

1 to that?

2 MS. FRAZIER: Yes, sir. The State is requesting the  
3 intent instruction. It's not contained in the standard  
4 jury instructions for this charge, but through the  
5 evidence in the case, it has become pretty clear that the  
6 defendant's intent is going to be a jury question.

7 I did cite a case, Chesnoff v. State. That case is  
8 on point as it relates to the charge in the case, but in  
9 that case, it was an aggravated battery great bodily harm  
10 count where the State requested for the court to define  
11 what great bodily harm is under the case law and because  
12 the standard instructions did not define it.

13 The court granted it based off what the case law  
14 said and the appellate court said that was fine, it's  
15 within the court's discretion, and it's not improper to  
16 instruct the jury on the law, even if it's not contained  
17 in the standard instructions. Chesnoff is  
18 C-H-E-S-N-O-F-F v. State, 840 So.2d 423.

19 THE COURT: All right. Mr. Hayes, would you like to  
20 respond?

21 MR. HAYES: Your Honor, that would be an incomplete  
22 instruction without a definition of knowingly. Both  
23 Counts I and II were alleged in the information as  
24 knowingly. If intent is at issue, then the definition of  
25 intent, knowingly, should also be included. If knowingly

1 is included and the definition thereof, then we have no  
2 objection to the instruction.

3 THE COURT: All right. I'm going to -- intent is at  
4 issue here and -- because there is evidence that the  
5 defendant did have the intent to commit these crimes, but  
6 there's also the defense that has been proposed that his  
7 intent was to do otherwise. And so I'm going to allow  
8 this instruction. I find that is applicable. I'm going  
9 to give the instruction as it is set forth in the  
10 standard jury instructions.

11 So that was sent by Ms. Frazier. And so the  
12 instruction that I will give -- and I will give it after  
13 I instruct on entrapment. I will give it after that and  
14 before the plea of not guilty, reasonable doubt, and  
15 burden of proof instruction.

16 And it will read: The intent with which an act is  
17 done is an operation of the mind and therefore is not  
18 always capable of direct and positive proof. It may be  
19 established by circumstantial evidence like any other  
20 fact in a case.

21 I think it's applicable. I think it benefits both  
22 sides, quite frankly, because the intent is an issue on  
23 both sides as to what his intent was. And so whether  
24 that intent can be proved by circumstantial evidence by  
25 the state or whether his defense of intent that he had

1           some other intentions as to he was going through his  
2           actions can also be established by circumstantial  
3           evidence, I think it's clear for both sides. And so I  
4           will put it in where I just stated.

5           MR. HAYES: Will you add knowingly as it is also  
6           included in the information, Your Honor?

7           THE COURT: No, I'm not going to define that.

8           MR. JUDKINS: But our objection is noted.

9           THE COURT: Your objection is noted. Thank you.

10          All right. Let's go to Count III, Mr. Hayes. And  
11          you have offered an instruction here with tampering with  
12          or fabricating physical evidence. And what I've seen  
13          that you've done here is you've added a third element --

14          MR. HAYES: Yes, Your Honor.

15          THE COURT: -- in regards to being altered,  
16          destroyed, concealed, or removed. Do you want to present  
17          any argument on that?

18          MR. HAYES: Yes, Your Honor. Under Costanzo v.  
19          State -- and let me gather it up here.

20          THE COURT: I've reviewed it.

21          MR. HAYES: I believe that that element is required  
22          as a matter of law and has been demonstrated by the  
23          evidence in this case that the information was available  
24          elsewhere. At least it was materially available  
25          elsewhere. And, as a matter of law, backing something up

1 to the cloud and deleting something from an individual  
2 device must be shown that there must be --

3 THE COURT: Can't it be concealed from one item, but  
4 not concealed elsewhere? I mean, can't you conceal --  
5 isn't the evidence here that he might have been  
6 attempting to conceal it from his phone, but that for  
7 some reason it still stayed on his cloud? I mean, I  
8 don't know exactly how that works, but it wasn't on his  
9 phone.

10 MR. HAYES: And, Your Honor --

11 THE COURT: And so -- but it happened to be on the  
12 cloud. And so there can still be a concealment or a  
13 removal from one item without it -- and then finding that  
14 it was tampered with and removed from that item, but  
15 still be available someplace else.

