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Crawford v. State Appellant's Brief 2 Dckt. 41669

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

SHANE CRAWFORD, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	No. 41669 (Ada Co. No. CV-PC-2013-11891) **MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW**

Appellant Shane Crawford submits the following in support of his Petition for Review.

A. *Why Review Should be Granted*

Review should be granted under I.A.R. 118(b)(4) because the Court of Appeals has unreasonably determined that testimony that Mr. Crawford touched his daughter "[o]utside of [her] vaginal area" was sufficient to establish that Mr. Crawford engaged in manual-genital touching during his trial on a charge of lewd conduct against a minor. As a result of that error, the Court of Appeals erroneously found that trial and appellate counsel were not ineffective for failing to challenge the sufficiency of that evidence.

In addition, it has erroneously found that trial counsel was not ineffective for failing to object to the trial court's inadequate response to a jury inquiry. This ruling is in conflict with another opinion of the Court of Appeals, namely the opinion issued in Mr. Crawford's direct

appeal where the Court of Appeals reversed a different count based upon a similar instruction error. *State v. Crawford*, Docket No. 38787 at 3 (Ct. App. 2012). Thus, review of this issue should be granted under I.A.R. 118(b)(3). A true and correct copy of *State v. Crawford, supra* is attached hereto as Exhibit A. A true and correct copy of the Court of Appeals opinion in this case is attached as Exhibit B.

B. *Procedural History and Statement of Facts*

1. Introduction

Shane Crawford was charged in Ada County Case No. CR-FE-2010-7100 with two counts of Lewd Conduct with a Minor Child Under Sixteen ("Counts I and II") and two counts of Sexual Abuse of a Child Under Sixteen. (CR 5.) Mr. Crawford entered not guilty pleas to the four charges and was represented at trial by attorney Matt Roker. (*Id.*) He was found guilty by a jury of the two lewd conduct counts and not guilty of the two sexual abuse counts. He was sentenced to concurrent sentences of twenty-five-years with six years fixed on each count. (CR 4-5.)

2. Testimony at the trial

The state's first witness was As.C. She was the alleged victim in Count I. As.C. testified that she is Mr. Crawford's daughter and that in 2009 she was living in a home with him and the rest of her family. (T pg. 196, ln. 1 – pg. 198, ln. 5.)[1] A few months before July of 2009, As.C. and Mr. Crawford were watching a movie while laying on the couch in the living room. (T pg. 198, ln. 6 – pg. 199, ln. 19.) As.C. testified that while lying on the couch, Mr. Crawford "started reaching up my shirt and groping my breasts and then he started going down into my panties and began touching my vagina." (T pg. 199, ln. 21 – 25.) As.C. elaborated that Mr. Crawford's hand

[1] Mr. Crawford attached a copy of the trial transcript to his petition and asked that the court take judicial notice of it. (CR 11, 257.) The court granted the motion. (Transcript Post Conviction Proceedings (8/7/2013) pg. 11, ln. 12-16.)

was over her bra feeling her breasts and that "he was feeling down into my crotch area." (T pg. 200, ln. 12 – pg. 201, ln. 7.) As.C. thought the entire event lasted about 30 minutes and when "he was going onto my vagina" she left to go play video games upstairs. (T pg. 201, ln. 18-25.)

The next witness was Tracy Crawford, Mr. Crawford's ex-wife. (T pg. 218, ln. 7 – pg. 219, ln. 3.) Ms. Crawford testified about the family relationships and the divorce, and was allowed to testify about both An.C. and As.C. making disclosures to her regarding being sexually touched by Mr. Crawford. (T pg. 218, ln. 12 – pg. 234, ln. 6.)

An.C. was the next witness. An.C. was the victim in Count II. An.C. testified that she is also Mr. Crawford's daughter. (T pg. 238, ln. 8-16.) She claimed that when she was in 8th grade, Mr. Crawford offered her an alcoholic drink and asked her if she knew what a clit was. (T pg. 242, ln. 17-18.) An.C. responded that she "did not know what that was." *Id.* An.C. then testified that "He said, 'Well let me show you,' and then was going to show me and I, like, backed away when he was going to show me." (T pg. 243, ln. 10-12.) When the prosecutor asked "So, did his hand touch you?", An.C. responded "Yeah." (T pg. 243, ln. 10-16.) But when asked "Where did he touch you?", An.C. testified, "Outside of my vaginal area." (T pg. 243, ln. 15-16.)

The state argued to the jury and later confirmed to the Court that the "clit incident" was the incident which constituted Count II. (T pg. 498, ln. 5-14; pg. 545, ln. 8 - pg. 546, ln. 6.)

On another occasion, when An.C. was about 13 years old, she was on the couch with Mr. Crawford and he was rubbing her leg up toward her privates, outside of her bikini line. (T pg. 244, ln. 20 – pg. 245, ln. 21.) Around Christmas of 2008, Mr. Crawford allegedly pulled out his penis and tried to show it to An.C., but she looked away. (T pg. 248, ln. 24 – pg. 251, ln. 11.) At a party, Mr. Crawford allegedly grabbed An.C.'s breast in front of others in a joking way. (T pg. 251, ln. 12 – pg. 253, ln. 11.) Another time, while on the phone with her grandfather, Mr.

Crawford began rubbing An.C.'s stomach and moving his hand toward her shirt; she kept batting it away before he could touch any private areas. (T pg. 254, ln. 1 – pg. 257, ln. 2.)

The state then presented the testimony of the detective assigned the case and a counselor specializing in counseling sexually abused children. (T pg. 274, ln. 22 – pg. 335, ln. 7.) The state's last witness was Sharon Crawford, Mr. Crawford's mother, who noted that the girls had disclosed that Mr. Crawford had been touching them in a way that made them uncomfortable, but saw nothing sexual about the touching they reported. (T pg. 346, ln. 1-16; pg. 351, ln. 22 – pg. 352, ln. 4.)

Mr. Crawford called his son, Nolan Crawford. (T pg. 405, ln. 5-12.) Nolan testified that his father had a good relationship with his family, that he knew that An.C. had walked in on her father in states of undress in the bathroom and had walked in on her parents having sex. (T pg. 407, ln. 8 – pg. 413, ln.19; pg. 415, ln. 18 – pg. 416, ln. 4.) George Crawford, his other son, testified similarly. (T pg. 429, ln. 1 – pg. 435, ln. 18.) The defense then rested. (T pg. 462, ln. 6-7.)

The state then recalled An.C. who testified that she had walked in on her parents having sex in their bathroom. (T pg. 465, ln. 3 – pg. 467, ln. 5.) The state then rested. (T pg. 469, ln. 4.) No I.C.R. 29 motion for judgment of acquittal was made by defense counsel. The jury found him guilty on the two Lewd Conduct counts and not guilty on the two Sexual Abuse Counts. (CR 8.)

Mr. Crawford appealed. (CR 5.) Elizabeth Allred of the State Appellate Public Defender's Office represented Mr. Crawford on appeal. (*Id.*) On June 27, 2012, the Court of Appeals vacated the conviction on Count I, but affirmed on Count II and also affirmed the sentence with respect to Count II. *State v. Crawford, supra* (Exhibit A). The Court of Appeals vacated Count I because the trial court failed to adequately answer the second part of jury inquiry

#3: "Does touching of the breast area constitute manual-genital contact?" The Court of Appeals found that the court's failure to clarify that the breast was not a genital for purposes of the lewd conduct statute was error, but also that only Count I involved an incident where there were allegations of breast touching. Thus, the error was harmless as to Count II.

The Remittitur in the appeal was filed in the district court on August 23, 2012. (CR 6.) On September 14, 2012, the state moved to dismiss Count I. On October 3, 2012, the district court granted the motion to dismiss, leaving only the judgment and sentence as to Count II remaining. (CR 6.)

3. Proceedings upon post-conviction petition

On July 2, 2013, Mr. Crawford filed a petition for post-conviction relief as to Count II alleging that his trial counsel and appellate counsel were ineffective. (CR 4.) He alleged that trial counsel was ineffective for failing to move for a judgment of acquittal under I.C.R. 29(a) due to insufficiency of the evidence as to Count II. He alleged that there was insufficient evidence to support the conviction on Count II as a matter of law because An.C. did not testify that Mr. Crawford touched her genitalia and the state did not present any other evidence that Mr. Crawford touched An.C.'s genitalia at that time. (CR 6-10.)

He also alleged that trial counsel was ineffective during jury deliberations. Mr. Crawford alleged that trial counsel's performance was deficient because a reasonably competent attorney would have requested that the Court answer "yes" in response to the first part of the jury's question: "In order to have committed manual-genital contact, does it require touching the vaginal area?" or have asked the court to define the word "genital." He also alleged that trial counsel's deficient performance prejudiced Mr. Crawford because, had the court instructed the jury on the definition of "genital," or instructed the jury that it had to find that Mr. Crawford manually

touched the vaginal area of As.C. (in Count I) and/or An.C. (in Count II), the jury would have acquitted Mr. Crawford of Count II because there was no evidence of manual-genital touching to support a conviction on that count. (CR 9-10.)

Mr. Crawford also alleged that he was prejudiced because appellate counsel could not raise the issue of whether the trial court should have instructed the jury as to the definition of "genital" or that it should have instructed the jury that it had to find that Mr. Crawford manually touched the vaginal area of A.C. (in Count I) and/or An.C. (in Count II) because trial counsel failed to preserve that issue for appeal. Had the issue been preserved for appeal, the Court of Appeals would have reversed the conviction on Count II due to the trial court's jury instruction error. (CR 10.)

Finally, Mr. Crawford alleged that appellate counsel's performance was deficient because a reasonably competent appellate attorney would have raised a sufficiency of the evidence claim as to Count II given the insufficiency of proof, especially as there were not stronger issues to raise on appeal as to Count II. He also alleged appellate counsel's deficient performance prejudiced Mr. Crawford because had she raised an insufficiency of the evidence challenge as to Count II on appeal, the Court of Appeals would have vacated the conviction and ordered that a judgment of acquittal enter as to that count. (CR 11.)

