol in the house, so he drank outside. The only issue at trial was who was telling the truth – Mr. Cerno or Tyler. Allowing the jury the mental image of Mr. Cerno sprawled on the couch, passed out with pants down and penis exposed in front of a porno flick could very well have pushed the jury beyond reasonable doubt, based on a purely emotional response.

The evidence concerning Mr. Cerno's condition one night when he believed he was alone, when considered carefully, does not impeach his testimony; rather, it corroborates it. Mr. Cerno never testified that he did not view pornography, either while sober or drunk. He testified that he usually drank until he passed out, which was precisely his condition when his relatives surprised him with an early return from the wake. The district court, however, admitted it for a reason that violated Federal Rule of Evidence 404(b) – to show action in conformity with. No doubt the jury used it as probative of the charged offenses during deliberation.

In a case as close as this, with the determination of innocence or guilt resting on the credibility of the accused and his accuser, the district court's error in admitting evidence it previously excluded on the basis of inflammatory impact cannot be said to be harmless. Mr. Cerno's conviction should be reversed and the case remanded for a new trial.

CONCLUSION AND RELIEF SOUGHT

Procedural error occurred in sentencing Mr. Cerno. U.S.S.G. § 5B1.2(b)(1) was illegally applied and his case should be remanded for resentencing without application of the enhancement. Substantial error occurred as well, insofar as the district court misunderstood its discretion in considering the nature and circumstances of the offense and ignored mitigating factors it stated it sought to consider. For this reason as well, the case should be remanded for resentencing. Finally, the prejudicial impact of the admission of evidence concerning Mr. Cerno's viewing of the videotape requires reversal of the verdict and remand for a new trial.

ORAL ARGUMENT STATEMENT

Mr. Cerno respectfully requests oral argument, which will provide the Court the opportunity to clarify questions concerning the issues presented.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,630 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

__/s_____
Alonzo J. Padilla
Attorney for Steve Cerno

CERTIFICATE OF PRIVACY REDACTIONS AND VIRUS SCANNING

I, Alonzo J. Padilla, certify that all required privacy redactions have been made, and that, with the exception of these redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk, and that the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, *i.e.*, Norton AntiVirus Corporate Edition, Version 8.0, updated October 15, 2007, and according to the program, are free of viruses.

__/s_____
Alonzo J. Padilla
Attorney for Steve Cerno

Respectfully submitted,

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_____
Alonzo J. Padilla
Attorney for Steve Cerno

CERTIFICATE OF SERVICE

I hereby verify that a true copy of the foregoing pleading was mailed by first class mail, postage prepaid, and submitted digitally via e-mail to the Clerk of the United States Court of Appeals for the Tenth Circuit, Byron White United States

Courthouse, 1823 Stout Street, Denver, CO 80257, and by Federal Express, and submitted digitally via e-mail to Assistant United States Attorney Paul Spiers, P.O. Box 607, Albuquerque, New Mexico 87103, this 17th day of October, 2007.

__/s_____
Alonzo J. Padilla
Attorney for Steve Cerno

AO 245B (Rev 12/03) Criminal Judgment Sheet 1

UNITED STATES DISTRICT COURT

District of New Mexico

UNITED STATES OF AMERICA
V.
Steve Cerno

Judgment in a Criminal Case

(For Offenses Committed On or After November 1, 1987)
Case Number: **1:05CR01603-001LH**
USM Number: **31668-051**
Defense Attorney: **Alonzo J. Padilla, Appointed**

THE DEFENDANT:

☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s)
☒ after a plea of not guilty was found guilty on count(s) **1 through 5 of Redacted Indictment**

The defendant is adjudicated guilty of these offenses:

Title and Section	*Nature of Offense*	*Offense Ended*	*Count Number(s)*
18 U.S.C. Sec. 2241(a)	Aggravated Sexual Abuse, 18 U.S.C. Sec. 2246(2)(B); Crime in Indian Country, 18 U.S.C. Sec. 1153	03/31/2005	1
18 U.S.C. Sec. 2241(a)	Aggravated Sexual Abuse, 18 U.S.C. Sec. 2246(2)(C); Crime in Indian Country, 18 U.S.C. Sec. 1153	03/31/2005	2

The defendant is sentenced as specified in pages 2 through 4 of this judgment. The sentence is imposed under the Sentencing Reform Act of 1984. The Court has considered the United States Sentencing Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. 3553(a). The Court also believes the sentence is reasonable and provides just punishment for the offense.

