

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE**

<b>STATE OF TENNESSEE,</b>	)	
	)	
<b>Appellee,</b>	)	<b>Court of Criminal Appeals</b>
	)	<b>Case No. M2005-00166-CCA-R3-CD</b>
<b>vs.</b>	)	
	)	
<b>MARK SCHIEFELBEIN,</b>	)	
	)	
<b>Appellant.</b>	)	

**ON APPEAL AS OF RIGHT FROM THE  
WILLIAMSON COUNTY CRIMINAL COURT**

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**BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

This is an appeal as of right by Mr. Mark Schiefelbein from the Criminal Court of Williamson County, Tennessee. Mr. Schiefelbein was convicted of seven counts of aggravated sexual battery and one count of especially aggravated sexual exploitation of a minor. The judge imposed a twelve-year sentence for each offense and ran the sentences consecutively for an effective sentence of ninety-six years.

In summary, Mr. Schiefelbein operated a gymnasium in Williamson County. He was alleged to have molested an adolescent female student during gym class over a period of several months. The allegations were vigorously contested at trial. Mr. Schiefelbein denied touching the child in an inappropriate manner. The case was literally a swearing match of “he said” - “she said.”

As part of his gymnastic classes Mr. Schiefelbein would videotape his students. The State alleged that some of the videotapes unnecessarily focused on the “crotch” areas of the female children, including the alleged victim, and thus the State played hours and hours of these videotapes to the jury.

The defense requested copies of these tapes for trial preparation purposes. The State refused to provide copies and, instead, insisted that the tapes be viewed in the police department ostensibly because they were “pornographic.” The contested videotapes were of fully clothed children doing gym activities in front of dozens of other children and adults. The judge refused to allow the defense attorney to have his own copy of the tapes under the theory that the child would be “re-victimized” if the tapes were released. Consequently the

defense attorney was forced to travel to Williamson County with his client and review hours and hours of videotapes and, as a practical matter, never had the opportunity to view all the tapes. Thus, instead of engaging in more productive activities the defense attorney was distracted by having to review the evidence at the police department.

The defense asserts here on appeal that this discovery violation compromised Mr. Schiefelbein's right to counsel. This Court has recently ruled that the prosecutor may not withhold discovery from the defense under the theory that photographs of children are somehow "pornographic."

During the trial the judge was of the view that the public should not see the videotapes of the gym activities because this would present "re-victimization issues." The judge took the unprecedented step of having the spectators in the courtroom "shift" away from the television screen so that the public could not see the videotapes which were played to the jury. This bizarre procedure not only violated Mr. Schiefelbein's constitutional right to a public trial, but the jury could have been left with no other impression that the tapes were somehow "sinister." The unusual restrictions on the presentation of evidence, which is a matter of public record, is unprecedented in Tennessee and certainly conspired to deny Mr. Schiefelbein a fair trial. This Court should reverse this conviction in light of this error which was not only prejudicial to Mr. Schiefelbein but impacted the integrity of the judicial process.

This appeal also presents a host of evidentiary errors as well as the now-familiar *Blakely* sentencing issues. The primary evidentiary error is the judge's refusal to permit the defendant's medical expert to testify, which would have greatly impacted the credibility of

the complaining witness. This denied Mr. Schiefelbein the constitutional right to present a complete defense where credibility was everything. At bottom, the defense believes that Mr. Schiefelbein did not receive even the rudiments of a fair trial. Accordingly, this Court should reverse these convictions and remand this case to Williamson County.

This appeal as of right is accompanied by a companion Application for an Extraordinary Appeal by Permission pursuant to Rule 10, T.R.A.P. concerning a post-trial motion to dismiss three counts of rape which were improperly severed from the trial of the remaining counts. Mr. Schiefelbein asserts that those three counts should be permanently barred from trial given a violation of the compulsory joinder rule.

## **DESIGNATION OF THE RECORD**

The Technical Record in this matter is 800 pages in length and is divided into six volumes. References to the technical record will be by the abbreviation "TR." The trial of this matter was held in Williamson County and was one of the last cases conducted without a court reporter under the videotape project which has since been terminated. In light of the length of trial and the number of videotapes, the defense caused the videotaped trial to be transcribed by the official court reporter. The transcriptions are off the videotape and there are references in the transcript to the videotape at intervals. The trial judge then authenticated this transcript so that this authenticated transcript may serve as the record of the proceedings on appeal in lieu of the videotapes themselves. However, the videotapes of the trial have also been transmitted to the clerk of this Court and are also part of the record on appeal. All references to the record will be by roman numeral by volume number (as placed thereon by the clerk of this Court when receiving said record) and then by page number. There are twenty-three volumes of testimony. There are fifty trial exhibits and twenty exhibits associated with the sentencing hearing.

## **DESIGNATION OF PARTIES**

The appellant will be referred to by his name as Mark Schiefelbein. The appellee will be referred to as the State of Tennessee.



## ISSUES FOR REVIEW

- 1. Whether the Trial Court Erroneously Failed to Compel the District Attorney to Provide to Defense Counsel, for His Personal Viewing, Copies of Videotapes Taken from the Defendant's Premises, an Audiotape of Defendant's Conversation with Alleged Victim, and Materials Taken from the Defendant's Computer in Violation of Rule 16, Tennessee Rules of Criminal Procedure and in Violation of the Right to Counsel Provisions of the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution.**
- 2. Whether the Trial Court Violated Mr. Schiefelbein's Right to a Fair Trial under the Due Process Provisions of the United States and Tennessee Constitutions as Well as the Right to a Public Trial under the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitutions by Excluding the Public from Portions of the Courtroom So That the Public Could Not See the Various Videotapes That Were Being Played in the Courtroom as Evidence in the Trial.**
- 3. Whether the Judge Improperly Impeached Mr. Schiefelbein and Struck His Truthful Testimony in the Presence of the Jury in Violation of the Due Process Provisions of the United States and Tennessee Constitution and the Prohibition of the Invasion of the Fact-finding Function of the Jury in Violation of the Sixth Amendment to the United States Constitution, and Article I, Section 9 of the Tennessee Constitution.**
- 4. Whether the Trial Court Exhibited Extreme Bias During the Trial and Improperly Asked Questions of State Witnesses Which Were Designed to Bolster the Prosecution and Harm Mr. Schiefelbein in Violation of the Due Process Provisions of the United States and Tennessee Constitutions.**
- 5. Whether the Trial Court Erroneously Refused to Allow the Defense Expert to Testify as to the Findings in the State's Medical Report Which Showed That the Alleged Victim Had No Medical Injuries Which Deprived Mr. Schiefelbein of His Right to Present a Defense, Rebut the State's Evidence, and Also Deprived Mr. Schiefelbein of the Right to a Fair Trial under the Due Process Provisions of the United States and Tennessee Constitutions.**

- 6. Whether the Trial Court Erroneously Severed the Rape Counts from the Remaining Counts over the Objection of the Defense Lawyer and Thus a Future Trial is Barred by the Compulsory Joinder Provisions of the Rules of Criminal Procedure And, Potentially, the Double Jeopardy Provisions of the United States and Tennessee Constitutions.**
- 7. Whether the Trial Judge Repeatedly Permitted the State to Introduce Prohibited Hearsay and Opinion Testimony and Excluded Legitimate Defense Evidence Which Was Clearly Admissible in Violation of Multiple Provisions of the Tennessee Rules of Evidence.**
- 8. Whether the Trial Court Erroneously Permitted the District Attorney to Cross-examine Mr. Schiefelbein about a “Voice Stress Analysis.”**
- 9. Whether the Trial Court Erroneously Charged the Jury That Aggravated Sexual Battery Could Be Committed If the “Defendant Acted Either Intentionally, Knowingly, or Recklessly” in Violation of the Burden of Proof Requirements of Tenn. Code Ann. § 39-11-201 the Defendant’s Federal and State Constitutional Due Process Protections and His Rights to a Jury Trial.**
- 10. Whether the Trial Court Erroneously Instructed the Jury That the Mental State for Aggravated Sexual Battery Could Be Proved by the State in the Disjunctive in That the Court Told the Jury That the “Defendant Acted Either Intentionally, Knowingly or Recklessly,” in Violation of the Defendant’s Federal and State Rights to a Jury Trial and the Right to a Unanimous Verdict.**
- 11. Whether the Maximum Sentences Were Unlawful in Violation of the Sixth and Fourteenth Amendments to the United States Constitution Because the Enhancement Factors Used to Arrive at the Maximum Were Neither Admitted by the Defendant Nor Found by the Jury.**
- 12. Whether the Trial Court Erroneously Imposed Consecutive Sentences Which Constituted an Abuse of Discretion in the Absence of Appropriate Factors.**
- 13. Whether the Sentence Length and the Consecutive Sentencing Were Illegal Because of the Failure of the Court to Require the State to Produce the “Raw Data” upon Which the State’s Experts Based Their Opinions.**
- 14. Whether the Trial Judge Should Be Removed from Further Proceedings in this Matter.**

## STATEMENT OF THE CASE

On November 12, 2002, the Williamson County Grand Jury indicted Mr. Schiefelbein for three counts of rape of a child, seven counts of aggravated sexual battery, and one count of especially aggravated sexual exploitation of a minor. (TR I, pp. 37-47). On July 7, 2003, the State moved to sever the rape charges from the other offenses. Over the objection of the defense attorney the Court granted the motion to sever in an oral ruling. (TR XXII, pp. 2168-2169). See also the Order entered on July 7, 2003 noting that the Court granted the State's motion to sever Counts 1, 3, and 8. (TR III, p. 367).

The jury trial began on July 7, 2003 and continued until July 12, 2003. The jury convicted the defendant of seven counts of aggravated sexual battery and one count of aggravated exploitation of a minor. (TR III, p. 373).

On September 30, 2003 the judge imposed the maximum of twelve years on all eight counts and ran all the sentences consecutively for an effective sentence of 96 years. (Vol. IV, pp. 484-491).

A motion for new trial and a motion for reduction of sentence were filed on October 8, 2003. (TR IV, pp. 492-495). The defendant filed a motion for judgment of acquittal on September 1, 2004. (TR IV, p. 536). An amended motion for new trial was filed on September 1, 2004. (TR IV, p. 556). An amended motion for reduction of sentence was filed also on September 1, 2004 raising the *Blakely* issues. (TR IV, p. 588). A second amended motion for new trial was filed on October 14, 2004. (TR V, p. 609).

The defense also filed motions to dismiss Counts 1, 3, and 5 of the Indictment on September 1, 2004. (TR IV, p. 538).

All of the motions came to be heard on October 18, 2004, whereupon the Court denied the motion for a new trial. (TR V, pp. 624-628).

On December 15, 2004, the Court denied the motion to dismiss. (TR VI, p. 788). On December 15, 2004, the Court also denied the motion for judgment of acquittal. (TR VI, p. 786).

A notice of appeal was timely filed on January 7, 2005. (TR VI, p. 790). The Defendant, Mr. Schiefelbein remains confined pending his appeal.

## STATEMENT OF THE FACTS AT TRIAL

### A. STATE'S PROOF

#### REBECCA JOAN ROBINSON

[QUESTION BY THE JUDGE]

Rebecca Joan Robinson (hereinafter referred to as "Becca") testified that to tell the truth means you tell what you know, you make sure that you tell exactly what happened to you, and you tell the truth. She said to tell a lie means to not tell the truth. (Vol. XII, pp. 295-296).

[DIRECT EXAMINATION]

Rebecca Joan Robinson was born on June 15, 1990 and she is thirteen years old. Becca goes to Harpeth Hall school and will be in the eighth grade. She lives with her mom and dad, Jill and Ross Robinson, in Brentwood. Becca's dad is a cardiac anesthesiologist at Saint Thomas Hospital and her mom stays at home. Becca has three sisters, Paige, who is 17, Ashley, who is 15, and Amy, who is 9. (Vol. XII, pp. 296-297).

Prior to living in Tennessee, Becca and her family lived in North Carolina. She was four years old when she moved to Tennessee. (Vol. XII, p. 298).

Becca stated that she does not take gymnastics anymore. She started taking gymnastics when she was two years old at Highpoint Gymnastics in Highpoint, North Carolina. (Vol. XII, p. 298).

Becca testified that when she moved to Tennessee she continued taking gymnastics at Let It Shine gym and trained there for six or seven years. Becca left Let It Shine to train at Harpeth Gymnastics for a period of time and then took a year off. She then went back to

Let It Shine for one-and-a-half years to two years. Becca believes she left Let It Shine to go to Harpeth Gymnastics because her mom wanted her to try a new gym. (Vol. XII, p. 299).

Becca left Let It Shine the second time because one of her coaches, Mark Schiefelbein, was starting his own gym called Espirit Gymnastics. Becca first went to Gabby's because Mr. Schiefelbein had not opened up his gym yet. Mr. Schiefelbein paid Gabby to use her gym until his gym opened. Becca later went to Espirit when it opened. (Vol. XII, pp. 300-301).

Becca described gymnastics as four events; floor, bars, beam and vault. She liked the bars best because it was the most fun and she got to do a lot of fun things and try new stuff although some of it was kind of scary. (Vol. XII, p.301).

Becca competed against other gymnasts and explained that there are different levels of competing. She said gymnastics was pretty fun and she had a high interest in it. She thought about going to the Olympics but it was pretty hard to get to there. (Vol. XII, pp. 302-303).

Becca began competing at level four. She had always competed up to the time she stopped taking gymnastics. She has won awards and believes she has won the most awards on the bars. (Vol. XII, pp. 303-304).

(Witness shown Exhibit 1 - Photograph)

Becca testified that pictured in the photograph (Exhibit 1) is herself, Mr. Schiefelbein, Jordan Melton, Andy, Caitlin Marrs [Waters], and Alli Wesson [Williams]. Becca placed second all around, fourth in vault, first on bars, sixth on beam and third on floor event. The competition was in Atlanta, The Bamarama, and she said it was a fun meet. They won that

competition and were undefeated that year. Becca was in level six and was eleven years old at the time. (Vol. XII, pp. 304-306).

Becca testified that she was Mr. Schiefelbein's favorite student. He told her that more than one time while in gymnastics class. She said she was the only one who could go into the office. (Vol. XII, p. 307).

Becca testified that when she left Let It Shine to train at Mr. Schiefelbein's gym that she liked him. She does not like him now because he touched her vagina and breasts during gymnastics class. She said the touching first started when she would do frog stretches and Mr. Schiefelbein's hand would be on top of her vagina over her leotard. Becca told Mr. Schiefelbein that she felt uncomfortable and he said that he would try to move it. She said his finger would sometimes slip under her leotard and he would touch her vagina area. (Vol. XII, pp. 308-309).

Becca would tell Mr. Schiefelbein, "Mark, your hand is under my leotard. Please don't put it there. I don't want it there." She said he would say okay and would put his hand back on top and it would end up slipping in again. (Vol. XII, p. 309).

Becca testified that Mr. Schiefelbein's hand touched her vagina area over her leotard while doing frog stretches around eight to ten times, but maybe higher. She cannot remember the exact number of times because it is hard to remember those things and she does not like remembering it because it is a bad memory. She said "who wants to remember that, I don't." (Vol. XII, pp. 309-310).

(Becca demonstrates to the jury a frog stretch)

Becca testified, while demonstrating a frog stretch to the jury, that Mr. Schiefelbein's hands would be on her butt and his fingers would be in between her legs, basically on her vagina. (Vol. XII, pp. 310-311).

(Using a doll, Becca demonstrated how her legs and body would be in a frog stretch in a middle split with the knees bent ninety-degrees and her torso flat on the ground.)

Becca demonstrated on the doll how her legs would be bent apart and how Mr. Schiefelbein's fingers would be. She said his fingers would sometimes move under her leotard but sometimes his fingers stayed still. (Vol. XII, p. 312).

Becca stated that a leotard looks like a one piece swimsuit but the leotard has thicker straps. (Vol. XII, p. 313). Becca was shown some of her leotards. She remembered some of the leotards she was wearing when Mr. Schiefelbein's finger would slip underneath her leotard. (Vol. XII, p. 313).

After being shown her yellow leotard by the district attorney, Becca then recalled that "Mr. Schiefelbein's finger would not slip under that much with that one. But they could [with] that one." (Vol. XII, pp. 313-314).

(Exhibit 2 entered - Yellow Leotard)

When asked if she recalled another type of leotard she would be wearing, Becca responded with, "Well the pink one you had out." She stated, "that was a leotard that Mr. Schiefelbein's finger might have slipped under on." When asked again about his finger slipping under, Becca responded, "I think so, that I can remember." (Vol. XII, p. 314).

(Exhibit 3 entered - Lavender Leotard)



When asked what other kinds of leotards she would wear, Becca's response was, "I don't really remember what they looked like." When shown her zebra striped leotard, the district attorney asked her what was her recollection when wearing that one. Becca responded with, "His fingers [were] mostly on top, but they could slip under it." Becca was unable to recall wearing any of her leotards without them first being shown to her by the district attorney. (Vol VI, pp. 315-316).

(Exhibit 4 entered - Zebra Leotard)

Becca testified that she recalls talking to Detective Breedlove wherein she stated that Mr. Schiefelbein's finger went under her leotard about 30 times. Becca now says it was probably some number between 8 to 30 – like 15, 16, or maybe 17 times. (Vol. XII, p. 317).

Becca testified that the reason for the difference in the number of times she stated that Mr. Schiefelbein touched her is that she thinks she may have been second guessing herself because she was so distraught. She says the number is a little lower than what she told Detective Breedlove. (Vol. XII, p. 318).

Becca testified that she was angry inside and just mad at the things Mr. Schiefelbein did to her because they are wrong. She said "you" should not do that to people and she was just distraught about it. When she was talking to Adrian [Detective Breedlove] she said she was confused on certain points. She was distraught and thinks the amount was lower now that she thinks more about it. (Vol. XII, p. 319).

Becca testified that while she was doing frog stretches she would sometimes be on the regular floor because the rod floor would hurt her knees, but most of the time she would be

on the rod floor. She explained that a rod floor is “like a strip of floor and it is very bouncy and easier to tumble on.” (Vol. XII, pp. 319-320).

Becca testified that the very first time Mr. Schiefelbein touched her was on the regular floor and was over her leotard. She stated there were other students in the gym at the time and she believes they were right next to her. She believes this occurred when she was competing at level six. Becca remembers this being the first time because it was when it was over her leotard and she told Mr. Schiefelbein that it did not feel comfortable. She kept it in a couple of times because it had been over her leotard and she had just not talked to him about it yet. (Vol. XII, pp. 320-321).

Becca testified that Mr. Schiefelbein touched her on the rod floor. She stated that he made her “do everything over there on the rod floor.” She said he would make her pull aside her leotard and he would touch her vagina. (Vol. XII, p. 321).

Becca testified that when they were doing the frog stretches that Mr. Schiefelbein would stretch the gymnasts in order. At first Becca was the one who would go first but she then became the last one to be stretched. She said he would touch her while the other girls were on the trampoline, doing workouts and [beams]. (Vol. XII, p. 322).

(A diagram of the gym is shown to the witness - Exhibit 5)

Becca testified that there was some “stuff” missing on the diagram of the gym she was being shown. Becca indicates on the diagram where Mr. Schiefelbein’s office is and that the office has a door. She stated the office had a window and that Mr. Schiefelbein had patched it up at some time. She indicates on the diagram where the parents sat and where the rod floor and regular floor were. (Vol. XII, pp. 323-324).

Becca indicates that the diagram is missing the trampoline, bars, lockers and [balance beams] and indicates where the trampolines, lockers and beams were located. (Vol. XII, p. 325).

Becca indicates on the diagram where she was on the rod floor when Mr. Schiefelbein touched her. She stated that it was open to everybody's view and there was a purple and white mat near her that could be folded into a square. (Vol. XII, pp. 325 - 326).

Becca testified that when Mr. Schiefelbein touched her on the rod floor that the other girls were on the bars. Becca indicates on the diagram where she was and where Mr. Schiefelbein was when she was doing frog stretches. (Vol. XII, p. 326).

Becca testified that when she would pull her leotard aside, she did that because Mr. Schiefelbein said to her, "let me see it so I can see where I'm touching you." She said she "gave in" because he gets really mad very easily and she does not like it when he gets mad because he would yell a lot. (Vol. XII, pp. 327-328).

Becca testified that after she pulled her leotard aside, Mr. Schiefelbein would look and would say "can I touch it?" Becca told him no, but then she "gave in" because he would get angry and she was his favorite and she did not want him to get angry at her so she would pull it aside, and then he would ask her if he could touch her vagina for three seconds. She told him no but finally gave in because he would get angry. (Vol. XII, pp. 328-329).

Becca testified that when she pulled her leotard over to the side that she was sitting in a straddle position. (Vol. XII, p. 329). Becca indicates on the diagram where Mr. Schiefelbein was standing when she was in the straddle position. She said he would be in front of her and they were on the rod floor behind the mat. (Vol. XII, p. 330).

Becca testified that the first time Mr. Schiefelbein had her pull her leotard aside and touch her was when she was training for level seven. (Vol. XII, pp. 331-332).

Becca testified that Mr. Schiefelbein would ask her how it felt on a scale one through ten and she would say zero because it did not feel good to her. It made her feel violated. Mr. Schiefelbein would then say “no, you’re lying. It had to feel good.” Becca stated that every time she would tell the truth he would be angry with her so she started to lie about it. She would say “fine, it felt good and give him a number,” but she was lying because she knew he would be angry at her if she told him the truth. (Vol. XII, p. 333).

Becca testified that she did see Mr. Schiefelbein with a video camera. He would be taping their tricks on the bars, trampoline, and the rod floor. (Vol. XII, pp. 333-334).

Becca testified that the video camera was sitting on the mat and Mr. Schiefelbein told her that he had an idea but he knew that she was going to hate it. He said, “let me video tape your vagina so I won’t have to look at it again.” Becca told him no, but she finally gave in because she did not like him being angry at her. He made her pull aside her leotard and he sat the video camera on the ground and videotaped her vagina. (Vol. XII, p. 334).

Becca testified that the next day he told her the videotape did not turn out so he needed to do it again. Becca told him no, but she gave in. Mr. Schiefelbein would get angry at her and she did not like it when he was angry with her because he would ignore her so she would give in. (Vol. XII, p. 335).

Becca testified that this time he wanted her to pull aside her leotard and he wanted to fix her leotard and she told him no. He told her to pull it aside and said “now let me fix your

leotard” and she told him no. She finally gave in and he fixed it, then he touched her vagina in the second videotape. <sup>1</sup> (Vol. XII, pp. 335-336).

Becca testified that she had started to “develop” breasts and told her mom. Her mom said “why don’t you tell him” and Becca said “no, I don’t want to.” At the gym that day Becca told Mr. Schiefelbein about it and he wanted to see what they looked like. She told him no, but she gave in and he wanted to touch her breasts. She went into the office and he said, “let me see,” and she said no. She gave in and she pulled aside her leotard and then he put his hand in her leotard and felt her breasts. At this time the door was closed and she had her back to the door. Becca is pretty sure it was on May 1st when this happened because she was in the shower and her mom said, “it is May 1st and it happened.” Her mom told her to never forget that date. (Vol. XII, pp. 338-340).

Becca testified that it did not make her very happy when Mr. Schiefelbein touched her breasts. She said it was violating her personal space and she did not like that. (Vol. XII, p. 340).

Becca testified that Mr. Schiefelbein made her touch his penis in the office. The first time he made her put her hand in his pocket and squeeze his penis. She said he was wearing “those black squishy pants that whenever he walked it made a noise” that were like sweat pants. (Vol. XII, pp. 340-341).

Becca testified that the day Mr. Schiefelbein made her touch his penis in his pocket was the same day he made her touch his penis out of his pocket and he had on the same

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<sup>1</sup> No videotapes of this alleged taping were ever located although the police executed a secretly obtained search warrant for Mr. Schiefelbein’s home and office.

clothes. (Vol. XII, p. 341). Becca remembers that they were over by the gym bars and she remembers him asking her to put her hands in his pocket because he had a treat or something like that in his pocket for her. (Vol. XII, p. 342).

Becca remembers this was sometime in the winter after Thanksgiving either 2001 or 2002 – she was not sure of what year. Becca said she quit gymnastics in June of 2002 so it would have been the Thanksgiving before she quit. She remembers it was winter because Mr. Schiefelbein only wore long pants when it was winter. Becca recalls talking to Detective Breedlove and telling him that Mr. Schiefelbein had on shorts but she does not remember why she said that because she remembers clearly that he was wearing black pants. (Vol. XII, pp. 342-343).

Becca testified that Mr. Schiefelbein called her into his office and she was like “oh, no,” because she thought something was going to happen. She thought that because he was angry because she did not want to put her hand in his pocket. He called her in and he pulled his penis out and she turned around and was like “ugh” because she was not expecting anything like that. He then said “you can touch it and squeeze it.” Becca said she did not want to and he grabbed her hand and made her squeeze his penis. (Vol. XII, p. 344)

Becca testified that Mr. Schiefelbein’s penis (when she touched it) looked like it was swollen because it was purple and red and it felt squishy. She stated “it was not the best feeling in the world.” Becca stated that the only other time she had seen a penis before was when she walked by and saw her dad taking a shower. (Vol. XII, pp. 360-361).

(Witness given a male doll to demonstrate).

Becca demonstrated with the doll how Mr. Schiefelbein pulled out his penis. (Vol. XII, p. 345).

Becca quit the gym in June of 2002 because her back was fractured and she was taking time off. She said the main reason she quit was because of Mr. Schiefelbein touching her vagina and breasts, but she did not tell her parents that. She said Mr. Schiefelbein told her not to tell her parents because he would get in trouble. He told her “please don’t tell. I’ll get in trouble.” Becca did not want to get in trouble for telling because she thought he would get angry with her. He told her that more than one time when they were at the gym. (Vol. XII, p. 346).

Becca fractured her back by incorrectly landing “double backs” off the bars and by doing two flips in succession on the floor and just landing really low. Every time she did it, it would hurt her back. She went to the doctor and was told she would have to wear a back brace and wore it for about four months and could not do gymnastics with her back in that condition. (Vol. XII, pp. 346-348).

Becca’s parents were very supportive of her when she quit gymnastics because she had not told them yet the real reason why she had quit. She really had not quit at the time but was thinking about it and told them she wanted to quit and that she was not enjoying it. (Vol. XII, p. 348).

Becca testified that after she quit gymnastics, Mr. Schiefelbein drove over to her house in the “tumble bus” to talk to her about quitting gymnastics. (Mr. Schiefelbein uses the “tumble bus” as a mobile gymnasium to teach children gymnastics.) Becca told Mr. Schiefelbein on the bus that she wanted to quit because she was not enjoying gymnastics.

One of Becca's friends, Mia Yabut, was on the bus with them during this conversation. Mr. Schiefelbein then made Mia leave the bus and go into the house. Mr. Schiefelbein then asked Becca if the real reason why she wanted to quit was because of him touching her and Becca said yes, that was the real reason. (Vol. XII, pp. 348-349). Becca recalls that this occurred the day after they celebrated her sister's birthday which was June 30th. She said Mr. Schiefelbein told her he would not touch her again and she did not believe him. She did not trust him because of what he had done to her and she did not like being around him. Becca does not remember how Mr. Schiefelbein acted when she told him this.(Vol. XII, pp. 349-350).

Becca testified that Mr. Schiefelbein wanted them to come to the gym the next day so they could talk about her "really quitting." Becca went to the gym and he told her he wanted to talk to her in the office. She told him, "Mark I really want to quit." He said, "Well you need to come a little bit longer to make sure you still want to quit." Becca said, "I really want to quit." She told her parents to come in and she started crying and said, "Mom, I really want to quit." Becca said her mother told her, "Well, I think you should at least go." Becca said, "Mom, I just want to quit," and her mother got mad at her because she wanted to quit and her back was getting better. Her mom then left the gym and went out to the car. (Vol. XII, pp. 351-352).

Becca explained that after she told her parents she wanted to quit they were supportive of her "all the way." Becca said she was not enjoying gymnastics and they knew that. Becca said she did not make "this" up just so she could get out of gymnastics. She said she could never make up something like "this" because "it's just so nasty" and she thinks "it" is



just wrong. Becca eventually told her parents why she really wanted to quit gymnastics. (Vol. XII, pp. 351-353).

Becca told her parents why she wanted to quit gymnastics on September 8th which was the night Mr. Schiefelbein was over and she was angry at him because he was teasing her about a boy. Becca hit him over the head and he got angry with her and her mom asked her why she did that and she said because he was teasing her and it made her very angry. Becca went up to her room and started crying. She came back downstairs and her mom asked her again why she did that and she told her, "Mom, I have multiple reasons why I did that." Becca said she had all of this anger built up inside her because of him touching her and "all that other stuff." Becca said her mom asked, "Well, did he touch you or something like that?" Becca told her, "Yes mom, he did." Becca said her mom felt like something like that was going on. (Vol. XII, pp. 353-354).

Becca testified that when Detective Breedlove came to her house he had her call Mr. Schiefelbein and talk to him over the phone. Becca knows Mr. Schiefelbein's voice because she had been doing gymnastics with him for a very long time and she just recognized his voice when he answered the phone. (Vol. XII, pp. 358-359).

Becca testified that Mr. Schiefelbein had given her presents before. Becca stated that after she touched his penis he said, "I'm really sorry for making you do that, I'll give you anything that you want." She told him she wanted a teddy bear and he said okay and bought her one. (Vol. XII, p. 359).

(Teddy Bear entered as Exhibit 6)

Becca testified that when she got the teddy bear she put it in her bag and told her mom that she got it for working with him coaching. She did not want her to know the real reason and afterwards she hid it. (Vol. XII, p. 360).

When asked if the door to the office would close, Becca answered in the affirmative. Becca stated that while in the office, “you could just picture a hole in the wall and then like you would be sort of in the office but you would still be able to see like the gymnastics and stuff going on.” She said Mr. Schiefelbein never acted like he was worried about other people seeing in the office and that he never said anything to her about it that she can remember. There was also a cut out of the wall and there was this glass container so you could be in the office but you could still see out in the gym. Becca does not remember if the cut out was in the office when she was in there or not. (Vol. XII, pp. 362-363).

Becca testified that one time on the rod floor Mr. Schiefelbein was touching her and the Yabuts walked in and he told her to do the stretch again so they would not know anything was going on and so they are not suspicious. Becca stated that whenever she did frog stretches all of the girls were always behind the mats. (Vol. XII, pp. 363-364).

Becca testified that Mr. Schiefelbein did not touch her every time she did frog stretches, but almost every other day. (Vol. XII, p. 365).

Becca testified that Mr. Schiefelbein never showed her any of the videotapes that he made. She said that Mr. Schiefelbein told her that he destroyed them. (Vol. XII, pp. 365-366).

[CROSS-EXAMINATION]

Becca testified that she did say that she was the only one that was allowed in Mr. Schiefelbein's office. Becca agreed that Mr. Schiefelbein never told the other students that they were not allowed in his office and only she was. Becca has seen other girls in Mr. Schiefelbein's office but the other girls can only go in his office if he calls them in and they cannot just openly walk in. She said that no one has ever knocked on the office door to get Mr. Schiefelbein's attention. She said they would just talk to Mr. Schiefelbein outside of his office. She agreed that she has seen parents and other students in his office. (Vol. XIII, pp. 376-378).

Becca testified that she knows the difference between good touching and bad touching. Becca said that bad touching is basically touching you in your private area like your vagina and your breasts. Good touching is hugs and holding hands. Her father and mother taught her about good and bad touching which she thinks was before Mr. Schiefelbein touched her. Her mother told her to tell the person who touched her no and to tell her about it. (Vol. XIII, p. 378-379).

Becca knew that if someone touched her in a bad way that she could tell her mom and her mom would protect her and take care of her. She knew that if she told her mom about Mr. Schiefelbein touching her that her mom would not let her go back to the gym. Becca agreed that whether Mr. Schiefelbein would have been angry about her telling her mom was irrelevant because her mom would have taken her out of the gym. (Vol. XIII, p. 381).

Becca testified that most of the touching that occurred at the gym was on the rod floor and always occurred while gym was going on and was behind the mat every time. Becca has spoken with Detective Breedlove about this once or twice. (Vol. XIII, p. 382).

Becca testified that besides Detective Breedlove, she has spoken with a lady police officer; she does not know her name. She has also spoken with Mary Katharine, Marlene and Amy. She is not sure who Marlene works for but Amy works for Child Advocacy Center. Becca does not recall talking with an agency called Our Kids where she and her mom went to talk to them about this. However, she does remember having a physical exam. (Vol. XIII, pp. 383-384).

Becca testified that in her conversations with Detective Breedlove, the lady officer, Amy and Marlene that she did mention a mat. (Vol. XIII, pp. 384-385).

Becca testified that the purpose of a rod floor is to make you tumble higher. Becca agreed that if there were mats in the middle of the rod floor then you could not tumble very far and you would have to move them off of the rod floor. She stated the rod floor is maybe a foot off of the floor. The floor is concrete with carpet on it. (Vol. XIII, pp. 385-386).

(Witness shown Exhibit 5 - Diagram of the Gym)

(Witness shown photograph)

Becca indicates that on the right side of the picture is the rod floor. (Vol. XIII, p. 387).

(Photograph entered as Exhibit 7)

(Witness shown a second photograph)

Becca indicates that this second photograph is of the rod floor also. (Vol. XIII, p. 388).