In support of the petition, Mr. Crawford attached as Exhibits the trial transcripts, the Appellant's and Respondent's Briefs in the direct appeal and the Court of Appeals' unpublished opinion. (CR 11.) The Court later took judicial notice of the trial transcripts. (TPCP (8/7/2013) pg. 12, ln. 12-16.)

The state filed an Answer and a Motion for Summary Disposition. (CR 266, 278.) Mr. Crawford filed a Cross-Motion for Summary Disposition. (CR 281.) After briefing and a

hearing, the court denied Mr. Crawford's motion, granted the state's motion and dismissed the case. (CR 323, 337.)

A timely notice of appeal was filed. (CR 339.) On March 24, 2014, a Corrected Final Judgment was filed by the district court.

C. *The Court of Appeals Erred in Finding Trial and Appellate Counsels' Performances Were Not Deficient and There Was Insufficient Evidence in the Trial Record to Support the Conviction on Count II*

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama*, 287 U.S. 45, 73 (1932). The Equal Protection and Due Process Clauses of the Fourteenth Amendment guarantee the right to counsel on appeal. *Douglas v. California,* 372 U.S. 353 (1963). This right to counsel includes the right to effective assistance of that counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Idaho law also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852.

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.* An ineffective assistance of appellate counsel claim is judged under the standards set forth in *Strickland. See e.g., Mintun v. State*, 144 Idaho at 658, 168 P.3d at 42.

The Due Process Clauses of the United States and State Constitutions preclude conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970).

> In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979). In the case where a properly instructed jury has convicted, even though no rational trier of fact could have found guilt beyond a reasonable doubt, that conviction cannot constitutionally stand. *Jackson*, 443 U.S., pg. 318. According to the U.S. Supreme Court: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S., pg. 319.

1. Trial counsel

Trial counsel was ineffective because he failed to move for a judgment of acquittal as to Count II.

Here is the testimony from An.C regarding Count II:

Q. And so do you remember a time when you were in the kitchen with your dad?

A. Yes.

. . . .

Q. Okay. So what were you doing in the kitchen?

A. He was offering me an alcoholic drink and I told him I didn't want any alcohol. And I don't know how the conversation got brought up, but he asked me what a clit was and I told him I didn't know what that was.

. . . .

Q. And then what did he do?

A. He said, Well, let me show you," and then went to show me, and I, like, backed away when he was going to show me.

Q. Okay. So did his hands touch you?

A. Yeah.

Q. Where did they touch you?

A. Outside of my vaginal area.

(T pg. 242, ln. 3 - pg. 243, ln. 16.) After her testimony about being touched outside of her vaginal area, An.C testified as follows:

Q. Okay. So was he going down, like down from your shorts or was he going up?

A. Up.

(T pg. 243, ln. 13-19.)

An.C. testified that Mr. Crawford was reaching up her shorts and he touched outside her vaginal area. It makes sense that he was not able to reach her vaginal area in light of An.C's testimony that she "backed away when he was going to show me." (T pg. 243, ln. 11-12.) However, being touched "outside of my vaginal area" is not sufficient to prove the allegation in Count II, which alleged manual-genital touching. (CR 67).

An.C's trial testimony that she was touched outside of her vaginal area is corroborated by her prior statements to Detective Ellis. The detective testified:

Q. Yeah, on the day that the alcohol use was involved. I believe there was an allegation by [An.C] that the father had brought up the issue of do you know what a clit is.

A. Correct.

Q. Do you remember that?

A. Right. That was the day in the kitchen where he --

Q. Yes.

A. Yes

Q. And did [AC] [verbatim] tell you what her response was when she indicated that her father had made a quick move toward her to show her what a clit was?

A. Yes, she indicated that he had reached his hand up the pant leg of her shorts.

Q. Okay.

A. He was *trying* to get her - get his hand inside of her underwear and she stepped away from him and told him no.

(T pg. 284, ln. 24 - pg. 285, ln. 18.) (Emphasis added.) An.C did not tell Detective Ellis that she was touched on her vaginal area. An.C told the detective that Mr. Crawford touched under her pant leg in an attempt to get his hand inside her underwear, but she avoided that contact by stepping away. An.C's prior statement confirms her trial testimony that she was touched outside of her vaginal area.

There was insufficient evidence to support Count II because the state did not produce any evidence that Mr. Crawford touched the genitals of An.C. during the "clit incident." The evidence was only that he touched outside of her vaginal area. Consequently, it was ineffective assistance of trial counsel to fail to move the court for a judgment of acquittal under I.C.R. 29.

When An.C. testified she was touched outside of her vaginal area she was testifying that she was not touched on her genitalia. An.C. never claimed there was penetration of her genitalia, which would be required in order to touch her vagina, consequently, the state was required to prove manual touching of An.C.'s external genitalia. This required the state to prove that Mr. Crawford touched An.C.'s "vaginal area," where the external female genitalia is located. But all it proved was that he touched her "outside [her] vaginal area," *i.e.*, not on her vaginal area, but

elsewhere, *e.g.*, the inner or upper thigh, leg, or hip. Being touched outside the vaginal area cannot constitute manual-genital touching and the trial court's conclusion that the state's evidence was sufficient is erroneous. As all the external female genitalia is within the vaginal area, manual touching of An.C's vaginal area is a fact the state needed to, but did not, prove at trial.

Since a Rule 29 motion would have or should have been granted at trial, it was deficient performance for trial counsel to not make the motion.

2. Appellate counsel

Appellate counsel was also ineffective because she failed to raise the sufficiency of the evidence claim as to Count II on appeal. The trial court, however, dismissed the appellate counsel claim reasserting that "the evidence gave rise to reasonable inferences of guilt on Count II." (CR 334.) The court's argument in this regard fails for the reasons set forth above.

Appellate counsel's deficient performance was prejudicial because had the sufficiency of evidence issue been raised on appeal, the Court of Appeals would have vacated the conviction and remanded the case for the entry of a judgment of acquittal.

3. The Court of Appeals' majority opinion on the sufficiency of the evidence issue

The majority of the Court of Appeals affirmed the district court. Chief Judge Gutierrez dissented. The two judge majority first found that trial counsel and appellate counsel did not err by failing to argue the evidence was insufficient to prove Count II finding the evidence to be sufficient.

> To prove lewd conduct with a minor child under sixteen, the state must prove that the defendant engaged in "any lewd or lascivious act or acts," which includes manual-genital contact, and that such was "done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party." I.C. § 18–1508. Crawford argues that the only evidence supporting a finding that there was manual-genital contact between him and Victim II was her testimony. However, Crawford contends that Victim II did

not directly testify that he touched her genitals. During direct examination by the state, Victim II testified as follows:

Q: Okay. And so let's go back to the touching. Besides touching when he was rubbing your leg, was he getting close to where your underwear was at?
A: Yes.
Q: In fact, was he up there to your privates?
A: Yes.
Q: And so do you remember a time when you were in the kitchen with your dad?
A: Yes.
Q: Can you kind of tell the jurors a little bit about when that was.
A: When it was?
Q: About how old you were.
A: I was in 8th grade....
Q: Okay. So what were you doing in the kitchen?
A: He was offering me an alcoholic drink and I had told him that I didn't want any alcohol. And I don't know how the conversation got brought up, but he asked me what a clit was and I told him that I didn't know what that was.
....
Q: And then what did he do?
A: He said, "Well, let me show you," and then went to go show me, and I, like, backed away when he was going to show me.
Q: Okay. So did his hands touch you?
A: Yeah.
Q: Where did they touch you?
A: *Outside of my vaginal area.*
Q: Okay. So was he going down, like down from your shorts or was he going up?
A: Up.

(Emphasis added.) According to Crawford, the statement that he touched "outside of [her] vaginal area" can only be interpreted to mean that Crawford had not touched Victim II's genitalia, but had instead touched outside of her genital area.

We disagree. Victim II's statement that Crawford touched her "outside of [her] vaginal area" does not demand a conclusion that Crawford did not engage in manual-genital contact. It is the province of the jury to determine what the witness meant by the ambiguous phrase "outside of [her] vaginal area," and we will not substitute our view for that of the jury as to the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *Decker*, 108 Idaho at 684, 701 P.2d at 304.

Substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence. *State v. Severson*, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009); *State v. Stevens*, 93 Idaho 48, 50–51, 454 P.2d 945, 947–48 (1969). Even when circumstantial evidence could be interpreted

> consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt. *Severson*, 147 Idaho at 712, 215 P.3d at 432; *State v. Slawson*, 124 Idaho 753, 757, 864 P.2d 199, 203 (Ct. App. 1993).
>
> Such is the case here. The jury could have reasonably interpreted Victim II's statement that Crawford touched her "outside of [her] vaginal area" to mean, among other things, that Crawford had touched the external genitalia outside of her vagina or touched the area surrounding her genitalia (as Crawford proposes). As noted by the district court, the jury had the opportunity to observe Victim II's demeanor as she testified and take note of her reluctance to describe what happened to her. Moreover, not only did Victim II testify that Crawford touched her "outside of [her] vaginal area," but she also responded affirmatively to the question that he was "up there to [her] privates." This response was given without reference to any specific event. However, it did follow a discussion regarding prior touching of Victim II's upper thigh that had made her uncomfortable and immediately preceded the discussion of the incident in the kitchen comprising Count II. Moreover, the kitchen incident is the only incident to which an assertion that Crawford had touched "up there to [Victim II's] privates" would logically correlate, as all other incidents to which she testified involved him touching her "upper thigh," "close to [her] private area," or "outside of [her] bikini line." A jury could have reasonably understood this affirmation by Victim II that Crawford had touched "up there to [her] privates" as referencing the single count for which the state was arguing that such manual-genital contact had occurred. Thus, the circumstantial evidence in the record, although subject to differing interpretations,
> supports a reasonable inference of guilt consistent with the jury's verdict. Accordingly, we hold that there was substantial evidence upon which a reasonable trier of fact could have found that the essential elements of lewd conduct with a minor child under sixteen, including manual-genital contact, were proven beyond a reasonable doubt in this case.

Crawford v. State, Exhibit B, pg. 6-9.