☐ The defendant has been found not guilty on count .
☐ Count dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Cibola
County of Residence

May 1, 2007
Date of Imposition of Judgment

/s/ C. LeRoy Hansen
Signature of Judge

Honorable C. LeRoy Hansen
United States District Judge
Name and Title of Judge

May 7, 2007
Date Signed

ATTACHMENT A

Defendant: **Steve Cerno**
Case Number: **1:05CR01603-001LH**

ADDITIONAL COUNTS OF CONVICTION

Title and Section	*Nature of Offense*	*Offense Ended*	*Count Number(s)*
18 U.S.C. Sec. 2241(a)	Aggravated Sexual Abuse, 18 U.S.C. Sec. 2246(2)(B); Crime in Indian Country, 18 U.S.C. Sec. 1153	04/30/2005	3
18 U.S.C. Sec. 2241(a)	Aggravated Sexual Abuse, 18 U.S.C. Sec. 2246(2)(C); Crime in Indian Country, 18 U.S.C. Sec. 1153	04/30/2005	4
18 U.S.C. Sec. 2241(a)	Aggravated Sexual Abuse, 18 U.S.C. Sec. 2246(2)(B); Crime in Indian Country, 18 U.S.C. Sec. 1153	04/30/2005	5

Defendant: **Steve Cerno**
Case Number: **1:05CR01603-001LH**

IMPRISONMENT

The defendant is committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **life.**

This term is imposed as to each of Counts 1 through 5; said terms shall run concurrently.

☒ The court makes these recommendations to the Bureau of Prisons:

La Tuna Federal Correctional Institution, Anthony, New Mexico-Texas; or Safford Federal Correctional Institution, Safford, Arizona, if eligible.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant must surrender to the United States Marshal for this district:
  ☐ at on
  ☐ as notified by the United States Marshal.
☐ The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:
  ☐ before 2 p.m. on
  ☐ as notified by the United States Marshal
  ☐ as notified by the Probation or Pretrial Service Office.

RETURN

I have executed this judgment by:

Defendant delivered on _____ to
_____ at _____ with a Certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
Deputy United States Marshal

Defendant: **Steve Cerno**
Case Number: **1:05CR01603-001LH**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	Assessment	Fine	Restitution
	$500.00	$0	$0

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ In full immediately; or

B ☐ $ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties:Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

The Mandatory Victim Restitution Act of 1996 is applicable in this case. However, no monetary losses have been provided or presented to the Court; therefore, no restitution is due at this time.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. No. Cr. 05-1603 LH

STEVE CERNO,

Defendant.

MEMORANDUM OPINION AND ORDER

On May 1, 2006, Defendant Steve Cerno, through his attorney Alonzo J. Padilla, filed a Motion in Limine (Doc. No. 29) seeking to exclude evidence under Federal Rule of Evidence 403. Defendant seeks to exclude four x-rated videotapes found in Defendant's bedroom closet as well as testimony that Defendant was observed asleep, with his pants down, in front of the television while it was playing an x-rated video when his family arrived from a wake late one evening. The United States filed its response (Doc. No. 40) on August 30, 2006. Having considered the parties' arguments, briefs, and the relevant law, and being otherwise fully advised, the Court finds that Defendant's motion in limine should be granted.

I. BACKGROUND

On July 27, 2005, Defendant was indicted in a seven-count Indictment for various acts of aggravated sexual abuse and aggravated sexual contact with Jane Doe, a female Indian. According to the Indictment, the alleged acts occurred on or between March 1, 2005, and March 31, 2005; on or between March 1, 2005, and April 30, 2005; and on or between April 1, 2005, and April 30, 2005.

The United States intends to present evidence at trial of four x-rated videotapes containing

adult pornographic scenes found in Defendant's bedroom closet. The United States also intends to present the testimony of Jane Doe, the victim in this case, in which she observed pornographic movies in a box in Defendant's closet which disturbed her and prompted her to report to a family member that she thought Defendant was a pervert. The United States argues that introduction of the pornographic videotapes is relevant evidence to corroborate the victim's testimony, the credibility of which is a central issue in the case.