(Photograph entered as Exhibit 8)

Becca testified that there was one more piece of the gym missing from the diagram of the gym (Exhibit 5) which was a mirror on one of the walls. The mirror runs the full length of the floor. (Vol. XIII, p. 389).

(Witness shown a photograph)

(Photograph entered as Exhibit 9)

Becca indicates on the diagram that the mirror is on the left-hand wall beside the floor running the length of the floor mat. Becca testified that Mr. Schiefelbein had a designated parent viewing area and that it is quite common for gymnastic centers. (Vol. XIII, pp. 389-391).

Becca testified that if you are in the parent's area you are able to see "almost everywhere" in the gym. She stated that you cannot see right where the rod floor starts because the bathroom covers it up. Other than one small area Becca agreed that one could see everything from the parent viewing area. (Vol. XIII, pp. 391-392).

Becca testified that while the "bad touches" from Mr. Schiefelbein were going on in the gym, there were other students in the gym. She was not quite sure how many other students were in the gym. However, Becca agreed that she previously had told Detective Breedlove that there were forty to fifty students in the gym during those times. (Vol. XIII, p. 392).

Becca testified that when Mr. Schiefelbein would touch her that there were never any parents or other adults in the gym. (Vol. XIII, p. 394).

Becca agreed that when she was on the rod floor the other girls were on the trampoline or the bars. (Vol. XIII, p. 394).

(Witness shown a photograph)

Becca indicates that the photograph shows the trampolines that the other girls were on. (Vol. XIII, p. 395)

(Photograph entered as Exhibit 10)

Becca testified that there were times when other girls were doing frog stretches and she was on the trampoline. Becca stated that when you are on the trampoline that there is a “tumble tramp” but it does not totally block the view of the rod floor because the trampoline is higher than the rod floor. She also agreed that when you are standing up on the trampoline that your eyes are even higher than the trampoline and you can see the rod floor from the trampoline. (Vol. XIII, pp. 396-397).

Becca agreed that when Mr. Schiefelbein was stretching either her or any of the other girls, in order for a girl to go to another apparatus or another skill they would have to get Mr. Schiefelbein’s permission. She also agreed that if they want to go to the bathroom or get a drink of water they have to ask permission from him also. (Vol. XIII, pp. 397-398).

Becca described Mr. Schiefelbein as a “pretty good coach” and he taught very good gymnastics. She said he would holler at her a lot of the times and that he was a hard coach. She agreed that she improved as a gymnast with Mr. Schiefelbein. (Vol. XIII, p. 398-399).

Becca agreed that she first said Mr. Schiefelbein touched her eight to ten times. She later said he touched her twenty to thirty times and then she said he touched her every other day. She is not sure for how long or when it started or when it ended. She stated that it started in 2001 somewhere around March or April and ended in 2002. (Vol. XIII, pp. 399-400).

Becca testified that Mr. Schiefelbein was touching her every other day, most of the time, unless he had a compromise with her that he would not touch her for a month. (Vol. XIII, pp. 400-401).

Becca agreed that she was “distraught” when talking with Detective Breedlove. She defined “distraught” as having a bunch of different feelings and you don’t know what to feel. Becca said when she was talking to Detective Breedlove that she was happy that she was actually telling him what happened, but was sad and angry too. (Vol. XIII, p. 401).

Becca testified that she did not tell Detective Breedlove that she was sad and angry. She agreed that on the videotape she was playing around at the police department. She agreed that she was faking sneezes but she says she was still angry. She stated that she was “partly happy.” (Vol. XIII, p. 402).

Becca testified Mr. Schiefelbein started touching her when she was doing frog stretches at the end of level six but before she started level seven. Becca agreed that she told Detective Breedlove that it was around Fall Fiesta, summer/fall of 2001. (Vol. XIII, pp. 403-404).

Becca testified that the last time Mr. Schiefelbein tried to touch her was when she was at a house and was taking care of dogs, her family was next door and he asked if he could

touch her breast and she told him no. The last time he actually touched her was sometime in March of 2002. (Vol. XIII, p. 405).

(Witness demonstrates the frog position with the doll)

Becca testified that while in the frog position Mr. Schiefelbein would be pushing her with his right and his left hand would be up further on her back. She does not remember exactly because she has not done it in a while. (Vol. XIII, pp. 407-408).

Becca testified when she was in the “straddle position” was when Mr. Schiefelbein would ask to touch her. (Vol. XIII, p. 408).

(Witness demonstrates with two dolls)

Becca demonstrates the straddle position with the girl doll and then puts the boy doll in the position that Mr. Schiefelbein was in. However, the male doll’s legs would not bend so Becca testified that Mr. Schiefelbein was on his knees. She stated there were other girls in the gym when the straddles were going on. (Vol. XIII, pp. 412-413).

Becca agreed that she testified earlier that Mr. Schiefelbein was touching her while she was straddling and that she used the right hand to demonstrate Mr. Schiefelbein touching her. However, Becca does not remember which hand he used to touch her. Becca testified that she has known Mr. Schiefelbein for two years and that he is left-handed. Becca agreed that since he is left-handed that his left hand is his dominant hand. (Vol. XIII, pp. 414-415).

Becca agreed that she had previously indicated that Mr. Schiefelbein was wearing sweat pants that were noisy and she knew this because it was in the winter time. Becca also agreed that she told Detective Breedlove when he interviewed her that Mr. Schiefelbein was wearing not just shorts but “quilted shorts” at the time. Becca does not know what quilted



shorts Mr. Schiefelbein has. Becca now states that he was wearing black pants. (Vol. XIII, pp. 415-417).

Becca agreed that her memory is better now than it was closer to the events. (Vol. XIII, p. 417).

Becca testified that there was nothing coming out of Mr. Schiefelbein's penis. She stated that she saw it and then turned away. However, she told Our Kids that she did not look at the penis. She stated that she saw it "for like one second." (Vol. XIII, pp. 417-418).

Becca previously indicated that Mr. Schiefelbein had given her a stuffed animal to keep her quiet. She stated that it was unusual for him to give gifts to all of his students. However, Becca stated that Mr. Schiefelbein gave candy and stuff to the other students but he did not give them other gifts like stuffed animals. However, Becca agreed that Mr. Schiefelbein did give the other girls a stuffed animal after the state meet. She agreed that she was not the only one that got a stuffed animal. However she stated that she was the only one that got a stuffed animal "because of what happened." (Vol. XIII, pp. 419-420).

Becca testified that Mr. Schiefelbein did give the other girls candy and hair clips. (Vol. XIII, p. 421).

Becca agreed that anybody outside in the parent's area could just put their head in this opening to see what was going on in the office. She also agreed that people would put their heads in to see what was going on quite often. They would do this rather than open the door or put their head in the door. People would just put their heads through that opening to speak to Mr. Schiefelbein if he was in there. (Vol. XIII, p. 423).

(Diagram entered as Exhibit 11)

Becca testified that the touching of the breasts incident happened not too long after the May 1st event. She also testified that she remembered her mother talking to Mr. Schiefelbein about Dolly Parton and in that discussion her mom was talking to him about Becca's development and becoming a woman. (Vol. XIII, pp. 424-425).

Becca agreed that the last time Mr. Schiefelbein touched her was on her breasts in May of 2002. (Vol. XIII, p. 426).

Becca testified that she began gymnastics when she was two years old. She agreed that she told Detective Breedlove that in the summer of 2001 she was practicing five days a week. She also stated that during school she practiced four days a week. She stated that she would practice four hours and thirty minutes to five hours a day. (Vol. XIII, pp. 426-427).

Becca testified that her daily routine would be to wake up at 6:15, start school at 8:30, get out of school at 3:15, drive to gymnastics after school and would stay at the gym for at least five hours. She would arrive at the gym at 4:00. She would practice until 9:00 then go home and do homework until around 11:00 and then go to bed. (Vol. XIII, p. 428). Becca would do this same routine basically every day. She said this routine did get tiring for her. (Vol. XIII, p. 429).

Becca testified that she told her parents many times that she wanted to quit and she also told Mr. Schiefelbein. She stated that every time she told them that she wanted to quit her mom and dad would encourage her to stay in gymnastics and that it would be good for her to stay involved. (Vol. XIII, pp. 429-430).

Becca testified that in June or July of 2002, she injured herself and had to wear a back brace for four months. She could not compete or do gymnastics while she wore the back

brace. She stopped wearing the back brace in September of 2002. After she stopped wearing the back brace she had to go to rehab. After rehab she was thinking about going back into gymnastics. Becca stated that she did not talk to her mom much about going back because she did not like to talk about it. (Vol. XIII, pp. 431-432).

Becca testified that the tumble bus had padding on the floor and you could put mats in there and kids could do gymnastics in the bus. She stated that Mr. Schiefelbein would drive the bus around to various schools helping elementary and pre-elementary kids get interested in gymnastics. (Vol. XIII, p. 433).

Becca testified that after she talked with Mr. Schiefelbein on the tumble bus that she, Mr. Schiefelbein, and her parents met at the gym in the office the next day. Becca told them that she wanted to quit because she did not enjoy it and she started crying. (Vol. XIII, p. 435). Becca testified previously that her mom got mad and angry because her mom thought Becca had a real talent in it. (Vol. XIII, p. 436).

Becca testified that before her back injury that she was having problems with doing a back handspring on the beam. She could not move on to the next level until she could do a back handspring on the beam. She had been trying to do that for a very long time and it is hard to do. (Vol. XIII, pp. 437-438).

Becca testified that Mr. Schiefelbein got angry with her and left the gym because he thought she could do the back handspring on the beam but she did not think she could. She said that she did the back handspring on the beam when Mr. Schiefelbein was not there. When he came back to the gym he asked her to do it and she did. In order to move up she would have to do this on a regular basis, not just one time. (Vol. XIII, p. 439).

Becca testified that she did not like Mr. Schiefelbein because he touched her private parts. She did not trust him as much once he first started touching her. She is not sure when she stopped liking him. Becca said that Mr. Schiefelbein was her coach and she was his favorite so the first time he touched her she still liked him. As he continued to touch her she liked him less and less. She thought it was sickening. (Vol. XIII, p. 440).

Becca agreed that Mr. Schiefelbein would continue to come to her home during this time. While he was at her home she would hang on to him to an extent that her parents had to tell her, "Becca, leave Mark alone." She said that she hung on him because he would get angry if she did not. She said that he told her that if she did not hug him first when she got into the gym that he would get angry with her. Becca agreed that she hung on him at her home while he was allegedly abusing her and her parents would tell her, "don't hang on Mark, leave him alone." (Vol. XIII, p. 441).

Becca stated that she chose to be around Mr. Schiefelbein. (Vol. XIII, p. 442).

Becca testified that she had to write reports at school and she wrote a report about Mr. Schiefelbein in sixth grade, dated May 14, 2002. (Vol. XIII, p. 452).

(Report by Becca entered as Exhibit 12)

[REDIRECT EXAMINATION]

Becca agreed that the paper she wrote about Mr. Schiefelbein said that he was very influential in her life and that she respected him, at that time. Becca said she wrote the report about Mr. Schiefelbein because he was her gymnastics coach and he had taught her very well in gymnastics and she respected him for that. She also said that he was very good at it and she was his favorite so she wrote about him. (Vol. XIII, pp. 456-457).

Becca testified that she liked being the favorite because it was fun. She did feel bad for the other kids because they did not get other things like gifts. She also said that the other girls would “jostle” her and start not liking her and it would make her sad. (Vol. XIII, p. 457).

Becca testified that some of the gifts that she got that the other girls did not get were T-shirts from places he went. The other girls did get a teddy bear and a goody bag after state meet which she got the same thing as they did. (Vol. XIII, pp. 457-458).

Becca testified that Mr. Schiefelbein did get her a birthday present on her 12th birthday. He gave her candy and a \$50 gift certificate to Limited Too. Becca thinks Mr. Schiefelbein may have given Jordan a birthday present too but she does not remember. (Vol. XIII, p. 458).

Becca testified that Mr. Schiefelbein did get her a Christmas present. He gave her roller skate shoes and a writing pen. Becca said that she does not know if he gave the other girls Christmas presents but he did give her little sister Annie Rose and her mom a Christmas present. He got her mom a rolling pin and got Annie Rose the same thing he got Becca. (Vol. XIII, p. 459).

Becca testified that her sisters, Ashlie and Paige, took gymnastics at Let It Shine. She said her sister Annie Rose took gymnastics at Espirit. None of them take gymnastics now. Becca stated that when Ashlie and Paige quit gymnastics that it was okay with her mom. Annie Rose quit taking gymnastics after she found out what Mr. Schiefelbein had allegedly done to Becca. (Vol. XIII, p. 460).

(Exhibit 11 shown to witness - Diagram of gym)

(Witness shown Exhibit 7 - photographs)

Becca identifies the rod floor and the various mats in the photograph. (Vol. XIII, p. 464). Becca identifies the big purple and white mat as the mat she talked about previously. (Vol. XIII, p. 465).

Becca marks on the picture with an X on the rod floor where she would do her stretches and she put a circle where Mr. Schiefelbein would be. (Vol. XIII, pp. 465-466).

Becca testified that when she would do the straddle stretch she would face the wall. She said that when she was doing the straddle stretch that Ms. Schiefelbein was close enough to touch her vagina, her leg and basically everything except her back because her back was away from him. She does not recall Mr. Schiefelbein placing his hands anywhere else except her vagina. (Vol. XIII, pp. 466-468).

(Witness shown Exhibit 8 - photograph)

Becca identifies the trampoline and the rod floor in the photograph. Becca stated the other girls would be on the trampoline or the bars. Becca indicates on the photograph with an X where she was when Mr. Schiefelbein was stretching her. (Vol. XIII, p. 469). Becca testified that she was on the rod floor but could not draw it very well on the picture because the vault was in the way. She was where the vault was. (Vol. XIII, p. 471).

Becca testified that her back was facing towards the trampoline. When she is in the frog stretch her legs are pointing towards the back wall to the left and her head towards the right. Becca agreed that Mr. Schiefelbein would be kneeling and that is where he would be when he would have one hand on her back and one hand on her butt with his fingers between her legs. (Vol. XIII, pp. 471-472).

(Witness shown Exhibits 7 through 10 - Photographs)

Becca stated that she thinks she has been to the Children's Advocacy Center twice. She went there for court school and to talk to Amy. Becca explained that she watched a video and it taught her about the Court and was very helpful. She talked with Amy about what was going to happen and she was shown a diagram of the Court so she would know where everyone was sitting. Becca also came to the courtroom when nobody was there. (Vol. XIII, pp. 478-479).

Becca testified that when she went to the clinic they gave her a physical and they had to look in her vagina area to make sure everything was okay. Becca testified that this was not the first time a doctor or anybody looked at her vagina like that. She does not remember what they did but she had a physical before. Becca said "no" when asked if she talked to the lady about what Mr. Schiefelbein did to her. (Vol. XIII, pp. 479-480).

(Witness shown a copy of a script of what she said to Detective Breedlove to refresh her memory).

Becca agreed that she told Detective Breedlove that she was behind the mat. She said in the "script" that he [Mr. Schiefelbein] was sitting behind the mat doing it. (Vol. XIII, p. 484).

Becca testified that when she said there were 40 or 50 students at the gym that she meant that is how many were enrolled at the gym at the time. (Vol. XIII, p. 486).

Becca testified that when Mr. Schiefelbein would touch her that there were not any parents at the gym. She stated there were "mostly six or seven girls" at the gym at the time. She said the gym is small. (Vol. XIII, pp. 486-487).

Becca agreed that she said she was the only one that was allowed to go into Mr. Schiefelbein's office. She stated she was not allowed to freely go in, she had to ask him or he would call her in. She stated the other girls were not usually allowed in there or called in. She was allowed to if she was not doing gymnastics or if she was doing concessions. (Vol. XIII, pp. 487-488).

Becca testified that when Mr. Schiefelbein would get angry with her that he would ignore her and since she was his favorite she hated being ignored. She stated that it would not be fun because "he wouldn't really coach you if he ignored you." She stated she would give in so he would coach her while she was doing gymnastics and she did not want him angry at her. (Vol. XIII, p. 490).

Becca stated she would not make this up to get attention and that it is wrong, nasty and violates people. She does not know who could go around doing that. (Vol. XIII, p. 491).

[RE CROSS EXAMINATION]

Becca agreed that she likes attention but from her parents. She stated she does not like it all the time. She stated she did not really want to be the center of attention at the gym. (Vol. XIII, p. 491).

Becca stated that she did not like having more than the other girls because it made her feel bad because they did not get what she got. She stated she never manipulated the other girls to keep them away from Mr. Schiefelbein. (Vol. XIII, pp. 491-492).

Becca agreed that she told Marlene Baugh that the first time it happened was "end of summer," which she said was "June or July." Becca's birthday is in June and she considers that her summertime so it was probably July after her birthday. She agreed that she used her



birthday as a reference point which is an important event. She was also able to place it at that time period because she knew it was a little bit after her birthday. (Vol. XIII, pp. 494-495).

Becca agreed that she never told the people of Our Kids that Mr. Schiefelbein's penis was swollen, red and purple. She agreed that they were asking her to describe what she saw and that she never used those words. Becca knew the importance of telling them and that they wanted all of the details but she did not tell them that. (Vol. XIII, p. 495).

Becca agreed that Mr. Schiefelbein had given presents to her, her mom and her sister and they he was fairly close to her family. She stated Mr. Schiefelbein had only given them Christmas presents one time. She also agreed that Mr. Schiefelbein did not make a lot of money because gym coaches don't make a lot of money. (Vol. XIII, p. 499).

[REDIRECT EXAMINATION]

Becca testified that the "straddle thing" started some time in the fall. She believes she was at level six when he started touching her on the outside of her leotard. When the "straddle thing" happened she thinks she was training for level seven. (Vol. XIII, p. 505).

[QUESTIONS BY THE JURY]

Q: Why did you write the paper about Mr. Schiefelbein indicating that you admired him so very much in May of 2002?

Becca testified that she thought he was a great coach and she admired him for the way he taught them very well. He may have been a hard coach but he taught them to do good gymnastics so she admired him for that. (Vol. XIII, p. 514).

Q. Was there ever a time when you were tempted to tell your parents about the touching before the meeting with Mr. Schiefelbein and your parents?

Becca testified that yes there were a bunch of times where she thought, “oh, my gosh, I just want to tell my mom so bad” but she just restricted it because she thought she was going to get in trouble. (Vol. XIII, p. 514)

Q. Did you ever tell anyone about the touching before that meeting with your parents and Mark? Anyone else?

Becca testified that no, she did not. She thought that if she did tell anyone that she would tell her parents first because she felt most comfortable telling them. (Vol. XIII, p. 515).

Q. This question is asking Becca to remember the phone call that she placed to Mark with Detective Breedlove present. What was said in that conversation?

Becca testified that she called and said she wanted to come back to gymnastics, but there were a couple of conditions. She said as long as you [Mr. Schiefelbein] do not touch her vagina anymore and he said he would not do that. Becca testified that Mr. Schiefelbein never admitted to it. She said there was another condition that he would not video tape. She asked him if he had destroyed the videotapes and he said there were none. He asked where her parents were and her mom was actually in the room. (Vol. XIII, pp. 515-516).

Q. Clarify or go into more detail about when you were asked to have your breasts touched at a house while looking after dogs.

Becca testified that it was night and she and her sister were scared to go over to the house by themselves. She and her sister were taking care of two dogs and the people were gone all weekend. They asked Mr. Schiefelbein to come with them because they were scared to go over there by themselves. They were downstairs at the house and her little sister was

upstairs playing with the dogs and Mr. Schiefelbein asked, “can I see your breast?” Becca said “no.” He then said “can I touch you?” Becca said “no” again. She stated that she kind of yelled it loud enough so her sister heard it and she came downstairs. (Vol. XIII, pp. 516-517).

Q. Was there any times when parents or other students came up to you while Mr. Schiefelbein was touching or videotaping you? If so, what happened?

Becca testified that Mr. Schiefelbein was touching her one time and the [Yabut’s] were walking up to the gym and he said, “okay, we need to change to - - let’s just do this stretch one more time so they don’t think - - so they are not suspicious of anything.” (Vol. XIII, p. 518).

Q. Do you know whether it was unusual to have a video camera at the gym?

Becca testified that she was not quite sure. Sometimes he [Mark] would videotape their tricks. He would tell them when he was bringing the video camera so you would know the day. She does not remember other gyms really always having them. (Vol. XIII, p. 518).

Q. Do you know whether anyone else saw him videotaping you while you were stretching?

Becca stated that she did not understand the question. She is not sure if they did. (Vol. XIII, pp. 518-519).

Q. Can you comment upon the size of the room or the gym? Do you have any idea how to measure that gym?

Becca testified that she has no idea how big it was although it was a small gym. Not too big, but not too small. It was able to hold children and equipment. (Vol. XIII, p.519).

Q. Why were you more afraid to tell your parents than you were to anger Mr. Schiefelbein?

Becca testified that at first she thought they would say, “oh, my gosh, Becca, I can’t believe you let him do that.” She thought they would be angry with her because of what she did. She was just scared to tell them because it was a big deal. She was really “freaked out” to tell them. (Vol. XIII, pp. 519-520).

Q. Why did Becca jump on Mr. Schiefelbein when he visited her parent’s home?

Becca testified that she did not exactly jump. She would give him a hug or something like that. She does not know if jump is the right word, but she did not just run up to him and jump but sometimes she would give him big hugs and stuff like that. (Vol. XIII, pp. 520).

(Questions of the Jurors entered as Exhibit #14)

### **DETECTIVE ADRIAN BREEDLOVE**

Adrian Breedlove has been a detective for the Brentwood Police Department since January of 2002. He has been a police officer for seven and-a-half years. (Vol. XIII, pp. 522-525).

Detective Breedlove became involved in this case on September 9, 2002. (Vol. XIII, p. 525). That evening Detective Breedlove talked to Becca’s father on the telephone and set up an interview for them to come in the next morning. (Vol. XIII, p. 526).

Detective Breedlove testified that Becca and her parents came to the Brentwood Police Department about 10:00 o’clock in the morning on September 10, 2002. Detective Breedlove met with Becca and her mother and father on that day. Detective Breedlove first

spoke with Becca's parents and then began to interview Becca. The interview occurred in the interview room inside the detective's office which is a secure location. This room is wired for video and for sound. All of their interviews are video taped and/or audio taped in that room. (Vol. XIII, pp. 527-528).

Detective Breedlove described Becca's demeanor during the interview as happy and friendly. She would sometimes be just stoic and other times she would be down. There was never a point where she cried. When she talked about sensitive subjects her voice would go a little lower and every now and then she would just kind of shudder while she was describing something. (Vol. XIII, p. 529).

Detective Breedlove testified that the next step in his investigation, after speaking with Becca, was to contact the Department of Children's Services and the D.A.'s office because it was a pretty serious allegation. From that point his intention was to get search warrants for Mr. Schiefelbein's gymnasium and for his apartment. Detective Breedlove said he was looking for video tapes of Mr. Schiefelbein molesting or touching Becca. Detective Breedlove subsequently obtained a search warrant for Mr. Schiefelbein's business and one for his home.(Vol. XIII, p. 530).

Detective Breedlove testified that prior to executing the search warrants, on the night of September 10, 2002, he spoke with Mr. and Mrs. Robinson about the possibility of placing a "perp" phone call. That is where the alleged victim would call the defendant and engage them in conversation in an attempt to elicit more information and possibly a confession from the perpetrator. Detective Breedlove said he had never done one of these before. He was also the only law enforcement officer present at the Robinson's house that evening during

the “perp phone call.” Detective Breedlove asked Mr. and Mrs. Robinson to “sleep on it” because they were not real comfortable with it and neither was Detective Breedlove. (Vol. XIII, pp. 531-532).

Detective Breedlove testified that on the evening of September 11, 2002, Becca placed the phone call to Mr. Schiefelbein. Becca and her parents gave their consent to the recording of this phone call. Detective Breedlove said a mini micro-cassette recorder was used to record the phone call. Detective Breedlove said they use those at his office to record various things including telephone transmissions when somebody calls in to give an anonymous tip or something of that nature. They have a plug that plugs into the telephone and into the microphone part of the recorder and all they have to do if somebody calls is hit record and it records both sides of the conversation. (Vol. XIII, pp. 532-533).

Detective Breedlove testified that he did give Becca some instructions before placing the call. He told her to act normal and to say that she was thinking about coming back but she wanted to make sure he [Mr. Schiefelbein] was not going to touch her again. He also told her to ask about the video tapes. He did not give her any instructions on what to do if the conversation stalled. (Vol. XIII, p. 533)

Detective Breedlove testified that he tried to prompt Becca while she was on the phone with Mr. Schiefelbein but that it was really hard because of the way they were sitting on the bed. He was kneeling down and Becca was holding the phone and he was on the other side trying to hear what Mr. Schiefelbein was saying during the conversation. (Vol. XIII, pp. 533-534).

Detective Breedlove stated he has a recording of the telephone call with him at court. He said he was listening to the conversation between Becca and Mr. Schiefelbein as it was being recorded. He was kneeling beside Becca and listening as the conversation was happening. The only voices on the tape are Becca's and Mr. Schiefelbein's. (Vol. XIII, pp. 534-535).

(Copy of transcript of audio tape entered as Exhibit #15)

(Audio tape played for the jury - Entered as Exhibit #16))

Detective Breedlove testified that the pause on the tape is when Mr. Schiefelbein asked to speak to Becca's mom and at that point Becca put him on hold and Mrs. Robinson ran downstairs in the kitchen to pick up the phone downstairs so it would sound authentic because Becca told Mr. Schiefelbein that her mom was downstairs cooking dinner. Detective Breedlove stated that since Mr. Schiefelbein had been at their home several times that he would know Becca was lying if her mom had picked up the phone right away in Becca's room. Unfortunately, since the tape recorder was plugged into the phone in Becca's room it only records on the phone it is plugged into so the conversation with Mr. Schiefelbein and Mrs. Robinson was not recorded. Detective Breedlove stated that he never even thought of that and wish he would have. Mrs. Robinson went downstairs and spoke with Mr. Schiefelbein on the phone for a little while and then he wanted to speak with Becca again. Becca picked up the phone again, and the tape recorder was still running so the rest of the conversation with Becca occurs after the pause on the tape. (Vol. XIII, pp. 536-538).

Detective Breedlove does not recall if Becca was wearing her back brace while they made the telephone call to Mr. Schiefelbein. However, he does recall that she was wearing it when he interviewed her on the 10th. (Vol. XIII, p. 538).

Detective Breedlove testified that after the “perp” phone call was made he executed the search warrants. Detective Breedlove and five other detectives in the department went to Espirit Gymnastics which is located at 7106 Crossroads Boulevard in Williamson County. Detective Breedlove explained that the other detectives went down to the gym and waited for his phone call to let them know that he had placed the “perp” phone call. Once he finished the “perp” phone call, he called his lieutenant on his cell phone and told him the call was over and the search warrants could be executed. (Vol. XIII, pp. 538-539).

Detective Breedlove testified that the first search warrant to be executed was at Espirit Gymnastics. He believes there were still classes going on at that time so his lieutenant and one of the other detectives walked inside and they told Detective Breedlove that they had spoken to Mr. Schiefelbein and they wanted to wait until after 9:00 o’clock when the kids were gone. All of the kids and parents were gone before they executed the search warrant. Detective Breedlove stated that Mr. Schiefelbein was cooperative at that time so one of the officers and his lieutenant stayed inside the gym and by the time the gym closed at about 9:00 Detective Breedlove had made it down to the gym to assist in executing the search warrant. (Vol. XIII, pp. 539-540).

Detective Breedlove testified that he spoke with Mr. Schiefelbein while he was at the gym. He stated that Mr. Schiefelbein had given him consent to search the gym originally but



then once he spoke with him he revoked that consent and said that he would cooperate if he had to and would do what he had to do by the law. (Vol. XIII, pp. 540-541).

(Witness shown a copy of the consent form)

Detective Breedlove testified as to what is contained on the consent form and that it was signed by Mr. Schiefelbein on 9/11/02. (Vol. XIII, pp. 541-542).

(Consent to Search Premises Form entered as Exhibit #17)

Detective Breedlove testified that when Mr. Schiefelbein revoked the consent to search that he and Lieutenant Campsey were already inside the building,. Detective Breedlove produced the search warrant for the gym and Mr. Schiefelbein said he would cooperate if he had to by law. (Vol. XIII, p. 543).

(Witness shown three photographs)

Detective Breedlove testified that the photographs mentioned in the consent to search form he recognized. He stated they are pictures of the office located inside Espirit Gymnastics in the front of the building and they fairly and accurately depict the office as it appeared on that day. (Vol. XIII, pp. 543-544).

(Photographs of the Office entered as Exhibits #18, 19 and 20)

Detective Breedlove testified that these were the only photographs taken at the gym that night. He stated that he does not know why other pictures were not taken of the entire gym. He stated that he was not in charge of photography. Detective John Wood was doing the photographing that night and he cannot speculate as to why he did not take any more pictures. (Vol. XIII, pp. 544-545).

(Witness shown Exhibit #19 photograph)

Detective Breedlove testified that Exhibit #19 is a picture depicting a desk work area in the office on the right. However, Detective Breedlove does not know a whole lot about the office because he just poked his head in for a second because Detective Wood was the computer specialist and he was more involved in searching the office. Detective Breedlove stated that if he remembers correctly the area when you walk into the office on the right is a work area. (Vol. XIII, pp. 545-546).

(Witness shown Exhibit #18 photograph)

Detective Breedlove testified that Exhibit #18 depicts the office when you are looking in from the doorway. (Vol. XIII, p. 546).

(Witness shown Exhibit #20 photograph)

Detective Breedlove testified that Exhibit #20 depicts the computer in the office. (Vol. XIII, pp. 546-547).

Detective Breedlove testified that he does not remember any opening or any window in the office. (Vol. XIII, p. 547).

Detective Breedlove testified that after they finished executing the search warrant at the gym, they executed the second search warrant at Mr. Schiefelbein's home. While at the gym Detective Breedlove showed Mr. Schiefelbein the warrant for apartment in Franklin. He showed him the warrant and gave him a choice, Mr. Schiefelbein could either follow them over there with a key and let them in and he was free to be there while they executed the warrant or he could leave. Either way they were leaving directly from the gym and going to his apartment and Mr. Schiefelbein agreed to follow them there and he drove his own vehicle. (Vol. XIII, p. 547).

Detective Breedlove described the size of the gym as being as wide as the courtroom is long and was pretty big but not huge. The gym is in a light industrial area so it is several long buildings of not office space but kind of like little warehouses. He does not recall if it is one suite or two suites. (Vol. XIII, pp. 547-548).

Detective Breedlove testified that the night the search warrant was executed that no pictures were made of the rod floor or anything of that nature. He states that he wishes he had been in charge of photographing but they all had a specific task to do. (Vol. XIII, p. 548).

Detective Breedlove testified that when they arrived at Mr. Schiefelbein's apartment Mr. Schiefelbein let them in. They went inside and Detective Wood was taking pictures again. He started photographing the entire scene before they touched anything. Detective Breedlove stated that when you walk in the apartment there is a kitchen over to the right and then the great room/living room area. There is a little short area directly in front that leads to the bedroom. Detective Breedlove stated that off to the right of the little hallway is the bathroom. After photographing everything they began collecting evidence. (Vol. XIII, p. 549).

Detective Breedlove testified that video tapes were seized from the gymnasium and from Mr. Schiefelbein's apartment. (Vol. XIII, p. 549).

Detective Breedlove testified that the video tapes from Mr. Schiefelbein's apartment were located in various areas. There were a bunch of video tapes in the closet, a few in Mr. Schiefelbein's bedroom and a couple dozen of them against the wall by the front door. (Vol. XIII, p. 550).

(Witness draws a diagram of the apartment on the easel)

Detective Breedlove demonstrated on the diagram where everything was located in the apartment. He stated there was a small VHS digital camera (Panasonic) with little bitty tapes. It was hooked up to the television or the VCR and strewn around it were a bunch of tapes on a small table and on the floor. (Vol. XIII, pp. 551-552).

(Diagram of Apartment marked as Exhibit #21)

(Witness shown three pictures of interior of apartment which were marked as Exhibits #22,23 and 24)

Detective Breedlove testified that one picture was of the living room area of Mr. Schiefelbein's apartment. (Vol. XIII, p. 553).

(Witness shown Exhibit #22)

Detective Breedlove testified that Exhibit #22 is a photograph of Mr. Schiefelbein's apartment which shows a few steps in from the front door of the apartment looking over to the left towards the TV, sitting on top of the entertainment center with the case for the video camera and some video tapes. (Vol. XIII, p. 555).

(Witness shown Exhibit #23 and #24)

Detective Breedlove testified that Exhibit #23 and #24 are alternate views of the same area as shown in Exhibit #22. (Vol. XIII, pp. 555-556).

Detective Breedlove testified that he confiscated the video tapes shown in the photographs. (Vol. XIII, p. 556).

Detective Breedlove testified that he viewed the tapes that were confiscated from Mr. Schiefelbein's apartment. He stated there are various things on the tapes from as far back

as a few years ago to as recent as 2002 from a few different gyms. One of the gyms was in another state. There are a bunch of tapes from Mr. Schiefelbein's gym. There are several shots of Becca on the tapes. (Vol. XIII, pp. 557-558).