4. Why review should be granted

Chief Judge Gutierrez sets out why review should be granted in his dissent. He writes that:

> Important to today's post-conviction appeal is Victim II's testimony at the criminal trial. Rather than beginning with the incident at issue in Count II—the underlying count for this post-conviction appeal—the prosecutor began with general questions about Crawford's touching of Victim II. Specifically, Victim II testified that before she was thirteen (2006 or earlier) and after she was thirteen (2006 and later), she was touched by Crawford and that she became uncomfortable with Crawford's touching at around age thirteen. Victim II explained that Crawford would touch her "on [her] upper thigh," and "[c]lose to [her] private area." Crawford, according to

Victim II, was getting close to where her underwear was at, and in fact was up there to her privates.

After eliciting this general testimony from Victim II, the prosecutor moved on and proceeded to ask Victim II about the kitchen incident, the subject of Count II. Victim II explained that she was in the kitchen at her home and was wearing pajama shorts and a tank top. According to Victim II, Crawford offered her alcohol, which she refused, but during the discussion in the kitchen, Crawford asked Victim II if she knew what a "clit" (clitoris) was. After she responded that she did not know what a clitoris was, Victim II explained Crawford's actions:

[Victim II]: He said, "Well, let me show you," and then went to go show me, and I, like, backed away when he was going to show me.
[The prosecutor]: Okay. So did his hands touch you?
[Victim II]: Yeah.
[The prosecutor]: Where did they touch you?
[Victim II]: Outside of my vaginal area.
[The prosecutor]: Okay. So was he going down, like down from your shorts or was he going up?
[Victim II]: Up.
[The prosecutor]: Did you—did you make any comments to him?
[Victim II]: I just told him that I was going to bed and I went upstairs and just went straight to bed.

Following Victim II's testimony regarding the kitchen incident, the prosecutor moved on to another incident that occurred while Victim II and Crawford were watching television. This incident was offered with regard to Count IV, as best can be gleaned from the closing argument. In her testimony, Victim II explained that Crawford and she would be on the couch, that Crawford would pull a blanket out and put it over the two of them, and that Crawford would start rubbing her upper thigh. She clarified that Crawford would begin at the knee area and move upward, toward her "privates" and just "outside of [her] bikini line." The prosecutor, while questioning about this incident, also asked, "At some point did you remove his hand from around your vaginal area or from near your vaginal area?" Victim II said, "Yeah."

The prosecutor then shifted gears to an incident in December 2008, near Christmas, that was the basis for Count III. During this December 2008 incident, Crawford showed Victim II his penis and asked her to look at it. Following Victim II's testimony, the prosecutor went on to another incident at a television sports party in which Crawford, in front of guests, grabbed Victim II's left breast (presumably, over her clothing) and exclaimed, in a joking manner according to Victim II, that she was "growing boobs." This incident, like the television incident, was also offered in support of Count IV, based upon the prosecutor's closing argument. The last incident brought out by the prosecutor also was in support of Count IV. In the

last incident, Victim II explained that she was talking to her grandfather on the phone when Crawford started rubbing her stomach and started moving his hand toward her breasts, before she pushed his hands away.

The crux of this appeal, as it relates to the ineffective assistance of counsel claims, turns on whether Victim II's testimony concerning Count II about Crawford touching her *outside* her vaginal area refers to touching Victim II's genitalia. Victim II's testimony is problematic in this case because Victim II's testimony about being touched outside the vaginal area does not clarify whether Crawford touched her genitalia or touched her outside of the genitalia. The phrase vaginal area is ambiguous; this Court and the Idaho Supreme Court have used the phrase to refer to the genital area, but the courts have also used the phrase more specifically to refer to the area around the vaginal orifice. *Compare, e.g., State v. Cardell*, 132 Idaho 217, 220, 970 P.2d 10, 13 (1998) (interchanging vaginal area with genitalia), *and State v. Mayer,* 139 Idaho 643, 649 84 P.3d 579, 585 (Ct. App. 2004) (equating vaginal area with genital area), *with State v. Lewis*, 96 Idaho 743, 745, 536 P.2d 738, 740 (1975) (describing a doctor's testimony in which the doctor explained that he found no evidence of torn or bruised tissue in the vaginal area, presumably referring to the specific area around the vaginal orifice), *and State v. Durst*, 126 Idaho 140, 143, 879 P.2d 603, 606 (Ct. App. 1994) (discussing a physician's testimony in which "[h]e testified that in his opinion, to a reasonable degree of medical certainty, the victim's injuries were caused by a forced entry of the vaginal area by penile penetration."). Similarly, the courts have used the term vagina where, in context, the proper term should be external genitalia. *E.g., State v. Pepcorn*, 152 Idaho 678, 687, 273 P.3d 1271, 1280 (2012 (paraphrasing the victim's testimony to explain that "Pepcorn placed his hand on her thigh then slowly moved it up to her vagina and let it rest there as she rode in front of him on four-wheeler rides."). The vagina is, in fact, an internal genital, but genitalia also includes the external genitals, namely the vulva.

In considering Victim II's testimony, the majority opinion errs by using Victim II's general testimony about Crawford's touching throughout the years in support of Victim II's statements about the kitchen incident. Specifically, the majority relies upon Victim II acknowledging that throughout the years, Crawford would touch her on her upper thigh, close to her private area, close to where her underwear ***was at, and up to her privates. But Victim II's testimony about Crawford's*** *actions throughout the years did not state that Crawford specifically touched her this way during the kitchen incident. More importantly, even though Crawford may have touched Victim II close to her genitalia throughout the years, the general testimony did not state that Crawford actually touched any part of her genitalia.*

The majority also attempts to support its use of the general testimony about the touching by contending that "the kitchen incident is the only incident to which an assertion that Crawford had touched 'up there to [Victim II's] privates' would logically correlate." This contention is incorrect. In her testimony about the

television and blanket incident (or incidents), Victim II acknowledged that she removed Crawford's hand "from around [her] vaginal area or from near [her] vaginal area," but this testimony related to another incident and count.

In fact, the testimony about Crawford's touching throughout the years is far too general to relate to any specific incident; Count II, as clarified by the prosecutor, only focuses on the kitchen incident. Besides the fact that Victim II's testimony is too general to relate to any specific incident, it would still be unreasonable for a jury to draw an inference that Crawford actually touched Victim II's genitalia during the kitchen incident, because Victim II never indicated that Crawford actually touched her genitalia in her general testimony about Crawford's actions throughout the years.

Although unaddressed by the majority opinion, there was testimony at the criminal trial that clarifies what Victim II was referring to in the kitchen incident. A sex crimes investigator with the Meridian Police Department interviewed Victim II. During his testimony, he explained what Victim II told him in regard to the kitchen incident:

[The prosecutor]: And did [Victim II] tell you what her response was when she indicated that [Crawford] had made a quick move toward her to show her what a clit was?
[The investigator]: Yes, she had indicated that he had reached his hand up the pants leg of her shorts.
[The prosecutor]: Okay.
[The investigator]: He was trying to get her—get his hand inside of her underwear and she stepped away from him and told him no.

The investigator's testimony is consistent with Victim II's testimony that she "backed away when he was going to show me" what a clitoris was. However, Victim II indicated to the investigator that Crawford tried to get his hand inside of her underwear (presumably trying to make contact with her genitalia). The reasonable inference drawn from Victim II's and the investigator's testimony is that Crawford was attempting to touch the genital area under Victim II's underwear, but touched Victim II outside of her genital area and did not touch her external genitalia.

Taken together, the evidence and all reasonable inferences do not lead to the conclusion that Crawford touched Victim II's genitalia during the kitchen incident; rather, the evidence and inferences lead to the opposite conclusion. For this reason, I would hold that defense counsel provided deficient performance by failing to move for judgment of acquittal, as it would have been objectively reasonable to make such a motion. I would also conclude that appellate counsel provided deficient performance by failing to raise the issue of sufficiency of the evidence, as this issue was clearly stronger than the issues presented in the first appeal. Prejudice is shown in both instances because a favorable ruling would have led to

Crawford being acquitted of Count II.

Crawford v. State, Exhibit B, pg. 12-16. (Gutierrez, C.J., dissenting) (emphasis added).

As demonstrated by Chief Judge Gutierrez, there was not sufficient evidence to sustain the conviction. Thus, trial and appellate counsel were ineffective for not raising a challenge to the sufficiency of the evidence. This Court should grant review under I.A.R. 118(b)(4) because the Court of Appeals has unreasonably determined there was sufficient evidence to establish that Mr. Crawford engaged in manual-genital touching.

D. ***The Court of Appeals Erred in Finding That Trial Counsel's Failure to Request an Affirmative Answer to the Jury's Inquiry or to Request the Court to Define the Word "Genitalia" Was Not Deficient Performance on the Part of Trial Counsel***

During the trial, the jury was instructed and excused to deliberate. (T pg. 482, ln. 7 – pg. 492, ln. 7; pg. 534, ln. 12.) During deliberations, the jury sent a number of questions to the judge. (T pg. 542, ln. 6 – pg. 546, ln. 2.) Question number three had two parts, as follows:

> [1.] In order to have committed manual – genital contact does it require touching the vaginal area?
>
> [2.] Does touching of breast-area constitute manual-genital contact?

In response to part two, defense counsel stated that the answer was "no." (T pg. 544, ln. 21.) The district court stated that it was "not going to define for them manual-genital." (T pg. 544, ln. 21-24.) The state asked that the jury just be informed that they needed to reread the instructions. (T p. 545, ln. 6-7.) The district court noted:

> Well, if the jury – I do not feel comfortable defining, and, in fact, there is case law that says not only should you default to the standard instructions, but that while – while it may see – it's tempting to want to define every single word, that it's inappropriate for the court to do so and that the jurors have to apply their understanding – their common ordinary understanding to it. And, therefore, I'm just going to tell them to reread the instructions.

(T p. 545, ln. 8-18.) The jury was then specifically informed, "Please re-read all the instructions."

(CR 68.) The jury returned a guilty verdict on Counts I and II after being so instructed. (CR 8.) Mr. Crawford also argued that trial counsel was ineffective in failing to ask the court, in response to the first part of question #3, to either tell the jury that manual contact with the vaginal area was required or to define "genital." Had trial counsel made a proper request, the district court would have given the jury proper instructions and the jury would have acquitted him of both Counts I and II. (CR 9-10.)