16 MR. HAYES: Your Honor, my understanding is that the  
17 direct language of Costanzo v. State says that the  
18 statute does not criminalize deleting evidence existing  
19 in the memory of a particular electronic device,  
20 particularly where such evidence resides elsewhere in the  
21 electronic aether. The facts as demonstrated in this  
22 case are nearly identical to the facts in Costanzo v.  
23 State.

24 It's been proved that he did, in fact, apparently  
25 alter the information on the phone, but in the course of

1           doing that, backed it up to the cloud, specifically with  
2           the intent -- or at least later sent it directly to his  
3           attorney. That's very, very similar to the facts of  
4           Costanzo v. State, Your Honor.

5           THE COURT: Ms. Frazier.

6           MS. FRAZIER: Judge, I have reviewed the case. And  
7           the fact is Costanzo v. State is completely  
8           distinguishable because in that case, the defendant  
9           created a video and then he disseminated it widely. He  
10          e-mailed it -- he showed it to somebody, he texted it to  
11          someone, and he e-mailed it to somebody.

12          That's completely different than this case where the  
13          texts that may have been backed up on the cloud, the  
14          State had no access to that. The State had no way of  
15          getting it. And the bottom line is that it was deleted  
16          from the phone, with the intent to conceal it from law  
17          enforcement.

18          MR. HAYES: Your Honor, the video introduced in this  
19          case demonstrates that he actively attempted to show law  
20          enforcement exactly where it was on the cloud. He showed  
21          it to his lawyer, he showed it to his coworker.

22          THE COURT: We don't know what he was doing on that  
23          tape because I think what the tape shows, I think what  
24          law enforcement was concerned about, I guess, is when  
25          they rushed in, that he was hiding something or deleting

1 something or I don't know. That's up to the jury to make  
2 a determination.

3 But based on my previous questions, that's going to  
4 be denied. I'm going to stick with the standard  
5 instruction, that's why we have the standard  
6 instructions. And the fact that it's available elsewhere  
7 I don't think is -- does not completely remove the fact  
8 that he could conceal or remove it from a particular  
9 device, even if it, for whatever reason -- maybe it's  
10 just automatically backed up to his cloud. I don't know.  
11 I don't know how that works.

12 Or maybe he's putting it on his cloud so that if law  
13 enforcement finds him, that it's not directly on his  
14 phone and he can show law enforcement, see, it's not on  
15 my phone. But he still has it on his cloud. I don't  
16 know. I don't know the reason. That's up to the jury to  
17 determine the facts.

18 But there is evidence there that he concealed it or  
19 removed it from a particular device, regardless of  
20 whether it was available someplace else. That request is  
21 denied, but your objection is noted on the record.

22 All right. 301.11, failure to maintain evidence or  
23 keep a record.

24 MR. HAYES: Yes, Your Honor. The evidence in this  
25 case has been clear that Debra -- the investigator,

1 Ms. Titkanich, set up a profile. She set up a profile on  
2 a web site where she had several pages of text to go  
3 through to create the profile. She didn't retain any of  
4 those -- she didn't retain any of those. She did not  
5 retain the original --

6 THE COURT: Didn't she testify that there was one  
7 profile and she changed it?

8 MR. HAYES: And she modified it. And the only one  
9 evidence -- or the only one we've ever gotten in this  
10 case was the modified version, Your Honor. She spoliated  
11 evidence, she failed to preserve evidence, and she  
12 modified it and then presented the modified as the  
13 original article.

14 THE COURT: The request is denied.

15 Okay. Then you just gave me the traveling to meet a  
16 minor statute for Count I instruction. Was there  
17 something that was not included that you would like  
18 included?

19 MR. HAYES: Yes, Your Honor. We believe that  
20 unlawful sexual conduct is not defined in the statute.

21 THE COURT: I agree with that. That definition  
22 should be included. That's what you're asking for, the  
23 definition of unlawful sexual conduct?

24 MR. HAYES: Yes, Your Honor.

25 THE COURT: And I did not include that and I agree

1 with that. That should be put in.