Detective Breedlove testified that portions of the tapes he viewed he considered to be normal videotape. He does not know much about gymnastics but there are several parts of the tapes that show Becca and other girls and boys just practicing and they appear to be normal practice tapes. (Vol. XIII, pp. 558-559).

Detective Breedlove testified that there were tapes that he considered not normal practice tapes. On five of the tapes there were approximately 248 shots of Becca where Mr. Schiefelbein zoomed in very closely on her pelvic area. On the first videotape there were 87 shots of her vaginal and crotch area that he labeled. (Vol. XIII, p. 559).

Detective Breedlove testified that Becca was dressed in a leotard each time. He said there is audio on the tapes and a time and date stamp. (Vol. XIII, p. 560).

Detective Breedlove testified that he seized Mr. Schiefelbein's digital camcorder and used it to view the tapes because his police department does not have anything like that. The best camera they have is an eight millimeter recorder. (Vol. XIII, pp. 560-561).

Detective Breedlove stated that the time and date that appear on the videotapes is between May 2001 and June 2002. (Vol. XIII, p. 561).

(Videotape A entered as Exhibit #25)

(Videotape B entered as Exhibit #26)

(Videotape C entered as Exhibit #27)

(Videotape D entered as Exhibit #28)

(Videotape E entered as Exhibit #29)

[Judge rules to have everyone in the gallery (media and public) move to the other side of the courtroom so they cannot see the video tapes being played to the jury] (Vol. XIII, pp. 596-597). (*This is addressed in Issue 2.*)

Detective Breedlove testified that there were 25 videotapes confiscated from Mr. Schiefelbein. One of them was a video head cleaner but the rest were actual tapes. He also confiscated the video recorder, its case and the power source. He has viewed all of the tapes. Detective Breedlove stated there were videos taken of Becca in Mr. Schiefelbein's gym between May 2001 and June 2002. Detective Breedlove stated that on numerous occasions, approximately 248 times on five tapes there were closeup shots of Becca's clothed vaginal area. She was wearing a leotard. He said there was normal gymnastics going on. (Vol. XIII, pp. 602-603).

Detective Breedlove testified that on several occasions Becca is actually doing a gymnastic skill during practice, but there is a lot of other times where she is either just standing around or laying down not doing anything. (Vol. XIII, p. 603).

Detective Breedlove has reviewed all five tapes. When he confiscated the tapes they were not labeled or anything. He has subsequently labeled them in a letter fashion in alphabetical order. He started with the ones that had Becca on them starting with A through E and then went from there labeling the rest. (Vol. XIII, pp. 603-604).

(Exhibit #25 - Tape A is shown to the jury)

(Handwritten jury instructions re: media coverage entered as Exhibit #30 )

Detective Breedlove testified as to the method he used in tabulating how many times Mr. Schiefelbein zoomed in on Becca's vaginal area. Every time Mr. Schiefelbein zoomed in on Becca's vaginal area Detective Breedlove would count that as one time whether it was for just a second or two or if the zoom stayed there for a couple of minutes. He wanted to make sure he had a total number of times no matter how long it lasted. He did not make any effort to tabulate how long the camera was zoomed in on Becca's vaginal area. On Tape A Mr. Schiefelbein zoomed in on Becca's vaginal area 81 times. Detective Breedlove stated there are four more tapes which have similar views of Becca on them. The other four tapes contain pretty much the same thing as on Tape A but with different dates and different outfits. (Vol. XIV, pp. 620-622).

Detective Breedlove testified that on Tapes B through E there are other instances of Becca doing stunts or tricks where the camera zooms in on her crotch or vaginal area numerous times. The camera also zooms in on her buttocks numerous times. Detective Breedlove also stated that there are numerous times when the camera zooms in on Becca's vaginal area when she is just standing. (Vol. XIV, p. 622).

Detective Breedlove testified that there are numerous views on Tapes B through E where Becca is pushing a mat. Detective Breedlove elaborates that this means when one of the other girls is on the trampoline and there was a side view of the girl on the trampoline actually doing the skill, it was basically a rear view of Becca. (Vol. XIV, pp. 622-623).

Detective Breedlove testified that Tape B shows all three types of views of Becca's private areas. The camera zooms in on Becca's private area 84 times on Tape B. He used the same method of tabulation on Tape B as he did on Tape A. (Vol. XIV, p. 623).

Detective Breedlove testified that on Tape B there is a portion which lasts about a minute and-a-half that would be compelling for the jury to see because of things that were said by Mr. Schiefelbein on the tape. Detective Breedlove stated that during this portion there is another girl on the trampoline doing skills and Becca was pushing a mat up underneath the person on the trampoline and Mr. Schiefelbein said, "Becca, you better get that in, you're totally blowing it now," as he zooms in on Becca. Detective Breedlove stated that as you are looking at Becca from the camera on the screen she turned sideways and her legs are obscuring any view. She does this a couple of more times and Mr. Schiefelbein says, "Becca, hang on to the mat and get it in like you used to, please." Becca then gets the mat in and it is a straight on view with no obstructions from any legs and then Mr. Schiefelbein says, "better, thank you Becca." (Vol. XIV, pp. 624-625).

Detective Breedlove testified that about 30 seconds before the beginning of what he just testified about you can hear somebody in the background say Mark, off camera, and at that time Mr. Schiefelbein zoomed in on Becca's vaginal area because she is laying down and Mr. Schiefelbein says, "give me a second" as he zoomed in. (Vol. XIV, p. 625).

(Tape B is shown to the jury - Exhibit #26)

Detective Breedlove testified that Tape A was approximately 120 minutes total and Tape B is either 60 or 80 minutes long as are Tapes C, D and E. Detective Breedlove stated that Tape C contains the same types of views as on Tapes A and B. He said that Mr. Schiefelbein zoomed in on Becca's vaginal area 69 times on Tape C. He used the same method of tabulation as in Tapes A and B. (Vol. XIV, pp. 625-626).



Detective Breedlove testified that Tape D contains the same type of views of Becca's private parts as on the previous tapes. However Tape D is much shorter and there were only five instances where Mr. Schiefelbein zoomed in on Becca's private parts. (Vol. XIV, pp. 626-627).

Detective Breedlove testified that Tape E contains at the beginning what appeared to be a gymnastics meet somewhere which took up about 30 to 45 minutes of the tape. The tape then cut to another area from 2002 where Mr. Schiefelbein zoomed in three times on Becca. Tape E is about 60 minutes in length. (Vol. XIV, pp. 627-628).

Detective Breedlove testified that the camera he used to show the video he obtained from Mr. Schiefelbein's apartment. Detective Breedlove became familiar with the camera out of necessity at the police department. The police department does not have any digital VHS cameras or players so in order to play and view the tapes he had to learn to use the camera. (Vol. XIV, pp. 629-630).

Detective Breedlove explained to the jury while holding up the camera where the tape goes in. He also stated the camera has a view finder and a flip out view screen. It also has a stereo microphone to record right and left side audio and the infrared for the remote control. It also has a wide and telescoping view so you can zoom in back and forth very easily. (Vol. XIV, pp. 630-631).

Detective Breedlove also showed the jury the case that the camera came in and that the case was found on the floor in Mr. Schiefelbein's apartment when they recovered the evidence. (Vol. XIV, p. 631).

(Witness shown Exhibits #22 and #23 - photograph)

Detective Breedlove testified that depicted in the photograph at Mr. Schiefelbein's apartment is the camera and camera case. Detective Breedlove testified that Exhibit #23 shows an alternate view of the camera and camera case. (Vol. XIV, p. 632).

Detective Breedlove testified that the tapes are all digital VHS tapes. (Vol. XIV, p. 632).

Detective Breedlove testified that the first step in the investigation process was interviewing Becca which occurred on September 10, 2002 at the Brentwood Police Department. He said this interview was recorded. He explained there are three hidden cameras in the interview room and one hidden microphone. It is all routed to the VCR that is located in the lieutenant's office and his supervisor's office, where you can monitor and record both audiotape and VHS tape. (Vol. XIV, pp. 633-634).

Detective Breedlove testified that this was not the only interview he had with Becca. He was present during the interview with Becca and Marlene Baugh at the Child Advocacy Center. He said Marlene Baugh is a Department of Children's Services worker and she was assigned to investigate this case from the Department of Children's Services standpoint. (Vol. XIV, pp. 634-635).

Detective Breedlove stated that he heard Becca testify here at the trial. (Vol. XIV, p. 635). He said that he believes Becca's statements during the interviews and during the trial regarding the incidents involving Mr. Schiefelbein and they were consistent. When Becca first talked to Detective Breedlove although she could not remember exact dates or number

of times, she told him the same thing over and over again. Detective Breedlove testified that the one thing she did remember specifically was the number of times Mr. Schiefelbein touched her breast which happened once and the time she touched his penis which happened once. Detective Breedlove stated that Becca never wavered from that and the only thing she could not really remember were dates and exact number of times he touched her vagina. (Vol. XIV, pp. 638-639).

Detective Breedlove testified that during the first interview Becca told him that Mr. Schiefelbein touched her breast some time in May, a few days after she began developing the one breast. Becca mentioned the “Dolly Parton” comment that she testified to at trial. She told him a couple of days later her mom told Mr. Schiefelbein about her developing and then that same day or a couple of days later is when Mr. Schiefelbein touched her breast. Becca told Detective Breedlove that this happened inside his office with the door closed. (Vol. XIV, p. 639).

Detective Breedlove testified that during the second interview, when Marlene Baugh was present, that they discussed with Becca the breast incident. Becca told them she was behind the door and this is consistent with her testimony she gave in court. Detective Breedlove does not recall if Becca testified during the interviews whether the door was open or closed. He stated that he does remember if Becca said the door was closed to some degree and he does not remember if she said it was completely closed and latched or whether it was almost completely closed. (Vol. XIV, pp. 643-644).

Detective Breedlove testified that the second interview with Marlene Baugh and Becca was tape recorded with a hand-held tape recorder provided by Ms. Baugh. He stated

that the quality of that tape was horrible and was not a professional cassette recorder. He said you can hear a little bit of the interview but you cannot hear much of it because of the background noise. (Vol. XIV, p. 644).

Detective Breedlove testified that the interview Becca gave regarding Mr. Schiefelbein's penis was consistent with her testimony in court. (Vol. XIV, p. 644). Becca told him that it happened in the office and only happened once. (Vol. XIV, p. 645).

Detective Breedlove testified that during the first interview Becca told him what Mr. Schiefelbein had on during that time. This information was inconsistent. In the interview she said that he was wearing shorts, but then later on she stated he was wearing "black swishy" pants. Detective Breedlove cannot remember when she said he was wearing pants. (Vol. XIV, pp. 645-646).

Detective Breedlove testified that Becca did not tell him about the incident with the penis through the pants pocket during the first interview, but during the interview with Ms. Baugh she did. During the second interview Becca said that it occurred in the gym and that he had asked her to reach into his pocket, that he had something in there for her. Becca reached in there and felt something and jerked her hand back out because she did not know what it was. (Vol. XIV, p. 646).

Detective Breedlove testified that during the time when Mr. Schiefelbein pulled his penis out of his pants Becca stated that he took her hand and placed it on his penis. (Vol. XIV, pp. 646-647).

Detective Breedlove testified the first interview took place on September 10, 2002 and he does not remember the exact date of the second interview but it was just a few days later. He has it in his notes and he has his notes from that interview. (Vol. XIV, p. 647).

Detective Breedlove testified that during the first interview Becca said that on one occasion Mr. Schiefelbein asked her to pull her leotard aside and he videotaped it. She said she did not want him to, but she said that he explained it was for training purposes and that he wanted to make sure if he wasn't going to touch it anymore, he wanted to make sure where he was touching so he would know not to. Becca then stated that she cannot remember if it was exactly the next day or a couple of days later, the next time she was at the gym he told her that he had watched it at home and it was not good enough and he needed to do it again. Becca stated that he did it again and this time he touched it while he was videotaping her. Detective Breedlove stated this was consistent with the testimony she provided at trial. (Vol. XIV, pp. 647-648).

Detective Breedlove testified that when he interviewed Becca the first time he asked her about the size of the gym and how many students were there. Becca stated it was approximately 40 or 50 students then total. (Vol. XIV, pp. 648-649).

Detective Breedlove testified that he does not recall what Becca said during the trial regarding when Mr. Schiefelbein began touching her over or under her leotard. However, he does recall what she said during her interview with him. She said it was in the springtime of 2001 is when it started. Detective Breedlove stated that she also mentioned her birthday and that is in June. She also mentioned the Fall Fiesta but it was in response to when was the first time he touched her inside. (Vol. XIV, pp. 649-650).

## LUCY FOX

Ms. Lucy Fox is a judge for the U.S.A.G. and is on the Tops National Team Staff which is a developmental program. Ms. Fox explained that the TOPS program is a talent opportunity program for U.S.A.G. The U.S.A.G. stands for U.S.A. Gymnastics and they are the governing body of gymnastics in our country. (Vol. XIV, p. 655).

Ms. Fox testified that she was a member of the 1984 Olympic team and the 1983 Pan-American Games Team. She was on the national team for four years starting from the age of 14, then competed in college at the University of Georgia where she was a five time national champion and six time All-American. (Vol. XIV, p. 656).

Ms. Fox testified that after graduating college she went to work in a club in southern California where she was a coach. Ms. Fox then worked for Cal State Fulton where she was a coach. She then went to West Virginia University to get her masters and she coached college there for four years. Ms. Fox has been a member of the TOPS national team for four years and a judge for seven years. (Vol. XIV, p. 656).

Ms. Fox testified that she has judged college events, the national team, and compulsory athletes to elite athletes who will represent us in the world championships or Pan-American Games. (Vol. XIV, pp. 656-657).

Ms. Fox testified that she is familiar with the defendant, Mr. Schiefelbein because she has judged in the State of Tennessee and he has been a coach. She only knows him professionally through judging his athletes and also from the TOPS National Testing. (Vol. XIV, p. 658).

Ms. Fox testified that she is aware of the U.S.A. Gymnastics Safety Handbook. She, as a professional member, has to pass the safety certification test. Ms. Fox explained that any professional member has to sit through the course and get certified to be on the floor at a competition. It talks about regulations of equipment, certain spotting techniques and the whole overall spectrum of gymnastics to make sure that as a professional member on the floor you know what is going on. (Vol. XIV, p. 659).

(Witness shown copy of the safety handbook)

Ms. Fox testified that the placement of hands when spotting a gymnast is contained in the handbook. (Vol. XIV, p. 659). She said the portion of the safety handbook that refers to hand spotting starts on page 67. (Vol. XIV, p. 660).

Ms. Fox testified that hand spotting is when a coach assists an athlete when they are learning skills for safety and also when they have mastered a skill if an athlete is uncomfortable. Hand spotting assists the athlete to perform the skill by lifting them and catching them if they are in trouble. (Vol. XIV, p. 660).

Ms. Fox reads a portion from the handbook on hand spotting:

Hand spotting refers to a method of spotting where a coach places his or her hands on the gymnast, and lifts and manipulates and/or supports the gymnast in mastering a skill. Warning and consent documents should refer to the act of hand spotting and what it means. All spotting should result in minimal touching support, and athletes should be informed about the potential for touching while being spotted. Unnecessary touching should not be used particularly when the spotter is male and the gymnast is female. Gymnast and parents should be aware that from time to time a slip may occur and the gymnast will be touched on the buttocks, crotch or chest. The coach and gymnast should understand such touching is at a minimum and should not occur repeatedly.

If the coach or instructor accidentally touches one of these areas, he/she should be sensitive to the situation and indicate that the touch was an accident by a brief apology and then return to instructions. When a coach/instructor is performing a rescue type spot, then concern about touching a private area is obviously trivial in comparison to the consequence of the unprotected fall. (Vol., VI, pp. 661-662).

Ms. Fox testified that figure 23 in the handbook shows how to hand-spot on bars and how you help an athlete get up to the maximum of a handstand. (Vol. XIV, p. 662).

Ms. Fox testified that when an athlete does a frog stretch they will lay on their stomach and bend their knees and their feet will touch behind them and optimally you want to pull the feet up as close to them as possible. The frog stretch stretches their hip flexors which are very important in gymnastics on every event. She said the athlete does this by themselves or you can help them by putting your hand on the athlete's lower back towards their tush and put your hands on their feet because if they are not flexible, their feet will come up and so you gently press down on their feet to get the optimal stretch in their hip flexors. (Vol. XIV, pp. 662-663).

(Witness demonstrates where hands would be for this stretch)

Ms. Fox testified that on the frog stretch your fingers should never go between the gymnast's legs because it would be quite uncomfortable and there is no reason for that. (Vol. XIV, p. 664).

Ms. Fox testified that no coach should place their fingers no matter what gender they are between an athlete's legs. (Vol. XIV, p. 665).



Ms. Fox testified that rescue spotting is if an athlete is coming down from a skill and they are coming towards their head, you grab them to protect their necks. A rescue spot protects the athlete from hurting themselves or injuring themselves. (Vol. XIV, p. 666).

Ms. Fox testified that no zones are the private parts of an athlete in their crotch, or on their chest, or their buttocks. (Vol. XIV, pp. 666).

Ms. Fox testified that prior to taking the witness stand she viewed several videotapes provided to her by Detective Breedlove. The tapes showed gymnasts engaged in various skills. (Vol. XIV, pp. 666). Ms. Fox testified that on the videotapes she saw a lot of athletes' crotches which she stated had no purpose for any training purposes. She stated every once in a while there would be another athlete maybe doing a flip, but before that athlete did that skill it would zoom in on another athlete's crotch. She stated that all she could see was their private area. (Vol. XIV, p. 667).

(Exhibit 25 - Tape A shown to witness)

Ms. Fox testified that in the video (Tape A) the gymnasts were kicking up to a handstand and then they would straddle and press down and try and hold the straddle position without their bottoms on the floor. This is called a handstand straddle down. Ms. Fox testified that from a side view the purpose of videotaping this skill would show you their shoulder angle, if their back is arched. However, the video in Tape A is from the back view which the only thing she could see from that angle is if the athlete's toes were not pointed and their knees were bent. She stated there is no purpose for zooming in on the gymnast's vaginal area. (Vol. XIV, pp. 669-670).

(Witness shown additional footage from Tape A)

Ms. Fox testified that the purpose of videotaping the girl in the black leotard would be to show their body shape and body position but she did not see what an athlete could have gotten from it. You could see her back move a little bit, her knees bent and her toes flexed and her elbows were bending a little bit. She said you could show the girl this video for strength purposes. Ms. Fox stated that the girl would not get much out of this video. (Vol. XIV, p. 671).

Ms. Fox testified (referring to the girl in the blue leotard where it was a closer zoom shot) that you could see the beam at the very end when she was falling off. She could not really see anything but maybe her elbows, but not anything significant where she could say her elbows were bent to show the athlete. She stated there was nothing in the close zoomed up shots that might have any benefit to show an athlete. (Vol. XIV, p. 672).

(Witness shown additional footage from Tape A)

Ms. Fox testified after viewing a clip showing an exercise on the trampoline that an athlete could look at the actual double back that the athlete did and to see if they set properly or not. But, the second part of the video there was no athlete shown, just zooming in on her crotch to push the mat. (Vol. XIV, pp. 672-673).

Ms. Fox testified that it does not take any special skill to push the mat underneath a girl on the trampoline. The purpose of the mat is for a little cushion on the landing. (Vol. XIV, p. 673).

Ms. Fox testified that no coach should put their fingers between a gymnast's legs while doing stretching exercises. There is no need for it and it is not proper. She stated no child should have any fingers touching them in that area. She stated that a lot of these girls are just developing across their chest and it hurts and is sore so you should avoid that. (Vol. XIV, p. 674).

Ms. Fox testified that a coach can help an athlete stretch in the straddle position by pushing them down to try and get them flat, and they do that gently. The hands would be placed either on the top of their tush and on the leg where the line of the leotard is. She stated the fingers would either go towards their legs diagonally or they could be straight up towards their head along their back. (Vol. XIV, pp. 674-675).

[CROSS-EXAMINATION]

Ms. Fox testified that the "no zones" areas are your chest, crotch and the buttocks. She stated you should not have any contact with these areas except for safety purposes. She stated a coach should never touch a child's chest or crotch. In some stretching exercises the palms of their hands could be on top of their tushes, sort of the hip area, to push down. (Vol. XIV, p. 680).

Ms. Fox testified that not every student can get flat while in the frog position. She stated some students need help in getting the optimal flat position. If the student needed help you would push the pelvic area down. (Vol. XIV, p. 683).

Ms. Fox testified that if you want to get the back area down on the gymnast your one hand would be on their feet because when you push their hips down their feet will come up

and you do not want that to happen. You have your other hand on the hip area, at the top of the buttocks area. (Vol. XIV, pp. 684-685).

Ms. Fox testified that a coach could put their hands as far as midway down the gymnast's tush. There are exceptions to the "no zone." She said a coach should never touch the vaginal area or be in the area of the vaginal area of a student. (Vol. XIV, p. 686).

(Witness shown panel of TOPS photos - Entered as Exhibit 33)

Ms. Fox testified that in the photograph, dated June 28th, is a lady measuring a gymnast from her hip bone down to see how low she can get in the split. They measure their hip bone to the floor. Ms. Fox stated the lady measuring's finger is on the top of her leg towards the back in the vaginal area. She states, however, that she is not touching the vagina but is in the vagina area. (Vol. XIV, pp. 688-689).

Ms. Fox testified that in the photograph the lady's finger is near the gymnast's hip bone. She stated she can see the outside of her finger and if it was in the vaginal area then she would not be able to see, her hand would be farther under her. Ms. Fox stated that the hand, on occasions, will come near the hip bones but not on the inner thigh. (Vol. XIV, pp. 690-691).

Ms. Fox testified that there is a purpose for photographing the upper thighs to the crotch area for coaching purposes in gymnastics. There is not a purpose for photographing from the knee up, crotch and stomach area. (Vol. XIV, p. 691).

(Witness shown photograph from USA Gym Magazine - entered as Exhibit 34)

Ms. Fox agreed that in the photograph the gymnast is in the cat leap position which includes the crotch area. Ms. Fox agreed that if you want to study the angle between the legs, the hip to the pelvic region, the hip by nature includes the crotch area. (Vol. XIV, pp. 692-693).

Ms. Fox agreed that on occasion it would be necessary to photograph the upper thigh, pelvic area. (Vol. XIV, p. 695).

Ms. Fox testified that a video can be made for the coaches benefit as well as the gymnast's benefit for learning purposes. (Vol. XIV, pp. 698-699).

Ms. Fox testified that the video excerpts she saw there were separate instances of an athlete jumping on the trampoline and a coach could look at and benefit from that. A coach cannot benefit from the video from the zoom in on the crotch. (Vol. XIV, p. 698).

Ms. Fox testified that body line refers to looking for a straight line of the athlete from the pulling up to the ribs and to the hip placement all the way down. (Vol. XIV, p. 698).

Ms. Fox agreed that keeping a straight body line is important, depending on the skill. (Vol. XIV, p. 699).

Ms. Fox testified that every athlete is different and she agreed that you have to do more with some than others. (Vol. XIV, p. 700).

[REDIRECT EXAMINATION]

Ms. Fox testified that in the excerpt where the athlete was doing presses that you could see the toes and the whole body when the camera was pulled back. She stated with the zoom in shots you could only see the athlete's inner thigh and her crotch. In some of them

she stated she could not even see the athlete's knees to even say if the knees were flexed so there was no purpose for that. She stated you could not see her hands or elbows either She stated you need to see the athlete's body for it to be beneficial, and just one little crotch does not benefit anything. (Vol. XIV, p. 704).

(Witness shown Exhibit #33)

Ms. Fox testified the first picture depicts the mat and how far the mat is from the athlete's hip bone. In the next picture Ms. Fox states that the hand is not touching the vagina and the reason for this picture is to show the athlete to stay square, the hips need to be square. Ms. Fox testified in the next picture that the finger is on the hip bone. Ms. Fox stated that there would never be a reason for any finger to go underneath a child's leotard. (Vol. XIV, pp. 704-705).

Ms. Fox testified that in the next few photographs that the finger is not touching the athlete's vagina and that her vagina is underneath her. She stated they were all female gymnasts in the photographs and the person doing the measuring is a female. She stated these were all splits. She stated it would almost be impossible to measure a frog stretch the way you measure a split unless you went underneath the child somehow. There is no reason to measure a frog stretch. (Vol. XIV, p. 706).

Ms. Fox testified that other ways of measuring an athlete other than by using an arm is by using a tape measure. You have to find the hip bone and then you pull out the tape measure because it is recorded by inches from the hip bone to the floor. This is for

measuring splits and is part of the TOPS testing. There is no frog testing. (Vol. XIV, p. 707).

(Witness shown excerpt from Safety Handbook)

Ms. Fox read from the handbook what no zones are, “Make every effort to avoid spotting or touching the gymnast’ chest, buttocks or genital area, no zones.” (Vol. XIV, p. 707).

(Witness shown anatomical diagram of a small female - entered as Exhibit #35)

Ms. Fox indicates certain areas on the diagram that are no zones. Ms. Fox agreed that from her earlier testimony that she stated there are certain situations where it may be appropriate to touch on the hip area. (Vol. XIV, p. 708).

(Page 67 from U.S.A. Gymnastics Handbook entered as Exhibit #36)

(Page 49 from U.S.A. Gymnastics Handbook entered as Exhibit #37)

Ms. Fox testified that when an athlete is in the frog stretch position and their feet do not pop up when they are being pressed down that they may still need to be pressed down a little. (Vol. XIV, p. 711).

Ms. Fox testified that she was not paid to testify and that she came because she was an athlete and she has a daughter and it is important to make sure that these things do not happen to our children. (Vol. XIV, p. 712).

[REXCROSS EXAMINATION]

Ms. Fox testified that she did not know who Becca Robinson was and she has not been in the courtroom so she does not have any idea about this case. (Vol. XIV, p. 712-713).

[QUESTIONS BY THE JURY]

Q: Are there any rules or regulations in your sport that requires - - that require two deep leadership, requiring at least two responsible adults to be present during all activities?

Ms. Fox testified that no, that a coach is there but you do not have to have another person around. (Vol. XIV, p. 715).

Q. In your judgment is there any reason to measure on an hourly or weekly basis at a gym?

Ms. Fox testified that she did not really understand what was meant by measuring but if it is pertaining to the pictures then the answer is no. (Vol. XIV, pp. 715-716).

[QUESTION BY THE JUDGE]

Q. Does this measuring happen for all athletes or only the elite?

Ms. Fox testified that measuring is just written for part of the TOPS testing program which does go into the elite athletes. So, a lot of athletes can get measured that way. (Vol. XIV, p. 716).

[QUESTIONS BY THE JURY]

Q. Ms. Fox, in your professional opinion as an athlete, coach and judge, do you think what you saw on the videotape, specifically the crotch close ups were inappropriate?



Ms. Fox testified that yes, they were very inappropriate. (Vol. XIV, p. 717).

[QUESTION BY THE JUDGE]

Q. In your opinion, ma'am, should a gym instructor obtain parental consent before videotaping a participant? *(This question is the subject of Issue 4.)*

Ms. Fox testified not if it is a legitimate video for training purposes. (Vol. XIV, p. 718).

(Juror's Questions entered as Exhibit #38)

**DETECTIVE ADRIAN BREEDLOVE**

**(Continuation)**

Detective Breedlove testified that he has the original interview videotape with Becca Robinson. (Vol. XIV, p. 720).

(Videotape played to the jury - entered as Exhibit 39)

Detective Breedlove testified that there are a few errors in the transcription of the videotape. The most significant error is on page 29, there is a part where he asked a question, "which one of your friend's parents were there?" On the transcript it said "Lee Abbots", but it is the "Yabuts." Detective Breedlove testified that this is the same incident that Becca testified to at trial. (Vol. XIV, p. 723).

Detective Breedlove testified that the reason he felt the need to tell Becca in the interview that he knew this was upsetting was because he did not want her to shut down and stop talking to him. He stated that towards the beginning of the interview you can see John Wood, another detective, in the room. He had him in there because he has children and he

thought he might be able to help. Towards the end of the interview Detective Wood left because Becca was focusing on Detective Breedlove and did not feel he needed to be in there anymore. (Vol. XIV, pp. 723-724).

Detective Breedlove testified that every now and then Becca (during the interview) would get real low and soft and he did not want to lose her. He was trying to gather as much information as he could on that date. (Vol. XIV, p. 725).

Detective Breedlove testified that when Becca's voice got real low she was talking about Mr. Schiefelbein's penis and when he was touching her vagina. Detective Breedlove stated that he knew from basic training that when you are talking to a child or victim of this sort that they need to be reassured every now and then. He would say, "hey, you are not the one that did this. You are okay. You are not in trouble for this." He kept saying this because he wanted to make sure that she knew that she was not in trouble and he did not want to lose her. (Vol. XIV, p. 725).

Detective Breedlove testified that he felt it was important to reassure her that she was not in trouble. He also stated that because of his training and experience, although he had never interviewed a child about anything like this, he knew from training that kids need to be reassured that they did not do anything wrong. So they do not feel ashamed more than they already do. (Vol. XIV, pp. 725-726).

Detective Breedlove testified that Becca said in Mr. Schiefelbein's discussions with her that Mr. Schiefelbein said that Becca would get in trouble and that Mr. Schiefelbein would get in trouble. (Vol. XIV, pp. 726-727).

[CROSS-EXAMINATION]

Detective Breedlove testified that to the best of his knowledge he did not have any indication that Mr. Schiefelbein knew he was going to execute a search warrant at his office, at the gym or at his home. (Vol. XV, p. 732).

Detective Breedlove testified that Mr. Schiefelbein did not have a chance to go to his home before they executed the search warrant. (Vol. XV, p. 733).

Detective Breedlove testified that he does not know what tape was in Mr. Schiefelbein's digital camera at his house. He wishes he did because he would have labeled it. He stated he did not label it until after he started watching all of them. He does not know which one he labeled first. He does know that the first one he watched he labeled A. (Vol. XV, p. 733).

Detective Breedlove testified that he watched the tapes back at his office, a couple of days later after the interview. (Vol. XV, p. 733).

Detective Breedlove testified that he believes there were a total of 79 tapes seized from Mr. Schiefelbein's home and office. Detective Breedlove stated that he looked at all 79 tapes and also two members from Project Alert. Project Alert is a part of the National Center for Missing and Exploited Children. It is retired law enforcement officers who are working for the National Center - - NCEMC, and they come down and help in cases like this. (Vol. XV, p. 734).

Detective Breedlove testified that he believes there were a total of 43 VHS tapes which he returned all of them to Mr. Schiefelbein except for two. He stated there were 11

eight millimeter cassettes and he returned all of them except for one or two. He stated he kept all of the 25 digital VHS tapes. He stated the property receipt was downstairs in the general's office and it shows where Mr. Schiefelbein signed for what he got back. (Vol, IX, pp. 734-735).

Detective Breedlove testified that in his review of the tapes he did note the time period they were from. The Project Alert members did this also. (Vol. XV, p. 735).

Detective Breedlove testified that some of the videotapes were copies of movies, the Olympics, North Shore Invitational, Dynamic Workout, UNM v. ASU, Good Will Games, Workout SDSU, and all kinds of stuff, they were not just tapes of children. (Vol. XV, pp. 736-737).

Detective Breedlove testified that the tapes ranged in dates from 1987 through 2002. He stated the last date of a videotape was February 9, 2002. (Vol. XV, pp. 737-738).

Detective Breedlove testified that after the tapes were seized and Mr. Schiefelbein was at the apartment he asked him to go down to the police department to speak with him and Mr. Schiefelbein followed them in his truck. (Vol. XV, p. 738).

Detective Breedlove testified that when he got the indictment and went to arrest Mr. Schiefelbein he was in the back outside of his gym. Detective Breedlove parked up front and went into the gym and saw an open door in the back corner of the gym and saw Mr. Schiefelbein standing there. He walked right up to Mr. Schiefelbein and took him into custody and put handcuffs on him. Detective Breedlove agreed that what he did was handcuff Mr. Schiefelbein and walk him through the gym in the sight and presence of the

students and parents in this gym. He stated that was not to embarrass him in front of his students. He said this was done at the direction of his supervisor. (Vol. XV, p. 741).

Detective Breedlove testified that except for the dates and times, Becca was consistent in her statements. Detective Breedlove agreed that in his work he would expect a witness to be pretty consistent which he thought Becca was. He agreed that if a witness is not consistent with her story that it would raise some doubt as to that witness' credibility and believability. (Vol. XV, p. 742).

Detective Breedlove agreed that he heard Becca testify initially at trial that there were "eight to ten touches" and that there were a "bunch of touches." He also heard General White say, "Well, Becca, did you not tell Detective Breedlove that there were 30 touches?" He also heard Becca say, "Well, maybe I was lower" and now that she thinks about it, and it is actually 15 to 17 times. (Vol. XV, p. 743).

Detective Breedlove testified that in his summary reports to this particular incident Becca reported to him that Schiefelbein touched her vagina over her clothing 20 to 30 times, and he touched her vagina under the leotard approximately 30 times. Detective Breedlove stated that this is what Becca told him. (Vol. XV, pp. 743-745).

Detective Breedlove stated that he does not believe going from 8 to 10, and 15 to 17, then 30, to 20 to 30, then to 50 is inconsistent because she has a range. He stated that Becca kept staying pretty much within that range the whole time - the range of 8 to 50. (Vol. XV, p.745).