Due to trial counsel's failure to object, appellate counsel was not able to raise the jury instruction error regarding that particular jury question. "Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Had the issue been preserved, the Court of Appeals would have vacated the conviction on Count II under the same reasoning it vacated the conviction on Count I. *State v. Crawford*, pg. 4.

In the direct appeal, the Court of Appeals held that the trial court had a duty to further instruct the jury due to the jury inquiry writing that "if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity, or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion." *State v. Crawford*, *supra* (Exhibit A), *citing State v. Sheahan,* 139 Idaho 267, 282, 77 P.3d 956, 971 (2003). *Sheahan*, in turn, relied upon *Dawson v. Olson*, 97 Idaho 274, 543 P.2d 499 (1975), where this Court wrote, "There may be situations in which a trial judge may decline to answer questions put by the jury, but where a jury returns on its own motion indicating confusion, the court has the duty to give such additional instruction on the law as the court may think necessary to clarify the jury's doubt or confusion." 97 Idaho at 281, 543 P.2d at 507, *quoting Worthington v. Obertuber*, 125 A.2d 621 (Penn. 1966).

In addition, I.C. §§ 19-2132(a) and 19-2204 provide that the trial court must instruct the jurors on all matters of law necessary for their information.

Just as the jury's second question ("Does touching of the breast area constitute manual-genital contact?") imposed upon the trial court a "duty to give additional instructions on the law reasonably necessary to alleviate the jury's doubt or confusion," the jury's first question ("In order to have committed manual-genital contact, does it require touching the vaginal area?") showed that the jury was confused about whether the evidence on Count II, *i.e.*, that Mr. Crawford touched An.C. "Outside of [her] vaginal area" was sufficient to sustain the conviction. (T pg. 243, ln. 15-16.) The jury's first question showed that it understood that external touching within the vaginal area, *i.e.*, the external genitalia, was sufficient, but was confused over whether being touched outside the vaginal area was sufficient to prove Count II because that was all An.C. testified to. Trial counsel should have asked the trial court to give additional instructions on this issue. Thus, trial counsel's performance was deficient under *Strickland v. Washington, supra.*

Had the jury question been answered properly, the jury would have acquitted Mr. Crawford. But even if the trial court had denied defense counsel's request, the request would have preserved the issue for appeal and alerted appellate counsel to the issue. The Court of Appeals would have reversed the conviction on Count II due to the trial court's jury instruction error. Thus, trial counsel's deficient performance was prejudicial under *Strickland* and the trial court erred in summarily dismissing this aspect of the ineffective assistance of trial counsel claim.

1. The Court of Appeals' majority opinion on the jury inquiry issue

As to the issue of whether trial counsel was ineffective for failing to object to the court's response to the jury inquiry, the Court of Appeals was also not unanimous. The majority stated:

Crawford contends that his trial counsel also provided ineffective assistance by

failing to request that the district court define "genital" or give an affirmative answer to a jury question of whether touching the "vaginal area" was required for manual-genital contact under the statute. In general, it is within the trial court's discretion to determine whether, and the manner in which, to respond to a question posed by the jury during deliberations. I.C.R. 30(c); *State v. Sheahan*, 139 Idaho 267, 282, 77 P.3d 956, 971 (2003); *State v. Pinkney*, 115 Idaho 1152, 1154, 772 P.2d 1246, 1248 (Ct. App. 1989). This grant of discretion is premised on the assumption that the instructions as given are clear, direct, and proper statements of the law. *Pinkney*, 115 Idaho at 1154, 772 P.2d at 1248. Consequently, if a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury, but it is under no duty to do so. *Id.* However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *Id.*; *see also* I.C. §§ 19–2132(a) and 19–2204 (providing that a trial court must instruct the jury on all matters of law necessary for their information).

Here, the jury was instructed that, in order to find Crawford guilty of lewd conduct as charged in Count II, the jury had to find that the state proved Crawford committed an act of manual-genital contact upon or with the body of Victim II. The jury instructions did not define "genital." During deliberations, the jury asked several questions, including the question at issue here: "In order to have committed manual-genital contact, does it require touching the vaginal area? Does touching of the breast-area constitute manual-genital contact?" Crawford's counsel indicated that he believed the answer was "no." The district court stated, "No, the answer is reread the instructions. I'm not going to define for them manual-genital contact." The state agreed with the district court. The district court concluded:

Well, if the jury—I do not feel comfortable defining, and, in fact, there's case law that says not only should you default to the standard instructions, but that while—while it may seem—it's tempting to want to define every single word, that it's inappropriate for the court to do so and that the jurors have to apply their understanding—their common ordinary understanding to it. And, therefore, I'm just going to tell them to reread the instructions.

Crawford argues that it was objectively deficient performance for his trial counsel not to either request that the district court define "genital" or provide an affirmative response to the first sentence of the jury's question. Crawford also argues that, had trial counsel made such a request, the issue would have been preserved for appeal, and the district court's decision would have been reversed on appeal. However, this claim relies on Crawford's assertion that "vaginal area" is synonymous with "genital" as used in I.C. § 18–1508. This is incorrect. The jury was properly instructed as to the elements of the crime charged in Count II that they were

required to find beyond a reasonable doubt. The jury's question of whether touching the "vaginal area" was required for manual-genital contact does not indicate difficulties or confusion as to the law that could not be adequately resolved by the instructions given: the state had to prove manual-genital contact, not "vaginal area" contact. Thus, the district court had discretion on whether and in what manner to instruct the jury further regarding its question.

The district court opted to instruct the jury to "reread the jury instructions," leaving to the jury the decision of whether the evidence, as presented, sufficed to constitute manual-genital contact as charged in Count II. As noted by the district court in its summary dismissal, terms which are of common usage and are generally understood need not be further defined when instructing the jury. *State v. Draper*, 151 Idaho 576, 589, 261 P.3d 853, 866 (2011); *State v. Caldwell*, 140 Idaho 740, 742, 101 P.3d 233, 235 (Ct. pp. 004). Crawford concedes that the common understanding of the term "genital" usually refers to the external genitalia, including the labia and clitoris, but also includes the internal sex organs, such as the vagina, cervix, and uterus. *See, e.g.*, Webster's Third New International Dictionary 946 (1993) (defining "genitalia" as "the organs of the reproductive system; esp: the external genital organs"). Thus, the trial court did not err by not defining "genital" further for the jury, and the decision by Crawford's trial counsel not to request that the trial court do so did not constitute ineffective assistance.

Additionally, as noted by the district court and previously discussed, an affirmative answer to the jury's question would have been inaccurate and may have confused the jury, as the "vaginal area" and "genitals" are not necessarily synonymous. Although touching the vaginal area is sufficient, it does not solely constitute manual-genital contact under I.C. § 18–1508. Moreover, the state bore the burden of proving manual-genital contact, not "vaginal area" contact, so an instruction that touching the vaginal area was required would have been erroneous. As a result, Crawford's trial counsel was not ineffective for not requesting that the trial court provide a definition of the commonly understood term "genital" or provide an inaccurate affirmative response to the jury question, as those requests would have been properly denied.

Crawford v. State, Exhibit B, pg. 9-11.

2. Why the Court should accept review on the jury inquiry issue

Chief Judge Gutierrez again dissented:

Finally, Crawford asserts that defense counsel provided ineffective assistance of counsel by failing to request that the court define genital in response to part of a jury question or provide an affirmative response to the first part of the same jury question. During jury deliberations, the jury asked the court a two-part question, which stated, "In order to have committed manual-genital contact, does it require

touching the vaginal area? Does touching of the breast area constitute manual-genital contact?" Crawford's defense counsel recommended a single answer, saying, "No." The court responded, "No, the answer is reread the instructions. I'm not going to define for them manual-genital." The court then referred to the prosecutor, and the prosecutor expressed her view that the jury asked a two-part question: "I think they have a two-part question, does it include the vaginal area and does it [ ] include breast. So, I mean, how can you say no?" Following the prosecutor's remarks, the court decided that it would instruct the jury to reread the instructions.

> *The majority concludes that the jury's question "does not indicate difficulties or confusion as to the law that could not be adequately resolved by the instructions given." **I disagree; so, too, did the panel on direct appeal. State v. Crawford, Docket No. 38787 at 3 (Ct. App. June 27, 2012) ("By asking, 'In order to have committed manual-genital contact, does it require touching the vaginal area? Does touching of the breast-area constitute manual-genital contact?' the jury expressed doubt or confusion on a point of law not adequately covered in the jury instructions and pertinent to this case, thereby revealing a defect, ambiguity, or gap in the instructions. Thus, the district court had the duty to give additional instructions on the law reasonably necessary to alleviate the jury's doubt or confusion.").** As this Court explained in the prior unpublished opinion, in general, it is within the trial court's discretion to determine whether, and the manner in which, to respond to a question posed by the jury during deliberations. State v. Sheahan, 139 Idaho 267, 282, 77 P.3d 956, 971 (2003). This grant of discretion is premised on the assumption that the instructions as given are clear, direct, and proper statements of the law. Id. Consequently, if a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury, but it is under no duty to do so. Id. However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. Id. **Under this reasoning, we held in the direct appeal that the district court had the duty to give additional instructions on the law reasonably necessary to alleviate the jury's doubt or confusion concerning manual-genital contact. See Crawford, Docket No. 38787 at 3.***
>
> The last issue raised by Crawford in this appeal, though, is not whether the district court erred when it failed to give clarifying instructions, but whether counsel provided ineffective assistance of counsel. I would hold that it was objectively unreasonable for defense counsel not to request that the court otherwise clarify the law to alleviate the jury's doubt or confusion. Had defense counsel requested the court to otherwise clarify the law to alleviate the jury's doubt or confusion, and the court given the instruction, there is a reasonable probability that Crawford would have been acquitted by the jury.
>
> In summary, the district court erred by granting the State's motion for summary

dismissal. As for Crawford's cross-motion for summary disposition, there is no genuine issue of material fact, and Crawford is entitled to judgment as a matter of law on each of the three ineffective assistance of counsel claims; accordingly, the district court erred by denying Crawford's cross-motion for summary disposition.