Additionally, the United States wishes to introduce testimony that "one time" after the victim and other family members returned home from a wake, they walked into the living room and observed Defendant passed out drunk with his penis exposed from his pants while a pornographic videotape was playing. Jane Doe also intends to testify that she found the association between Defendant and the pornographic videotapes disgusting. The United States contends that this testimony is relevant to show that Defendant disgusted the victim and that she actively attempted to physically reject him, which will help prove the element of use of force necessary to prove Aggravated Sexual Abuse under 18 U.S.C. § 2241(a).

II. DISCUSSION

Federal Rule of Evidence 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

The evidence that Defendant possessed pornographic tapes, watched them, and one time passed out drunk while watching such a tape with his penis exposed is certainly prejudicial as it could divert the jury's attention away from the question of Defendant's responsibility for the crimes charged to the improper question of Defendant's bad character. The Court finds that this

evidence is of an inflammatory nature that could unfairly prejudice the jury against Defendant.

Moreover, the evidence has only slight probative value to the question of Defendant's guilt of the charged crimes. The victim did not observe the videotapes during the course of the crimes in question nor is it alleged that Defendant used the videotapes at any time to try to entice Jane Doe to commit any of the alleged sexual acts. The videotapes are also of adult pornographic scenes and there is no allegation that the videotapes contain child pornography. In addition, there is no evidence that the incident in which Jane Doe and other family members observed Defendant watching a pornographic tape, passed out drunk with his genitalia exposed, was close in time or otherwise connected to the alleged sexual abuse committed against the victim. That the evidence may corroborate the victim's memory is of tenuous probative value since her memory of the pornographic materials is not linked in time to the events at issue.

The Court also finds that the evidence of Defendant's proclivity for pornography has minimal relevance to the issue of whether Defendant used force against her. Watching adult pornographic videos does not necessarily show a propensity to commit sexual abuse. Although the fact that the victim found Defendant disgusting and attempted to physically reject him is certainly relevant to the issue of use of force, one of the reasons for her disgust – his adult pornographic activities – is far less relevant to whether or not she attempted to resist Defendant's advances at the time of the events at issue.

Accordingly, after carefully balancing the competing interests, the Court concludes that the probative value of this evidence and testimony is substantially outweighed by the danger of unfair prejudice under Rule 403.

IT IS THEREFORE ORDERED that Defendant's Motion in Limine (Doc. No. 29) is **GRANTED.**

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. No. Cr. 05-1603 LH

STEVE CERNO,

Defendant.

MEMORANDUM OPINION AND ORDER

On September 27, 2006, Defendant Steve Cerno filed a Motion for Judgment of Acquittal or in the Alternative, Motion for a New Trial (Doc. No. 57). Defendant asserts that the United States failed to present sufficient evidence to sustain Defendant's conviction for the crimes of aggravated sexual abuse as charged in Counts 1 through 5 of the Indictment. In the alternative, Defendant requests a new trial based on the alleged error of admitting into evidence testimony regarding an incident in which Defendant was passed out drunk with his penis exposed while a pornographic videotape was playing on the television (hereinafter "the exposure testimony"). This Court, having considered the briefs, evidence, and applicable law, concludes that Defendant's motion should be denied in its entirety.

I. BACKGROUND

On July 27, 2005, Defendant was indicted in a seven-count Indictment for various acts of aggravated sexual abuse and abusive sexual contact with Jane Doe, a female Indian. Counts 1 through 5 alleged acts of aggravated sexual abuse in violation of 18 U.S.C. § 2241(a) that occurred on or between March 1, 2005, and March 31, 2005; on or between March 1, 2005, and April 30, 2005; and on or between April 1, 2005, and April 30, 2005. The sexual acts alleged in

Counts 1 through 5 consisted of contact between the defendant's mouth and the victim's vulva, and penetration of Defendant's finger into the victim's genital opening. Counts 6 and 7 alleged that Defendant engaged in abusive sexual contact with the victim in violation of 18 U.S.C. § 2244(a)(1) on or between April 1, 2005, and April 30, 2005. The sexual contact alleged in Count 6 consisted of Defendant intentionally having the victim touch his penis, either directly or through clothing. The sexual contact alleged in Count 7 consisted of Defendant intentionally biting, either directly or through clothing, the victim's breast.