Detective Breedlove testified that for a child he believes it is not inconsistent to go from 8 to 10, and then revise it to 15 to 17 and then 50 to 60. (Vol. XV, 747).

Detective Breedlove testified that if this were an adult this would be inconsistent. He stated that he would expect an adult's memory of something like this to be much better than Becca's. (Vol, IX, p. 748).

Detective Breedlove testified that in his interview with Becca she stated that all of these incidents happened in the gym. She also told him that while she was being touched there were other students in the gym. He said that as part of the investigation he contacted other students to see if they could corroborate what Becca claimed happened. (Vol. XV, p 748).

Detective Breedlove testified that two people corroborated what Becca had said. Those two were Joel Hawthorne and Nancy Westerman. (Vol. XV, p. 750).

Detective Breedlove agreed that Becca had indicated that Mr. Schiefelbein had used a scale of one to ten in deciding how it was pleasurable or not, a rating scale. On page two of Detective Breedlove's investigative report he indicated that "the use of the rate scale one to ten was significant in this case because it shows transference of normal gymnastics terminology to personal sexual gratification by Mark." (Vol. XV, p. 751).

Detective Breedlove testified that it is not his opinion that only gymnastics people use a rating scale of one to ten and it does not say that in his report. He stated that it is significant in this case. He stated that other people not involved in gymnastics use this scale all the time and he does also. He used it when he interviewed Becca. (Vol. XV, p. 752).

Detective Breedlove testified that the one to ten scale is important in this case because when Detective Breedlove asked Becca a question on the scale of one to ten she immediately thought of ten as bad. That was not his intention - on a scale of one to ten, ten being good. (Vol. XV, pp. 752-753).

Detective Breedlove wrote in his report on page 3, "Although she told me that the video was probably about nine months old, I know from my experience and on-the-job training that pedophiles do not easily destroy child pornography because it is a prized possession." (Vol. XV, pp. 753-755). Detective Breedlove testified that he did not find any videos showing Becca's vaginal area and Mr. Schiefelbein manipulating it. He believes that is because either it was destroyed or he just did not find it by not looking hard enough or not looking in the right places. It never really occurred to Detective Breedlove that a video like that never existed. (Vol. XV, p. 755).

Detective Breedlove testified that Mr. Schiefelbein held on to the tapes for a long time and they were his prize possessions. He believes to this day that those tapes still exist, unless Mr. Schiefelbein destroyed them between September 11th of last year and the present. (Vol. XV, p. 756).

Detective Breedlove states that it is still his position that Becca was consistent in her testimony when she testified as to what clothes Mr. Schiefelbein was wearing when he allegedly pulled out his penis. He stated that when he first interviewed Becca she stated Mr. Schiefelbein was wearing shorts. Detective Breedlove admitted that this is a little bit inconsistent but during the next interview with her and the DCS worker she said black pants

which was right. He considers going from shorts to black pants a mistake, not being inconsistent. (Vol. XV, pp. 756-757).

At trial Becca testified that the camera was on the floor in front of her when Mr. Schiefelbein was videotaping her bottom part. However, in Detective Breedlove's report on page 13 Becca states that Mr. Schiefelbein was holding the camera. Detective Breedlove agreed that this was fairly inconsistent testimony, but it does not change the fact of everything else about what Becca said about those incidents. (Vol. XV, pp. 758-759).

Detective Breedlove agreed that at trial Becca testified that Mr. Schiefelbein touched her breast one time. (Vol. XV, p. 760). In a supplemental report prepared by Corporal Melissa Westbrook, on September 17, 2002 (Vol. XV, p. 765), Becca stated that Mr. Schiefelbein had touched her breasts several times. (Vol. XV, p. 771). Detective Breedlove testified that he does not "hold much water" in this supplemental report because the officer wrote it eight days after the interview and the officer did not even remember Becca's name. The officer stated she could not remember it very well. (Vol. XV, pp. 772-773).

[REDIRECT EXAMINATION]

Detective Breedlove testified that he was not at the interview with Becca and Our Kids. (Vol. XV, p. 774).

(Witness shown report from Child Advocacy Center to refresh his recollection)

Detective Breedlove testified that Becca told him that Mr. Schiefelbein's penis looked "hard and puffy." He does not remember what color she said it was. (Vol. XV, p. 778). He said Becca drew him a picture of Mr. Schiefelbein's penis. (Vol. XV, p. 780).



Detective Breedlove testified that he does not believe when Becca testified about where the camera was that it was inconsistent because he does not think she was paying that much attention to where the camera was. He thinks that if someone was touching him that he would be more focused on that and not on where the camera was. (Vol. XV, p. 780).

Detective Breedlove testified that every time Becca was asked about Mr. Schiefelbein touching her breasts she would always say it happened in May. (Vol. XV, p. 786).

Detective Breedlove testified that every single time Becca said the touching took place in the gym. She always said the touching always occurred on the rod floor, behind the mat. That has never wavered. He stated the touching of her breast by Mr. Schiefelbein occurred in the office and that has never wavered. The touching of his penis was in the office and that has never wavered. (Vol. XV, p. 787).

Detective Breedlove testified that he asked Becca during the interview if there were any sleep-overs at the gym and she said yes. Becca told him that whenever they had sleep overs that he did not do anything. There were several times in the interview where he went back over things saying them different ways looking for inconsistencies. The only inconsistencies that there were, if you want to call them that, were exact dates and the exact number of times. He did not expect her to remember that because she is a child and according to her it happened a lot. He stated that she is at the gym every single day and that it all runs together. If it happened every single day, she would have said every single day. She is going to school and doing gymnastics and her life is a whirlwind and it all runs together. (Vol. XV, pp. 788-789).

Detective Breedlove testified that according to the family and Becca that Mr. Schiefelbein visited their home several times. She never said Mr. Schiefelbein touched her at her home. (Vol. XV, p.789).

Detective Breedlove testified that Becca told him Mr. Schiefelbein used a pleasure scale during the initial interview. He stated that Becca told him several times that Mr. Schiefelbein got excited when he touched her. She stated this during the initial interview, during the interview with him and Marlene and on the stand. (Vol. XV, p. 790).

(Chart by General White entered as Exhibit #40)

[RE CROSS EXAMINATION]

Detective Breedlove's report on page 2 states, "Although Becca could not give specific dates about the sexual assaults, she was able to narrow down the times and the frequencies to some degree." "Becca was unable to pinpoint exact dates of when [Mr. Schiefelbein] digitally penetrated her vagina or rubbed the outer parts of it, but she told me that it did not begin until sometime after January 2001, and was at first only occasional; but it escalated to almost every day after a few months." Detective Breedlove testified that Becca never said it happened every single day she was at the gym. (Vol. XV, p. 793).

Detective Breedlove agreed that Becca did say on the stand that it was either every day, or every other day, or every other, other day. (Vol. XV, pp. 793-794). She may have said in his interview with her "every day" or "every other day," but she never said it happened every single day that she was there. She could not remember exactly how many times this happened. (Vol. XV, p. 794).

## PHYLLIS THOMPSON

Phyllis Thompson is employed at Our Kids Center which is a non-for-profit evaluation center. They do medical evaluations and psychosocial evaluations for children where there is a concern of possible sexual abuse. Ms. Thompson is a licensed clinical social worker. (Vol. XV, p. 795).

Ms. Thompson talks to children about their health and their medical history for purposes of medical diagnosis and treatment. (Vol. XV, p. 796).

Ms. Thompson testified that she met with Becca Robinson on October 2, 2002. She said at that meeting Becca was alert and oriented and answered questions in a direct manner. She stated that Becca did not exhibit any confusion or hesitation about what she was talking about. Becca's speech was clear and she was "cognizantly age appropriate" in her interactions and thought processes. Becca was 12 at this time. (Vol. XV, p. 796).

Ms. Thompson testified that when she meets with a child she explains to them that they are going to have a medical exam and explains the process of that exam. She explains to them that it is important to tell the truth because they are going to be making determinations such as do they need to give the child medicine or not give them medicine, based on the type of touching; do they need to test for germs on different places of their body that could lead to infections. Ms. Thompson stated that based on the information the child tells them, they make their decisions about how invasive they have to be about the examination. Ms. Thompson stated that Becca expressed to her that she understood that. (Vol. XV, p. 797).

Ms. Thompson testified that she went through a general health history with Becca. Becca told her about some broken bones she had, a wrist, and a middle toe; and a few months before she had fractured her back and was in a brace full time. (Vol. XV, pp. 797-798).

Ms. Thompson does not recall if Becca was wearing her back brace or not because she did not do the physical exam, she is not the nurse practitioner. (Vol. XV, p. 798).

Ms. Thompson testified that Becca told her she was having bad dreams about what her coach did to her. She asked Becca what the coach did to her and Becca told Ms. Thompson that he touched her private spot which she clarified as the genitalia, or the part she pees from – with his finger. (Vol. XV, p.798).

Ms. Thompson testified that she asked Becca if he touched her over her clothes or on her skin and Becca told her on her skin. She asked Becca if he touched her on the inside or the outside and Becca said she was unsure. (Vol. XV, p. 798).

Ms. Thompson explained that when she talks about inside she means was there any penetration. She stated this gets a little difficult with kids because a lot of times kids will talk about inside but their inside means different from what an adult person's inside means. She stated if you asked a little girl if she has wiped with toilet tissue, did you wipe on the outside or the inside, she would say inside because it touches the part where the skin changes to – close to the surface. Becca told Ms. Thompson that she was unsure if it was “this part or this part.” (Vol. XV, p.799).

Ms. Thompson testified that she asked Becca if it happened one time or more than one time. Becca told her that it had happened a lot of times. (Vol. XV, p. 799).

Ms. Thompson asked Becca if there was any pain or bleeding involved and Becca told her that she felt some pain when he touched her private spot, but that there was no bleeding associated with that contact. Becca denied any oral contact with the mouth. (Vol. XV, p. 800).

Ms. Thompson testified that she asked Becca if he [Mr. Schiefelbein] had touched her in any other way. Becca said that he had touched her breasts, on her skin. (Vol. XV, pp. 799-800).

Ms. Thompson testified that she asked Becca if he had her touch him in any way. Becca told Ms. Thompson that he had her touch his private spot with her hand and she said she felt something that was “hard and squishy.” Becca said she made a groping motion with her hand and said that was how he made her touch him. (Vol. XV, p. 800).

Ms. Thompson testified that Becca told her she did not look so she could not answer the question if she saw anything coming out of his penis. (Vol. XV, pp. 800-801).

Ms. Thompson testified that she asked Becca again if she felt or saw anything but in a more appropriate manner asking for her age and Becca said, “I wasn’t looking,” and then she said she did not feel anything. (Vol. XV, p. 802).

[CROSS EXAMINATION]

Ms. Thompson testified that there was a report prepared by Our Kids based upon the summary of both her interview and Ms. Ross, the nurse practitioner who did the exam. The report is a combination of both. (Vol. XV, pp. 803-804).

Ms. Thompson testified that her part of the report is based on Becca's medical history and the psychological part. She stated she is not provided with any documents, other than a referral which was provided by Marlene Baugh with the Department of Children's Services. (Vol. XV, p. 804).

Ms. Thompson testified that what she relies on is what the child tells her. (Vol. XV, p. 804).

Ms. Thompson testified that she did not review documents from the Brentwood Police Department that indicated Becca had said Mr. Schiefelbein had touched her about every day. However, this information is in the presenting history which she took from Becca's mother prior to talking to Becca. Ms. Thompson stated that Becca's mom told her that Mr. Schiefelbein touched Becca about every other day. (Vol. XV, p. 805).

Ms. Thompson testified that her interview with Becca was probably less than 30 minutes and she did not feel comfortable making a diagnosis of whether Becca was depressed or not. (Vol. XV, pp. 805-806).

Ms. Thompson testified that she has never rendered an opinion as to whether a child is depressed as a result of an alleged abuse. She makes recommendations if she believes that the child needs to go into counseling. (Vol. XV, p. 807).

Ms. Thompson suggested or recommended that Becca see a counselor who is experienced in sexual abuse which she states is not a diagnosis. She tells the parents of the child that the counselor would make the determination on any type of treatment plan that

would be needed. Ms. Thompson stated that she did not have any kind of follow-up with that. (Vol. XV, p. 807).

[QUESTIONS BY THE JUDGE]

Q. How many times was there a report by the child of experiencing “pain,” using that word? *(This question is the subject of Issue 4.)*

Ms. Thompson testified that she did not ask Becca a quantitative.

Q. How many times in your notes or your recollection was that word used in the context of the touching?

Ms. Thompson testified that she asked Becca if she experienced any pain or have any bleeding and Becca said that there was no bleeding, and she felt pain when he touched her private spot. (Vol. XV, pp. 808-809).

[QUESTIONS BY THE JURY]

Q. It was stated that Becca had nightmares about this. Did she describe any of the nightmares?

Ms. Thompson testified that Becca did not describe the nightmares to her and she did not ask her to. (Vol. XV, p. 812).

Q. Did Becca indicate, by word or action, whether she was forced to touch the defendant’s penis by reaching behind her or in front of her?

Ms. Thompson testified that she did not and those sorts of questions were not asked. Ms. Thompson stated that Becca said that he groped her. (Vol. XV, p. 812).

(Jury Questions entered as Exhibit 41)

**JILL ROBINSON**

Jill Robinson lives at 5174 Carlton Way in Brentwood. She is married to Roscoe Boss Robinson and they have four children, Paige who is 17, Ashley who is 15, Becca who is 13, and Annie Rose who is 9. (Vol. XV, p. 815).

Ms. Robinson testified that she is familiar with the defendant Mark Schiefelbein. (Vol. XV, p. 815). She stated Mr. Schiefelbein coached her daughter Becca in gymnastics for a couple of years. He also coached Annie Rose for a while and Ashley took a few tumbling lessons from him also. (Vol. XV, p. 816).

Ms. Robinson testified that Becca started taking gymnastics when she was about two-and-a-half when they were living in North Carolina. When they moved to Nashville she picked it up again and then got tired of it and quit for about a year or so. Becca took a cheerleading class with a friend at Let It Shine and she realized that she missed gymnastics and wanted to go back so she did. She has been doing gymnastics for probably eight or nine years total. (Vol. XV, p. 818). When Becca wanted to quit she was fine with that and Becca felt like it just was not fun anymore. (Vol. XV, p. 819).

Ms. Robinson testified they allowed Mr. Schiefelbein to come into their family. He did not have any family around and they allowed him to experience family life with them. She said he ate dinner with them, went to the movies with them, came over to watch movies, went to hockey games and baseball games with them; and he would go with her husband to see guy flicks. She stated he was like part of the family. (Vol. XV, p. 816).



Ms. Robinson testified that Mr. Schiefelbein was part of the family starting in November of 2000 and continued up until Becca told her what he had been doing to her in September of 2002. (Vol. XV, pp. 816-817).

Ms. Robinson testified that Becca's relationship with Mr. Schiefelbein was very close. Ms. Robinson thinks Becca looked at him like an uncle. Ms. Robinson has five brother and she thinks that is how she would characterize the relationship. She stated they had fun together, he would come over and he would play games with the family. She stated that Becca felt very comfortable around him and she really loved him. (Vol. XV, p. 817).

Ms. Robinson testified that at one point she noticed a change in Becca and Mr. Schiefelbein's relationship. She stated it seemed a little more stressed. On one episode they were coming home from church and Mr. Schiefelbein's truck was in the driveway and Becca said, "Oh, no, not – I don't want him to be here now. I don't want him to be here today." (Vol. XV, pp. 817-818).

Ms. Robinson testified that she did not notice a change in Becca's demeanor about going to gymnastics during this time. (Vol. XV, p. 819).

Ms. Robinson testified that her normal routine in taking Becca to the gym would be to stay for an hour or so and watch her warm up and do some of her tricks and then she would leave. She stated that Becca's workout would last five hours. There were times that she would be in the area and would come back in to check on her and see how she was doing. She did not do this every time. She would come early enough where she could watch the last part of the workout, maybe the last 45 minutes at the end of a workout. (Vol. XV, p. 820).

Ms. Robinson testified that during the time when Becca and Mr. Schiefelbein's relationship was strained, when she would get ready to leave the gym Becca would look at her and she interpreted Becca's look as, "please don't leave." (Vol. XV, p. 820).

Ms. Robinson testified that when Becca would give her that look that she would sometimes sit back down and Becca would ask for permission to talk to her. She stated there were times where she would ask permission if she could say good-bye to her one more time and Mr. Schiefelbein would say yes, make it quick or whatever. She stated Becca would put her arms around her and give her a hug and say "please don't go." (Vol. XV, p. 821). Ms. Robinson stated that when this happened she would stay for a little bit longer and would think in her mind, well, maybe she is afraid that she is going to have to do something difficult or an event she is afraid of; maybe she wants her moral support, and she would stay a bit longer and then go. (Vol. XV, p. 822).

Ms. Robinson testified that Becca did injure her back in June when she was doing gymnastics. After a week of complaining that her back hurt Mr. Schiefelbein said that she may need to go to the doctor because she is complaining that it really hurts. Ms. Robinson took Becca to the doctor and she had fractured her L5. They put her in a brace and she had to wear the brace for approximately three months. (Vol. XV, pp. 823-824).

Ms. Robinson testified that Becca did not continue to do gymnastics during that period, she was not allowed to and could not. Becca did, at times, go to the gym to help with the concession stand during this time because she wanted to be around her friends. These were her best friends and were like family to her. Mr. Schiefelbein let her work in the

concession stand and she really enjoyed that. She would do that maybe twice a week. (Vol. XV, p. 824).

Ms. Robinson testified that there were times when Becca told her that she wanted to quit gymnastics. Becca had a couple of especially hard workouts and one was very difficult for her and Mr. Schiefelbein called Ms. Robinson to tell her that he thinks Becca was not doing what he was asking her to do and he thought she just needed to “hang it up and just forget about it.” When Ms. Robinson talked to Becca about this Becca was very upset because Mr. Schiefelbein had gotten so angry with her that she would not do a back handspring on the high beam, with Mr. Schiefelbein being across the gym. Ms. Robinson stated that Becca would do it if he was close to her. (Vol. XV, pp. 825-826).

Ms. Robinson testified that Becca was upset because it hurt her back but she said that was not a good enough excuse for Mr. Schiefelbein. She stated that Mr. Schiefelbein got so angry with Becca that he left the gym for an hour-and-a-half. Ms. Robinson said that Becca was so distraught that he did this that she did the back hand spring on the high beam, one after the other, the whole time he was gone. Ms. Robinson said that when Becca came home she said “I’ve had it. I don’t want to do this anymore. I’m just sick of this.” Ms. Robinson stated that the next morning they had a talk and she told Becca that she did not have to do gymnastics anymore and Becca said she would like to play the violin. Ms. Robinson took her that day to get a violin and she began lessons that week. This was the 1st, 2nd or 3rd of July in 2002. (Vol. XV, pp. 825 - 826).

Ms. Robinson testified that she was okay with Becca not wanting to do gymnastics anymore. She enjoyed watching her work out and compete but if Becca was adamant about

not wanting to do it then she was okay and it was fine with her if she did something else. She said she was not going to force her and that it was not that important, it is an extracurricular activity. (Vol. XV, p. 828).

Ms. Robinson testified that Mr. Schiefelbein was not informed that evening that Becca was quitting. Becca did not go to practice the next day. Ms. Robinson called Mr. Schiefelbein the next day to tell him that Becca was not coming in that day and that she does not want to come back and that she has had it. Ms. Robinson stated that Mr. Schiefelbein asked her to put Becca on the phone and Ms. Robinson told him that she was in the pool and could not come to the phone. (Vol. XV, pp. 827-828).

Ms. Robinson testified that Mr. Schiefelbein asked her if he could come over that evening to talk to Becca and she said he could and he did. He came over that evening with his tumble bus along with Mia and her mom Carmen Yabut. (Vol. XV, p. 830).

Ms. Robinson testified that Becca went outside to meet Mr. Schiefelbein on the tumble bus along with Mia. Mia came back in the house before Becca and Mr. Schiefelbein did. Mr. Schiefelbein came in to speak with Ms. Robinson and he was begging Becca to come back. Ms. Robinson stated that Mr. Schiefelbein was crying, begging and pleading with Becca not to quit. (Vol. XV, p. 830). Ms. Robinson stated that Mr. Schiefelbein was pleading with Becca to come back and that she owed this to him. He said he had worked so hard to get her where she was and to please not quit now. (Vol. XV, p. 832).

Ms. Robinson stated that she did not think the way Mr. Schiefelbein was behaving was appropriate. She could not understand why he was so distraught over her wanting to quit

gymnastics. Ms. Robinson stated that other girls had quit gymnastics, Allie, Lilly and Andy. (Vol. XV, p. 831).

Ms. Robinson testified that Becca did not make a decision that night about continuing with gymnastics. She stated that Mr. Schiefelbein left the house and he was to go visit his family in California the next morning. (Vol. XV, p. 832).

Ms. Robinson testified that Carmen Yabut was supposed to take Mr. Schiefelbein to the airport but she could not get a hold of him. Ms. Yabut called Ms. Robinson and seemed upset. Ms. Yabut was concerned because she was at the house the night before and she saw how upset Mr. Schiefelbein was and she was crying along with her daughter. She stated it was very emotional that night. (Vol. XV, p. 833).

Ms. Robinson testified that after Mr. Schiefelbein got back from California she and her husband talked to him about Becca. She stated that Mr. Schiefelbein wanted to “revamp” the way he did workouts and wanted to make workouts more fun. He said this because he wanted Becca to come back to gymnastics so he was thinking of ways that he could get her to come back. (Vol. XV, p. 834).

Ms. Robinson testified that this conversation took place in the gym because Mr. Schiefelbein asked them to come there. She said he told her that if he could talk to Becca one-on-one that he promised her that he could get her back in gymnastics. Ms. Robinson said she wanted Becca to quit for the right reason. She said you don’t quit gymnastics because you are having a really bad day or you are afraid of a trick, you do not want to just throw it all away. Ms. Robinson said as a mother she wanted to make sure that this was an

appropriate reason to quit gymnastics. She stated that if Becca had truly had it and she really wanted to do something else, then that would be an appropriate reason to quit gymnastics. (Vol. XV, pp. 835-836).

Ms. Robinson testified that Mr. Schiefelbein wanted to try and negotiate something to get Becca back in gymnastics. Ms. Robinson said Becca was defiant towards this and she had never seen her like that before. They were sitting in Mr. Schiefelbein's office and she is usually pretty respectful but she was just saying, "no, no," and she was just so defiant. (Vol. XV, p. 836).

Ms. Robinson testified that she remembers looking at Becca and thinking why is she acting like this, this is not the way she normally responds. Ms. Robinson said her husband was there too. Ms. Robinson actually got up and left because she felt so frustrated inside because she could not figure out where Becca was coming from, why she was being so defiant. (Vol. XV, pp. 836-837).

Ms. Robinson testified that the negotiations of Becca going back to gymnastics were ongoing while her back was in the brace. (Vol. XV, p. 838).

Ms. Robinson testified that there were negotiations because they, as parents, were trying to do what was best for Becca. At that point, they respected Mr. Schiefelbein and listened to him and thought maybe Becca should give it another chance. She could go 12 more times or whatever the number was that Mr. Schiefelbein wanted her to go to see if she truly did want to quit, or if she had just had a couple of bad workouts. (Vol. XV, pp. 839-840).

Ms. Robinson testified that she knew Becca would never go to the Olympics because she was not a strong enough tumbler. However, she did think she could get a scholarship to college. (Vol. XV, p. 840).

Ms. Robinson testified that it was a Sunday in September, either the 7th or 8th, when Becca told her about what Mr. Schiefelbein had done to her. That day Mr. Schiefelbein had come over for Sunday dinner and they were coming home from church and his truck was in the drive and Becca stated, “why is his truck here?” After they ate the dog got out and ran away. Becca and Annie Rose and an older child rode in the truck with Mr. Schiefelbein to look for the dog. While in the truck one of Becca’s sisters mentioned a boy that she liked and Mr. Schiefelbein began to tease her about him. Becca got angry and popped him on the head. When they got back to the house Mr. Schiefelbein was really upset and came in the house and told Ms. Robinson that things had been different between him and Becca; that she was not being respectful. He was extremely angry with her for the way she behaved in the truck, and he told Ms. Robinson that Becca had struck him. Mr. Schiefelbein said he was going to leave before he lost his cool and left. When Becca came in Ms. Robinson asked her what happened and Becca told her that Mr. Schiefelbein was teasing her and she was extremely embarrassed and she did hit him. Ms. Robinson asked Becca why he gets so angry with her over insignificant things and that she just did not understand. Ms. Robinson kept thinking why did he get so upset over “silly things” and then it just came out of her mouth before she even thought and she said “is he touching you inappropriately?” Becca just said, “yes.” (Vol. XV, pp. 841-842).

Ms. Robinson turned around and just hugged her and said it will never happen again. Ms. Robinson took Becca into the bedroom and asked her a few questions and told her it was going to be all right. Ms. Robinson called her husband, who was working, and told him what Becca had said. Ms. Robinson stated she was just in shock because this is the person they allowed to be in their home and their family, and they loved and trusted him. She felt like he betrayed the whole family. (Vol. XV, p. 843).

Ms. Robinson testified that she was real careful about the questions she asked Becca because she did not want to ask more than she should. She asked her where did he touch you and Becca stated, “my private spot.” Ms. Robinson asked if he touched her on top of her leotard or under and Becca said, “under.” She asked her if it happened a lot and Becca said, “yes.” Ms. Robinson asked Becca what he touched her with and she said, “his finger, his hands.” Ms. Robinson stated that that was all she asked her. She did not ask her any details and just left it at that. (Vol. XV, p. 844).

Ms. Robinson testified that she remembers when Becca started to develop in her chest. She stated Becca was twelve-years old and it was May Day, 2002. (Vol. XV, p. 845).

Ms. Robinson testified that when Becca was being taught by Mr. Schiefelbein that she was competing at level six and level seven and was training for level eight. She stated it was the summer of 2001 when Becca began training for level seven. (Vol. XV, pp. 845-846).

Ms. Robinson testified that Becca’s first level seven meet was in January of 2002. She also stated that Becca participated in the Fall Fiesta which is a gymnastics meet that was sponsored by Espirit Gymnastics in November of 2001. (Vol. XV, pp. 846-847).



Ms. Robinson stated that from what she observed when she was at the gym the gymnasts were given specific tricks or routines to do and when they were done they had to hold their hand up and wait for Mr. Schiefelbein to acknowledge them. They would then have to show that particular trick to get it “signed off” so they could go on to the next thing. If they wanted to get a drink of water or go to the bathroom they had to ask permission. (Vol. XV, p. 847).

Ms. Robinson testified that Mr. Schiefelbein did not like people coming into his office. She knows this because he told her that he did not want people coming in there and he did not want gymnasts in there at all. He did not want parents coming in and out. She stated it was “his domain” and was his space. She stated the door would usually be open because he was out in the gym coaching. If he was in there the door would be open and closed. (Vol. XV, pp. 847-848).

Ms. Robinson testified that after Becca told her that Mr. Schiefelbein had been touching her she called the police the next morning. She took Becca to talk to Detective Breedlove the next afternoon. (Vol. XV, pp. 848-849).

Ms. Robinson testified that when Detective Breedlove was interviewing Becca that she was in Lieutenant Campsey’s office watching it on closed circuit TV. Ms. Robinson stated that during the interview she just felt sick and that she knew Becca was being “totally honest,” and that Becca was telling Detective Breedlove exactly what happened. (Vol. XV, p. 849).

Ms. Robinson testified that she thought Becca was somber during the interview. She stated it was difficult for Becca to say what she had to say and she was uncomfortable saying the things she had to say. Ms. Robinson stated that there were times when Becca acted silly and not like herself at all. She thinks Becca was just uncomfortable and it was very difficult for her to say what had happened to her. (Vol. XV, p. 851).

Ms. Robinson testified that after the interview with Detective Breedlove that he came out to their home to help Becca make a phone call to Mr. Schiefelbein to try and catch him in a confession. Ms. Robinson stated that she gave Detective Breedlove permission to do this. Ms. Robinson was there listening with her daughter and Detective Breedlove when they made the call. (Vol. XV, pp. 851-852).

Ms. Robinson testified that she could hear Mr. Schiefelbein's end of the conversation. She was sitting right next to Detective Breedlove and she had her right ear right up next to the phone and could hear what he was saying. (Vol. XV, p. 852).

(Witness shown Exhibit 15 - Transcript of telephone call)

Ms. Robinson testified that she heard Becca say to Mr. Schiefelbein that she was worried about him touching her in her private spots. She also heard Mr. Schiefelbein respond, "No, I'm not going to do that." She also heard Becca ask about Mr. Schiefelbein videotaping her private spot. She also heard him say "there is no videotapes," and "I don't know what you're talking about." (Vol. XV, pp. 852-853).

Ms. Robinson stated that at some point Mr. Schiefelbein asked to speak with her. Ms. Robinson stated that she had to run downstairs so the acoustics would sound different, so that

he would not know that she was in the same room with Becca while she was asking him those questions. She ran downstairs and got on the other phone and talked to him. (Vol. XV, p. 854).

Ms. Robinson testified that she was shocked at what he said because he said that Becca sounds great. He also said that he was glad Ms. Robinson had this talk with her and that she wants to come back to gymnastics. Ms. Robinson asked him if Becca apologized to him and he said yes she did and everything is fine. Ms. Robinson stated that she was shocked and had a hard time even speaking because her daughter just asked him and pleaded with him not to touch her in her private spot again. She stated he never brought that up to her. Ms. Robinson could not believe that he was talking to her like that after the conversation he just had with Becca. It was not consistent at all and she just could not believe that it even occurred. (Vol. XV, pp. 854-856).

[CROSS-EXAMINATION]

Ms. Robinson testified that she was on scholarship for gymnastics at BYU while in college. She stated that her and Becca had talked about Becca going to BYU but not necessarily on scholarship and not for gymnastics. (Vol. XV, pp. 857-858).

Ms. Robinson testified that Becca started with Espirit Gymnastics in September 2000 and she had a normal workout routine. At that time Mr. Schiefelbein did not have his own gym and was renting space from Gabby. He had only six gymnasts and they worked out at the same time. (Vol. XV, pp. 858-859).

Ms. Robinson could not recall what Becca's normal routine was while at Espirit. She stated that Mr. Schiefelbein would change the schedule around. (Vol. XV, p. 859).

Ms. Robinson could not recall how many times Mr. Schiefelbein had been to her house between May of 2002 and September of 2000, but it was a lot. (Vol. XV, pp. 860-861).

Ms. Robinson testified that she did have to tell Becca to "back off" when she would be clinging on Mr. Schiefelbein while at their house. (Vol. XV, p. 861).

Ms. Robinson testified that there were occasions when Becca was having trouble doing a particular skill or apparatus and would come home frustrated and say she wanted to quit gymnastics and Ms. Robinson would encourage her to stay involved. (Vol. XV, pp. 862-863).

Ms. Robinson agreed that it was Mr. Schiefelbein's coaching style to withdraw from the girls and go back to them if he got upset with them. He would withhold his attention and ignore them if they did not do a trick correctly or if they did not do what he wanted them to do. This was his coaching style. Ms. Robinson understood this was his coaching style but said she did not like it and she let him know that she did not like it. (Vol. XV, p. 863).

Ms. Robinson agreed that he did this with all the girls but he did it more with Becca than anyone else. She stated it would not take anything for him to get upset with Becca. She said that she had talked with the other parents, and she knew that that happened to the other girls also. They would let Ms. Robinson know when Mr. Schiefelbein was ignoring their daughters. (Vol. XV, p. 864).

Ms. Robinson agreed that when the incident happened in July of 2002 that she would not talk to Mr. Schiefelbein for four of five days after that. (Vol. XV, p. 864). Ms. Robinson stated that she was angry with Mr. Schiefelbein because he got upset with Becca again over something stupid. Ms. Robinson does not recall saying that she was angry with Mr. Schiefelbein because she was trying to keep her involved in gymnastics and he was driving her out of gymnastics. (Vol. XV, p. 866).

Ms. Robinson testified that Becca's back brace came off in November of 2002. She stated her back took longer to heal and that is why it was on for longer than three months. (Vol. XV, pp. 866-867).

Ms. Robinson testified that on days when she would drop off Becca at the gym and wait there would sometimes just be the "team girls" there and other days there would be only ten or so girls at the gym. (Vol. XV, p. 867).

Ms. Robinson testified that in May of 2002 there were three girls on Becca's team. She believes there were three or four level six girls. (Vol. XV, p. 868)

Ms. Robinson testified that while Becca was injured she wanted to go to the gym to work the concession stand which is at the front of the gym where all the parents and kids sit. (Vol. XV, p. 869).

Ms. Robinson testified that Becca was having problems performing back hand springs on the high beam and she had a hard time doing front giants and releasing to a hand stand on the low bar. She was also having a difficult time doing other skills. Ms. Robinson testified

that Becca knew that if she could not perform these skills that she would not move on to level eight. (Vol. XV, pp. 870-871).

Ms. Robinson testified that after Becca told her about the allegations against Mr. Schiefelbein that she took her to counseling sessions at the guidance center. Becca saw a woman named Andrea once a week for a few months. Becca also saw the guidance counselor at her school. (Vol. XV, p. 871).