Crawford v. State, Exhibit B, pg. 16-18. (Gutierrez, C.J., dissenting) (emphasis added).

As pointed out in the dissent, the majority's opinion here is inconsistent with the Court of Appeals's opinion in the direct appeal. The Court of Appeals in the direct appeal stated that the inquiry showed that the jury was confused about the instructions and clarification was required, while the Court in this case finds the opposite. Consequently, this Court should grant review under I.A.R. 118(b)(3) because the Court of Appeals's ruling that the trial court did not need to give additional instructions to the jury is in conflict with the Court of Appeals's decision in Mr. Crawford's the previous appeal where it held that the trial court was so required. *State v. Crawford, supra.*

E. *Conclusion*

This Court should grant review, reverse the decision granting summary disposition to the state and also reverse the order denying Mr. Crawford's motion for summary disposition and order that judgment be entered in Mr. Crawford's favor.

Respectfully submitted this 24th day of February, 2015.

Dennis Benjamin
Attorney for Shane Crawford

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 2 2015, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to:

John C. McKinney
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38587

STATE OF IDAHO,	)	**2012 Unpublished Opinion No. 538**
	)	
Plaintiff-Respondent,	)	**Filed: June 27, 2012**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
SHANE ERICK CRAWFORD,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Judgment of conviction and concurrent unified sentences of twenty-five years, with minimum periods of confinement of six years, for two counts of lewd conduct with a minor under the age of sixteen, affirmed in part, vacated in part, and remanded.

Sara B. Thomas, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Shane Erick Crawford appeals from his judgment of conviction and sentences for two counts of lewd conduct with a minor under the age of sixteen. For the reasons set forth below, we affirm in part, vacate in part, and remand for a new trial.

I.

FACTS AND PROCEDURE

In 2010, the state filed a complaint charging Crawford with two counts of lewd conduct with a minor under the age of sixteen, I.C. § 18-1508, identified as Count I and Count II. The state also charged Crawford with two counts of sexual abuse of a child under the age of sixteen (Counts III and IV). The alleged victim in Count I was Victim I and the alleged victim in the remaining counts was Victim II. Crawford was found guilty of Count I and Count II and

acquitted of the two remaining counts. The district court imposed concurrent unified terms of twenty five years, with minimum periods of confinement of six years, for Count I and Count II. Crawford appeals.

II.

ANALYSIS

Crawford argues that the district court denied his right to due process by failing to instruct the jury, in response to a jury question, that the breast area is not a genital for the purpose of finding Crawford guilty of lewd conduct pursuant to I.C. § 18-1508. Crawford also argues that the district court imposed excessive sentences.

A. Jury Question

Idaho Code Section 18-1508 provides:

> Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

Here, in Count I, the state alleged that Crawford committed lewd conduct with Victim I by having manual-genital contact with her with the intent to appeal to and or gratify his sexual desire. Likewise, the state alleged in Count II that Crawford committed lewd conduct with Victim II by having manual-genital contact with her with the intent to appeal to and or gratify his sexual desire.

At trial, Victim I testified that, while she was lying on a couch in a living room and watching a movie with Crawford, Crawford reached up her shirt and groped her breasts and then moved his hand into her underwear and touched her vagina. Victim II testified that, while she was in a kitchen with Crawford, Crawford asked her "what a clit was." Victim II testified that, when she responded that she did not know, Crawford said, "Well, let me show you;" approached her as she backed away; and put his hand up her shorts and touched the outside of her vaginal area. Victim II also testified that, on another occasion, she was on a couch with Crawford and he

rubbed her upper thigh and moved up toward her "bikini line." Victim II further testified that, on a different occasion, Crawford exposed his penis and tried to show it to her but she looked away. Additionally, Victim II testified that Crawford grabbed her breast in front of others at a party in a joking way. Finally, Victim II testified that, while she was on the phone on one occasion with her grandfather, Crawford began rubbing her stomach and moving his hand toward her breast, but she kept pushing Crawford's hand away.

During closing argument, the prosecutor stated to the jury:

> At the end of the day and at the end of your deliberations, I'm going to ask you to come back and return a verdict of guilty against [Crawford], guilty of [Count I] involving [Victim I] on the sofa for rubbing her tummy, going up to her breasts and down into her vagina.
>
> . . . . [Count II] is [Victim II] and this is the episode where [Victim II] testified [Crawford] asked her if she knew what her clit was and he put her fingers up. That's what [Count II] is referring to.
>
> [Count III] refers to when [Crawford] pulled his penis out, he exposed it and nudged [Victim II] and told her to look and talked about how he groomed it. That's [Count III].
>
> And [Count IV] is when [Crawford] grabs [Victim II's] breasts and also when he's rubbing up toward her panty line getting closer and closer.

During deliberations, the jury submitted a question to the district court asking, "In order to have committed manual-genital contact, does it require touching the *vaginal* area? Does touching of the breast-area constitute manual-genital contact?" Outside the presence of the jury, Crawford's counsel indicated that he believed the answer was "no." The district court stated, "No, the answer is reread the instructions. I'm not going to define for them manual-genital contact." The state agreed with the district court. The district court concluded:

> Well, if the jury--I do not feel comfortable defining, and, in fact, there's case law that says not only should you default to the standard instructions, but that while--while it may seem--it's tempting to want to define every single word, that it's inappropriate for the court to do so and that the jurors have to apply their understanding--their common ordinary understanding to it. And, therefore, I'm just going to tell them to reread the instructions.

Thus, the district court informed the jury to "re-read all the instructions." During deliberations, the jury also asked the district court to confirm that:

> [Count I]-[Victim I] on couch incident
> [Count II]-[Victim II] being asked about "clit"
> [Count III]-Penis exposure to [Victim II]
> [Count IV]-[Victim II] on phone [with] grandfather [and] touching her

In response, the district court informed the jury that the alleged victim in Count I was Victim I, the alleged victim in the remaining counts was Victim II, and the jury was to rely on its memory of the evidence.

As noted above, Crawford argues that the district court denied his right to due process by responding to the jury's question without clarifying that the breast area is not a genital for the purpose of finding Crawford guilty of lewd conduct pursuant to I.C. § 18-1508. In general, it is within the trial court's discretion to determine whether, and the manner in which, to respond to a question posed by the jury during deliberations. *State v. Sheahan*, 139 Idaho 267, 282, 77 P.3d 956, 971 (2003); *State v. Pinkney*, 115 Idaho 1152, 1154, 772 P.2d 1246, 1248 (Ct. App. 1989). This grant of discretion is premised on the assumption that the instructions as given are clear, direct, and proper statements of the law. *Sheahan*, 139 Idaho at 282, 77 P.3d at 971. Consequently, if a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury, but it is under no duty to do so. *Id.* However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *Id.*

Here, Crawford was charged with two counts of lewd conduct pursuant to I.C. § 18-1508. Jury instruction thirteen informed the jury that, in order to find Crawford guilty of lewd conduct as charged in Count I, the jury had to find that the state proved Crawford committed an act of manual-genital contact upon or with the body of Victim I. Jury instruction fourteen instructed the jury in the same manner with respect to Count II and Victim II. By asking, "In order to have committed manual-genital contact, does it require touching the *vaginal* area? Does touching of the breast-area constitute manual-genital contact?" the jury expressed doubt or confusion on a point of law not adequately covered in the jury instructions and pertinent to this case, thereby revealing a defect, ambiguity, or gap in the instructions. Thus, the district court had the duty to give additional instructions on the law reasonably necessary to alleviate the jury's doubt or confusion. In *State v. Kavajecz*, 139 Idaho 482, 487, 80 P.3d 1083, 1088 (2003), the Idaho Supreme Court held that the act of touching of a minor's chest area does not fall within those acts specifically enumerated in I.C. § 18-1508 and a defendant cannot be convicted under the

statute for such contact. Therefore, *as a matter of law*, touching a child's breast area does not amount to manual-genital contact. By answering the jury's question regarding whether touching of the breast area constitutes manual-genital contact with the instruction to "re-read all the instructions" and by not informing the jury of the Court's holding in *Kavajecz*, the district court erred.

However, error is harmless and not reversible if the reviewing court is convinced beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Perry*, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010). Thus, we examine whether the alleged error complained of in the present case was harmless. *See State v. Lopez*, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005).

Crawford argues that it is impossible to discern whether the jury reached its verdict with respect to Count I and Count II on a valid theory of law because the jury heard testimony from both Victim I and Victim II that Crawford had touched their breast area. Therefore, Crawford asserts that, pursuant to *State v. Townsend*, 124 Idaho 881, 888, 865 P.2d 972, 979 (1993), his judgment of conviction and sentences must be vacated and his case remanded for a new trial.

In *Townsend*, the jury was instructed that it could convict Townsend of aggravated battery if it found that Townsend's use of either his vehicle or his hands during the battery constituted use of a deadly weapon as proscribed by the statute. However, the instruction that the jury could find Townsend guilty of aggravated battery by considering his hands deadly weapons was legally incorrect because hands do not constitute deadly weapons under the statute. *Id.* at 887, 865 P.2d at 978. The jury verdict did not specify whether the jury found that the aggravated battery was committed with Townsend's vehicle, his hands, or both. Thus, the Court was unable to discern whether the jury based its verdict on a valid or an invalid legal theory. The Court determined that the appropriate disposition, in view of the holding that one of the theories of criminal liability given to the jury (use of the vehicle as a deadly weapon) was legally valid and the other theory by which the jury was instructed it could find Townsend guilty of aggravated battery (use of his hands as deadly weapons) was legally invalid, was to vacate the conviction and sentence and remand the case for a new trial. *Id.* at 888, 865 P.2d at 979.