Defendant was tried by a jury on September 18-20, 2006. The jury convicted Defendant of Counts 1 through 5, the aggravated sexual abuse counts. The jury, however, acquitted Defendant of Counts 6 and 7, the abusive sexual contact charges. On September 27, 2006, Defendant timely filed a Motion for Judgment of Acquittal, or in the Alternative, Motion for a New Trial (Doc. No. 57). Defendant argues that he is entitled to a judgment of acquittal because there was insufficient evidence presented to support the verdict, particularly as to the element of the use of force by Defendant. In addition, Defendant asserts that the victim's testimony was so contrary to the physical evidence and to common sense that it cannot support the verdict. Defendant also contends that the verdict was inconsistent and demonstrates that the jury did not believe the victim entirely, which casts doubt on the jury's ability to impartially decide the case. Defendant alternatively asserts that he is entitled to a new trial in the interest of justice and due to the Court's error in admitting the exposure testimony.

II. DISCUSSION

A. Motion for Judgment of Acquittal

Rule 29 of the Federal Rules of Criminal Procedure provides that, on a defendant's

motion for judgment of acquittal, a court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In reviewing the sufficiency of the evidence, the court must ask whether, taking the evidence, together with the reasonable inferences to be drawn therefrom, in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt. *United States v. McCullough*, 457 F.3d 1150, 1159 (10th Cir. 2006).

1. Sufficiency of the Evidence

The only particular element that Defendant argues was not proven beyond a reasonable doubt is the use of force. Defendant contends that the evidence indicates that "if any sex occurred, which Mr. Cerno denies, it was consensual in nature and not the result of any force used or any threats made to the victim." Def.'s Mot. at 5. Section 2241(a) of Title 18 of the United States Code makes it a crime to knowingly cause another person to engage in a sexual act "by using force against that other person." 18 U.S.C. § 2241(a)(1). The element of force may be proven by showing that the defendant used physical force sufficient to overcome, restrain, or injure the victim. *See United States v. Reyes Pena*, 216 F.3d 1204, 1211 (10th Cir. 2000); *United States v. Buckley*, 195 F.3d 1034, 1035 (8th Cir. 1999); *United States v. Yazzie*, 153 F.3d 730, *3 (10th Cir. May 27, 1998) (unpublished decision). "The force requirement is satisfied if the 'sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact.'" *Yazzie*, 153 F.3d at *3 (quoting *United States v. Weekley*, 130 F.3d 747, 754 (6th Cir. 1997) (quoting *United States v. Lauck*, 905 F.2d 15, 18 (2d Cir. 1990))). Force may be inferred from such facts as disparity in size or disparity in coercive power between the victim and the defendant. *See Reyes Pena*, 216 F.3d at 1211.

The jury was properly instructed on the elements of aggravated sexual abuse and found that the element of use of force was met. The Court finds that the government provided sufficient evidence to prove the element. The victim testified that in March 2005, Defendant, the victim's uncle, began touching her. Tr. 191, 193-94. The victim was 16 years old at the time. *See id.* at 185. Defendant pulled down her pants and underwear. *Id.* at 193-94. She said that she told him to stop and to leave her alone, *id.* at 194, and that she leaned away from him, but that "it was hard because the bed was like against the wall," *id.* at 193. The victim testified that she tried to push herself away from him and was kicking her legs, but that it did not work because she was "powerless." *Id.* at 194. Defendant continued to try to touch her, while she tried to keep her legs closed. *Id.* at 194-95. The victim expressly stated that "he like forced my legs open, and that's when he like got down on his knees and began like touching me." *Id.* Defendant proceeded to lick her vagina and put his fingers inside her vagina. *Id.* at 195. When specifically asked if she used any strength to try to keep her legs together, the victim stated, "Yes. But I felt like so powerless, like I couldn't do anything. I just felt like I lost all my strength." *Id.* She said that Defendant used his hands to get her legs open and that it did not feel good. *Id.*

The victim then testified that a week later Defendant did the same thing. *Id.* at 195-96. She said that she told him to leave her alone, to stop, and that it was not right. *Id.* at 196. Defendant, however, touched her, licked her again, and put his fingers inside her again. *Id.* She testified that she tried to get him to stop by "pushing him, like trying to push him away," but that it did not work because "he was stronger than [her]." *Id.*