Ms. Robinson testified that she would, on average, drop by the gym and watch what was going on maybe once or twice a week. She might bring Becca something to eat. (Vol. XV, p. 872).

Ms. Robinson testified that the “strained period” between Becca and Mr. Schiefelbein was not for very long and was maybe at the end of May until June. Ms. Robinson stated that there were times that she noticed Becca was a little more apprehensive towards Mr. Schiefelbein which was around the end of June or July. (Vol. XV, pp. 872-873).

Ms. Robinson testified that as of the date that Becca told her about what Mr. Schiefelbein was allegedly doing to her that no decision had been made as to whether Becca was going to quit gymnastics or not, she was still considering it. (Vol. XV, p. 873).

[REDIRECT EXAMINATION]

Ms. Robinson testified that what she meant by Becca being a little more apprehensive was that she was just not as anxious to go to the gym. Becca also wanted her to be there with her. It was almost a loss of drive to go to gymnastics. (Vol. XV, p. 874).

Ms. Robinson testified that she was in the room with Becca when she was having her examination at Our Kids Clinic. She said Becca was laying down on a table and was not clothed from the waist down and she had to be examined vaginally. She stated that the person doing the exam was very gentle and considerate and would talk with Becca to make sure she knew what was happening to put Becca at ease. She stated that Becca was okay during this examination and they handled it very well. (Vol. XV, pp. 874-875).

Ms. Robinson testified that when Becca went to the gym to work at the concession stand that she would wear her brace, shorts and a T-shirt; she would not wear her leotard. (Vol. XV, pp. 875-876).

Ms. Robinson testified that she was sure that Becca would give Mr. Schiefelbein a hug when she first got to the gym to work the concession stand but that would probably be it because she did not stay for very long. She would just be there for an hour or so, so she could see her friends and say hi and work there and then come home. (Vol. XV, p. 876).

Ms. Robinson testified that there were never any parents who were there every time their child was in the gym. The parents would come and go. There were times where you would go to the gym and there were no parents at all. There were times when you would go back and there would be one or two sitting there. It just depended on the time but there were plenty of times when there were no parents there at all. (Vol. XV, p. 876).

[REXCROSS EXAMINATION]

Ms. Robinson testified that Becca's vaginal exam was normal. Ms. Robinson testified that she recalls telling Ms. Thompson at Our Kids that Becca said the touching occurred almost every other day. (Vol. XV, p. 877).

[QUESTIONS BY THE JURY]

Q. Did you know that Mark videotaped some of the workouts, and did you ever ask to see them, the tapes, that is?

Ms. Robinson testified that she did know Mr. Schiefelbein videotaped the girls. She also asked to view the tapes. She was able to see some of the videotapes that he took of Becca doing specific tricks. (Vol. XV, pp. 878-879).

Q. You mentioned Becca was defiant. First question: When was this; and second: Would you go into it a little more for us?

Ms. Robinson testified that Becca became really defiant when they were in Mr. Schiefelbein's office and he had just talked to Becca one on one. Mr. Robinson then came into the office, this was after the really bad workout, where she wanted to quit. Becca was almost rude to him and she just kept saying no, I don't want to do it. Her words and her body language were really tense. (Vol. XV, pp. 879-880).

Q. Had you, as a parent, discussed with Becca about, "bad touches?" Also, did you let her know that if anyone touched her, she should come to you or your husband?



Ms. Robinson testified that they did talk with Becca about good touches and bad touches and what they were and if anyone touched her that she should come and talk to them. She knew what was a good touch and what was an inappropriate touch. There is no question that she knew what that was. (Vol. XV, p. 880).

Q. Becca mentioned in her testimony that when she told you about Mark touching her, you said you had a feeling something had been going on. Could you elaborate on that?

Ms. Robinson testified that what she thinks Becca was thinking about when she said that was when they looked back over the situation, it all made sense; the control, the manipulation, some of the things he would say to her. She said it all made sense now, looking back. She stated that she could not imagine that happening but there are sick people out there that are capable of doing something like this. She stated that looking back on it, she doesn't know why she didn't see this behavior. (Vol. XV, pp. 881-882).

Q. At first you testified that Becca came home wanting to quit and right away you bought her a violin. Later you testified that you did not want Becca to quit because a trick or routine was too hard. Explain the reason for the apparent difference.

Ms. Robinson testified that it was not just the one trick. There had been several episodes where Mark had gotten angry at Becca for specific things. It was a culminating thing. There were so many times where he was upset with her but it was not just one trick. Ms. Robinson stated that Mr. Schiefelbein had Becca on beams six hours one day because

she would not do something the way he wanted her to do it. It was being angry at gymnastics meets, where he would just berate them at a meet. She also stated that Mr. Schiefelbein would berate them and intimidate them. (Vol. XV, pp. 882-884). By buying the violin Ms. Robinson stated she was letting Becca know that it was okay for her to want to do something else. (Vol. XV, p. 885).

Q. What caused you to ask Becca, the night of September 8th, if “he” had touched her inappropriately?

Ms. Robinson testified that it is a parent’s worst nightmare and you do not think it will ever happen to your own child. The thought had crossed her mind that maybe that is why he gets so upset with her for these stupid things. Maybe there is more to it. She just asked it. (Vol. XV, pp. 885-886).

[QUESTION BY THE JUDGE]

Q. Do you know if Becca shared her story about Mark with any of her friends at any time? *(This question is subject to Issue 4.)*

Ms. Robinson testified that, “yes, she has.”

(Jury Questions marked as Exhibit #42)

[FURTHER DIRECT EXAMINATION]

Ms. Robinson testified that Becca told her friends about the incident after she told her about it. (Vol. XV, p. 887).

Ms. Robinson testified that she had bought Becca the violin the very next day after Becca told her that she’d had it. (Vol. XV, p. 887).

Ms. Robinson testified that Mark never showed her any videotape of him zooming in on Becca's crotch area. She only saw a few videos. One in particular was one of her double fly-away, because he was so proud of it and wanted to share that with her. (Vol. XV, p. 887).

Ms. Robinson testified that her and Becca are very close. They relate very well to one another, and they have really good communication. She loves her to death and Becca loves her. (Vol. XV, p. 888).

Ms. Robinson testified that she believes Becca did not tell her earlier than the night in September about the touching because she was afraid. She stated that Becca was told that if she told then she would be in big trouble and that Mr. Schiefelbein would be in big trouble, and the gym would be in big trouble. Becca was afraid to tell anyone because of that.

**STATE RESTS**

## DEFENDANT'S PROOF

### EDMON YABUT

*[The following testimony was given outside the presence of the jury]*

Edmon Yabut is an emergency physician. Dr. Yabut works all around the Middle Tennessee area, but mostly in Springfield. Dr. Yabut is board certified in internal medicine and pediatrics. Dr. Yabut is currently working in the emergency room at Springfield, Tennessee. (Vol. XV, pp. 894-896).

Dr. Yabut testified that as part of his duties as an ER physician he is involved in rape cases. (Vol. XV, p 896).

(Dr. Yabut is deemed an expert in pediatrics by the Court)

Dr. Yabut testified that he reviewed a report from Our Kids on their examination of Becca Robinson. Dr. Yabut considers the whole report to be relevant as a physician. He stated you get a history and a physical exam. (Vol. IV, pp. 898-899).

Dr. Yabut testified regarding the Our Kids physical examination results. He thought the perfectly normal physical exam was not consistent with repeated painful contact with the genitals. Assuming Becca testified that anywhere from eight to twenty times there was penetration made, and that at one point there was indication that she might have been in pain, Dr. Yabut stated he did not think this was consistent with a normal physical exam where there is no tearing of the hymen. Dr. Yabut stated that in an intact or a virginal female, the only thing that would cause pain would be an injury to the vaginal area, and more specifically injury to the hymen. Dr. Yabut stated that even a couple of months after whatever last

accusation or accused molestation has happened, that you would see some evidence of previous injury, if there was pain. If it was completely painless, then you would expect a normal exam. (Vol. IX, pp. 901-902).

Dr. Yabut testified that a normal exam, in a prepubertal female, is an intact hymen, with a very intact hymen ring, without any scars, adhesions, discharge, without any furrowing of the hymenal walls or any indentations in the hymen wall. Dr. Yabut said that what was described in the Our Kids report was a normal presented hymen, which is a normal hymen. (Vol. XV, pp. 902-903).

Dr. Yabut testified that the way the history was written regarding Becca's incident was there was repeated contact, multiple occasions, and they were painful. In his opinion, he does not think it is possible to have a perfectly normal exam with repeated painful contact. (Vol. XV, p. 903).

[CROSS-EXAMINATION]

Dr. Yabut testified that the only report he reviewed was the Our Kids report. He did not review the interview between Detective Breedlove and Becca. (Vol. XV, p. 904).

Dr. Yabut testified that he had not seen previously the drawing that was prepared by the DCS worker that interviewed Becca. The DCS worker drew the light lines and Becca drew the dark lines, where she indicated an X over the vaginal entry. The dark lines are the areas that Mr. Schiefelbein touched her. Dr. Yabut testified that based upon the drawing, if he had just touched the majora and the minora he would not expect to find an injury. (Vol.

XV, p. 906). *[The judge excluded all of Dr. Yabut's testimony concerning the medical report which is the subject of Issue 5.]*

**[JURY IN]**

[Direct Examination of Dr. Edmond Yabut continued in presence of the jury]

Dr. Yabut testified that he lives in Brentwood and has been a resident of Williamson County for two years. He is an emergency physician. (Vol. XV, pp. 914-915).

Dr. Yabut testified that he has a thirteen year old daughter named Mia and a set of twins that are ten-years old, Nina and Trixie. Mia is involved in gymnastics at the present time at Let It Shine. He said that Mia left Let It Shine to train with Mr. Schiefelbein. (Vol. XV, p. 915).

Dr. Yabut testified that he met Mr. Schiefelbein in July of 2000. They were moving from Goodlettsville and decided Mia needed a better gym and so they went to Let It Shine where Mr. Schiefelbein began coaching Mia. When Mr. Schiefelbein left Let It Shine he started his own gym and Mia decided she wanted to go with him. (Vol. XV, p. 916).

Dr. Yabut testified that Mia was one of the first six kids that started at Mr. Schiefelbein's new gym, Espirit Gymnastics. Dr. Yabut was very supportive of Mr. Schiefelbein starting his own gym and he also co-signed the lease to the building. (Vol. XV, p. 917).

Dr. Yabut testified that the initial six girls who started at Espirit Gymnastics were his daughter Mia, Becca Robinson, Lilly and Andy Yopez, Catherine Traxler and Jordan Melton. (Vol. XV, p. 917).

Dr. Yabut testified that he has been able to observe Mr. Schiefelbein's coaching style. He stated Mr. Schiefelbein's coaching style is very aggressive and he is very particular with details. He stated Mr. Schiefelbein maximizes whatever he can get out of each kid and has a personal coaching style which is tailored to each kid. (Vol. XV, pp. 917-918).

Dr. Yabut testified that it was Mia and his choice to stay with Mr. Schiefelbein. He stated that Mia was ready for "hard core" gymnastics and she could not get that at Let It Shine so she stayed with Mr. Schiefelbein. Dr. Yabut spoke with Mr. Schiefelbein before Mia joined his gym and Mr. Schiefelbein told him that he would give everything in his power to improve Mia's gymnastics. (Vol. XV, p. 919).

Dr. Yabut described Mr. Schiefelbein as very sociable and gymnastics was his life and was the most important thing to him. Dr. Yabut stated that money, what he wears, where he lives or how he lives was not important to Mr. Schiefelbein. Dr. Yabut stated Mr. Schiefelbein was a little immature in terms of certain aspects of his life but for the most part, he thought he was a very outgoing person and very easy to deal with. Dr. Yabut stated that over the last year or two he has gotten to know Mr. Schiefelbein very well and has never had any problems with him. (Vol. XV, pp. 919-920).

Dr. Yabut testified that he had contact with Mr. Schiefelbein outside of the gym setting all of the time. He stated they would go out a lot, eat out a lot and watch movies together. Dr. Yabut has never heard Mr. Schiefelbein use one cuss word and has never heard him tell a dirty joke. He stated that Mr. Schiefelbein has tried to pay his debts off by working at the house and they have gotten to know each other well during that time. (Vol. XV, p. 920).

Dr. Yabut testified that Mia's training schedule during May of 2002 consisted of what is called TOPS training and strength and flexibility training. He testified that Mia trained with Becca on a regular basis at the gym during June of 2001 until May of 2002, along with Andy and Lilly Yopez. (Vol. XV, p. 921).

Dr. Yabut testified that Mia, Becca and Jordan practiced at the same time together almost all of the time. He would spend one or two hours at the gym five or six days per week. (Vol. XV, p. 922).

Dr. Yabut testified that he would go in and out of the office at the gym all of the time. He replenishes the first-aid kit every week or every month, so he is always in the office. Dr. Yabut is not aware of any rules that prohibit anybody from going in or out of the office. He stated that he does not think Mr. Schiefelbein would try and keep him out of the office, and that he has never tried to keep him out. (Vol. XV, pp. 922-923).

Dr. Yabut testified that pretty much every day that he is at the gym he has had occasion to observe Mr. Schiefelbein and Becca interacting. He stated they were very close and that Becca would grab Mr. Schiefelbein's attention all of the time. It was not a cause of concern on his end until his daughter, Mia, started complaining during competition season that she could not get Mr. Schiefelbein's attention. Dr. Yabut thinks a lot of the girls had a little crush on Mr. Schiefelbein, and Becca would get jealous. Dr. Yabut thought Becca spent a lot of time grabbing his attention. (Vol. XV, pp. 923-924).

Dr. Yabut testified that when Becca hurt her back she was not at the gym that often and did not work out at all. She would come to the gym to help out with whatever and hang



out at the gym. He said that before Becca hurt her back and left the gym that her relationship with Mr. Schiefelbein was the same between June of 2001 and May of 2002. (Vol. XV, p. 924).

[CROSS-EXAMINATION]

Dr. Yabut testified that there are three of them who co-signed on the gym building for Mr. Schiefelbein. (Vol. XV, p. 925).

Dr. Yabut testified that he was concerned about Mr. Schiefelbein because he was depressed about Becca quitting gymnastics and that he gets depressed when any kid quits gymnastics. (Vol. XV, p. 927).

Dr. Yabut testified that if there was a mat in front of him obstructing his view and they were not using it he would move it. He does not believe there was a rule that parents were not allowed on the floor. He has never hesitated to go out on the floor. (Vol. XV, p. 930).

[REDIRECT EXAMINATION]

Dr. Yabut testified that whether Mr. Schiefelbein owes him money or not does not affect his testimony. The \$12,000 that Mr. Schiefelbein owes him represents less than 2.5% of his income. He has three kids involved in gymnastics and he thinks any reasonable parent would put that over any amount of money. (Vol. XV, p. 931).

### **ROB TALLMAN**

Mr. Rob Tallman lives in Franklin, Tennessee and is a home builder. He has one child in gymnastics named Maddie. (Vol. XV, p. 932)

Mr. Tallman testified that Maddie became involved in Mr. Schiefelbein's gym the first part of 2001 and she is still there. (Vol. XV, p. 933).

Mr. Tallman testified that he had several conversations with Mr. Schiefelbein regarding filling in a hole in the office wall beginning during the summer of 2002. Mr. Tallman stated that Mr. Schiefelbein wanted the hole covered up for a gymnastics meet in November and he wanted it to look attractive. (Vol. XV, p. 933).

Mr. Tallman testified that there was a display case that kind of blocked the lower part of the opening to Mr. Schiefelbein's office. (Vol. XV, p. 934).

(Witness shown Exhibit 11 - photograph of office)

Mr. Tallman testified that the hole was eventually filled in the first part of September by Mr. Schiefelbein. (Vol. XV, p. 935). Mr. Tallman stated he finished the drywall and then painted it. (Vol. XV, p. 936).

(Two photographs marked as Exhibit No. 43)

[CROSS-EXAMINATION]

(Witness shown Exhibit No. 33 - picture of office)

Mr. Tallman testified that the picture shows the opening in the office prior to the fillment and the display case is flush up into the opening. He stated this was done for a gymnastics meet because the office was typically messy. (Vol. XV, p. 937).

## DEE ANN MELTON

Dee Ann Melton has lived in Brentwood, Tennessee for thirteen and-a-half years. (Vol. XV, p. 938). Ms. Melton has three children, Jordan, Alex and Asher. Jordan is 10 years old and is involved in competitive gymnastics. Jordan began taking gymnastics at Let It Shine. Ms. Melton met Mr. Schiefelbein at Let It Shine and was Jordan's coach. (Vol. XV, pp. 939-940).

Ms. Melton testified that when Mr. Schiefelbein left Let It Shine that her daughter left with him and they went to Gabby's in Nashville for about two months. She said Mr. Schiefelbein was in the process of opening a gym during those two months. Once the gym was open they went to the new facility called Espirit Gymnastics. (Vol. XV, p. 941).

Ms. Melton testified that she made a financial contribution of \$50,000 for the opening of the gym and she co-signed on the lease. She said the grand opening of the gym was on January 13, 2001. The first classes actually started on December 8, 2000. (Vol. XV, p. 942).

Ms. Melton testified that she observed Mr. Schiefelbein coaching not only her daughter but other students as well. (Vol. XV, p. 942).

Ms. Melton described Mr. Schiefelbein's coaching style as intense and direct. She stated he trains them to be independent in a lot of ways and that they progress through a lot of skills and exercises beginning on their own and then he helps them to be self-motivated and to motivate each other. She stated he holds them accountable and she thinks he is a good disciplinarian but fun at times. (Vol. XV, p. 943).

Ms. Melton testified that Mr. Schiefelbein would give the girls fun time. He helps them to face their fears and does not let them be wimps. She thinks Mr. Schiefelbein had a very good balance and grasp of when to push a child and when not to, when to back off, or when to allow the parent to really have some leeway and when not to. (Vol. XV, p. 944).

Ms. Melton testified that Jordan had received gifts from Mr. Schiefelbein. She received Beanie Babies, birthday cards, stuffed animals, goodie bags and fun things like hair clips and candy and that kind of stuff. (Vol. XV, pp. 944-945).

Ms. Melton testified that she has had occasion to interact with Mr. Schiefelbein outside of the gym setting. They would have cookouts, go to movies with a group of people, go to dinner, or on gymnastics trips. (Vol. XV, p. 946).

Ms. Melton testified that her daughter trained five days a week for about four to five hours a day during June of 2001 and May of 2002. She would take her daughter to the gym and would sometimes stay about 30 minutes in the beginning and would come back the last 30 minutes. She would sometimes stay an hour or even two hours. (Vol. XV, pp. 946-947).

Ms. Melton testified that the area when you first enter the door that is chained off is the parent viewing area. She said that is the appropriate area for parents to be but if she needed to speak to Mr. Schiefelbein she would either waive him over or she would go back to where he was. (Vol. XV, pp. 947-948).

Ms. Melton testified that when sitting in the parent's seating area, looking out to the gym, that there is no portion of the gym that you cannot see. (Vol. XV, p. 948).

Ms. Melton testified that her daughter trained with the upper level group which included Mia, Becca, Raven, Bridget and Merrell. She stated these girls all trained together at the same time and had the same schedule. (Vol. XV, p. 948).

Ms. Melton testified that she knows Becca Robinson. She met her at Let It Shine. She said that when Mr. Schiefelbein opened his gym that Becca came with them. (Vol. XV, p. 949).

Ms. Melton testified that on average there would be 20 girls or boys practicing in the gym during June of 2001 to May of 2002. She stated it could be more but that is an average number. (Vol. XV, p. 949).

Ms. Melton testified that the atmosphere at the gym during the training session was intense but upbeat. She stated there is no lagging around or hanging around and the workouts are pretty full. The gymnasts are not just twiddling their thumbs or having break time or anything like that. (Vol. XV, p. 950).

Ms. Melton testified that when a gymnast wants to move on from one skill or apparatus to another they have to "test off," and then ask Mr. Schiefelbein for permission to go on to the next thing. (Vol. XV, p. 950).

Ms. Melton testified that the office is not off limits to anyone. She said she would go in Mr. Schiefelbein's office maybe once a week and the door was usually open. (Vol. XV, pp. 950-951).

Ms. Melton testified that during June of 2001 until May of 2002, if she wanted to speak with Mr. Schiefelbein and he was in his office she would go and stand right at the door and make sure he was not on the phone and would interrupt him. (Vol. XV, p. 952).

Ms. Melton testified that during June of 2001 until August or September of 2002 the wall to the office was open and you could see into the office from the parent viewing area. Ms. Melton does not believe the office had a lock on it. (Vol. XV, p. 952).

Ms. Melton testified that the hole in the office wall was so big that you could communicate with Mr. Schiefelbein by standing next to the display case and talking in. (Vol. XV, p. 953).

Ms. Melton testified that Becca is a very bubbly, happy go lucky, energetic person. She stated that Becca had a crush on Mr. Schiefelbein and she adored him and that it was annoying and irritated people. She said Becca would jump all over him and hug on his back, and interrupt people to get his attention. She said Becca loved Mr. Schiefelbein and was all over him and craved his attention. She said it became an issue sometime in the summer through the fall until July of 2002. (Vol. XV, pp. 955-956).

Ms. Melton testified during July of 2002 that Becca and Mr. Schiefelbein had a huge blow-up regarding Becca being afraid to do a back-hand spring on the beam. She was not going to do it and Mr. Schiefelbein got really tough on her. Ms. Melton stated that Becca was crushed because Mr. Schiefelbein basically chose gymnastics over what she thought their relationship was. (Vol. XV, pp. 956-958).

Ms. Melton testified that Becca was normal up until that day her and Mr. Schiefelbein had the blow-up. When Becca came back to the gym after July 4th holiday she would not look at Mr. Schiefelbein or even talk to him. She was hurt and it turned into bitterness and anger. Ms. Melton stated she watched this for several months and Becca would come up with excuse after excuse of why she could not do gymnastics. (Vol. XV, pp. 959-961).

Ms. Melton testified that she had seen Mr. Schiefelbein do frog stretches with Becca and the other girls just about every time she was in the gym. (Vol. XV, p. 961). She said they would do the frog stretches on the rod floor. The rod floor is on the right wall from the front to the back from the parent's viewing area. Ms. Melton said there were mats that got moved around all the time. (Vol. XV, p. 962).

Ms. Melton testified that she never saw Becca respond in any way to any kind of inappropriate touching or anything while doing frog stretches with Mr. Schiefelbein. (Vol. XV, p. 963).

[CROSS-EXAMINATION]

Ms. Melton testified that in addition to the \$50,000 she contributed to the gym she also contributed an additional \$30,000, a total of \$80,000. (Vol. XV, p. 965).

Ms. Melton testified that even if the gym went under she has the UCC form on the equipment and has first right to the equipment and would be able to sell it to get her money back. (Vol. XV, p. 966).

Ms. Melton testified that there was generally always a parent at the gym. (Vol. XV, p. 966).

Ms. Melton testified that Detective Breedlove showed her some videotapes of her daughter. (Vol. XV, p. 969).

(Videotape played in open court)

Ms. Melton testified that the videotape of her daughter was for gymnastics purposes only. (Vol. XV, p. 971). She said that Mr. Schiefelbein is really interested in body placement. (Vol. XV, p. 972).

Ms. Melton testified that the camera movement tracked her daughter's whole hip placement area. She does not believe for one minute that Mr. Schiefelbein was filming her vagina for any purpose. (Vol. XV, p. 976).

Ms. Melton testified that if she thought a shot was very close then she would go to Mr. Schiefelbein and ask him about it and if it was necessary. (Vol. XV, p. 977).

Ms. Melton testified that she was at the bond hearing and heard the testimony of Detective Breedlove. (Vol. XV, p. 979).

(Jury Out Hearing)

(Witness shown video tape of Defendant in bathroom at gym)

(Jury In)

(Witness shown video tape of Becca at the gym)

Ms. Melton testified that, after reviewing the videotape of Becca, that she does not believe the Defendant would tape any one of his students for anything other than gymnastics purposes. (Vol. XV, p. 1001).



Ms. Melton agreed that the first video she was shown, while the jury was out, was the bathroom at the gym. Ms. Melton testified that after seeing this video she does not believe the defendant would tape the girls for any other purpose than gymnastics. She also stated that she does not know if it was the defendant on the second portion of the tape and she does not know the whole context of the tape. (Vol. XV, pp. 1001 - 1006).

Ms. Melton testified that the video taken of Becca while Lilly Yopez was on the trampoline was taken for gymnastics purposes. She stated that he did film Lilly too and that he did focus in on Becca. She stated that she does not know the circumstances surrounding the taping and it was taken way out of context with whatever it was that was going on. Ms. Melton stated that for her to make a determination would be “jumping the gun.” She would want to know what all was happening that day. (Vol. XV, p. 1007).

Ms. Melton testified that she signed the notice to parents of students and that her child is still in gymnastics. Ms. Melton testified that until she finds some credible evidence that contradicts the character of Becca and what she knows about Becca, her daughter will still be allowed to go to gymnastics. (Vol. XV, p. 1010).

### **BECCA ROBINSON**

Becca testified that she drew the diagram being shown to her. She drew it when she was talking with Detective Breedlove and Marlene at the Child Advocacy Center. (Vol. XVI, pp. 1048-1049).

Becca testified that the circle with the two legs coming out represents her, and the box represents the video camera. She stated that she thinks she was asked to draw the position she was in on the rod floor and where Mr. Schiefelbein was. (Vol. X, pp. 1049-1050).

Becca testified that the camera was on the floor both times when Mr. Schiefelbein videotaped her in the straddle position. (Vol. XVI, p. 1052).

Becca testified that while Mr. Schiefelbein was fixing up the camera he told her to pull aside her leotard. (Vol. XVI, p. 1053).

(Diagram marked as Exhibit #44)

Becca testified that her birth date is June 15, 1990. She stated that Mr. Schiefelbein gave her a present on her birthday in 2002 and she wrote him a thank you note. (Vol. XVI, p. 1054).

(Thank you note marked as Exhibit #45)

Becca testified that in either June or July, when she had on the back brace, she went to the sleep-over at the gym. (Vol. XVI, p. 1056).

(Photograph of Becca at sleep-over marked as Exhibit #46)

Becca testified that she remembers talking to a policewoman, Corporal Melissa Westbrook, and that she told her that Mr. Schiefelbein touched her breasts one time and touched her vagina several times. (Vol. XVI, pp. 1057-1058).

[CROSS-EXAMINATION]

Becca testified that Mr. Schiefelbein gave her a \$50 gift certificate for her birthday. (Vol. XVI, p. 1059).

Becca testified that at the sleep-over at the gym, Mr. Schiefelbein had stopped touching her during that time. (Vol. XVI, p. 1060).

[REDIRECT EXAMINATION]

Becca testified that the green square on the diagram represents a mat. (Vol. XVI, p. 1076).

[QUESTIONS BY THE JUDGE]

Becca testified that she has not made up anything that Mr. Schiefelbein has done to her. She stated no one has told her what to say against him. She stated no one has coached her to say things against him about the inappropriate things. (Vol. XVI, pp. 1078-1079).  
*(These questions are the subject of Issue 4.)*

**MELISSA WESTBROOK**

Melissa Westbrook testified that she works for the City of Brentwood Police Department as a corporal on patrol. Corporal Westbrook testified that she had occasion to speak with Becca about an incident that allegedly occurred involving her on September 9, 2002. Corporal Westbrook testified that she was called into headquarters to speak with Becca about an incident that had taken place. (Vol. XVI, p. 1082)

Corporal Westbrook prepared a Brentwood Police Department supplemental report which contains what she was told by Becca. (Vol. XVI, p. 1083).

Corporal Westbrook testified that Becca told her she had been touched on her vagina and breasts. The police report indicates that Becca told Corporal Westbrook that Mr. Schiefelbein had touched her breasts several times too. (Vol. XVI, pp. 1084-1085).

[CROSS-EXAMINATION]

Corporal Westbrook testified that she wrote the report on September 17, 2002 at the request of Detective Breedlove. (Vol. XVI, p. 1086).

Corporal Westbrook testified that Becca was very upset during this interview. She was not crying but was upset and scared. Becca told her that she did not want Mr. Schiefelbein to get in trouble, but she just wanted him to stop it. (Vol. XVI, pp. 1087-1088).

#### **MICHELLE DAY**

Michelle Day testified that she lives in Franklin, Tennessee. She has a daughter involved in gymnastics, Raven Day, who is 11 years old. (Vol. XVI, pp. 1091-1092).

Ms. Day testified that they moved here from Knoxville and was looking for a gym where her daughter could continue her growth in gymnastics and go up to a higher level. She was currently competing at level 6. Ms. Day checked out two different gyms and her daughter started at Espirit Gymnastics in April of 2002. Her daughter said she liked it there and wanted to stay there. Ms. Day said her daughter loved Espirit from day one. (Vol. XVI, pp. 1092-1093).

Ms. Day testified that she has observed Mr. Schiefelbein coaching her daughter as well as other girls in the gym a lot. She said Raven worked out at the gym four to five days

a week. She takes Raven to the gym and takes her home. She typically stays for most of the practices and is there quite often. (Vol. XVI, p. 1094).

Ms. Day testified that Raven had come from a gym where she did not work out as many hours as she did at Esprit. She said the workouts at Esprit were very demanding and rough and that Mr. Schiefelbein expected a lot out of the gymnasts. She said Mr. Schiefelbein had a great system set up to keep the gymnasts motivated. (Vol. XVI, p. 1095).

Ms. Day testified that Raven had received gifts from Mr. Schiefelbein on a couple of occasions. She has received candy, hair scrunchies, glitter, and stuffed animals from Mr. Schiefelbein. (Vol. XVI, p. 1096).

Ms. Day testified that she would see Mr. Schiefelbein outside of the gym when competition season began. He would ride with her sometimes on out of town trips. He has also been over to her house for cookouts, playing board games, and things of that nature. (Vol. XVI, p. 1096).

Ms. Day testified that she thought Mr. Schiefelbein to be very intelligent and motivated. She thought he was a very creative person. As a coach, she admired the way he was able to take these young ladies and progress them in the sport. She said he was very devoted to the girls. She said outside of the gym she found Mr. Schiefelbein to be very pleasant and amusing. She also stated he is very knowledgeable of the sport and she enjoyed having conversations with him about it. (Vol. XVI, pp. 1097-1098).

Ms. Day testified that at the gym, when classes have started, the music is going and the girls have been taught to self-start themselves. They have a regimen and they know that

they go through a series of exercises. She said Mr. Schiefelbein sort of micromanages from the center. The girls cannot progress forward onto something else until they could get his attention, demonstrate the skill, and then he will tell them to repeat it, practice more or move on to the next skill. (Vol. XVI, p. 1098).

Ms. Day testified that the girls know that there is a routine in the gym and that they have to ask permission to go get water, go to their locker, or perhaps use the facilities. She stated Mr. Schiefelbein keeps his eye on what is going on with all of the girls even if he is working one-on-one with a child; he has his eyes on everyone to see what everybody is doing. (Vol. XVI, p. 1099).

Ms. Day testified that most of the time, when she is in the gym, there would be 13 to 15 girls in the gym. (Vol. XVI, p. 1099).

Ms. Day testified that when you walk into the gym you walk in to what is called the parent viewing area. She stated that parents are not prohibited from going on to the gym floor but it is usually not necessary. She has on occasion gone on to the floor. (Vol. XVI, p. 1100).

Ms. Day testified that you can see all aspects of the gym when you are sitting or standing in the parent viewing area. She stated the gym is square and you can see corner to corner. She stated on one wall to the left is an entire row of mirrors, so you can look in the mirrors and catch pretty much every angle in the gym. (Vol. XVI, pp. 1100-1101).

Ms. Day testified that when her daughter joined the gym in April of 2002, that the office was an open area. There was a glass display case that was at an angle and kind of

blocked off the office area. The door to the office was immediately to the left of the big opening, on the right-hand side. She said as you were standing in the parent area, looking toward the office into the opening, that you were able to see into the office. (Vol. XVI, pp. 1101-1102).

Ms. Day testified that she was not aware of any policy that no one was allowed in the office but Becca. She was also not aware of any policy that no children or no parents were allowed in the office. Ms. Day saw students and parents going in and out of Mr. Schiefelbein's office. (Vol. XVI, pp. 1102-1103).

Ms. Day testified that Becca is a very outgoing young woman and she liked Mr. Schiefelbein. She felt like Becca had a little bit of a crush on him. She stated Becca is very bubbly and engaging with Mr. Schiefelbein; sometimes a little bit more so than some of the other girls in regards to coming up to him and draping her arm around his shoulder. (Vol. XVI, p. 1103).

Ms. Day testified that when Becca would drape her arm around Mr. Schiefelbein that he would ignore it. She stated that at one point he just simply undraped her arm and did not say anything to her and just sent her off to do a skill or something. Ms. Day observed this on more than one occasion. (Vol. XVI, p. 1104).

Ms. Day testified that she would be in the gym when Mr. Schiefelbein was stretching the girls and Becca. (Vol. XVI, p. 1104).

Ms. Day testified that Becca never indicated to her that she was in some way, form or fashion in distress. She also stated that at no time was she uncomfortable when she

observed Mr. Schiefelbein stretching Becca nor did she ever feel that something was wrong. (Vol. XVI, p. 1105).

[CROSS-EXAMINATION]

Ms. Day testified that she has gotten to know Dee Ann Melton. (Vol. XVI, p. 1105).