The state argues that, even if the district court erred by not instructing the jury that touching of a minor's chest area does not fall within those acts specifically enumerated in I.C. § 18-1508 in response to the jury question, such error was harmless regarding Count II because

that count did not involve any testimony or allegation that Crawford touched Victim II's breasts. We agree. As noted above, during closing argument, the state argued what conduct Crawford allegedly committed that constituted the offense of lewd conduct charged in Count II. Specifically, the state informed the jury that Count II involved the episode where Crawford allegedly asked Victim II "if she knew what her clit was and he put her fingers up." Defense counsel, during closing argument, referred to Count II as involving the same incident. Additionally, during deliberations, the jury asked the district court to *confirm* that the alleged conduct related to Count II was Victim II "being asked about 'clit'." Thus, we are convinced beyond a reasonable doubt that, with respect to Count II, the jury did not consider Victim II's testimony regarding Crawford's touching of her breast area at other times and reached its verdict on a valid legal theory. Therefore, even though the district court erred by not instructing the jury that touching of a minor's chest area does not fall within those acts specifically enumerated in I.C. § 18-1508 in response to the jury question, such error was harmless regarding Count II.

However, with respect to Count I, the episode in which the state alleged Crawford committed lewd conduct included his touching of both Victim I's breast and vaginal areas. Specifically, the state alleged that Count I involved Victim I "on the sofa for rubbing her tummy, going up to her breasts and down into her vagina." Further, the jury asked the district court to confirm that the alleged conduct related to Count I was Victim I "on couch incident." Instruction provided to the jury must not permit the defendant to be convicted of conduct that does not constitute the type of crime charged. *State v. Folk*, 151 Idaho 327, 342, 256 P.3d 735, 750 (2011). Because of the district court's lack of instruction to the jury that touching of a minor's chest area did not fall within those acts specifically enumerated in I.C. § 18-1508 in response to the jury question, the jury could have found Crawford guilty of lewd conduct on Count I based on an invalid legal theory--that Crawford committed manual-genital contact with Victim II by touching her breast area. Because it is impossible to discern what theory the jury based its verdict on, we are not convinced beyond a reasonable doubt that the district court's error did not contribute to the jury's verdict with respect to Count I. Thus, the error was not was harmless. As in *Townsend*, the appropriate disposition is to vacate Crawford's conviction and sentence with respect to Count I and remand the case for a new trial.

B. Excessive Sentences

Crawford also argues that the sentences imposed by the district court are excessive. Because we vacate Crawford's judgment of conviction and sentence with respect to Count I, we need only address Crawford's claim with respect to Count II.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable and, thus, a clear abuse of discretion. *State v. Brown,* 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

At the sentencing hearing in this case, the district court noted that it wanted to make sure Crawford's sentence fulfilled the objectives of protecting the community and the victims. The district court also noted that it did not believe Crawford was amenable to rehabilitation in the short term. The district court detailed six disciplinary actions taken against Crawford while he was incarcerated on an unrelated matter. The district court further commented that it was surprised that, having been in the military, Crawford had difficulty following the rules. The district court determined that Crawford's inability to follow rules did not make him a good candidate for being out in the community. In addition, the district court noted the findings in the psychosexual evaluation that Crawford was a moderate risk to reoffend and tended to manage emotions through repression and denial, which seemed to influence his engaging in inappropriate sexual behavior. The district court also noted the findings in the psychosexual evaluation that Crawford was not amenable to sex offender treatment due to his lack of acknowledgement of

inappropriate sexual behavior. The district court determined that, because Crawford was not amenable to treatment, he needed to be incarcerated for a significant period of time. In light of the foregoing, the district court imposed a unified term of twenty five years, with a minimum period of confinement of six years, for Count II.

After an independent review of the record and having regard for the nature of the offense, the character of the offender and the protection of the public interest, we conclude that the sentence imposed by the district court with respect to Count II was reasonable upon the facts of this case. Thus, the district court did not abuse its discretion by sentencing Crawford to a unified term of twenty-five years, with a minimum period of confinement of six years, for Count II.

III.

CONCLUSION

The district court erred by answering the jury's question regarding whether touching of the breast area constitutes manual-genital contact pursuant to I.C. § 18-1508 with the instruction to "re-read all the instructions" and by not instructing the jury that the act of touching a minor's chest area does not fall within those acts specifically enumerated in the statute. While such error was harmless with respect to Count II, the error was not harmless with respect to Count I. The district court did not abuse its discretion by imposing Crawford's sentence for Count II. Accordingly, we affirm Crawford's judgment of conviction and sentence with respect to Count II, but we vacate Crawford's judgment of conviction and sentence with respect to Count I and remand for a new trial.

Chief Judge GRATTON and Judge LANSING, **CONCUR.**

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41669

SHANE CRAWFORD,	)	**2014 Unpublished Opinion No. 870**
	)	
Plaintiffs-Appellants,	)	**Filed: December 17, 2014**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Judgment summarily dismissing petition for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent. John C. McKinney argued.

MELANSON, Judge

Shane Crawford appeals from the district court's judgment summarily dismissing his petition for post-conviction relief in which he alleged ineffective assistance of trial and appellate counsel. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

A jury found Crawford guilty of two counts of lewd conduct with a minor child under the age of sixteen, I.C. § 18-1508.[1] The convictions were based on incidents involving two of

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[1] Idaho Code Section 18-1508 provides, in pertinent part:

> Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, manual-genital conduct . . . when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony . . . .

EXHIBIT B

Crawford's daughters. The victim in Count I alleged that Crawford had fondled her breasts and touched her vagina. The victim in Count II alleged that, while he was in the kitchen with her, Crawford had asked her whether she knew what a clitoris was, approached her as she backed away, and touched outside of her vaginal area in an attempt to show her. During jury deliberations, the jury sent the following questions to the judge: "In order to have manual-genital contact, does it require touching the *vaginal* area? Does touching of the breast-area constitute manual-genital contact?" Crawford's counsel proposed that the district court answer "no," but the district court refused because it did not want to define what "manual-genital" meant. The state proposed that the district court direct the jury to reread the jury instructions, which the district court did. The jury returned a guilty verdict of both counts and Crawford was sentenced to concurrent unified terms of twenty-five years, each with a minimum period of confinement of six years.[2] Crawford appealed. In an unpublished opinion, this Court determined that the district court's failure to provide additional instructions to clear up the jury's confusion regarding the applicable law indicated by the second sentence of the jury question was reversible error as to Count I.[3] *See State v. Crawford*, Docket No. 38587 (Ct. App. June 27, 2012). Accordingly, we vacated Count I of Crawford's judgment of conviction and sentence and remanded for a new trial on that count. However, we determined that the error was harmless as to Count II and affirmed the judgment of conviction and sentence for that count. On remand, the state dismissed Count I.

Crawford filed a petition for post-conviction relief from his judgment of conviction under Count II for lewd conduct with a minor child under sixteen. In his petition, Crawford alleged that he had received ineffective assistance of trial and appellate counsel. Specifically, he asserted that trial counsel was deficient for failing to move for judgment of acquittal as to Count II on the basis that there was insufficient evidence to support a guilty verdict. He further argued that his trial counsel was ineffective for failing to request that the district court define "genital" in "manual-genital contact" as requiring contact with the vaginal area, which also

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[2] Crawford was also charged with two counts of sexual abuse of a child under the age of sixteen for other conduct with Victim II, but the jury acquitted him of those counts.

[3] Specifically, we concluded that the district court should have instructed the jury further to clarify that touching of the breast area does not constitute manual-genital contact. *See State v. Kavajecz*, 139 Idaho 482, 486-87, 80 P.3d 1083, 1087-88 (2003) (holding that touching or kissing of the chest area of a minor child is not lewd conduct as defined under I.C. § 18-1508).

resulted in that issue not being preserved for appeal. Crawford also alleged that his appellate counsel provided ineffective assistance for failing to assert an insufficiency of the evidence claim as to Count II on appeal because it was the strongest issue on appeal for that count.

The state filed an answer and motion for summary dismissal, asserting that Crawford's proposed equation of the vaginal area with "genitals" as used in the statute was incorrect and that the evidence was sufficient to allow a reasonable jury to conclude that Crawford had engaged in manual-genital contact with Victim II. Crawford responded with a cross-motion for summary disposition, arguing that the state had not specifically denied his factual allegations in his petition, which he claimed created a prima facie case showing ineffective assistance of trial and appellate counsel. After a hearing, the district court denied Crawford's cross-motion and granted the state's motion for summary dismissal. The district court reasoned that a motion for judgment of acquittal before or after the verdict would not have been successful because there was substantial circumstantial evidence giving rise to a reasonable inference that Crawford had engaged in manual-genital contact with Victim II. The district court also concluded that, for the same reasons, an insufficiency of the evidence claim would not have been successful on appeal. In addition, the district court determined that a request to define "genitals" or to answer "yes" to the jury's question asking whether manual-genital contact required touching the vaginal area would have been denied as improper and an inaccurate statement of what the law required. Accordingly, the district court concluded that Crawford's trial and appellate counsel had not provided ineffective assistance and summarily dismissed Crawford's petition for post-conviction relief. Crawford appeals.

II.

STANDARD OF REVIEW

A petition for post-conviction relief initiates a proceeding that is civil in nature. I.C. § 19-4907; *Rhoades v. State*, 148 Idaho 247, 249, 220 P.3d 1066, 1068 (2009); *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). A petition for post-conviction relief differs from a complaint in an ordinary civil action. *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004). A petition must contain much more than a short

and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, a petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records, or other evidence supporting its allegations must be attached or the petition must state why such supporting evidence is not included with the petition. I.C. § 19-4903. In other words, the petition must present or be accompanied by admissible evidence supporting its allegations or the petition will be subject to dismissal. *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011).

Idaho Code Section 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to a motion by a party or upon the court's own initiative, if it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When considering summary dismissal, the district court must construe disputed facts in the petitioner's favor, but the court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). Moreover, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather, the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). Such inferences will not be disturbed on appeal if the uncontroverted evidence is sufficient to justify them. *Id.*

Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal of a claim for post-conviction relief is appropriate when the court can conclude, as a matter of law, that the petitioner is not entitled to relief even with all disputed facts construed in the petitioner's favor. For this reason, summary dismissal of a post-conviction petition may be

appropriate even when the state does not controvert the petitioner's evidence. *See Roman*, 125 Idaho at 647, 873 P.2d at 901.

Conversely, if the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008). If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629.

On appeal from an order of summary dismissal, we apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010); *Sheahan*, 146 Idaho at 104, 190 P.3d at 923. Over questions of law, we exercise free review. *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069; *Downing v. State*, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001).