The victim further testified that in late April 2005 Defendant came into her room again, put his hand up her shirt, and began touching her breasts. *Id.* at 199. The victim told him to

leave her alone, but he continued. *Id.* He pushed her bra up and her bra snapped, breaking the bra. *Id.* She stated that she was crying, but he continued to lick her breast. *Id.* at 200. She stated that he put his mouth on her vagina again. *Id.*

On cross-examination, defense counsel asked whether it was "a fair statement to say that when these alleged incidents were taking place, that there was no force involved." *Id.* at 240. The victim responded, "No, I would not say that." *Id.* The victim admitted that she was never hit, "but he did force my legs open." *Id.*

The Court finds that the record demonstrates that Defendant used physical force to overcome and restrain the victim. The Court therefore concludes that the evidence was sufficient to prove that Defendant used force against the victim when causing her to engage in the sexual acts described in Counts 1 through 5 of the Indictment. *Cf. Reyes Pena*, 216 F.3d at 1207, 1211 (court did not err in holding that there was sufficient evidence to show use of force where victim was minor and defendant grabbed her arm, made her lay next to him, and penetrated her vagina digitally while she attempted to evade him by sliding into crack of bed and where victim tried to kick and push defendant away when he assaulted her but he would push her against wall); *Buckley*, 195 F.3d at 1035 (holding that element of force to show violation of 18 U.S.C. § 2241(a)(1) proven where victim testified that defendant removed her clothing, got on top of her, had intercourse with her, causing pain and bleeding, where she indicated she wanted him to stop and attempted to push him off her, but was unable to do so because of his size); *United States v. Fulton*, 987 F.2d 631, 633 (9th Cir. 1993) (use of force element within meaning of 18 U.S.C. § 2241(a)(1) met where evidence showed defendant used force sufficient to overcome or restrain victim: young victim testified that defendant pushed her on floor or bed; defendant

would force her to lie down while he touched her private parts; victim tried to push defendant away but he was stronger than her; and defendant would grab her, hold her down, remove her pants, and place his fingers inside her vaginal cavity).

Furthermore, the Court finds unavailing Defendant's arguments that the victim's testimony was not credible and thus was not sufficient to support the verdict. In determining whether a motion for acquittal should be granted or not, courts should not weigh conflicting evidence or evaluate witness credibility because those are "the exclusive province of the jury." *United States v. Dazey*, 403 F.3d 1147, 1159 (10th Cir. 2005). Decisions regarding the credibility of witnesses are to be resolved in favor of the jury's verdict. *United States v. Gabe*, 237 F.3d 954, 961 (8th Cir. 2001). Moreover, a victim's testimony alone may be sufficient to persuade a reasonable jury of the defendant's guilt beyond a reasonable doubt. *Id.* Such was the case here. Defendant challenged the victim's credibility at trial, but those challenges failed. The jury had an opportunity to weigh both Defendant's and the victim's accounts of what occurred, and the jury found the victim to be credible. Based on the totality of the evidence, the Court concludes that the evidence, viewed in the light most favorable to the government, was sufficient to satisfy all the elements necessary to convict Defendant of Counts 1 through 5 such that a reasonable jury could have found Defendant guilty beyond a reasonable doubt of Counts 1 through 5. *Cf. Gabe*, 237 F.3d at 961 (verdict not against weight of evidence because victim's testimony alone was sufficient to support conviction).

2. Inconsistent Verdicts

Defendant also argues that the jury's verdicts in Counts 1 through 5 must be overturned because the guilty verdicts were inconsistent with its non-guilty verdicts in Counts 6 and 7.

Defendant contends that the inconsistent verdicts indicate that the jury did not believe all of the victim's testimony and must have believed some of Defendant's testimony. The Court rejects Defendant's argument.

It is well established that "consistency in verdicts is not required." *United States v. Jaynes*, 75 F.3d 1493, 1508 (10th Cir. 1996) (upholding conspiracy conviction despite defendant's acquittal of aiding and abetting substantive offenses). "This rule has been explained 'as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch.'" *Id.* at 1508-09 (quoting *United States v. Powell*, 469 U.S. 57, 65 (1984)). A jury may have properly reached its conclusion of the defendant's guilt on one offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the other offense. *Powell*, 469 U.S. at 65. Because the inconsistency may be the result of lenity and the government cannot invoke review, the Supreme Court ruled that inconsistent verdicts are not reviewable. *See id.* at 66-67. The Supreme Court determined that a criminal defendant is already protected from jury irrationality by the independent review of the sufficiency of evidence undertaken by the trial and appellate courts. *Id.* at 67. Thus, whether or not a verdict is inconsistent, a court must uphold a defendant's conviction if there was sufficient evidence to support a guilty verdict on the charge for which the defendant was convicted. *See Jaynes*, 75 F.3d at 1509. Accordingly, the Court's review of the sufficiency of the evidence as to Counts 1 through 5 would "be independent of the jury's determination that evidence on [Counts 6 and/or 7] was insufficient." *Powell*, 469 U.S. at 67.