Ms. Day testified that she was in the foyer during Ms. Melton's testimony. She stated she was sitting off to the side looking at the newspaper. She said she was aware there was a monitor sitting on the table but that she was not actively watching or listening to the monitor. She said she had no idea of what was going on in the courtroom. (Vol. XVI, pp. 1107 - 1108).

Ms. Day testified that Mr. Schiefelbein never gave her daughter gift certificates, DVDs or roller blades. Ms. Day was not aware that Mr. Schiefelbein had given these items to Becca. (Vol. XVI, pp. 1108-1109).

Ms. Day testified that she has not seen the videotapes that Mr. Schiefelbein had taken of Becca. Ms. Day stated that since her daughter has been taking gymnastics at the gym that there has been no videotaping. However, she is aware that taping was done in the past. (Vol. XVI, pp. 1111-1112).

Ms. Day testified that since she has been at the gym with her daughter that she is in the gym most of the time, as well as two other parents, simply because of the driving distance. She stated on the rare occasion that she is not there, there has been a parent in the gym. (Vol. XVI, pp. 1112-1113).

(Exhibit #25 - videotape played for witness)



Ms. Day agreed that Mr. Schiefelbein zoomed in on Becca's crotch area while she was pushing the mat in the video. Ms. Day testified that even after viewing these tapes she would allow Mr. Schiefelbein in her home and would allow her daughter to take gymnastics from him. She stated those videotapes do not raise any concern in her eyes. (Vol. XVI, pp. 1113-1114).

Ms. Day testified that it does not raise her concern because when Becca is acting as a spotter, it is important that the girl performing the trick not get hurt. (Vol. XVI, p. 1115).

### **MIA YABUT**

Mia Yabut is thirteen years old. Her parents are Edmond and Carmen Yabut. She has lived in Williamson County for three years. Before moving to Williamson County she had been involved in gymnastics for five years. When she came here to Franklin she was involved in gymnastics at Let It Shine for a couple of months. While she was at Let It Shine she met Becca Robinson. (Vol. XVI, p. 1121).

Mia testified that Mr. Schiefelbein was her coach at Let It Shine. When she left Let It Shine she went with Mr. Schiefelbein to Gabby's along with five other students; Lilly, Andy, Becca, Catherine, Jordan and herself. They stayed at Gabby's until September or December of 2000 and then went to Espirit when it opened. She stated Mr. Schiefelbein was the owner and coach at Espirit. (Vol. XVI, p. 1122).

Mia testified that when she first started at Espirit she and Becca were at level six. She and Becca had the same practice schedules and they practiced four days per week during the

school year and in the summertime they practiced five days per week. (Vol. XVI, pp. 1123-1124).

Mia testified that Mr. Schiefelbein's coaching style was very aggressive. She stated he always wants them to do the best they can. (Vol. XVI, p. 1124).

Mia testified that she did receive gifts from Mr. Schiefelbein such as goodie bags with candies, notepads and Beanie Babies. She also got a T-shirt from his ski trip, Skittles, baby bottle pops and a piece of paper that stated the reasons he liked coaching her. (Vol. XVI, pp. 1124-1125).

Mia testified that she and Becca were really close, they were best friends. She would see Becca in the gym as well as outside the gym almost every day. She stated they would spend the night with each other and play at each other's houses. She and Becca were very close and shared secrets with each other. (Vol. XVI, p. 1125).

Mia described Becca as being really funny and outgoing. She said Becca likes to say what is on her mind. (Vol. XVI, p. 1126).

Mia testified that she had discussions with Becca about her wanting to quit the gym. She said Becca told her that she did not like it very much anymore. Mia said that one day when Becca did not come to the gym that she and Mr. Schiefelbein took the tumble bus to her house. After her and Becca played on the tumble bus a while Becca said she really wanted to quit. Mia said she started crying. Mia left the bus so Mr. Schiefelbein could talk to Becca alone. After about five minutes Mia went back out to the bus and she and Mr. Schiefelbein and Becca talked some more and then they all went back into the house together. (Vol. XVI, pp. 1126-1127).

Mia testified that while Mr. Schiefelbein was stretching one girl the other girls would be on the trampoline. When he was ready for the next girl he would call them over. She stated that while she and the other students were on the trampoline he would be on the rod floor stretching someone. She said you could see him and the girl being stretched on the rod floor from the trampoline. Mia testified that while Mr. Schiefelbein would be stretching Becca that they would all be watching because they were a little jealous of her attention. (Vol. XVI, pp. 1128-1129).

Mia testified that they were jealous of Becca because she was always talking to Mr. Schiefelbein a lot more than everyone else and he would always be talking to her a lot more. (Vol. XVI, p. 1129).

Mia testified that Becca never indicated to her that Mr. Schiefelbein was touching her inappropriately. She never saw Mr. Schiefelbein touch Becca in a way that she considered inappropriate. (Vol. XVI, p. 1129)

[CROSS-EXAMINATION]

Mia testified that when she rode over to Becca's house on the tumble bus with Mr. Schiefelbein that her mom and sisters drove in the car behind them. (Vol. XVI, p. 1130).

Mia testified that Becca, Mr. Schiefelbein and Becca's mom were in the room and she was not. She said when they came out of the room that Becca had been crying. (Vol. XVI, pp. 1131-1132).

Mia testified that even as Becca's best friend she was a little jealous of her because she always got a little bit more attention from Mr. Schiefelbein. (Vol. XVI, p. 1133).

Mia testified that she does not remember Becca and Mr. Schiefelbein going in the office. (Vol. XVI, p. 1134).

Mia testified that she misses Becca as a friend. (Vol. XVI, p. 1134).

[REDIRECT EXAMINATION]

Mia testified that Mr. Schiefelbein is still her coach. She said there was not a policy at the gym that said the students were not allowed in the office. She said they were allowed to go in the office when they wanted to. (Vol. XVI, p. 1135).

[RE CROSS EXAMINATION]

Mia testified that if you wanted Mr. Schiefelbein you could just open the door or yell through the display case. You did not have to have Mr. Schiefelbein call you into the office. (Vol. XVI, p. 1135).

Mia testified that you could see into the office if you looked over the display case. (Vol. XVI, p. 1136).

Mia testified that there were times when it was just her and Becca with Mr. Schiefelbein. She said there were times when it was just the team girls and no parents were in the gym. (Vol. XVI, p. 1136).

### **MARK ALLEN SCHIEFELBEIN**

Mark Schiefelbein has lived in Franklin, Tennessee for about a year-and-a-half. He was born and raised in California. His date of birth is December 3, 1965. His father lives in Missouri and his mother lives in Southern California. He has three sisters and a brother. (Vol. XVI, pp. 1139-1140).

Mr. Schiefelbein first became involved in gymnastics when he was eight years old. (Vol. XVI, p. 1141). He moved to Arizona his senior year when he was seventeen years old to further his gymnastics career. He felt he had bottomed out at the gym he was at in California. (Vol. XVI, p. 1142).

Mr. Schiefelbein went to the University of New Mexico on a gymnastics scholarship in 1985. He stayed at the University of New Mexico for two competitive years. (Vol. XVI, pp. 1143-1144).

Mr. Schiefelbein went to the University of Nebraska in 1987 because he wanted to make the Olympic team. He stayed there for one year. He then trained for six months at a gym in Utah then took some time off because he was off scholarship. He worked for ten months and then put some money away and went back to New Mexico for one more year. (Vol. XVI, pp. 1144-1145).

Mr. Schiefelbein testified that he was ranked 19th at his best ranking. He felt like he did not want to expend another year of his life trying out for the Olympic team because that was the only goal he had left. He was eager to get started in coaching and would hopefully one day own a gym. (Vol. XVI, pp. 1145-1146).

Mr. Schiefelbein had a job offer at South Cal Gymnastics which he took as the assistant boys' coach for one month and then for five months he was offered the head girls' coaching job. Mr. Schiefelbein stayed there for about seven months. (Vol. XVI, pp. 1146-1147).

Mr. Schiefelbein next took a job in San Marcos, California as the assistant girls' coach. He was hired to coach the higher level girls because of his knowledge. He said there were about 15 to 20 team girls. (Vol. XVI, pp. 1147-1148).

Mr. Schiefelbein testified that he then accepted a job at San Diego Aztecs which is a program in San Diego that runs out of the university. He was the assistant coach and was responsible for about 18 students. (Vol. XVI, p. 1148).

Mr. Schiefelbein testified that after leaving San Diego he took a job briefly in Utah for about three to four months coaching girls gymnastics. He was responsible for about 20 girls. (Vol. XVI, p. 1149).

Mr. Schiefelbein testified that he next took a job back in California that was CCGI. (Vol. XVI, p. 1149). He said because it was a head coaching job he was making a little bit more money and it was closer to home. He was the head program director and head girls' coach. He was in charge of about 35 to 50 team girls. (Vol. XVI, pp. 1151-1152).

Mr. Schiefelbein then started his own gym called Dynamic Gymnastics and Tumbling Academy. He was involved with that gym for a year-and-a-half and then sold it. (Vol. XVI, p. 1152).

After that Mr. Schiefelbein went back home to Fountain Valley and operated a tumble bus for about a year-and-a-half. (Vol. XVI, pp. 1152-1153).

Mr. Schiefelbein testified that a tumble bus is a full size school bus with all of the seats removed and the flooring so it is just a shell inside. Once it is cleared out you can put in preschool sized gymnastics equipment inside and teach classes on the bus. It is a little

miniature gymnastics center that is mobile. He would park it at preschools and teach students 30 minute classes. (Vol. XVI, p. 1153). At his peak enrollment he had 170 three to five year olds. Mr. Schiefelbein sold the tumble bus to his sister and she still operates it today. (Vol. XVI, p. 1154).

Mr. Schiefelbein then moved to Texas to pursue a relationship for three to four months. While in Texas he coached team kids and helped run a gym. He then moved back home for a little while and then accepted a job in Illinois for one year where he was the head coach and program director of a girls' team program. He was responsible for 50 to 60 girls at that gym. He left there the first part of December of 1999. (Vol. XVI, pp. 1154-1155).

Mr. Schiefelbein then went back home. While at home he saw an ad on the internet for a coaching position in Tennessee. He responded to the ad and then came out for an interview. The interview was at Let It Shine Gymnastics. Mr. Schiefelbein was hired and was there for about six months. (Vol. XVI, pp. 1156-1157).

While at Let It Shine, Mr. Schiefelbein was supposed to run the team program, be the head coach and program director of the team girls. He said that he felt as though he did not have the authority he was supposed to have or the freedom to run the program properly. Mr. Schiefelbein was fired from Let It Shine and he does not feel it was on good terms. (Vol. XVI, pp. 1157-1158).

Mr. Schiefelbein testified that he was not sure why he was fired from Let It Shine. He feels that maybe because there was a difference in the way he felt the team program

should have been run, which he presented upon taking the job, and the way the owner felt the gym should run and the direction he wanted it to go in. (Vol. XVI, p. 1159).

Mr. Schiefelbein testified that after Let It Shine he had planned on going back to California but there were parents who wanted him to continue to coach their kids and he was flattered by the idea that they thought enough of his coaching to want him to stay. The three families were the Yabuts, the Yepez's and the Meltons. (Vol. XVI, p. 1159).

Mr. Schiefelbein was approached by these families to start a gym. When he decided to stay in Tennessee the families wanted him to continue coaching their children right way. He said you cannot start a gymnastics center right away so that is why he rented space from Gabby's Gymnastics in Nashville for about two to three months while he put a facility together. (Vol. XVI, pp. 1160-1161).

Mr. Schiefelbein finally put together a facility named Espirit Gymnastics. The first workout day was on December 8, 2000. He said the original students that were with him at Gabby's when he opened his gym were Lilly and Andy Yepez, Mia Yabut, Jordan Melton, Becca Robinson and Catherine Traxler. He called them his "six pack." He said that all of these kids came from Let It Shine. (Vol. XVI, p. 1161).

Mr. Schiefelbein testified that he first met the Robinson family at Let It Shine. He had put Becca into one of his groups at the gym and began to train her. He said Becca's parents introduced themselves to him and from there they just kind of struck up a friendship. He said that eventually he became closer with the Robinsons and developed more of a friendship relationship. He said the Robinsons were kind of like his home away from home. He said



they befriended him and asked him to join them on many occasions and were hospitable. (Vol. XVI, pp. 1163-1164).

Mr. Schiefelbein said the Robinsons contributed \$2,500 towards his gym; \$2,500 to get the tumble bus ready and \$1,500 to have neck surgery. (Vol. XVI, p. 1164).

Mr. Schiefelbein testified that once he got the gym running the way it was supposed to run he got the tumble bus out and started mobile programs. He had 103 kids and went to three to four Franklin schools. Mr. Schiefelbein owned and operated the tumble bus. (Vol. XVI, p. 1165).

Mr. Schiefelbein testified that as time went on his relationship with the Robinsons grew. He said it was inevitable because of spending a lot of time in the gym and on gymnastics trips with them. He said they would invite him to ride in their car on trips, invite him to hockey games, Nashville Sounds games, or just over for dinner. They also started inviting him to church on a regular basis. He said they opened up their house to him and were hospitable. (Vol. XVI, p. 1166).

Mr. Schiefelbein said he would talk with Jill Robinson about her gymnastics background. He said there were many times that Jill would come in the gym and would bite her lip because she wanted to go out and coach the kids because of her own interest in gymnastics and knowing a lot of qualities that it takes to be good in gymnastics. (Vol. XVI, p. 1167).

Mr. Schiefelbein testified that he first met Becca at Let It Shine and he moved her into one of his groups. He believes in group training, that way the kids stay together forever and grow together. (Vol. XVI, p. 1168).

Mr. Schiefelbein testified that Becca was one of the kids that he felt had some ability and opportunity to go to higher levels in gymnastics. He felt she had some ability so he put her in one of his training groups. When he first met Becca she was carefree, positive and always had a smile on her face. (Vol. XVI, p. 1169).

Mr. Schiefelbein testified that he felt Becca had the ability to do good in gymnastics and she looked like how a gymnast is supposed to look. He said one negative factor she had was fear. He said when evaluating a gymnast you look at their strength and flexibility and how they can handle the training. He felt that Becca had some very high factors but she also had some negative factors. (Vol. XVI, p. 1170-1171)

Mr. Schiefelbein testified that he did not consider Becca, nor any of the other kids, a “tough” kid. The gyms he starts to train are usually in a recreational mode and they have to be changed into a training mode. You have to look at what these kids might become over the course of many years. He said you maximize their strengths and minimize their weaknesses and this is how you are supposed to try and coach. (Vol. XVI, p. 1171-1172).

Mr. Schiefelbein described his coaching style as aggressive and he believes he has had proven results from that. (Vol. XVI, p. 1172-1173).

Mr. Schiefelbein testified that when he opened Espirit that it grew quickly. When he first opened there were maybe 10 to 15 sign-ups and within the first month there were maybe 25 to 30 kids and it just kept growing. (Vol. XVI, p. 1174).

Mr. Schiefelbein testified that he liked to make gymnastics fun. He would explain to his gymnasts that gymnastics is a different kind of fun; it is serious fun and challenging too. He would give incentives to get the kids to enjoy the training. There are many different techniques he would use and one of them was giving the kids free time cards to have 15 minutes of free time to do their own thing. (Vol. XVI, pp. 1175-1176).

Mr. Schiefelbein testified that he would occasionally buy the team members gifts. He would like to reward them for working so hard. One of the rewards would be giving the kids goodie bags at state meets. (Vol. XVI, p. 1177).

Mr. Schiefelbein testified that he gave the Robinson family gifts. He also stated they called him "Markethesius" or "Uncle Mark" and that he was a part of their family and spent a lot of time over at their house and a lot of holidays at their house. (Vol. XVI, p. 1178).

Mr. Schiefelbein testified that he bought Becca gifts that he did not buy the other girls. He said the reason was because he had spent more time at her house. He said the Robinsons bought him gifts at Christmas time and on his birthday so he would always be prepared to give them gifts too. (Vol. XVI, p. 1179).

Mr. Schiefelbein testified that the gym opened in December of 2000. He said his involvement with the original six was a little bumpy at first because that is typical for a new

gym and when you are coaching kids that have been coached by other people for many years. (Vol. XVI, pp. 1180-1181).

Mr. Schiefelbein stated that of the original six he had three quit. He said it is hard to take when kids quit and he did take it personal and it was depressing to him. (Vol. XVI, pp. 1181-1182). He said part of his passion is to be able to give the kids a good gymnastics foundation and everything I possibly can and if they leave his program he hopes it is because he pushed them too hard and not because he ignored them or not pushed them enough. (Vol. XVI, pp. 1183-1184).

Mr. Schiefelbein stated that his relationship with Becca gymnastically was like the other kids. The difference began because he had more opportunities to be around Becca on a personal level at her house and other places they went. He was closer to her because he spent more time with her and was at her house more. (Vol. XVI, p. 1184).

Mr. Schiefelbein testified that there were times when he and Becca were together outside of the gym setting. He said Becca loved the tumble bus and loved to coach so she would go with him on the tumble bus to help teach classes during the summer. They would also go eat at Lenny's Deli after teaching classes on the tumble bus. (Vol. XVI, pp. 1185-1186).

Mr. Schiefelbein testified that there were times that Becca would want to ride with him in the car on the way back from church. They also went miniature golfing together one time and went to the movies with a group of people. (Vol. XVI, pp. 1187-1188).

Mr. Schiefelbein testified that he thinks one of the reasons a couple of the kids quit was because of his relationship with Becca. He said she would come in the gym and find him and give him a big hug and then go get her gymnastics outfit on. He said Becca took some liberties, more than she probably should have, and he let her. He said it might have been a mistake to let her do that. He said she was more comfortable around him than the other kids and would jump on his back and he would just play it off or ignore it. At times he thought it was excessive when she was trying to interact with him to the point that he could not even coach. He would have to tell her to get back to work. (Vol. XVI, pp. 1188-1189).

Mr. Schiefelbein testified that there was never a policy that anything was off limits to anybody, including the office. The only thing that he would say was a “policy” was he would rather the parents get his attention or send another kid to get his attention rather than coming onto the floor and this was for insurance purposes. He said the parents pretty much disregarded that and would on occasion come onto the floor. (Vol. XVI, p. 1190).

Mr. Schiefelbein testified that the office was never off limits to any parents nor any of the team girls. The office was never off limits to anybody except maybe the little ones. He said parents would come and go out of the office. He said he is not the best business person and so the parents would help him out. He said they would also grab a vacuum and help clean up. He said parents were coming in and out of the office all the time. (Vol. XVI, p. 1191).

Mr. Schiefelbein testified that the office was about ten feet by eight feet. Inside the office were drawers, a desk, three chairs, a little refrigerator, boxes and a bunch of junk. He

said there is a door for the office but it does not close all the way or lock. He said there is no reason to shut the door or lock it because Mr. Schiefelbein does not keep anything in there. (Vol. XVI, pp. 1192-1193).

Mr. Schiefelbein testified that there was a big hole in the wall of the office about 90 inches tall and 65 inches wide from the very beginning. He decided to have a big hole cut in the wall to put the display case he had so it would be open and not a closed office environment. He said it was like this almost the whole time he was there. (Vol. XVI, p. 1193-1194).

Mr. Schiefelbein leased the space in the building for the gym and there was always a specific design for a parent viewing area. He said parents would drop off their kids and would want to be involved in their kid's gymnastics so you have to have a parent viewing area for them. Mr. Schiefelbein put the parent viewing area where they can see the whole gym and all the activities the kids are doing. He said you can see absolutely everything in the gym from the parent viewing area. (Vol. XVI, p. 1194).

Mr. Schiefelbein testified that the gym is about 56 feet wide and about 118 feet deep and 6,610 square feet total. He stated it is not huge so you can see everything from the viewing area. However, Mr. Schiefelbein stated that there is a little corner on the left side of the viewing area that you may not be able to see but the only thing that sits in that corner is the water heater for the two bathrooms. (Vol. XVI, p. 1195).

(Witness shown a scaled drawing of the gym)

Mr. Schiefelbein testified that he made the diagram of the gym. He said there are various points on the drawing that are marked distances and he measured and wrote the distances on the diagram. He said the diagram is drawn to scale. (Vol. XVI, pp. 1199-1200).

(Scaled Drawing of Gym entered as Exhibit #49)

Mr. Schiefelbein testified that he has never been in the office alone with Becca with the door closed. He has never been in his office with any one student with the door closed. He said it is not good policy for obvious reasons. He does not think it would be proper to go into a closed environment with one kid, especially if you do not have female coaches or parents around. (Vol. XVI, p. 1201).

Mr. Schiefelbein testified that he brought Becca a birthday present in 2002 and he got a thank you note from Becca for the gift. (Vol. XVI, p. 1201).

Mr. Schiefelbein testified that the first skill Becca had problems with was the back-walk-over on the beam because of fear. This is when he first recognized right off that she did have a fear problem that hindered her. Her fear was a progressional issue that started with the back-walk-over and continued to plague her from time to time. (Vol. XVI, pp. 1202-1203).

Mr. Schiefelbein testified regarding the incident on July 1, 2002 where he left the gym. He left the gym to show his disapproval that Becca would not do the back-hand spring and he knew she could do it. She had done the back-hand spring many times by herself and she needed to get up and do it. He said sometimes he would remove himself from the

environment, this was very rare, but he did that on occasion. When he left he went to Home Depot to get some stuff for the gym before they closed that night. While he was at Home Depot he called Becca's mother and told her what was going on and that she could come get Becca. Becca's mother told Mr. Schiefelbein that she was preoccupied with a large catered party for one of her older daughter's birthday and that he would have to deal with it on his own. Mr. Schiefelbein then called the gym to make sure the kids were okay and told them to stop doing the back-hand springs until he got back. (Vol. XVI, pp. 1203-1205).

Mr. Schiefelbein testified that he had a former gymnast that he used to coach who was 17 years old on the floor with the kids coaching them when he left the gym. He said there were about six to seven kids there at that time. (Vol. XVI, p. 1205).

Mr. Schiefelbein testified that when he returned to the gym from Home Depot Becca was happy that she could do the back-hand spring. Becca had done the back-hand spring on the beam numerous times while he was gone. When he got back he asked to see her do it one more time and she did. (Vol. XVI, p. 1206).

Mr. Schiefelbein testified that from a coaching perspective from that night that he achieved his purpose. He said it is very tricky because the sport is very demanding and there is a lot of emotion involved and a lot of fear involved. He said it gets tricky to figure out ways to motivate your gymnasts. (Vol. XVI, pp. 1206-1207).

Mr. Schiefelbein testified that the next day, July 2nd, Becca did not come into the gym. He had contact with her mother that day when she called to let him know that Becca



would not be there which is customary for parents to do when a kid will either be late or not come in at all. (Vol. XVI, p. 1207).

Mr. Schiefelbein testified that he does not believe Becca came to practice on the 3rd either. He stated Mia was concerned about Becca because they are very good friends and workout partners. Mr. Schiefelbein told Mia that if Becca was not going to come to the gym that they would bring the gym to her, referring to the tumble bus. He thought it might get Becca excited about gymnastics. He also wanted to show the Robinsons the bus and the generator that he had been working on. (Vol. XVI, p. 1208).

Mr. Schiefelbein testified that after practice on the 3rd, he and Mia went over to the Robinson's home in the tumble bus. He said when they got there they went to the door and Becca saw the tumble bus and came out to the bus. For a while Mia and Becca were playing on the bus. Mr. Schiefelbein went on the bus and started talking to Becca about quitting. He and Mia and Becca were on the bus at that time. (Vol. XVI, p. 1209).

Mr. Schiefelbein testified that Mia just left the bus and did not say why, and went into the house. He stated he is not sure how long he and Becca were on the bus but if he had to estimate he would say 15 to 20 minutes. He was trying to encourage her in a positive way and discuss with her the things she would be giving up if she quit gymnastics. (Vol. XVI, pp. 1210-1211).

Mr. Schiefelbein testified that Becca never indicated to him that the reason she was dropping out was because of him sexually touching her. He said absolutely not. Nothing about that at all came up. (Vol. XVI, p. 1211).

Mr. Schiefelbein testified that at some point Mia came back on the bus and they kept talking about the gym. He thinks Becca was definitely considering it and was not going to quit. He said she was going back and forth and then they all went back into the house. (Vol. XVI, p. 1212).

Mr. Schiefelbein testified that when they went back into the house he was downstairs and Mrs. Robinson went upstairs into Becca's room. Mr. Schiefelbein went up to Becca's room shortly thereafter and Becca was crying. He said it was an emotional decision for her. At some point Mrs. Robinson and Mr. Schiefelbein both had tears in their eyes and it was a very emotional situation. (Vol. XVI, pp. 1212-1213).

Mr. Schiefelbein explained that he was emotional because he is trying to build up a gym and he sees it deteriorating and not getting bigger. Out of his original "six pack" he has only two kids left, if Becca quit. He was feeling a little self-pity and all this work he had done was going down the tubes. He also stated that the Robinsons were like family to him and so he had a personal vested interest in the family on top of being the coach. This was the reason why he was so emotional. He said this was on July 3rd. (Vol. XVI, p. 1214).

Mr. Schiefelbein testified that the reason he did not go to California the next day as planned was because he was too tired and had not packed yet or done laundry. He said he would sleep in and then decide when to go to California because he could change his flight. (Vol. XVI, pp. 1215-1216).

Mr. Schiefelbein testified that the next morning, July 4th, he was woken up by knocking on the door by Ross Robinson and Edmond Yabut. He said he was flattered that

they were worried about him and that it was nice to have people care about you but to him it really was not an issue. He thinks they jumped to the conclusion that he was more down and out or distraught than he actually was because he did not bring the dog over and did not go to California as planned. Mr. Schiefelbein went to California later that evening. (Vol. XVI, pp. 1216-1217).

Mr. Schiefelbein testified that while out in California, Caitlin called him and Becca called him. He said Becca called him just to talk and that she would always call him when he went on vacation. She also talked about maybe coming back to gymnastics. (Vol. XVI, pp. 1217-1218).

Mr. Schiefelbein testified that when he returned from California that he did have discussions with Jill Robinson and Becca about coming back to gymnastics. (Vol. XVI, p. 1218).

Mr. Schiefelbein testified that Becca hurt her back sometime in May and started to wear her back brace in June or July. The doctor said there was some compression fracture. (Vol. XVI, pp. 1218-1219).

Mr. Schiefelbein stated that they have sleep overs at the gym probably two to three times a year and the kids really like them. (Vol. XVI, p. 1219). He said Becca did attend the sleep over in July. He said Jill Robinson told him that Becca could not have had a better time and she loved it and enjoyed this sleep over more than usual. (Vol. XVI, p. 1220).

Mr. Schiefelbein testified that they usually do a sleep over on Friday night after practice. He has part-time female coaches that help at the sleep overs. There is always a

female chaperone at the sleep overs. They usually get pizza and some stuff for breakfast. (Vol. XVI, pp. 1220-1221).

Mr. Schiefelbein testified that he did not stay the night at all the sleep overs. If there were enough adult/parent chaperones then he would go home and sleep in his own bed. (Vol. XVI, pp. 1221-1222).

Mr. Schiefelbein testified that there were two main issues that were making Becca wanting to quit gymnastics. One was fear of doing certain skills and the other was her back injury. He said that her inability to perform these skills would inhibit her from moving up to the next level. (Vol. XVI, pp. 1222-1223).

Mr. Schiefelbein testified that he received a phone call from Becca on September 9th or 10th. He took the call on his fax phone which was by the display case in the gym. Mr. Schiefelbein was in the middle of class teaching his level 4 kids when he took the phone call. (Vol. XVI, pp. 1224-1225).

(Witness shown transcript of phone conversation with Becca)

Mr. Schiefelbein testified that he does not like to take phone calls when he is coaching but he answered the phone because it is his phone for emergency calls. (Vol. XVI, p. 1227).

Mr. Schiefelbein testified that Becca said in this phone conversation that, "I miss gymnastics, my friends, and I think I might want to come back." He said during this phone conversation he was trying to watch 15 kids that he is coaching, there is music going and there are parents in the viewing area so there is a lot of noise in the gym at this time. He said he was not really understanding what Becca was saying. (Vol. XVI, p. 1228-1229).

At one point during the conversation Becca said to him that she was worried about him, “touching her in [her] private spots.” Mr. Schiefelbein responded by saying, “no, I’m not going to do that.” He said he has never done that before and he would not do anything like that. (Vol. XVI, pp. 1229-1230).

Mr. Schiefelbein testified that he was shocked and caught off guard when she said that. He was not really sure how to immediately react to something like that. He was not going to react until he figured out what she was trying to say. (Vol. XVI, p. 1230).

Mr. Schiefelbein testified that when Becca asked him about the videotapes that he said there were no videotapes and that he did not know what she was talking about. He was not going to continue that conversation over the phone with Becca because of the subject matter. (Vol. XVI, pp. 1231-1232).

Mr. Schiefelbein testified that Becca started talking about gymnastics again and then the conversation ended. He was under the impression that Becca was coming in the gym the next day to start back gymnastics. She was still in her back brace but was going to do very minimal things they talked about. (Vol. XVI, pp. 1233-1235).

Mr. Schiefelbein testified that after his conversation with Becca that he spoke with her mom. During that conversation neither one of them brought up the allegations made by Becca regarding the touching. He did not want to bring it up with Ms. Robinson over the phone. He was going to go over to their house that night to try and resolve this with the Robinsons in person. If he got out of the gym too late then he would discuss it with them the next day. (Vol. XVI, pp. 1235-1236).

Mr. Schiefelbein testified that he did not know, at that point, if Ms. Robinson knew about the allegations Becca made against him. (Vol. XVI, p. 1237).

Shortly after the phone conversation with Becca some detectives walked into the gym and he and the detectives went into the office to talk. (Vol. XVI, pp. 1237-1238).

Mr. Schiefelbein testified that Detective Breedlove came in and talked to him and had a search warrant. Mr. Schiefelbein gave his consent to search his office but later changed his mind and revoked that consent. He changed his mind because they did not give him any information about anything. He would ask them questions and he would not get an answer and he thought it was an invasion of privacy. (Vol. XVI, p. 1239).

Mr. Schiefelbein testified that they then gave him a search warrant for his house and he went over to the house with the detectives. (Vol. XVI, p. 1240).

Mr. Schiefelbein testified that he never had the chance to try and resolve the matter with Becca and Ms. Robinson. He stated he was with Detective Breedlove all night until 3:00 in the morning. (Vol. XVI, p. 1240).

Mr. Schiefelbein testified that since the videotapes were seized he has had a chance to view only some of the tapes. (Vol. XVI, p. 1244).

Mr. Schiefelbein testified that he has seen the videotape of Becca while sliding the mat under the tramp and the camera focuses on her pelvic area. He stated that the sound on the tape is him talking to a lot of different people doing different things in the gym. He stated the shot of Becca's pelvic area serves a gymnastics purpose. (Vol. XVI, p. 1245).

Mr. Schiefelbein explained that in gymnastics the body is the tool and the body does all the actions and so biomechanically you have to study the body in order to make sure that you can get the kids to do the trick they are supposed to do. He said there are different purposes for those training tapes; some of which are to study biomechanics; some are to show kids what they are doing wrong; some are for technique; and some are to show him what the gymnast is doing wrong. (Vol. XVI, pp. 1245-1246).

Mr. Schiefelbein testified that the tapes serve two purposes: one for coaching and one for showing the kids certain skills. (Vol. XVI, p. 1246).

Mr. Schiefelbein testified that the purpose for videotaping the pelvic shots of Becca standing against the wall serves, again, for biomechanics. He stated that the purpose of a lot of those shots was because he wanted to teach Becca the [Stalder] press. She cannot do it and he wanted to find out how to teach her to do it. He stated none of the shots focus in on the “vaginal” area but on the pelvic area and the hips. He said you have insertion and origin of the legs and the hips twist and turn in so many different ways. He said it is very complicated how the hips work and the lower back works. He said there are reasons for the close-ups and they are to make sure that Becca is doing everything biomechanically that she is supposed to be doing.(Vol. XVI, pp. 1247-1249)

Mr. Schiefelbein disagrees with Lucy Fox who testified that these videotapes serve no gymnastics purpose at all. He disagrees with her because anybody who is on the cutting edge of technique in discovering new ways of coaching gymnastics that there are going to be new ways of coaching gymnastics. New ways and techniques are developed by taking ideas that are not in the norm, but ideas that are individual. He considers himself to be a

minority in the coaching community and at many clinics he has been to around the country his viewpoints are not always accepted. (Vol. XVI, pp. 1249-1250).

Mr. Schiefelbein testified that the purpose of frog stretches is to gain more flexibility. He said the two building blocks for gymnastics is strength and flexibility. The frog stretch has a lot to do with the balance beam and with hip turnout and pelvic tilts. (Vol. XVI, pp. 1250-1251).

Mr. Schiefelbein testified that he is left-handed. (Vol. XVI, p. 1252).

(Witness puts anatomically correct doll in frog stretch position)

Mr. Schiefelbein testified that they do one frog stretch that is 90 degrees and one frog stretch that is 45 degrees. He said if a gymnast cannot get all the way down in 90 degrees he will not do the 45 degree stretch with them. (Vol. XVI, p. 1252).