III.
ANALYSIS

Crawford does not allege that there is a genuine issue of material fact requiring an evidentiary hearing. Instead, he argues that the district court erred in granting summary dismissal in favor of the state and denying his cross-motion for summary dismissal because he is entitled to relief as a matter of law. Specifically, Crawford makes three claims of ineffective assistance of counsel. He alleges that trial counsel was ineffective for failing to make a motion for judgment of acquittal and for failing to request that the district court define the term "genital" or respond affirmatively to the jury's question asking whether touching the "vaginal area" was required for manual-genital contact. Crawford also asserts that appellate counsel was ineffective for failing to contest the sufficiency of the evidence as to Count II on appeal.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the petitioner has the burden of showing that the attorney's

representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88; *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694; *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. We have long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *State v. Dunlap*, 155 Idaho 345, 383, 313 P.3d 1, 39 (2013); *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). Indeed, there is a strong presumption that trial counsel was competent and that trial tactics were based on sound legal strategy. *Strickland*, 466 U.S. at 689; *Dunlap v. State*, 141 Idaho 50, 58-59, 106 P.3d 376, 384-85 (2004).

A. Sufficiency of the Evidence at Trial

Crawford argues that his trial counsel provided ineffective assistance by failing to make a motion for judgment of acquittal under I.C.R. 29 both before and after the jury verdict. Whether to move for judgment of acquittal is a tactical or strategic decision. *See State v. Kraft*, 96 Idaho 901, 905, 539 P.2d 254, 257-58 (1975). Generally, the failure to make a motion for judgment of acquittal cannot form the basis of a claim of ineffective assistance of counsel. *State v. Adair*, 99 Idaho 703, 707-08, 587 P.2d 1238, 1242-43 (1978). This is especially true when the reviewing court concludes that sufficient evidence to withstand such a motion was presented. *See id.* at 707, 587 P.2d at 1242; *Kraft*, 96 Idaho at 905, 539 P.2d at 257. Indeed, where the alleged deficiency is counsel's failure to make or file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Accordingly, the summary dismissal of Crawford's claim of ineffective assistance of trial counsel was proper if there was sufficient evidence upon which the trial court could have denied a motion for judgment of acquittal.

Idaho Criminal Rule 29 provides that, when a verdict of guilty is returned, the court, on motion of the defendant, shall order the entry of a judgment of acquittal if the evidence is insufficient to sustain a conviction of the offense. The test applied when reviewing the trial court's ruling on a motion for judgment of acquittal is to determine whether the evidence was

sufficient to sustain a conviction of the crime charged. *State v. Fields*, 127 Idaho 904, 912-13, 908 P.2d 1211, 1219-20 (1995). When reviewing the sufficiency of the evidence where a judgment of conviction has been entered upon a jury verdict, the evidence is sufficient to support the jury's guilty verdict if there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). We do not substitute our view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985). Moreover, we consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

To prove lewd conduct with a minor child under sixteen, the state must prove that the defendant engaged in "any lewd or lascivious act or acts," which includes manual-genital contact, and that such was "done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party." I.C. § 18-1508. Crawford argues that the only evidence supporting a finding that there was manual-genital contact between him and Victim II was her testimony. However, Crawford contends that Victim II did not directly testify that he touched her genitals. During direct examination by the state, Victim II testified as follows:

Q: Okay. And so let's go back to the touching. Besides touching when he was rubbing your leg, was he getting close to where your underwear was at?
A: Yes.
Q: In fact, was he up there to your privates?
A: Yes.
Q: And so do you remember a time when you were in the kitchen with your dad?
A: Yes.
Q: Can you kind of tell the jurors a little bit about when that was.
A: When it was?
Q: About how old you were.
A: I was in 8th grade . . . .
Q: Okay. So what were you doing in the kitchen?

A: He was offering me an alcoholic drink and I had told him that I didn't want any alcohol. And I don't know how the conversation got brought up, but he asked me what a clit was and I told him that I didn't know what that was.

. . . .

Q: And then what did he do?
A: He said, "Well, let me show you," and then went to go show me, and I, like, backed away when he was going to show me.
Q: Okay. So did his hands touch you?
A: Yeah.
Q: Where did they touch you?
A: *Outside of my vaginal area.*
Q: Okay. So was he going down, like down from your shorts or was he going up?
A: Up.

(Emphasis added.) According to Crawford, the statement that he touched "outside of [her] vaginal area" can only be interpreted to mean that Crawford had not touched Victim II's genitalia, but had instead touched outside of her genital area.

We disagree. Victim II's statement that Crawford touched her "outside of [her] vaginal area" does not demand a conclusion that Crawford did not engage in manual-genital contact. It is the province of the jury to determine what the witness meant by the ambiguous phrase "outside of [her] vaginal area," and we will not substitute our view for that of the jury as to the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *Decker*, 108 Idaho at 684, 701 P.2d at 304.

Substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence. *State v. Severson*, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009); *State v. Stevens*, 93 Idaho 48, 50-51, 454 P.2d 945, 947-48 (1969). Even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt. *Severson*, 147 Idaho at 712, 215 P.3d at 432; *State v. Slawson*, 124 Idaho 753, 757, 864 P.2d 199, 203 (Ct. App. 1993).

Such is the case here. The jury could have reasonably interpreted Victim II's statement that Crawford touched her "outside of [her] vaginal area" to mean, among other things, that Crawford had touched the external genitalia outside of her vagina or touched the area surrounding her genitalia (as Crawford proposes). As noted by the district court, the jury had the opportunity to observe Victim II's demeanor as she testified and take note of her reluctance to describe what happened to her. Moreover, not only did Victim II testify that Crawford touched

her "outside of [her] vaginal area," but she also responded affirmatively to the question that he was "up there to [her] privates." This response was given without reference to any specific event. However, it did follow a discussion regarding prior touching of Victim II's upper thigh that had made her uncomfortable and immediately preceded the discussion of the incident in the kitchen comprising Count II. Moreover, the kitchen incident is the only incident to which an assertion that Crawford had touched "up there to [Victim II's] privates" would logically correlate, as all other incidents to which she testified involved him touching her "upper thigh," "close to [her] private area," or "outside of [her] bikini line." A jury could have reasonably understood this affirmation by Victim II that Crawford had touched "up there to [her] privates" as referencing the single count for which the state was arguing that such manual-genital contact had occurred. Thus, the circumstantial evidence in the record, although subject to differing interpretations, supports a reasonable inference of guilt consistent with the jury's verdict.

Accordingly, we hold that there was substantial evidence upon which a reasonable trier of fact could have found that the essential elements of lewd conduct with a minor child under sixteen, including manual-genital contact, were proven beyond a reasonable doubt in this case. As a result, a motion to acquit by Crawford's trial counsel would have properly been denied, so the tactical decision to not make such a motion did not constitute ineffective assistance.

B. Sufficiency of the Evidence on Appeal

Crawford also argues that it was error for his appellate counsel to not raise the issue of insufficient evidence of manual-genital contact on appeal. However, this claim would have failed on appeal for the same reasons it would have failed at trial, as already discussed. Appellate counsel is not ineffective for choosing not to raise weak issues that are likely to be denied. *See Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007) ("[T]he process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being the evidence of incompetence, is the hallmark of effective appellate advocacy.") Accordingly, Crawford's appellate counsel was not ineffective for not raising the issue of sufficiency of the evidence as to Count II on appeal.

C. Response to Jury Question

Crawford contends that his trial counsel also provided ineffective assistance by failing to request that the district court define "genital" or give an affirmative answer to a jury question of whether touching the "vaginal area" was required for manual-genital contact under the statute.

In general, it is within the trial court's discretion to determine whether, and the manner in which, to respond to a question posed by the jury during deliberations. I.C.R. 30(c); *State v. Sheahan*, 139 Idaho 267, 282, 77 P.3d 956, 971 (2003); *State v. Pinkney*, 115 Idaho 1152, 1154, 772 P.2d 1246, 1248 (Ct. App. 1989). This grant of discretion is premised on the assumption that the instructions as given are clear, direct, and proper statements of the law. *Pinkney*, 115 Idaho at 1154, 772 P.2d at 1248. Consequently, if a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury, but it is under no duty to do so. *Id.* However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *Id.*; *see also* I.C. §§ 19-2132(a) and 19-2204 (providing that a trial court must instruct the jury on all matters of law necessary for their information).

Here, the jury was instructed that, in order to find Crawford guilty of lewd conduct as charged in Count II, the jury had to find that the state proved Crawford committed an act of manual-genital contact upon or with the body of Victim II. The jury instructions did not define "genital." During deliberations, the jury asked several questions, including the question at issue here: "In order to have committed manual-genital contact, does it require touching the *vaginal* area? Does touching of the breast-area constitute manual-genital contact?" Crawford's counsel indicated that he believed the answer was "no." The district court stated, "No, the answer is reread the instructions. I'm not going to define for them manual-genital contact." The state agreed with the district court. The district court concluded:

> Well, if the jury--I do not feel comfortable defining, and, in fact, there's case law that says not only should you default to the standard instructions, but that while--while it may seem--it's tempting to want to define every single word, that it's inappropriate for the court to do so and that the jurors have to apply their understanding--their common ordinary understanding to it. And, therefore, I'm just going to tell them to reread the instructions.

Crawford argues that it was objectively deficient performance for his trial counsel not to either request that the district court define "genital" or provide an affirmative response to the first sentence of the jury's question. Crawford also argues that, had trial counsel made such a request, the issue would have been preserved for appeal, and the district court's decision would have been reversed on appeal. However, this claim relies on Crawford's assertion that "vaginal area" is

synonymous with "genital" as used in I.C. § 18-1508. This is incorrect. The jury was properly instructed as to the elements of the crime charged in Count II that they were required to find beyond a reasonable doubt. The jury's question of whether touching the "vaginal area" was required for manual-genital contact does not indicate difficulties or confusion as to the law that could not be adequately resolved by the instructions given: the state had to prove manual-genital contact, not "vaginal area" contact.[4] Thus, the district court had discretion on whether and in what manner to instruct the jury further regarding its question.