For the foregoing reasons, the Court declines to examine whether the verdicts in this matter were inconsistent. Because the Court has already determined that there was sufficient

evidence to support the jury's guilty verdicts for Counts 1 through 5, Defendant's motion for acquittal must be denied.

B. Motion for New Trial

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). In deciding a motion for new trial, a court should weigh the evidence and consider the credibility of witnesses in determining whether the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred. *United States v. Evans*, 42 F.3d 586, 593 (10th Cir. 1994). "Although a trial court is afforded discretion in ruling on such a motion, and is free to weigh the evidence and assess witness credibility, a motion for new trial is regarded with disfavor and should only be granted with great caution." *United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999) (internal citation omitted).

Defendant offers two grounds in support of his request for a new trial. First, Defendant argues that he is entitled to a new trial because the jury's verdict was against the weight of the evidence. The Court disagrees. The Court finds that the victim's testimony in this case was credible and, thus, concludes that there was sufficient evidence to support the jury's verdict as to Counts 1 through 5. *Cf. Gabe*, 237 F.3d at 961.

Second, Defendant asserts that the Court erred in ultimately admitting into evidence testimony that the victim and two other people returned home from a wake one evening to find Defendant passed out, with his penis exposed, while a pornographic videotape played on the television. Defendant contends that this evidence was highly prejudicial and that the admission of the testimony into evidence prevented him from receiving a fair trial.

On May 1, 2006, Defendant filed a Motion in Limine (Doc. No. 29), seeking to exclude under Federal Rule of Evidence 403 four x-rated videotapes found in Defendant's bedroom closet as well as the exposure testimony. Federal Rule of Evidence 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." On September 11, 2006, the Court, in a Memorandum Opinion and Order (Doc. No. 43), granted the motion in limine after concluding that the slight probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

During the trial, towards the end of defense counsel's cross-examination of the victim, the government asked the Court to reconsider its ruling on the motion in limine. *See* Tr. 242-46. At that time, the Court denied the government's motion to reconsider its ruling excluding the evidence. *See id.* at 246, 261. The Court did not reverse its decision until near the completion of Defendant's testimony on cross-examination. *See id.* at 376. It was only after Defendant had testified and opened the door to the disputed testimony that the Court determined that the probative impeachment value of the evidence outweighed the danger of unfair prejudice. *Cf. United States v. Burch*, 153 F.3d 1140, 1144 (10th Cir. 1998) (admission of rebuttal evidence to impeach credibility of witness is within sound discretion of district court).

The Court ultimately determined that Defendant's testimony representing himself as a benign drunk whose drinking did not impair his judgment made the exposure testimony relevant for impeachment purposes. The victim testified that her relationship with Defendant changed, "after he came back from rehab and he started drinking again." Tr. 191. Defendant admitted to being an alcoholic and to drinking alcohol almost every day during the time that the victim lived

with his mother and him. *See id.* at 321-22. Defendant, however, testified that we would generally "drink and not do anything." *Id.* at 338. He also testified that "when [he] drank, [he] really didn't want to go home because [he] would rather be out with [his] friends or [his] relatives back in McCarty, where [he] was drinking." *Id.* at 344. Defendant further stated: "And when I drank, all it did – all I wanted to do was – it just got me in a lazy mood. All I wanted to do was sit down and just leave me alone and drink. Well, if I passed out, well, I passed out. . . . So I would sit there, and the alcohol would just make me relax and just want to sit there and not do anything." *Id.* at 345. Defendant also stated that drinking beer never impaired his judgment to the point that he did not know what he was doing. *Id.* at 362. He testified that his drinking had not yet reached the point where it impaired his judgment. *Id.* at 373.