2 MR. HAYES: Okay. Thank you.

3 MS. FRAZIER: Judge --

4 THE COURT: Do you see that?

5 MS. FRAZIER: I see what he's saying. I'm concerned  
6 about the way that this is going to be worded, that the  
7 jury may disregard -- so the sexual conduct --

8 THE COURT: Sexual conduct is defined --

9 MS. FRAZIER: -- is defined, yes, sir. And the  
10 whole point --

11 THE COURT: And then unlawful -- but unlawful sexual  
12 conduct is a term that's used in the elements.

13 MS. FRAZIER: Yes, sir. I just want it to be clear.  
14 I want -- so part of the reason it would be unlawful  
15 sexual conduct is because the person would be a minor.  
16 So this unlawful sexual conduct as defined in their  
17 proposed instructions in terms of making an obscene or  
18 indecent communication, that -- I'm concerned that that's  
19 going to confuse the jury because any sexual conduct with  
20 a minor would have been unlawful.

21 THE COURT: All right. This is a standard  
22 definition. It's a term that's used in the elements.

23 MR. HAYES: Your Honor --

24 THE COURT: I'm going to define both sexual conduct  
25 and unlawful sexual conduct.



1           MS. FRAZIER: I think that we need to then fix  
2 element one because it only says to engage in unlawful  
3 sexual conduct. So that --

4           MR. HAYES: And, Your Honor --

5           MS. FRAZIER: May I please finish?

6           THE COURT: Hold on a second.

7           MR. HAYES: Certainly.

8           MS. FRAZIER: So if we're just saying that he's  
9 trying to get her to engage in unlawful sexual conduct,  
10 I'm looking at what the defense has provided, then that  
11 means that the jury is going to go to this unlawful  
12 sexual conduct and say, oh, well, maybe he didn't publish  
13 a sexually explicit image of her so he's not guilty of  
14 this.

15           THE COURT: All right. So let me ask Mr. Hayes  
16 then, because this is somewhat confusing, I agree. And  
17 for some reason in the standard instruction, they have  
18 found a need to define the sexual --

19           MR. HAYES: Your Honor --

20           THE COURT: -- conduct and unlawful sexual conduct.

21           MR. HAYES: -- if I may, Your Honor. So unlawful  
22 sexual conduct was defined by counsel. I did not mean to  
23 persuade the Court in any way that it was a standard  
24 instruction. And I've cited for these the statute --

25           THE COURT: Oh, that unlawful sexual conduct is

1 not --

2 MS. FRAZIER: No, sir, it's not.

3 THE COURT: -- in the standard instructions?

4 MS. FRAZIER: That's why I'm concerned about it.

5 THE COURT: All right, all right.

6 MR. HAYES: Which is why we argued in our --

7 THE COURT: Well, it looked like it was on what you  
8 provided to me and that's why I was --

9 MR. HAYES: Apologies for the confusion, Your Honor.  
10 We did not mean to imply that it was a standard  
11 instruction.

12 THE COURT: All right. So now you need to make your  
13 argument then.

14 MR. HAYES: So, Your Honor, the definition of sexual  
15 conduct as it is stated in the statute -- one, the  
16 statute is not drafted in such a broad manner that  
17 literally anything that meets the definition of  
18 standard -- of sexual conduct between an adult and a  
19 minor constitutes unlawful sexual conduct.

20 Included in the definition of sexual conduct, as in  
21 the jury's instruction -- or the Judge's jury  
22 instructions, include this activity: Actual physical  
23 contact with a person's clothed breasts. That would  
24 define a hug. That would indicate that an adult hugging  
25 a minor would be sexual conduct.

1           This is clear based on the breadth of this  
2 definition, as we can tell from --

3           THE COURT: It's a standard definition that's given  
4 to us by the Florida Supreme Court.

5           MR. HAYES: Yes, Your Honor. And if we had any --  
6 and if we had any idea of what conduct we were --  
7 constituted unlawful sexual conduct, and that is a  
8 violation somewhere in Chapter 827, Chapter 700, the  
9 listed chapters in the statute, if we had any idea of  
10 what the underlying crime was purported to be, then this  
11 would not be an impermissible statute. However --  
12 rather, an impermissible instruction.