(Witness shown pictures of gymnasts in different positions)

Mr. Schiefelbein explained that the “pelvic area” encompasses your bottom, the iliac crest, the hips, hip flexor, and all the muscles in that region. He said the “pelvic area” is a pretty general term. (Vol. XVI, p.1254).

Mr. Schiefelbein testified that he stretches kids to the point at which he believes is safe and not tear any muscles, but he is going to get the job done. He said everybody has their way of doing it, but most high level coaches are not gentle when stretching. He pushes the kids down pretty hard because you cannot allow gravity to push your body down enough. He said specifically on the frog stretches you have to push down the gymnast. (Vol. XVI, p. 1255).



(Witness demonstrates the frog stretch with the doll)

Mr. Schiefelbein testified that when doing the frog stretch that the gymnast's hips rotate all the way under and the private area is underneath, flat on the ground. He stated you want the gymnast flat and you are essentially pushing on their butt. (Vol. XVI, pp. 1259-1260).

Although Mr. Schiefelbein testified that he pushed Becca down on frog stretches, he stated that he has never knowingly touched her vaginal area. He is not aware of any time that he accidentally touched her vaginal area. (Vol. XVI, p. 1260).

Mr. Schiefelbein testified that Becca has never voiced a complaint to him about how he was doing her frog stretches. (Vol. XVI, p. 1260).

Mr. Schiefelbein testified that if he accidentally touched a gymnast in the "no zone" area he would announce it to the kid but not make a big deal about it so the kid does not feel embarrassed. He said you certainly do not just ignore it because then they think you did it on purpose. If you are aware that you accidentally touched a gymnast while spotting them then you say; "I didn't mean to do that" or "I'm sorry". Mr. Schiefelbein said he would not make a big deal about it, but he said he certainly would openly acknowledge the accident. He did state that this is a rare occurrence. (Vol. XVI, pp. 1261-1262).

Mr. Schiefelbein testified that there is only one "purple and white" mat in the gym. He said there are multiple purposes for that mat. That particular mat is good because you can fold it, use it for standing on to spot, or use it to do tricks on and off of. He said there are a lot of uses for the mat. (Vol. XVI, pp. 1262-1264).

Mr. Schiefelbein testified that in his gym they do not have any specific area for any specific mat. He said they end up where they ended up from the night before. (Vol. XVI, p. 1264).

Mr. Schiefelbein testified that the atmosphere of his gym is “hectic.” He said it is very lively, upbeat and fast-paced. He has music playing which makes the gymnasts want to workout more. He said there is a lot of stuff going on at once at the gym. (Vol. XVI, pp. 1266-1267).

(Videotape of gym from January 29, 2002 played for the jury)

Mr. Schiefelbein testified that the video was a perfect cross-section of a typical day at his gym. (Vol. XVI, p. 1267).

(Videotape of gym marked as Exhibit #50)

Mr. Schiefelbein testified that the Fall Fiesta in 2001 was on November 10th. (Vol. XVI, p. 1271).

Mr. Schiefelbein testified that he never knowingly touched Becca’s vaginal area or breasts for sexual gratification. He also testified that he never made videotapes of Becca’s vaginal area, or manipulating that area. (Vol. XVI, p. 1272).

[CROSS-EXAMINATION]

Mr. Schiefelbein testified that the phone Becca called in on is the “emergency” phone that everyone knows they can use to get a hold of somebody at the gym. The other phone they do not answer. (Vol. XVI, p. 1275).

(Audio tape of phone conversation played, Exhibit #16)

Mr. Schiefelbein agreed, after hearing the audio tape, that he was not yelling at the level 4 kids while on the phone as he previously testified. (Vol. XVI, pp. 1292-1293).

Mr. Schiefelbein testified that he has been to the Brentwood Police Department on several occasions with his attorney. He was not able to look at the videotapes in their entirety because of the strict rules the Court put on them. He stated the audiotape was never brought to his attention and no one ever told him that it was there. (Vol. XVI, pp. 1293-1294).

Mr. Schiefelbein testified that in court is the first time he has heard the audiotape of the phone conversation between him and Becca. (Vol. XVI, p. 1296).

Mr. Schiefelbein testified that it is not a good policy to be alone with a female gymnast in the office with the door closed. (Vol. XVI, p. 1304).

Mr. Schiefelbein testified that when he is pushing down on a gymnast doing a stretch that he can see his fingers. (Vol. XVI, p. 1307).

Mr. Schiefelbein testified that Becca complained about her back hurting in May and he had her go to the doctor in June. (Vol. XVI, p. 1308).

Mr. Schiefelbein testified that when Becca would come to the gym to work the concession stand she would sometimes wear a leotard because she would sometimes help coach. (Vol. XVI, p. 1310).

Mr. Schiefelbein testified that it is important that the tool for gymnastics is the body; and for that reason, he made the videotapes. (Vol. XVI, p. 1327).

Mr. Schiefelbein testified that when he videotaped himself in the bathroom that it was for his own purpose to tape himself. It was not an attempt to tape others without their knowledge. (Vol. XVI, p. 1352).

## **REBUTTAL WITNESSES BY THE STATE**

### **ANDREA YEPEZ**

Andrea Yepez is thirteen years old. (Vol. XVII, p. 1358). Andrea attends school at Saint Edwards School and lives in Brentwood. (Vol. XVII, p. 1361). Andrea has a sister named Lilly and they both used to take gymnastics from Mr. Schiefelbein. Andrea and her sister were both part of the original “six pack.” The other four members of the “six pack” were Catherine Taxler, Becca Robinson, Jordan Melton and Mia Yabut. They all came over from Let It Shine and started taking gymnastics at Espirit Gymnastics. (Vol. XVII, p. 1362).

Andrea testified that she would be in the gym when Mr. Schiefelbein and Becca were. She said Mr. Schiefelbein would do frog stretches with her from 30 seconds to one minute. (Vol. XVII, pp. 1362-1363).

Andrea testified that there was a difference in the way Mr. Schiefelbein did frog stretches with Becca. She said he would put his hand on the side of her but with Becca he would put his hand in the middle and push on her butt. She said she could not always see Mr. Schiefelbein do frog stretches with Becca. She said there was sometimes a mat in front of them and she could not see them. She and the other girls were usually on the bars. (Vol. XVII, pp. 1363-1364).

Andrea testified that if they wanted to move from the bars they would have to walk over and ask permission from Mr. Schiefelbein. (Vol. XVII, p. 1364).

Andrea testified that she has seen Mr. Schiefelbein and Becca go into the office. She said there was not always someone else in there with them. She said door was closed most of the time. (Vol. XVII, p. 1365).

[CROSS-EXAMINATION]

Andrea testified that if one girl got frog stretched then all the girls in the group got frog stretched. She said wherever Mr. Schiefelbein may have stretched Becca on the mat of the rod floor that he also stretched everyone else in that same spot.. (Vol. XVII, p. 1366). She said if he stretched Becca behind the mat then he stretched everyone behind the mat. (Vol. XVII, p. 1367).

Andrea testified that sometimes she was on the bars and sometimes on the beam when Mr. Schiefelbein would stretch Becca. (Vol XI, p. 1371).

[REDIRECT EXAMINATION]

Andrea testified that Mr. Schiefelbein would stretch Becca for ten minutes longer. (Vol. XVII, p. 1376).

### **NANCY WESTMAN**

Nancy Westman lives in Franklin, Tennessee. She has a daughter, Ally, who previously took gymnastics from Mr. Schiefelbein in August of 2001 until March of 2002. Ms. Westman knows the Robinsons. She said Ally was in gymnastics with Becca Robinson and they had the same training schedule. (Vol. XVII, pp. 1378-1379).

Ms. Westman testified that she was able to observe Mr. Schiefelbein and Becca interact. She noticed almost immediately that Mr. Schiefelbein favored Becca because he spent more time with her and hugged her. She said he hugged all the girls after an accomplishment or when they got off a piece of equipment at a meet but he hugged Becca more often during practice. She said Mr. Schiefelbein and Becca gave each other back rubs and rubbed each other's necks. (Vol. XVII, pp. 1379-1380).

Ms. Westman testified that on one occasion she was in the gym and Mr. Schiefelbein and Becca were tickling each other and fell back on the mat and laid next to each other, kind of tickling each other. She said it seemed to her to be more of a boyfriend/girlfriend type relationship. (Vol. XVII, p. 1380).

Ms. Westman testified that there was an incident when her daughter was tumbling and she fell and appeared to be hurt. She said since parents were not allowed to go out on the floor she stood back and watched her daughter lay on the floor and cry. She said Mr. Schiefelbein completely ignored her and was interacting more with Becca and totally disregarded the fact that her daughter had fallen and gotten hurt. Ms. Westman spoke to Mr. Schiefelbein about it later and he said he was purposely ignoring her because he did not feel like she was really hurt and sometimes ignoring is the best way to handling that. Ms. Westman did not agree and felt that it may have been her daughter's way of trying to get attention from him because he was totally engaged with Becca. (Vol. XVII, p. 1381).

Ms. Westman testified that there was a certain area that was chained off for parents. They did not go out on the floor unless Mr. Schiefelbein specifically asked them to and

parents were not allowed to go into his office. She said the office door was closed and if you needed to go in you had to ask permission. (Vol. XVII, p. 1382).

Ms. Westman testified that there was a hole in one of the walls of the office. She said if you were standing right up at the counter and leaning over you could see in the office but not from a distance. (Vol. XVII, p. 1383).

Ms. Westman testified that there were many days when she would arrive at the gym and there were no parents there. (Vol. XVII, 1384).

Ms. Westman testified that in February of 2002, they went to San Diego for a meet and on the way back in the van she was in the third row sitting in between her husband and Dee Ann Melton. She said Mr. Schiefelbein and Becca were sitting behind her. She could hear Becca say “No, Mark, no, just on my face.” She looked over her shoulder and could see Mr. Schiefelbein tickling Becca’s face and then his arm would go down her arm and then eventually to her leg and thigh. She looked directly in Mr. Schiefelbein’s face and gave him a look, like what are you doing? She did not say anything and did not want to make a big scene. She said Mr. Schiefelbein smiled back at her like he did not do anything wrong. She told her husband about it and talked with Dee Ann Melton about it. (Vol. XVII, p. 1387).

[CROSS EXAMINATION]

Ms. Westman testified, regarding the incident where her daughter fell, that she talked with Mr. Schiefelbein about it and he told her he was aware of the fall and that was his approach to handling her daughter. She agreed that as a mother she may not have liked it but she understood what he was doing and why he was doing it. She agreed with him at the time

and still does agree that sometimes with kids the best approach is just to ignore them when they try to act hurt to get attention. She agreed that falling is not unusual in gymnastics whether on the beam or the floor, it is pretty common. (Vol. XVII, pp. 1389-1390).

Ms. Westman testified that she has seen parents on the floor. She said they were allowed on the floor but only with permission. She said she has been out on the floor herself. (Vol. XVII, p. 1391).

Ms. Westman testified that she does not think she indicated in her earlier testimony that the office door was closed. She said she described the office and where the door was and that the door was sometimes closed. She said for the most part the door remained closed unless someone was going in and out. Ms. Westman does not know if the door has a lock on it or not. (Vol. XVII, pp. 1391-1392).

(Witness shown Exhibit #43)

Ms. Westman testified that she believes the hole in the wall was maybe three or four feet tall. (Vol. XVII, p. 1393).

Ms. Westman testified that there were five families in the van on the trip back from San Diego. She said the Yabuts, the Yepz, the Meltons, the Robinsons and her family were in the van. She said it was a 15 passenger van and had four rows of seats. She testified earlier that she was in the third row but she told the police detective she was in the second row. She said it was noisy in the van and there was a lot of giggling and laughter from all the girls. She said Jill Robinson was seated in front of her and that she did not say anything to Mrs. Robinson about what she saw with Mr. Schiefelbein and Becca even though she



nudged Dee Ann Melton and her husband to let them know. She said Becca's demeanor when she was saying "no, Mark, no" was giggling like two kids playing or two teenagers playing around. (Vol. XVII, p.1403).

## **REBUTTAL WITNESSES BY THE DEFENSE**

### **DEE ANN MELTON**

Ms. Melton testified that she was on the trip to San Diego in February of 2002. She was on the bus seated next to Ms. Westman. (Vol. XVII, p. 1413).

Ms. Melton testified that Ms. Westman was sitting in the middle and she was sitting next to the door and she could see the whole van. She said Becca and Mr. Schiefelbein were seated behind her and were playing this game to see if you could make the other person laugh. She said Mr. Schiefelbein was touching her trying to make her laugh and it was really nothing more than child's play, but it was irritating. (Vol. XVII, p. 1414).

Ms. Melton testified that she could see that Ms. Westman was getting frustrated and upset. Ms. Melton was watching the whole thing and there was nothing more to it than that. Ms. Melton said there was nothing sexual about it. She said Becca's tone when she said "no, Mark, no" was in a playful tone and she was just being silly. (Vol. XVII, p. 1415).

### **DEFENSE RESTS**

## **MOTION FOR NEW TRIAL**

### **DEFENDANT'S PROOF**

The defense called as its first witness Mrs. Dee Ann Melton to testify. The Court denied the defense's request and would not let Mrs. Melton testify. (Vol. XXIII, pp. 2177-2182).

The defense called as its next witness Mr. Auggie Boto to testify. The Court denied the defense's request and would not let Mr. Boto testify (Vol. XXIII, pp. 2182-2187).

The defense called as its next witness Mr. Johnson to testify. The Court denied the defense's request and would not let Mr. Johnson testify. (Vol. XXIII, pp. 2188-2194).

The defense called as its next witness Detective Breedlove to testify. The Court denied the defense's request and would not let Detective Breedlove testify. (Vol. XXIII, pp. 2195-2205).

The defense called as its next witness Ms. Karen Schiefelbein to testify. The Court denied the defense's request and would not let Ms. Schiefelbein testify. (Vol. XXIII, pp. 2206-2208).

The trial court then denied the Defendant's Motion for New Trial and Amended Motion for New Trial. (XXIII, p. 2275).

## ARGUMENT

- 1. The Trial Court Erroneously Failed to Compel the District Attorney to Provide to Defense Counsel, for His Personal Viewing, Copies of Videotapes Taken from the Defendant's Premises, an Audiotape of Defendant's Conversation with Alleged Victim, and Materials Taken from the Defendant's Computer in Violation of Rule 16, Tennessee Rules of Criminal Procedure and in Violation of the Right to Counsel Provisions of the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution.**

The State relied heavily on a number of the 25 videotapes confiscated from Mr. Schiefelbein's home by the police. Detective Breedlove testified that there were some 248 close-up shots of Becca which were taken in Mr. Schiefelbein's gym between May, 2001 and June, 2002. Becca was wearing leotards during these normal gymnastic activities. (Vol. VIII, pp. 606-603). The videotapes were several hours in length.

The hours of videotapes which were played to the jury are in evidence on appeal but this Court can also view the tapes on the videotape proceedings of the trial. (See e.g. Court Tape dated 07/08/2003 at 4:18:42 p.m. and Court Tape dated 07/09/2003, 10:41:08 a.m.) For the convenience of this Court eight "snapshots" of the videotapes appear on the next page.

## Snapshots

As one would imagine, the defense attorney desired to have copies of all of these hours and hours of videotapes so that he could inspect them and go over them with his client. The defense attorney also wanted a copy of the actual audiotape of his client's conversation with Becca, as well as copies of material taken from the client's computer. The district attorney, claiming all of this was "pornographic" and would re-victimize the child, refused to give the defense attorney copies of anything and insisted that the defense attorney inspect all this in the confines of the police department.

Much aggrieved by this arrangement, the defense attorney filed a motion with the Court to order the State to produce copies of the tapes and physical evidence. (TR I, pp. 137-142). The defense attorney observed that the district attorney was "taught in training not to turn over material such as that requested by the defendant." (TR I, p. 140). It is unclear to this day what this "training" is but, in any event, the district attorney refused and so the defense attorney asked for the assistance of the judge. An extensive hearing was conducted on February 18 which appears in Volume IX of the transcripts. The judge ruled that the evidence could only be viewed in the police department at a "mutually convenient time" and that the tapes would not be subject to copying. (Vol. IX, p. 187). (See also the Order appearing at TR II, pp. 154-155 which also appears at Appendix pages 1-2).

The defense then filed a motion for an interlocutory appeal of this discovery order. The defense argued that it was extremely inconvenient and potentially "hostile" to be viewing all of these hours of tapes over at the Brentwood Police Department. The defense also wanted to have experts examine the tapes but the financial situation was such that they could not afford to have experts travel to Brentwood to view these tapes. (Vol. X, p.195).

The trial court also entered an order appearing at TR II, p. 235 to the effect that an interlocutory appeal was not needed and that the defense was not prejudiced.

The defense asserts that these unreasonable restrictions on discovery are in direct violation of Rule 16, Tennessee Rules of Criminal Procedure and impacted the defendant's right to counsel under the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution. The defense attorney wasted hours of his time traveling back and forth to view tapes he could have reviewed at his convenience in his office.

There was absolutely no reason whatsoever to have such unnecessary restrictions on the various audio and video tapes and the materials taken from Mr. Schiefelbein's computer. The defense attorney never did get to see all of the tapes because of the restrictions imposed by the Court. (Vol XIII, pp. 564-565). Mr. Johnson, the defense lawyer, was only given a transcript of the audiotape of a conversation between his client and the alleged victim. (Vol. XVI, p. 1339). As a result, Mr. Schiefelbein himself never heard the audiotape of his conversation with the alleged victim until the trial! (Vol. XVI, p. 1339). There is simply no rule, statute or case which authorizes such a procedure.

This entire manner of handling the discovery caused public suspicion as to whether Mr. Schiefelbein received a fair trial. Indeed, the trial court questioned the lawyer on the record to get him to agree in public that there was no "denial" of discovery. (Vol. XVI, p. 1341). The procedures were totally unnecessary. This business of "revictimization" did nothing to protect Mr. Schiefelbein's right to a fair trial.

The district attorney argued prior to trial that even if this procedure was some sort of error that it would be “harmless.” (Vol. X, p. 203). The trial court stated that “appellate judges do not like the harmless error argument.” Clearly the State was acting at its peril. (Vol. X, p. 204).

While it is beyond the scope of the pretrial discovery problem, this Court should be aware that the issue of disclosure of the videotapes and other materials continued on even after the trial. When the defense tried to obtain the videotapes for purposes of the court reporter transcribing them into a transcript, the clerk advised that the judge had placed all of the videotapes of the trial under seal! (TR IV, p. 508). The defense then had to file a motion to permit the court reporter to transcribe the videotapes and to “check out the videotapes” from the clerk’s office for purposes of the motion for new trial. (TR IV, p. 508). So that the Court is clear about this we are not talking about the videotapes of the evidence but the videotapes of the trial itself. Finally, after motions and a hearing the clerk provided defense counsel with a single duplicate copy of the videotapes of the entire trial which counsel could then give to the court reporter who was then to return to Mr. Raybin and could not give them to any other person, including the defendant himself (!) and had to maintain the duplicate set without making any copies. The actual exhibits of the gymnastics procedures are under seal as well. (TR IV, pp. 516-517). Indeed, except for the limited access by appellate defense counsel the judge sealed the tapes of the video exhibits from public view for all time. (TR III, p. 316). (Appendix, pp. 9-11).

The defense asserts that these videotapes of the gymnastics procedures as well as the audiotape of the defendant’s statement when talking to the alleged victim should have been

copied and disclosed to the defense so the defense could examine these materials. The artificial restrictions were simply unlawful. In *State v. Butler*, Tenn. Crim. App. at Knoxville, filed October 27, 2004, this Court held that the defense must be provided with copies of materials even if those materials constituted child pornography as long as the discovery was in the context of the prosecution or defense of the criminal case. *Butler* dealt specifically with the offense of sexual exploitation of a minor. Mr. Schiefelbein's case involved aggravated rape, aggravated sexual battery and also the offense of sexual exploitation of a minor. Thus, *Butler* is clearly on "all fours" with our case here. There is simply no authority for the restrictions placed on the discovery of critical defense matters such as those presented here.

Undoubtedly, the State will argue once again on appeal here that while this was certainly error, it was "harmless." As noted, the trial judge himself was of the view that harmlessness could not be an issue on something like this. Moreover, we are not talking about a single isolated piece of information but hours and hours and hours of videotapes that formed the core of the State's case against this defendant as well as the defendant's conversation with the alleged victim. A transcript is no substitute.

Also, the defense wanted to call the original defense attorney, Mr. Patrick Johnson, to testify during the hearing on the motion for new trial to discuss the prejudice that he and his client suffered in not being able to look at the tapes in a convenient manner. (Vol. XXIII, pp. 2188-2190). Indeed, Mr. Raybin argued that he wanted Mr. Johnson to testify because Mr. Raybin had to "prove that it wasn't harmless for this man to be denied access to these videotapes." (Vol. XXIII, p. 2190). The prosecutor agreed that it would be appropriate for



the appeal for Mr. Raybin to be allowed a proffer of evidence. (Vol. XXIII, p. 2191). The judge denied the request that Mr. Johnson testify as to the nature of the prejudice. (Vol. XXIII, pp. 2194-2195). Presumably, the State will have little to say about prejudice given that the defense did everything possible to preserve this issue. This is reversible error *per se* not only because it is prejudicial but it is an affront to our entire judicial system.

In this issue the defense argues that the actions of the judge were improper in failing to enforce the well-settled rules of discovery. Yet, the error lies squarely at the feet of the prosecutor who should have made copies of this material as a matter of course and provided the materials to the defense lawyer just like we do in the other 94 counties of our State. Apparently the authorities in Williamson County believe the rules do not apply there.

This prosecutor should get to try her case again after fully complying with discovery. To that end, this Court should order that the prosecutor provide defense counsel with a full audio copy of his statement, copies of all the materials taken off the defendant's computer, and full copies of the videotapes taken from the defendant's premises so that defense counsel could review same with his client and necessary witnesses in preparation for the next trial.

**2. The Trial Court Violated Mr. Schiefelbein's Right to a Fair Trial under the Due Process Provisions of the United States and Tennessee Constitutions as Well as the Right to a Public Trial under the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitutions by Excluding the Public from Portions of the Courtroom So That the Public Could Not See the Various Videotapes That Were Being Played in the Courtroom as Evidence in the Trial.**

As a corollary to the preceding issue the defense asserts that the trial judge erroneously excluded the public from viewing evidence of the videotapes of the gymnastics

which showed the victim. When the tapes were played and made exhibits the public was forced to “shift” to another part of the courtroom so they could not see the evidence. This “partial closure” violated Mr. Schiefelbein’s right to a fair trial under the Due Process provisions of the United States and Tennessee Constitutions as well as the right to a public trial under the Sixth Amendment to the United States Constitution, and Article I, Section 9 of the Tennessee Constitution.

The judge ruled that the public and the media could stay in the courtroom “but I don’t want you seeing this videotape. You can hear about it, but I do not want you watching it at this time. So maybe if I can get you all over in that section.” (Vol. XIII, pp. 596-597). While this was going on, the Court posted a deputy at the door. (Vol. XIII, p. 598). The district attorney asked if a parent of a current student could see the evidence. (Vol. XIII, p. 600). See also page 629 where the Court says that the media has to be “reconfigured.”; See also Vol. XIV, page 719 where a video tape of an interview with the child and the police officer is broadcast in the courtroom and the audience is instructed to “move over.”; See also Vol. XV, page 984 where the judge tells the audience “if you want to watch you have got to sit over there. There is a rule right now in effect and you too sir.”; See also page 1000 where the judge says, “Mr. Johnson, if [the prosecutor] is going to start off with showing the video, you folks can sit over here if you would like.”; See also Vol. XVI, pages 1269 through 1270 where the Court says “I am going to ask everybody to sit on the left side due to the sensitive nature of the filming.” See also Vol. XVI, page 1324 where the district attorney said that because they were setting up some video tapes that everybody could “make the shift.”

There is absolutely no procedure under the law whereby a public trial can be conducted with the public excluded from portions of the courtroom so that the public cannot see and hear all of the evidence which is a matter of public record. The Sixth Amendment of the United States Constitution guarantees a defendant the right to a public trial as well as the public's right to attend trials. Article I, Section 9 of the Tennessee Constitution guarantees a defendant a similar right.

In *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985) the Supreme Court of Tennessee stated that a trial court must make specific findings to support any closure order. See also *State v. Sams*, 802 S.W.2d 635 (Tenn.Crim.App., 1991). The judge made no findings at all as to why this highly unusual procedure was utilized. The exclusion of the public from portions of the courtroom occurred for hours and hours and on at least half-a-dozen occasions throughout the trial. The right to a public trial belongs not only to Mr. Schiefelbein. The right to a public trial is that of the public itself. The trial court gave no legitimate reason for this extensive alteration of the public seating in a public courthouse when introducing matters that are of public record. This issue was re-raised during the motion for a new trial and the defense sought to introduce the testimony of persons who were in the audience during the "audience shift." The judge refused. (Vol. XXIII, pp. 2182-2187).

The exclusion of the public from viewing much of the evidence in this case, and by requiring the public to move around in the courtroom so that they could not see these videotapes, not only violated Mr. Schiefelbein's constitutional rights to a "public trial" but this bizarre procedure also violated Mr. Schiefelbein's right to a fair trial under the Due Process provisions of the United States and Tennessee Constitutions. Specifically, the jury

could not have been but significantly impacted by seeing the public cast about in the courtroom so that the public could not view this “sensitive” evidence. This was highly prejudicial to Mr. Schiefelbein since this could do nothing but give the impression that these so-called “crotch” shots, as well as other videos, taken by Mr. Schiefelbein were highly improper. What else could the jury think since even the public could not see them? No limiting instruction or curative instruction was given to the jury about any of this bizarre courtroom procedure and thus Mr. Schiefelbein was severely prejudiced. His rights were utterly destroyed by the judge’s attempt to keep the “victim” from being “re-victimized.” This assumes that the alleged victim was even a victim in the first place and does nothing but constitute judicial comment on the evidence by the way the evidence is treated in the courtroom.

The rules regarding broadcasting of minor children in the courtroom deal with the witness himself or herself when they are actually testifying and do not extend to evidence which may depict this child.<sup>2</sup> Given that there was no limiting instruction or admonition from the Court and given the prolonged time in which the jury saw the public moving around

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<sup>2</sup> “We have this rule, this is not my rule, it is the Supreme Court Rule [30C(1)] about audio, it’s audiovisual broadcasting of alleged victims that are minors. And I want to restate for those that did not hear that or see that I understand we are going to have videotapes played again of young people, and when that happens we need the camera just to be down and off. I don’t think you were here. We are not going to have video equipment on during that portion and you can take notes. But when the tapes are played for the jury, the media needs to be over there on this side. I am not going to let the media look at them because of potential rule victimization issues that we don’t open that can of worms, but you can hear and keep up over there. Is that okay with you guys?” (XIV, pp. 608-609)

the courtroom so that they could not see public record evidence, this Defendant was severely prejudiced. This is *per se* reversible error of constitutional magnitude.

**3. The Judge Improperly Impeached Mr. Schiefelbein and Struck His Truthful Testimony in the Presence of the Jury in Violation of the Due Process Provisions of the United States and Tennessee Constitution and the Prohibition of the Invasion of the Fact-finding Function of the Jury in Violation of the Sixth Amendment to the United States Constitution, and Article I, Section 9 of the Tennessee Constitution.**

The district attorney asked Mr. Schiefelbein during cross-examination if he had been to the Brentwood Police Department several times with his attorney to which Mr. Schiefelbein replied that he had been at the Brentwood Police Department. (Vol. XVI, p. 1293). The district attorney then asked Mr. Schiefelbein if he had looked at the gym video tapes. Mr. Schiefelbein responded, “I was unable to look at the video tapes in their entirety because of the strict rules that the Court put on us.” (Vol. XVI, p. 1294). This was absolutely accurate and truthful testimony. The defense attorney himself had stated earlier that he had seen most of the tapes but had not seen all of them. (Vol. XIII, p. 564-565). Incredibly, the trial court then instructed the jury that they should “disregard any comment that Mr. Schiefelbein made in his testimony concerning any alleged denial of access to tapes by the Brentwood Police Department prior to today. I am going to ask you to disregard what he said about that.” (Vol. XVI, p. 1344).

This “instruction” was totally unnecessary given the fact that Mr. Schiefelbein was denied access to the tapes. He was forced to look at the tapes in a room on police property. This was apparently the same room where he had been where the police recorded him earlier shortly after his arrest. The judge’s instruction to the jury to disregard the “comments” of Mr.

Schiefelbein regarding “alleged denial of access to tapes by the Brentwood Police Department prior to today” was not even accurate. (Vol. XVI, p. 1344). Mr. Schiefelbein said no such thing.

The judge had no business telling the jury to disregard the testimony of Mr. Schiefelbein when he gave truthful testimony that he had been unable to see all of the tapes because of the protective order. That was the whole point of all of the motions and complaints filed by the defense attorney. *A judge should not impose a protective order restricting access to evidence at the times and places convenient only to the State and then when Mr. Schiefelbein testifies about it in front of the jury to strike his testimony.* See also, *Arp v. Wolfe*, 49 Tenn.App. 294, 303, 354 S.W.2d 799, 803 (1957)(“As a general rule a party eliciting a statement from a witness cannot move to strike it because it proves unfavorable to him, even though inadmissible. ... Nor will an answer which is directly responsive to a question be stricken because it is not what counsel expected.”).

This “instruction” to strike the testimony was nothing short of the judge impeaching the testimony of Mr. Schiefelbein himself because the Court was “overly sensitive” to the feelings of the Brentwood Police Department rather than the fair trial rights of this Defendant. This entire procedure compromised Mr. Schiefelbein’s right to a fair trial when the Court itself impeached Mr. Schiefelbein about a matter relevant only to the Court itself and the Brentwood Police Department but which has nothing to do with the guilt or innocence of Mr. Schiefelbein. If the judge wanted to “correct the record” for purposes of the appellate court it could have done so out of the presence of the jury. To have the judge impeach Mr. Schiefelbein in the presence of the jury and strike his testimony was not only

unnecessary it constituted a judicial invasion of the fact-finding function of the jury and constituted nothing short of a judicial comment on the evidence in violation of Article 6, Section 9 the Tennessee Constitution. This is reversible error *per se*. See *State v. Suttles*, 767 S.W.2d 403 (Tenn. 1989).

**4. The Trial Court Exhibited Extreme Bias During the Trial and Improperly Asked Questions of State Witnesses Which Were Designed to Bolster the Prosecution and Harm Mr. Schiefelbein in Violation of the Due Process Provisions of the United States and Tennessee Constitutions.**

Occasionally a judge may fall into error by too closely questioning a defense witness which gives the appearance of partiality. *Parker v. State*, 178 S.W. 438 (Tenn.1915). The reverse is where the judge asks questions of state's witnesses clearly favorable to the State to the prejudice of the defense. See, *Graham v. McReynolds*, 90 Tenn. 673, 18 S.W. 272 (1891)( the court ruled out the attempts of a witness to explain certain testimony, but said: "The court has already ruled on that question. I take it that" witness "is doing the best she can in the matter," ; such judicial comment was error, since this language might be construed by the jury to be an indorsement of the credibility of the witness). The latter situation occurred at least four times in this case.

**A.**

The trial court committed reversible error and gave the appearance of bias and compromised Mr. Schiefelbein's right to a fair trial in violation of the United States and Tennessee Constitutions and unlawfully commented on the evidence by, on its own, asking serious credibility questions to the alleged victim after her direct and cross-examination, as follows:

THE COURT: Okay. Almost finished here, Ms. Robinson. I have two questions I want to ask you

THE WITNESS: Okay.

THE COURT: I want you to listen. If you don't understand the questions, let me know. And take your time to think about it. You don't have to just answer. Think about this. You're under oath, which means you're to tell the truth. And you've always been under oath, ever since you've been in the witness chair. Ms. Robinson, what you have called inappropriate that Mr. Schiefelbein has done to you, have you made any of these things up?

THE WITNESS: No.

THE COURT: Has anyone told you what to say against him?

THE WITNESS: No.

THE COURT: Or has anyone coached you to say things against him about the inappropriate things?

THE WITNESS: No.

THE COURT: Anybody coached you to say that things were inappropriate that he did to you?

THE WITNESS: I don't understand the question very well.

THE COURT: Okay. By the word "coached," I meant basically told you what to say or how to say it against him.



THE WITNESS: No.

THE COURT: Thank you. Now, you all can have follow-up on any of those three or four questions, if you'd like.

(Vol. XVI, p. 1077, line 19 through p. 1079, line 7).

There was absolutely no reason for the judge to have asked these credibility questions in the presence of the jury. The lawyers could have addressed this. The Court gave the appearance of siding with one side in this matter. This was particularly egregious given the fact that it was the Court asking credibility questions rather than simple fact questions or clarifying testimony. This one extended passage constituted reversible error *per se* and this Court should grant a new trial. No defendant can have a fair trial with questions asked of a complaining witness such as these which touched upon questions of credibility where credibility was everything:

We recognize that the actions of the trial judge were well motivated and were taken with the best of intentions. Nevertheless in an extremely close case such as this, the trial judge must be very circumspect in making statements to the jury which might in any way reflect upon the credibility of a crucial [child] witness.

*State v. Suttles*, 767 S.W.2d 403, 406 (Tenn.1989).