The Court found, following the completion of the government's cross-examination of Defendant, that there was significant probative value for impeachment purposes of the testimony regarding Defendant passed out drunk, exposed, in front of a pornographic video playing on the television. The testimony at issue impeaches Defendant's claims that drinking did not impair his judgment and that he knew what he was doing when he drank. The testimony also impeaches Defendant's statements that he would sit down and not do anything when drinking. The challenged testimony indicates that Defendant, when drinking, did engage in activities of a sexual nature, contrary to what his testimony represented. The Court therefore concluded that the Rule 403 balancing weighed in favor of admitting the evidence because the exposure testimony had significant probative impeachment value that was not outweighed by its potential for unfair prejudice. After reviewing the briefs and the evidence, the Court continues to find that the Rule 403 balancing weighed in favor of admitting the exposure testimony and determines that it did

not err in allowing the government to impeach Defendant regarding the exposure incident.[1]

Defendant additionally argues that the Court refused to make a record at the bench conference of the reasons for its admitting the exposure testimony into evidence. The record clearly shows, however, that the Court gave its reasons: "I've concluded that there is significant value in impeaching – probative value in impeaching the defendant by the incident that has been described in the motion in limine. . . it's impeachment only." Tr. 376. When asked by defense counsel to explain what Defendant said that opened the door to the evidence, the Court responded, "Well, he said he was completely in control of his senses, he didn't lose his judgment. That much is clear, that he lost it then." *Id.* The Court further explained, "[Defendant] denies that his judgment was impaired, and I submit that that occasion flies in the face of his denial of losing judgment. And I'm going to limit the extent of the cross-examination with respect to that to the extent that I've described." *Id.* at 377. The Court also gave defense counsel adequate opportunity to make his own record. *See id.* at 377-80. The Court held three separate bench conferences on the issue during each of which defense counsel argued his position.

Defendant also asserts that he was not given a fair trial because defense counsel was denied the opportunity to cross-examine the victim regarding the exposure incident. The challenged evidence, however, was admitted only for the limited purpose of impeaching Defendant. Defense counsel had the opportunity in re-direct to question Defendant about the

[1]The Court notes that it did not reverse its exclusion of the pornographic videotapes found in Defendant's closet, admitting only the exposure testimony. When the government resumed its cross-examination, it asked Defendant only about the exposure testimony and used it to impeach Defendant's statements that drinking did not impair his judgment. *See* Tr. 380-82. The government did not discuss the additional pornographic videotapes later found in Defendant's closet. *See id.* The videotapes were never admitted into evidence, although Defendant alluded to them during defense counsel's redirect. *See id.* at 384-85.

incident. Moreover, defense counsel never requested to re-call the victim in the case.

Finally, Defendant argues that he was prejudiced by the admission because defense counsel would have taken the time to view the videotape. Defense counsel, however, knew of the videotapes and their potential relevance prior to trial and could have viewed them before trial. The Court did not prevent defense counsel from reviewing the evidence. In any event, the exposure testimony was admitted for its impeachment value only, and again, defense counsel had the opportunity to question Defendant concerning the incident.

In sum, the Court finds that the Rule 403 balancing weighed in favor of admitting the exposure testimony for impeachment purposes and that the admission of the testimony was not so prejudicial as to deny Defendant a right to a fair trial. The interests of justice do not require a new trial in this matter. Accordingly, Defendant's motion for new trial should be denied.

IT IS THEREFORE ORDERED that Defendant's Motion for Judgment of Acquittal or in the Alternative, Motion for a New Trial (Doc. No. 57) is **DENIED** in its entirety.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. CR-05-1603 LH

STEVE CERNO,

Defendant.

Transcript of Sentence Hearing before The Honorable C. LeRoy Hansen, United States Senior District Judge, held in Albuquerque, Bernalillo County, New Mexico, commencing on May 1, 2007, at 1:56 p.m., and concluding at 3:04 p.m.

For the Plaintiff: Paul H. Spiers, Esq.

For the Defendant: Alonzo J. Padilla, Esq.

John De La Rosa, CCR
United States Official Court Reporter
421 Gold Avenue, Southwest
Albuquerque, New Mexico 87102
Phone: 505.348.2249

is not unduly harsh and is going to meet the purposes of sentencing as set forth in 18 U.S. Code 3553. I think the court can satisfy all concerned, get that healing process started, put this behind everyone, by imposing something less than a life sentence. That's what I'm asking you to do.