13           However, as Mr. Harvey has been charged, this is so  
14 excessively broad that it would allow the jury to make  
15 its own decision on what sexual conduct constitutes  
16 unlawful sexual conduct. While the jury can certainly  
17 apply the facts of this case to whether or not it  
18 includes something related to sexual conduct, the jury  
19 cannot be allowed to decide based on its own morality  
20 what is unlawful and what is not. This would, in effect,  
21 constitute an ex post facto law.

22           THE COURT: Ms. Frazier.

23           MS. FRAZIER: I'm kind of confused at what he's  
24 saying. The standard jury instructions define the sexual  
25 conduct and that's how it's charged in the State's

1 information.

2 Again, going back to element one of this, what I  
3 said to the Court before, the whole reason the sexual  
4 conduct, and there's evidence of the sexual conduct  
5 being --

6 THE COURT: Well, that's not the issue, though, the  
7 sexual conduct. The issue is whether or not the jury  
8 should make the determination as to whether or not that  
9 sexual conduct is unlawful.

10 MS. FRAZIER: The sexual conduct that is defined is  
11 unlawful. That's what the instruction is. If they find  
12 that he was going -- intending to do any of those things  
13 that's listed in sexual conduct and that she was 14 and  
14 he traveled to do that, then he's guilty.

15 This unlawful sexual conduct additional definition  
16 is not going to do anything but confuse the jury and it's  
17 going to indicate to them they can disregard sexual  
18 conduct. And I don't see the need for it based on the  
19 evidence that's been presented and how it helps them  
20 other than to confuse the jury.

21 THE COURT: All right. Anything else before I make  
22 a ruling?

23 MR. HAYES: Your Honor, the definition is so broad  
24 that it explicitly excludes a mother breastfeeding her  
25 baby. Meaning that without that line, the implied

1 definition includes breastfeeding would constitute sexual  
2 conduct.

3 MS. FRAZIER: No, no, it says --

4 THE COURT: Well, how is that? Breasts with intent  
5 to arouse or gratify --

6 MR. HAYES: Exactly. That is specifically excluded,  
7 Your Honor. So if that line were deleted, what is  
8 excluded -- in other words, just engaging in ordinary  
9 statutory interpretation, because they have explicitly  
10 excluded conduct as broad as breastfeeding, in the  
11 absence of that language, how broad is the rest of the  
12 definition supposed to be interpreted?

13 I would argue exceptionally broad because they had  
14 to explicitly remove breastfeeding from the definition of  
15 sexual conduct.

16 THE COURT: All right. The request is denied.  
17 We're sticking with the standard instruction of sexual  
18 conduct and as I have it in the final instructions.

19 Okay. Anything else that we need to discuss? Well,  
20 let's go through it page by page so that we can make  
21 sure. We've already discussed Count I.

22 Anything in regards to Count II? We haven't  
23 discussed that specifically. So do we need to discuss  
24 anything in regards to Count II? And nobody sent me  
25 anything so I assume that we don't, but I want to make

1           sure.

2           MR. HAYES: Your Honor, we would object to the  
3 absence of the definition of unlawful in both Counts I  
4 and II.

5           THE COURT: And your objection is noted for the  
6 record.

7           MR. HAYES: Can I get a ruling on that, Your Honor?

8           THE COURT: It's denied.

9           MS. FRAZIER: The State has no objection to the jury  
10 instructions as provided in Count II, Your Honor.

11          THE COURT: All right. So Count III, I've made my  
12 ruling in regards to the third element on that. And then  
13 we have the entrapment defense. And so anything that we  
14 need to discuss on entrapment?

15          MS. FRAZIER: Just one moment, Your Honor. I just  
16 want to double-check something.

17          (Pause.)

18          THE COURT: All right. I'm assuming it's okay  
19 because I asked you to look at these last night. So I'm  
20 moving on because I want to give you guys time.

21          All right. If you look at plea of not guilty,  
22 reasonable doubt, and burden of proof, that's a standard  
23 instruction. we'll use the information language, but  
24 that's a standard instruction as to reasonable doubt.

25          weighing the evidence is a standard instruction, but