## **B.**

The trial court committed reversible error in asking the State's expert a question as a "follow-up" as to whether a "gym instructor should obtain parental consent before videotaping the participant." (Vol. XIV, p. 718). This question was not suggested by any

of the questions of the jurors nor was it a legitimate follow-up question by any of the attorneys and was not for the purpose of clarifying any of the testimony. It was a totally unrelated matter, designed for no other purpose than to damage Mr. Schiefelbein who had tape recorded many of his students on multiple occasions. The question was not relevant to anything and was clearly designed to prejudice Mr Schiefelbein and indeed was not even accurate. One does not need permission to film other persons for private, non-commercial purposes.

Coming from the judge there was no objection required and it was clearly prejudicial and unnecessary. It gave the appearance that the Court was “taking sides” in this case and constituted a prohibited judicial comment on the evidence in violation of Article 6, Section 9 the Tennessee Constitution.

### C.

The trial court erroneously asked the mother of the alleged victim, “do you know if Becca shared her story about Mark with any of her friends at any time?” (Vol. XV, p. 886). This was a highly improper and biased question by the Court and should not have been asked given that this went to alleged prior “consistent” statements of the alleged victim to others which clearly is inadmissible absent a stringent foundation requirement. See e.g. *State v. Braggs*, 604 S.W.2d 883 (Tenn.Crim.App. 1980). This question was not relevant to any question asked by any of the parties. This violated the rules of evidence, constituted a prohibited judicial comment on the evidence in violation of Article 6, Section 9 the Tennessee Constitution, denied confrontation and denied Mr. Schiefelbein the right to a fair trial in violation of Due Process provisions of the United States and Tennessee Constitutions.

#### D.

One of the State's witnesses was a clinical social worker who had interviewed the alleged victim. (Vol. XV, p. 795-809). After both sides questioned the witness, the judge asked questions to the clinical social worker about what the alleged victim had said regarding "pain." The Court asked, "how many times was the report by the child experiencing "pain," using that word." (Vol. XV, p. 808). The witness said that she did not ask her a number of times. Then the judge said, "how many times in your notes or your recollection was that word used in the context of the touching?" (Vol. XV, 808).

This area of questioning was absolutely improper. While a judge may certainly ask clarification questions, there was absolutely no clarification needed of any question asked by anyone, either the prosecution, defense or the jury. This was clearly a prohibited judicial comment on the evidence in violation of Article 6, Section 9 of the Tennessee Constitution. The perception of judicial neutrality evaporated by this series of questions which, as we shall see in the next issue, contributed to even more mischief later . Mr. Schiefelbein was thus denied the right to a fair trial in violation of the Due Process provisions of the United States and Tennessee Constitutions.

**5. The Trial Court Erroneously Refused to Allow the Defense Expert to Testify as to the Findings in the State's Medical Report Which Showed That the Alleged Victim Had No Medical Injuries Which Deprived Mr. Schiefelbein of His Right to Present a Defense, Rebut the State's Evidence, and Also Deprived Mr. Schiefelbein of the Right to a Fair Trial under the Due Process Provisions of the United States and Tennessee Constitutions.**

The alleged victim in this matter was examined and no evidence of penetration was disclosed by the experts. A report to this effect was generated. (See the report at TR I, pp.

101-105, a portion of which is in the Appendix at pages 23-24). The child said she experienced pain during the touchings. (Vol. XV, p. 800). The defense attempted have a medical doctor testify and explain that the victim's claims of pain and injury would be inconsistent with the medical report, thus calling into question the validity and veracity of the complaining witness. (See offer of proof Vol. XV, pages 893-912). The district attorney argued that "pain" of the alleged victim was a "collateral matter" and there should not be any "extrinsic proof" about this lack of penetration as to the pain issue. The judge agreed with the state and told the defense lawyer that this testimony would not be relevant because this case dealt only with aggravated sexual battery. (Vol. XV, pp. 910).

The judge was just plain wrong. The proposed defense medical proof became highly relevant due to the "pain" issue given the judge's own questions to one of the state's expert witnesses earlier. Specifically, as we have just see in the prior issue, the Court took it upon itself to ask the counselor how many times the child had talked about pain. (Vol. XV, pp. 808-809). This then made directly relevant the testimony of the defense expert regarding the medical report which the trial judge should have permitted.

In addition, the detective testified about penetration: "Becca was unable to pinpoint exact dates of when Mark digitally penetrated her vagina or rub the outer parts of it, but she told me that it did not begin until sometime after January of 2001." (Vol. XV, p. 793). Lastly, this Court need but look at the Bill of Particulars to see that in the Bill of Particulars the State itself specified digital penetration in *all* the rape counts and all the aggravated sexual battery counts. (TR III, pp. 201-204) (Appendix, pp. 3-6). How, then, could defense medical proof that there was no penetration be excluded from this trial?

The defense expert testimony rebutted the State's case and went directly to impeach the credibility of the State's own expert and lay witnesses as well as the alleged victim herself. The defense attorney was correct on all points when he argued:

MR. JOHNSON: If Your Honor please, just briefly, the statute for aggravated sexual battery talks about sexual activity and simulated sexual activity. This is one of the problems we discussed when we were deciding whether to sever or not was the intertwined of the testimony. As long as there was no testimony of any pain concerning Becca Robinson, I wasn't going to use Dr. Yabut's testimony. It was when Ms. Thompson, from Our Kids, testified, apparently in response to a question, you may recall, about pain, that that's where I became concerned that the jury needs to be able to hear that. I think the General's objections go to not admissibility, but credibility as to how much weight the jury (inaudible) gives to his testimony. And she, obviously, is prepared to do a very good job if saying, well, if there's penetration, and it didn't go into the hymen, it's normal. And he can say yes, if there was some penetration. But if he's also going to testify that it's inconsistent with the number of times that she claims it happened; and the fact that, to the Our Kids representative, she claimed pain. And those are inconsistent. (Vol. XV, pp.908-909)

It is critical to this issue to note that the State was allowed to introduce its own expert testimony about the interview of the child prior to the physical examination itself. See Vol. XV, pp. 799-800. See also Vol. XV, pp. 803-804 where the social worker testified that the medical report was a combination of her report and that of the nurse practitioner who actually did the physical examination. (The report was signed by both experts and the signatures appear in the Appendix at pages 23-24). Yet, the defense was not allowed to call its own expert on that critical issue.

Mr. Schiefelbein was denied the right to present a defense by the exclusion of this critical defense testimony. See *Hale v. State*, 453 S.W.2d 424 (1969) (defendant denied right

to present proof regarding duress); *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636, (1986) (the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense); *State v. Harris*, 696 S.W.2d 546 (Tenn. Crim. App. 1985) (trial court's ruling which prevented evidence of defendant's inability to pay child support denied due process and denied "the accused the right to interpose a defense"); *State v. Culp*, 900 S.W.2d 707 (Tenn. Crim. App. 1994) (defendant was denied the constitutional right to present evidence concerning his necessity defense to an escape prosecution); *State v. Brown*, 29 S.W.3d 427 (Tenn. 2000) (testimony that the child admitted to two friends that she had sexual intercourse with an adolescent male during the same time that the defendant allegedly committed aggravated rape was relevant to the issue of whether the defendant was responsible for her hymenal injury and thus satisfied the admissibility requirements of the rape shield rule; exclusion of such testimony violated the defendant's right to present a defense and the testimony was admissible even though it violated the rule against hearsay).

This Court should grant a new trial.

**6. The Trial Court Erroneously Severed the Rape Counts from the Remaining Counts over the Objection of the Defense Lawyer and Thus a Future Trial is Barred by the Compulsory Joinder Provisions of the Rules of Criminal Procedure And, Potentially, the Double Jeopardy Provisions of the United States and Tennessee Constitutions.**

On the morning of trial the State filed a motion to sever the three rape counts and argued that Mr. Schiefelbein would be "protected" if the rape charges were severed from trial of the remaining counts. TR III, page 311. Given that the prospective jurors were in the courtroom the "hearing" was in a small adjoining room but in mid-record the videotape cut

off, and so the judge restated what had taken place. To the extent possible, this is all transcribed and appears in Volume XXII.

The State argued that the gym videos of the victim might not be probative of the rape counts but would be relevant for the battery counts and thus the rape counts should be severed. (XXII, p. 2163). The defense objected because the jury would still hear the evidence of the rape and the sexual battery since it was all “intertwined.” The judge agreed with the State and severed the three rape counts. (Vol. XXII, p.2169).

Apart from the merits of the issue, the judge was procedurally at fault in considering this issue on the morning of trial. Settled procedure dictates a pre-trial hearing on joinder and severance questions. *Spicer v. State*, 12 S.W.3d 438 (Tenn. 2000). Had there been a pretrial hearing the judge could have ruled on the admissibility of the gym videotapes and then determined if it made any difference at all if the rape charges were included in the admissibility issue. By not holding the required hearing the judge was making decisions in vacuum.

The State’s motivation in requesting a severance was a sham. The State was certainly not desirous of protecting any rights of Mr. Schiefelbein but utilized this severance as a vehicle to exclude the medical report which showed no penetration whatsoever. In short had the rape charges remained the defense surely would have had every reason to attack the lack of penetration. But, without the rape charges, the State could have a better chance of deflecting important defense proof by not introducing the medical report itself. As we have seen the State had it both ways: the tapes came in but the critical defense medical evidence

was excluded (ISSUE 5). Thus, the severance was motivated by an attempt to gain tactical advantage over the defense.

As a practical matter, the charges of aggravated sexual battery and aggravated rape were so intertwined as to be incapable of separating out one from the other. The allegations of each of the three groups of rape/sexual battery offenses were identical. The State's Bill of Particulars made it clear that the rape and sexual battery counts were identical. (TR II, pp. 201-204). See the Appendix at pages 3-6 to this brief for a copy. For example, Count 1 charging rape involved alleged digital penetration after a particular event held on November 10, 2004, but before Christmas, 2001 on the "rod floor" of Esprit Gymnastics. The nature of the offense was listed as "digital penetration" for the offense of aggravated rape. The Bill of Particulars describing Count 2, charging aggravated sexual battery, contained identical language in all respects as to the place, time and nature of the offense as the Bill of Particulars describing Count 1 and included an allegation of penetration! Thus, the Bill of Particulars describing Counts 1 and 2 were indistinguishable from one another save that one charged aggravated rape and the other charged aggravated sexual battery. For all that appears Count 2 may well have been a lesser included offense of Count 1.<sup>3</sup>

Suffice it to say that the allegations of the rape and sexual battery counts more than met the standard of a "criminal episode" and thus joinder was mandatory as required by Rule 8 (a), Tenn.R.Crim.P. The grounds for a severance were a farce and certainly did not meet

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<sup>3</sup> At the hearing on the motion for a new trial the defense attempted to develop proof suggesting a double jeopardy violation, (Vol. XXIII, p. 2197), but the judge refused to allow the evidence. (Vol. XXIII, p. 2205).



the standard of promoting a fair determination of the defendant's guilt or innocence. See *State v. Smith*, 137 N.J. Super. 89, 347 A.2d 816 (1975) (severance required of the final count charging defendant as a previously convicted criminal in possession of a firearm where the firearm was possessed in a shooting incident where proof of the prior conviction would be prejudicial to the remaining charges).

Before the video record of the trial recording cut off, the district attorney was arguing that the child "never testified that [Mr. Schiefelbein] digitally penetrated the vaginal cavity." (Vol. XXII, p. 2166). Indeed, given the medical report and the district attorney's concession, it is doubtful if there is even a rape case here. Nevertheless, the threat of a future rape prosecution is sufficient for the reasons more particularly set forth in the companion interlocutory appeal of the motion to dismiss. Consequently, Mr. Schiefelbein asserts here that the judge erroneously granted the severance in violation of the Tennessee Rules of Criminal Procedure and in violation of Mr. Schiefelbein's right to a fair trial under the Due Process provisions of the United States and Tennessee Constitutions.

**7. The Trial Judge Repeatedly Permitted the State to Introduce Prohibited Hearsay and Opinion Testimony and Excluded Legitimate Defense Evidence Which Was Clearly Admissible in Violation of Multiple Provisions of the Tennessee Rules of Evidence.**

This case presents a primer on the rules of hearsay and opinion testimony. The first five examples below demonstrate that trial judge repeatedly permitted the State to introduce prohibited hearsay and opinion testimony. The remaining examples illustrate that the judge did not extend to the defense a similar suspension of the rules of evidence.

**A.**

The trial court erroneously permitted hearsay opinion testimony from the alleged victim concerning her mother's out-of-court statement that "[her mother] kind of felt like something like that was going on." (Vol. XII, pp. 354-356). This testimony clearly constituted hearsay and was introduced for no other purpose than the truth of the matter asserted. See Tenn. R. Evid. 801(c) (defining a hearsay statement as an extrajudicial statement "offered in evidence to prove the truth of the matter asserted"); see generally *id.* 803 (listing various exceptions to the hearsay rule).

**B.**

The trial court erroneously permitted the district attorney to question the police officer as to whether all of the various statements of the alleged victim were "consistent" with each other and with the alleged victim's trial testimony. (Vol. XIV, pp. 634-638). There is no rule of criminal procedure or rule of evidence which allows a lay witness to give an opinion as to the consistency or inconsistency of someone else's statement. This constitutes hearsay, violates the expert opinion rule, invades the function of the jury and is unknown as an evidentiary proposition. See Tenn. R. Evid. 801(c) (defining a hearsay statement as an extrajudicial statement "offered in evidence to prove the truth of the matter asserted"); see generally *id.* 803 (listing various exceptions to the hearsay rule).

Here, the alleged victim was testifying through the mouth of a police officer who was permitted to give his opinion about the consistency and credibility of the alleged victim. It is the jury who is to decide whether statements are consistent or not and not some police officer. This violated the rules of evidence, the rules of confrontation under the United States

and Tennessee Constitutions and denied Mr. Schiefelbein the right to a fair trial under the Due Process provisions of the United States and Tennessee Constitutions.

**C.**

The trial court erroneously permitted the mother of the child to testify that when the child was talking about the event, “I knew that she was being totally honest. She was telling him exactly what happened.” (Vol. XV, p. 849). The trial court should have granted Mr. Schiefelbein’s objection and sustained the objection to the answer of the witness given that this is an opinion as to the veracity or credibility of another person. This sort of testimony is an opinion not permitted by a lay witness and invades the function of the jury. The testimony was prejudicial and the fact that the Court denied the objection conspired to deny Mr. Schiefelbein’s right to a fair trial in violation of the Due Process provisions of the United States and Tennessee Constitutions. Credibility has nothing to do with demeanor.

**D.**

The trial court improperly allowed the mother of the alleged victim to give multiple opinions and speculation testimony as to “why the victim did not tell [she, the mother] about the touchings?” (Vol. XV, pp. 887-891). The mother was then allowed to testify about her relationship with the daughter, because she claimed that the child was afraid and multiple other opinions and expressions of support for her daughter. *Id.*

All of this was pure opinion testimony by a lay witness and was designed for no other person than to buttress the credibility of the alleged victim. Tenn.R.Evid. 701, limits opinion testimony by lay witnesses to opinions (1) based on the perception of the witness and (2)

helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Lay opinions must be based on facts in evidence, thus, those opinions that are based on facts or circumstances not in evidence must be rejected. See *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 711 (Tenn.App.), perm. to appeal denied, (Tenn.1999) (citing *Pierce v. Pierce*, 174 Tenn. 508, 510, 127 S.W.2d 791, 792 (1939)). Accordingly, a non-expert must ordinarily confine his or her testimony to a narration of facts based on first-hand knowledge and avoid stating mere personal opinions. *Blackburn v. Murphy*, 737 S.W.2d 529, 531 (Tenn.1987). The purpose of this rule is “to preserve the primary fact-finding role of the jury, since '[i]t is the function of the witness to state evidentiary facts and the function of the jury to draw such conclusions as the facts warrant.’” *Id.* (quoting *Wilson v. Nashville, Chattanooga & St. Louis Ry.*, 16 Tenn.App. 695, 705, 65 S.W.2d 637, 643 (1933)). This testimony also denied Mr. Schiefelbein the right of confrontation, in violation of the United States and Tennessee Constitutions and also denied Mr. Schiefelbein the right to a fair trial under the Due Process provisions of the United States and Tennessee Constitutions.

#### **E.**

Notwithstanding the liberties granted the state in its proof, the judge refused to permit non-hearsay to be considered by the jury. For example, the trial court erroneously sustained the State’s objection to what the alleged victim said that Mr. Schiefelbein told her about the various “routines” in gymnastics. This question and answer was designed to show the state of mind and effect that the statement had on the alleged victim. Nevertheless, the Court erroneously sustained the objection as being “hearsay” when in fact it was not hearsay at all. (Vol. XIII, p. 437-438).

**F.**

The trial court erroneously sustained the State's objections and failed to permit the defense witness to testify as to conversations that she had with the alleged victim which expressed the victim's demeanor. This was critical to impeach the alleged victim but the Court repeatedly refused to permit this testimony. (Vol. XV, pp. 957-961).

**G.**

The trial court erroneously sustained the objection to Mr. Schiefelbein's testimony regarding Mr. Schiefelbein's conversation with the detective regarding the digital camera. (Vol. XVI, p. 1241). This was not hearsay. Defendant's testimony concerning what he was told by the detective was designed to deal with issues concerning what Mr. Schiefelbein knew or information he told the detective himself.

**H.**

The trial court erroneously sustained the objection as "hearsay" concerning Mr. Schiefelbein's testimony pertaining to his conversation with the detective when Mr. Schiefelbein told the detective that he was not guilty. Given the nature of the questions about the conversation and as to what Mr. Schiefelbein said and what the detective said, the fact that Mr. Schiefelbein denied his guilt was clearly not hearsay. (Vol. XVI, pp. 1243-1244).

**8. The Trial Court Erroneously Permitted the District Attorney to Cross-examine Mr. Schiefelbein about a “Voice Stress Analysis.”**

The district attorney cross-examined Mr. Schiefelbein about a “voice stress analysis.” (Vol. XVI, pp. 1301-1303). This was highly improper. A voice stress analysis is like a lie detector. See 47 A.L.R.4th 1202 (admissibility of voice stress evaluation test results or of statements made during test). The defense objected to this after Mr. Schiefelbein said that he did not know anything about voice stress analysis. The district attorney persisted and wanted to know if Mr. Schiefelbein understood that stress could be detected in a person’s voice by something called a “voice stress analysis.”

This line of questioning was totally irrelevant, was the same as prohibited polygraph evidence and was totally improper. “Tennessee courts have held repeatedly that polygraph test results, testimony concerning such results, and testimony concerning a defendant’s willingness or refusal to submit to a polygraph test are inadmissible.” See *State v. Damron*, 151 S.W.3d 510, 515 (Tenn.2004) (citing *State v. Pierce*, 138 S.W.3d 820, 826 (Tenn.2004)). Polygraph evidence is not considered reliable, and, therefore, it is irrelevant under Tennessee Rule of Evidence 402. *Id.* “Therefore, polygraph evidence, which includes polygraph test results, testimony concerning such results, and testimony concerning a defendant’s willingness or refusal to submit to a polygraph test, is not admissible.” *Id.* at 516. The Court erroneously permitted extensive cross-examination about this irrelevant and highly prejudicial topic. (Vol. XVI, pp. 1301-1303). This Court should reverse and remand for a new trial.

**9. The Trial Court Erroneously Charged the Jury That Aggravated Sexual Battery Could Be Committed If the “Defendant Acted Either Intentionally, Knowingly, or Recklessly” in Violation of the Burden of Proof Requirements of Tenn. Code Ann. § 39-11-201 the Defendant’s Federal and State Constitutional Due Process Protections and His Rights to a Jury Trial.**

The trial court instructed the jury that aggravated sexual battery could be committed if the “defendant acted either intentionally, knowingly, or recklessly.” (Vol. XVII, pp. 1506-1507). The defendant need not object to a jury instruction which is erroneous as long as same is raised in the motion for new trial. *State v. Page*, 81 S.W.3d 781 (Tenn. Crim. App. 2002). As more particularly set forth in *State v. Ogundiya*, Tenn. Crim. App. at Nashville, filed February 19, 2004, it constitutes reversible error to fail to tell the jury that the various mental elements modify different elements of the crime and they cannot all be “lumped in together.” For example, reckless conduct is sufficient to satisfy the element of the victim’s lack of consent for “simple” sexual battery. Lack of consent is irrelevant where the individual is under thirteen. To that extent, then, “recklessness” modifies the age of the victim, *State v. Howard*, 926 S.W.2d 579 (Tenn. Crim. App. 1996). Although, as in *State v. Ogundiya*, the trial court did instruct the jury that to have sexual contact with a victim the defendant must have “intentionally touched the alleged victim’s intimate parts,” the trial court did not explain that the *mens rea* of recklessness was applicable only to the element regarding the fact that the victim was less than thirteen. The jury instruction as given was clearly erroneous and permitted a conviction if Mr. Schiefelbein acted “intentionally, knowingly, or recklessly.”

Since Mr. Schiefelbein admitted, by definition to touching the victim for purposes of legitimate gymnastics, the question then becomes whether he did so intentionally or knowingly but not recklessly since that *mens rea* does not modify the nature of conduct element. Obviously, since recklessness was charged to the jury as a potential *mens rea*, Mr. Schiefelbein could have been convicted on a mental element not within the terms of the statute thus lessening the State's burden of proof and violating Mr. Schiefelbein's constitutional rights to proof beyond a reasonable doubt of only those statutory elements alleged in the statute and no others. Thus, the instruction violated the burden of proof requirements of Tenn. Code Ann. § 39-11-201 and violated the defendant's federal and state constitutional due process protections and his rights to a jury trial which require that the State prove every element of the offense beyond a reasonable doubt.

**10. The Trial Court Erroneously Instructed the Jury That the Mental State for Aggravated Sexual Battery Could Be Proved by the State in the Disjunctive in That the Court Told the Jury That the “Defendant Acted Either Intentionally, Knowingly or Recklessly,” in Violation of the Defendant's Federal and State Rights to a Jury Trial and the Right to a Unanimous Verdict.**

The trial court instructed the jury that the mental state for aggravated sexual battery could be proved by the State in the disjunctive in that the “defendant acted either intentionally, knowingly or recklessly.” (Vol. XVII, pp.1506-1507). This jury instruction allowed a verdict to be returned which was not unanimous in that the mental state definition instructions were in the disjunctive in violation of the defendant's federal and state rights to a jury trial and the right to a unanimous verdict. See generally, *State v. Page, supra*.



**11. The Maximum Sentences Were Unlawful in Violation of the Sixth and Fourteenth Amendments to the United States Constitution Because the Enhancement Factors Used to Arrive at the Maximum Were Neither Admitted by the Defendant Nor Found by the Jury.**

In this case the judge imposed the maximum sentence of twelve years for each offense. (Vol. XXI, p. 2153) The judge articulated a number of enhancement factors, none of which involved any prior conviction. (Vol. XXI, pp. 2138-2153). The sentencing factors utilized by the judge to impose the maximum sentence on each count were unlawful and in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution as more particularly set forth in *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

The defense adopts the view of two members of the Tennessee Supreme Court in *State v. Gomez*, 163 S.W.3d 632 (Tenn.2005) that the non-conviction enhancement factors may not be applied to enhance the “presumptive” sentence of eight years. The question is not what sentence is required but what the statute forbids. Under any of the sentencing structures examined in the recent Supreme Court cases, whenever a higher sentence is *forbidden*, absent a finding of fact (other than prior conviction), that fact must be admitted by the defendant or established to a jury beyond a reasonable doubt. The determinative question is whether, under Tennessee law, a judge is forbidden by statute from enhancing a sentence unless he or she make a finding of fact to justify an enhancement which permits a greater sentence. The defense believes that question can only be answered in the affirmative, as *Gomez* clearly held, and thus the maximum sentences imposed here were unlawful.

The defense is well aware that the sentencing question is still in flux in Tennessee as to the merits of the issue. However, this case is procedurally different from *Gomez* because here the defendant raised the *Blakely* issues below. See TR IV, p.558 (motion for new trial) and TR IV, p.588 (motion for reduction of sentence) as required by *State v. Gomez*, 163 S.W.3d 632 (Tenn.2005). *Thus there is no procedural bar to the issue.* For all these reasons this Court should reduce all twelve-year sentences to eight years.

**12. The Trial Court Erroneously Imposed Consecutive Sentences Which Constituted an Abuse of Discretion in the Absence of Appropriate Factors.**

The judge imposed the maximum of twelve years on each of the eight counts. The judge then proceeded to run the sentences consecutively for an effective sentence of ninety-six years. (Vol. XXI, pp. 2157-2158).

The judge found that consecutive sentencing was appropriate under Tenn. Code Ann. § 40-35-115(b)(5) which concerns two or more statutory offenses involving sexual abuse of a minor which considers the aggravating circumstances arising from the relationship between the defendant and the victim, the time span of the sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim. The judge said that there was an abuse of trust and a special skill that significantly facilitated the commission of the offense. (Vol. XXI, p. 2156). The judge found that the behavior here was “reprehensible, laced with deceptions, a real serious type of deception.” The judge also found that there had been damage to the child here. (Vol. XXI, p. 2157). Accordingly, the court imposed consecutive sentences for all of the counts.

Arguably consecutive sentences may be appropriate where the children are extremely young and the abuse continues on for many years. See for example, *State v. Hallock*, 857 S.W.2d 285 (Tenn.Crim.App. 1993). Moreover, this Court must consider the fact that the trial court ran all eight of the convictions consecutively for a total of ninety-six years. *State v. Taylor*, 739 S.W.2d 227 (Tenn. 1987) held that consecutive sentences should not routinely be imposed in sexual abuse cases and that the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved. Without minimizing the nature of the offense, this case involved only “fondling,” at worst, and there was nothing especially horrifying, shocking or outrageous in the nature of these offenses such that consecutive sentences would be warranted. See, for example, *State v. Hayes*, 899 S.W.2d 175 (Tenn.Crim.App. 1995). Unquestionably, the sentence here was grossly excessive. The district attorney requested a sentence of thirty years but the judge imposed a sentence of over three times that amount. (Vol. XXI, p. 2129). Clearly consecutive sentences were totally inappropriate and this Court should direct that the sentences should run concurrently if the convictions are not reversed.

**13. The Sentence Length and the Consecutive Sentencing Were Illegal Because of the Failure of the Court to Require the State to Produce the “Raw Data” upon Which the State’s Experts Based Their Opinions.**

Prior to the sentencing hearing the defense filed a motion to compel the State and Dr. Donna Moore to release the raw psychological test data gathered by Dr. Moore in performing psychosexual evaluation of the defendant. (TR III, pp. 432-433 and Appendix, pp. 7-8). The reason that the raw data was necessary was so that the defense expert could

review this data and rebut the proof if necessary. (See the affidavit of Dr. Walker at TR III, pp. 434-435).

A hearing was held on September 30, 2003 regarding this issue because the State refused to permit the release of the raw data. The doctor for the State testified that she had just never released the raw data before and “they were not going to do it.” The doctor said that it was part of their “policy and procedure in keeping a record.” (Vol. XIX, p.1585). The doctor also said that it is “not a standard practice that we typically release the data.” (Vol. XIX, p. 1588). At the end of the hearing, the judge said that the defense was not entitled to the raw data prior to the sentencing hearing. (Vol. XIX, pp. 1606-1607).

When the sentencing hearing occurred, the defense again requested the raw data, not as discovery, but as part of a subpoena for purposes of production at the hearing. (Vol. XX, p. 1726). The State objected saying that the judge had earlier ruled that the defense was not entitled to the raw data. Then the defense requested that the raw data be produced under Rule 26.2, Tenn. R. Crim. P. The judge denied that as well. (Vol. XX, p. 1727).

The State’s doctor started testifying about testing results and the defense again requested the raw data and the judge again refused. Then the judge refused to prevent an offer of proof as to the necessity of the raw data and the raw data itself. (See pp. 1756-1759, 1876-1877, and 1881).

Obviously the defense was deprived of the opportunity to cross-examine the doctor about her sexual report on the defendant. The defense expert was severely hampered in his

ability to contradict the report when he did not have the raw data information upon which the report was based. (Vol. XXI, p.1867)

Given the fact that the judge imposed the maximum sentence on this defendant and ran all the sentences consecutively this issue is extremely critical here and is one that constantly comes up in front of this judge who absolutely refuses to allow defense attorneys access to the raw data upon which prosecution experts base their opinions in sentencing hearings. This issue came up in *State v. Mounger*, 7 S.W.3d 70 (Tenn.Crim.App. 1999). However, the issue became moot on appeal. See 7 S.W.3d, 73, note 7. The issue is squarely presented here again and the defendant was clearly prejudiced. This Court should now reach the merits of the issue.

It is simply preposterous that the raw data of the testing of the defendant cannot be disclosed to the defendant himself. First, given that the test results come directly from answers of the defendant, the raw data upon which the psychological tests are based could be construed as a statement of the defendant subject to disclosure under Rule 16(a)(1)(A),Tenn. R. Crim. P. The judge confused pre-trial discovery with disclosure at trial itself. Since the witness had prepared this “raw data” off of testing she had conducted herself, then unquestionably the raw data was a “statement” of the witness which should have been produced pursuant to Rule 26.2, Tenn. R. Crim. P. Finally, Rule 705, Tenn. R. Evid. provides that “the expert may testify in terms of opinion or inference and give reasons without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”

The defense did everything but back-flips to get at the data but the judge refused at every turn and even refused an offer of proof. This is hardly a search for the truth. This Court should bring to a close the sad chapter of the “special procedures” in Williamson County which prohibit disclosure of the underlying data that State experts use in formulating their opinions.

**14. The Trial Judge Should Be Removed from Further Proceedings in this Matter.**

The judge was asked to recuse himself after the trial in conjunction with the post-trial motions. (TR IV, p. 594) (See also Appendix, pp. 12-22). He refused. (TR IV, p.628). This Court should direct that, if a new trial is granted, that a different judge retry this case.

The grounds presented to the trial judge included the fact that, following the trial, the judge filed disciplinary complaint with the Board of Professional Responsibility against Patrick Johnson, the defendant’s original attorney. (TR IV, p. 594). The essence of the judge’s complaint has to do, once again, with the press. Unfortunately, the judge has had an overly sensitive concern for the press which has impacted the rights of the defendant. This complaint was dismissed by the Board of Professional Responsibility. (TR IV, p. 604).

This appeal also recites multiple instances where the judge refused to permit the defendant and his attorney to inspect evidence outside the presence of the police department in violation of settled discovery rules. The judge refused to allow the public to see evidence which was a matter of public record. This appeal also asserts that the judge exhibited extreme bias by asking questions of the witness which aided the prosecution and severely hurt the defense. The judge conducted his own cross-examination of the defense witness. The judge

gave the appearance of bias by asking serious credibility questions to the alleged victim which bolstered the testimony of the alleged victim. The judge made an improper comment on the evidence by striking portions of Mr. Schiefelbein's testimony in the presence of the jury concerning the Brentwood Police Department. Finally, the defense alleged that, in another rape case, the judge advised Mr. Clark Shaw, the attorney for the client in the other case, that the client would get "the max" because it was a rape case. (TR IV, p.609). This establishes further bias on the part of the judge in rape cases. Counsel had Mr. Shaw appear at the hearing on the motion for new trial but the judge did not want any testimony on the motion to recuse and Mr. Shaw was released. (Vol. XXIII, p. 2175). The judge said he would let the parties know when he would hear the other matters including the motion to recuse. (Vol. XXIII, p. 2275). He never did; the judge just issued an Order denying the motion to recuse. (TR IV, p.628).

Tennessee has recognized that "the preservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial." *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn.Ct.App.1998). Thus, recusal is also appropriate "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d at 564-65 (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn.Crim.App.1994)). "Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Id.* See also, *State v. Keathly*, 145 S.W.3d 123 (Tenn.Crim.App.2003).

All litigants are entitled to the “cold neutrality of an impartial court” and have a right to have their cases heard by fair and impartial judges. *Kinard v. Kinard*, 986 S.W.2d 220, 227 (Tenn.App.1998)(quoting *Leighton v. Henderson*, 220 Tenn. 91, 414 S.W.2d 419, 421 (1967); *Chumbley v. People's Bank & Trust Co.*, 165 Tenn. 655, 57 S.W.2d 787, 788 (1933)). In general, a judge should recuse himself or herself if there is any doubt regarding the judge's ability to preside impartially or if the judge's impartiality can reasonably be questioned. See *State v. Hines*, 919 S.W.2d 573, 578 (Tenn.1995). Under Canon 3 of the Code of Judicial Conduct, a judge is required to recuse himself or herself when “the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.” Tenn.R.Sup.Ct. 10, Canon 3(E)(1)(a).

This judge refused to recuse himself from further proceedings in this case when asked to do so for more than good and sufficient reasons. This Court should now direct that he be removed.

### **CONCLUSION**

For all these reasons this Court should REVERSE these convictions and REMAND for a NEW TRIAL and ORDER that the trial judge RECUSE HIMSELF from further proceedings in this matter.



Respectfully submitted,

*HOLLINS, WAGSTER, YARBROUGH,  
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*Attorney for Appellant*

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail, Gordon Smith, State Attorney General, 425 5th Avenue North, P.O. Box 20207 Nashville, TN 37202-0207 and to Mary Katherine White, Assistant District Attorney General, Williamson County Courthouse, Suite G-6, 305 Public Square, Franklin, TN 37064 on this the 7th day of October, 2005

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David L. Raybin

## **APPENDIX**