My client may not be happy about the fact that in my sentencing memorandum I asked you to impose a sentence of 10 years, but I think under the circumstances that it would be a reasonable sentence in this case. If you felt that was too long, obviously, you could give him less; if you think it's not enough, you could give him more. But I do not feel that a life sentence is reasonable in this particular case under the circumstances present in this case, and that the court should impose something that's reasonable but not life. I would ask the court to do that.

Do you want my client to come back up?

THE COURT: Please. Well, I want to make a few comments about what I observed in this case. I observed a child who in effect had been abandoned by everybody around her because her mother had died, and she had spent months, maybe even years, of caring for her. She was driving to various places to get medical

provisions for her mother while her mother was dying. Then, when her mother died, as I understand it, she had no place to go, so she was in effect without a home when her father did not accept responsibility for her or whatever it was that caused her stepmother and her father not to accept her living with them. She is abandoned. And her grandmother was kind enough to accept her as a resident in her home, which was an extraordinary gift by her grandmother, no matter what the living conditions might be.

At that point, it appeared that -- at least it would have appeared to most people that she had to accept those living conditions, including the defendant, and she did. That included his sex abuse of her.

Finally, she had the strength to report it to someone who reported it to authorities, and thank goodness, because otherwise she would have many more scars than she does today.

I listened to her testimony very carefully. I listened to the defendant's testimony. The jury did, too. They listened carefully. It was very hard for a jury to find somebody guilty of charges like this, but they did, 12 of them. Unanimous.

I reviewed the Presentence Report which

includes the history of the defendant and the history of the victim, and I think I know a lot about him. I have studied this case a great deal, and I reviewed the Presentence Report factual findings, and I have considered the sentencing guideline applications and the factors set forth in 18 U.S.C. 3553(a)(1) through (7). And in arriving at a sentence for this defendant, I have taken into account the guidelines and the sentencing goals, and I believe that the sentence that I will now impose reflects the guidelines and each of the factors embodied in 18 U.S.C. 3553(a).

As I have already said, I want to make the law predictable instead of guesswork, so I have relied to some considerable extent on the sentencing guidelines as an evaluation of what other persons of similar background and criminal history and conviction of specific crimes are sentenced to.

The offense level here is 46 and the Criminal History Category is I. The guideline imprisonment range is life. I note that the defendant committed five counts of aggravated sexual abuse, a crime in Indian country.

As to Counts 1, 2, 3, 4, and 5 of Redacted Indictment 05 Criminal 1603, the defendant is

committed to the custody of the Bureau of Prisons for a term of life. Said terms shall run concurrently.

The court recommends that the defendant participate in the Bureau of Prisons sex offender program.

I believe this sentence is reasonable and provides just punishment for the offense.

I understand that it is difficult for relatives to accept a court's sentencing, but this is Law Day, and we all have to live by the laws of this country.

I believe the sentence is reasonable and provides just punishment for the offense.

I struggled to find something that is mitigating that I could use to reduce the sentencing level. I didn't find anything that would justify a reduction in the term.

I find that the defendant is a danger to the community; therefore, voluntary surrender will not be granted.

In accordance with Rule 32(C)(3) of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within 10 days. Pursuant to 18 U.S.C. 3742(a), within 10 days of the entry of the judgment, you have the right to

appeal the final sentence of this court. You have the right to apply for leave to appeal in forma pauperis if unable to pay the cost of an appeal.

Mr. Cerno, I'm proud of the way you have turned your life around, but I still have to apply the rule of law as the law is to be applied. You're excused.

MR. PADILLA: Your Honor, I would ask first of all in terms of a recommendation that you recommend that he be sent to a prison by the Bureau of Prisons closest to his home, which would be I guess the western part of the State of New Mexico. His family lives in Acoma, so either LaTuna or Safford, but a facility closest to his home.

THE COURT: Safford is an appropriate place. I'll make those recommendations to LaTuna and Safford.

MR. PADILLA: I don't know whether the court would be willing to put on the record whether you find as part of your decision that the guidelines that you applied in this case are presumptively reasonable, whether that is part of the rationale for making your decision.

THE COURT: Well, I haven't ever ruled that. I don't know that it's necessary for me to rule that in this case, but I have used those guidelines as a