The district court opted to instruct the jury to "reread the jury instructions," leaving to the jury the decision of whether the evidence, as presented, sufficed to constitute manual-genital contact as charged in Count II. As noted by the district court in its summary dismissal, terms which are of common usage and are generally understood need not be further defined when instructing the jury. *State v. Draper*, 151 Idaho 576, 589, 261 P.3d 853, 866 (2011); *State v. Caldwell*, 140 Idaho 740, 742, 101 P.3d 233, 235 (Ct. App. 2004). Crawford concedes that the common understanding of the term "genital" usually refers to the external genitalia, including the labia and clitoris, but also includes the internal sex organs, such as the vagina, cervix, and uterus. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 946 (1993) (defining "genitalia" as "the organs of the reproductive system; *esp*: the external genital organs"). Thus, the trial court did not err by not defining "genital" further for the jury, and the decision by Crawford's trial counsel not to request that the trial court do so did not constitute ineffective assistance.

Additionally, as noted by the district court and previously discussed, an affirmative answer to the jury's question would have been inaccurate and may have confused the jury, as the "vaginal area" and "genitals" are not necessarily synonymous. Although touching the vaginal area is sufficient, it does not solely constitute manual-genital contact under I.C. § 18-1508. Moreover, the state bore the burden of proving manual-genital contact, not "vaginal area" contact, so an instruction that touching the vaginal area was required would have been erroneous. As a result, Crawford's trial counsel was not ineffective for not requesting that the trial court provide a definition of the commonly understood term "genital" or provide an inaccurate affirmative response to the jury question, as those requests would have been properly denied.

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[4] Our prior decision on direct appeal principally concerned the question relating to touching the breast area, which was factually involved in Count I, but not Count II.

IV.

CONCLUSION

Crawford has failed to show that his trial and appellate counsel provided ineffective assistance of counsel as a matter of law, as there was substantial evidence to support the jury's verdict and Crawford's proposed response to the jury's question was an inaccurate statement of law. Accordingly, the district court's summary dismissal of Crawford's petition for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

Judge GRATTON, **CONCURS**.

Chief Judge GUTIERREZ, **DISSENTING**

Because I conclude that Crawford has demonstrated ineffective assistance of counsel, the district court's grant of the State's motion for summary dismissal should be reversed and the district court's denial of Crawford's cross-motion for summary disposition should be reversed. Accordingly, I respectfully dissent.

A. Sufficiency of the Evidence

Important to today's post-conviction appeal is Victim II's testimony at the criminal trial.[1] Rather than beginning with the incident at issue in Count II--the underlying count for this post-conviction appeal--the prosecutor began with general questions about Crawford's touching of Victim II. Specifically, Victim II testified that before she was thirteen (2006 or earlier) and after she was thirteen (2006 and later), she was touched by Crawford and that she became uncomfortable with Crawford's touching at around age thirteen. Victim II explained that Crawford would touch her "on [her] upper thigh," and "[c]lose to [her] private area." Crawford,

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[1] The facts in this case arise from a single trial, with three counts of alleged crimes involving Victim II (Counts II-IV). Relevant to this appeal, Count II of the information, based on the district court's oration, alleged that on or between 2007 and 2008 in the state of Idaho, Crawford committed an act of manual-genital contact upon or with the body of Victim II, and that Crawford committed the act with the specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of Crawford, Victim II, or another person.

In closing argument, the prosecutor clarified that Count II related to an incident in the kitchen in which Crawford asked Victim II if she knew what a clitoris was. The prosecutor also clarified what Counts III and IV referred to. Count III referred to an event around Christmas 2008 in which Crawford exposed his penis. Count IV referred to when Crawford grabbed Victim II's breast and also "when he's rubbing up toward her panty line getting closer and closer."

according to Victim II, was getting close to where her underwear was at, and in fact was up there to her privates.

After eliciting this general testimony from Victim II, the prosecutor moved on and proceeded to ask Victim II about the kitchen incident, the subject of Count II. Victim II explained that she was in the kitchen at her home and was wearing pajama shorts and a tank top. According to Victim II, Crawford offered her alcohol, which she refused, but during the discussion in the kitchen, Crawford asked Victim II if she knew what a "clit" (clitoris) was. After she responded that she did not know what a clitoris was, Victim II explained Crawford's actions:

[Victim II]:	He said, "Well, let me show you," and then went to go show me, and I, like, backed away when he was going to show me.
[The prosecutor]:	Okay. So did his hands touch you?
[Victim II]:	Yeah.
[The prosecutor]:	Where did they touch you?
[Victim II]:	Outside of my vaginal area.
[The prosecutor]:	Okay. So was he going down, like down from your shorts or was he going up?
[Victim II]:	Up.
[The prosecutor]:	Did you -- did you make any comments to him?
[Victim II]:	I just told him that I was going to bed and I went upstairs and just went straight to bed.

Following Victim II's testimony regarding the kitchen incident, the prosecutor moved on to another incident that occurred while Victim II and Crawford were watching television.[2] This incident was offered with regard to Count IV, as best can be gleaned from the closing argument. In her testimony, Victim II explained that Crawford and she would be on the couch, that Crawford would pull a blanket out and put it over the two of them, and that Crawford would start rubbing her upper thigh. She clarified that Crawford would begin at the knee area and move upward, toward her "privates" and just "outside of [her] bikini line." The prosecutor, while questioning about this incident, also asked, "At some point did you remove his hand from around your vaginal area or from near your vaginal area?" Victim II said, "Yeah."

The prosecutor then shifted gears to an incident in December 2008, near Christmas, that was the basis for Count III. During this December 2008 incident, Crawford showed Victim II his

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[2] Although the prosecutor asked Victim II to "describe for us an incident when you were about 13 and watching TV," Victim II's answers allude to multiple times in which Crawford pulled the blanket over himself and Victim II, and implicate that Crawford touched her on multiple occasions.

penis and asked her to look at it. Following Victim II's testimony, the prosecutor went on to another incident at a television sports party in which Crawford, in front of guests, grabbed Victim II's left breast (presumably, over her clothing) and exclaimed, in a joking manner according to Victim II, that she was "growing boobs." This incident, like the television incident, was also offered in support of Count IV, based upon the prosecutor's closing argument. The last incident brought out by the prosecutor also was in support of Count IV. In the last incident, Victim II explained that she was talking to her grandfather on the phone when Crawford started rubbing her stomach and started moving his hand toward her breasts, before she pushed his hands away.

The crux of this appeal, as it relates to the ineffective assistance of counsel claims, turns on whether Victim II's testimony concerning Count II about Crawford touching her *outside* her vaginal area refers to touching Victim II's genitalia. Victim II's testimony is problematic in this case because Victim II's testimony about being touched *outside* the vaginal area does not clarify whether Crawford touched her genitalia or touched her outside of the genitalia. The phrase vaginal area is ambiguous; this Court and the Idaho Supreme Court have used the phrase to refer to the genital area, but the courts have also used the phrase more specifically to refer to the area around the vaginal orifice. *Compare, e.g.*, *State v. Cardell*, 132 Idaho 217, 220, 970 P.2d 10, 13 (1998) (interchanging vaginal area with genitalia), *and State v. Mayer*, 139 Idaho 643, 649 84 P.3d 579, 585 (Ct. App. 2004) (equating vaginal area with genital area), *with State v. Lewis*, 96 Idaho 743, 745, 536 P.2d 738, 740 (1975) (describing a doctor's testimony in which the doctor explained that he found no evidence of torn or bruised tissue in the vaginal area, presumably referring to the specific area around the vaginal orifice), *and State v. Durst*, 126 Idaho 140, 143, 879 P.2d 603, 606 (Ct. App. 1994) (discussing a physician's testimony in which "[h]e testified that in his opinion, to a reasonable degree of medical certainty, the victim's injuries were caused by a forced entry of the vaginal area by penile penetration."). Similarly, the courts have used the term vagina where, in context, the proper term should be external genitalia. *E.g.*, *State v. Pepcorn*, 152 Idaho 678, 687, 273 P.3d 1271, 1280 (2012) (paraphrasing the victim's testimony to explain that "Pepcorn placed his hand on her thigh then slowly moved it up to her vagina and

let it rest there as she rode in front of him on four-wheeler rides."). The vagina is, in fact, an internal genital,[3] but genitalia also includes the external genitals, namely the vulva.[4]

In considering Victim II's testimony, the majority opinion errs by using Victim II's general testimony about Crawford's touching throughout the years in support of Victim II's statements about the kitchen incident. Specifically, the majority relies upon Victim II acknowledging that throughout the years, Crawford would touch her on her upper thigh, close to her private area, close to where her underwear was at, and up to her privates. But Victim II's testimony about Crawford's actions throughout the years did *not* state that Crawford specifically touched her this way during the kitchen incident. More importantly, even though Crawford may have touched Victim II close to her genitalia throughout the years, the general testimony did *not* state that Crawford actually touched any part of her genitalia.

The majority also attempts to support its use of the general testimony about the touching by contending that "the kitchen incident is the only incident to which an assertion that Crawford had touched 'up there to [Victim II's] privates' would logically correlate." This contention is incorrect. In her testimony about the television and blanket incident (or incidents), Victim II acknowledged that she removed Crawford's hand "from around [her] vaginal area or from near [her] vaginal area," but this testimony related to another incident and count.

In fact, the testimony about Crawford's touching throughout the years is far too general to relate to any specific incident; Count II, as clarified by the prosecutor, only focuses on the kitchen incident. Besides the fact that Victim II's testimony is too general to relate to any specific incident, it would still be unreasonable for a jury to draw an inference that Crawford actually touched Victim II's genitalia during the kitchen incident, because Victim II never indicated that Crawford actually touched her genitalia in her general testimony about Crawford's actions throughout the years.

Although unaddressed by the majority opinion, there was testimony at the criminal trial that clarifies what Victim II was referring to in the kitchen incident. A sex crimes investigator

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[3] The vagina is "a canal that leads from the uterus of a female mammal to the external orifice of the genital canal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2528 (1993).

[4] The vulva is "the external parts of the female genital organs." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2567 (1993).

with the Meridian Police Department interviewed Victim II. During his testimony, he explained what Victim II told him in regard to the kitchen incident:

> [The prosecutor]: And did [Victim II] tell you what her response was when she indicated that [Crawford] had made a quick move toward her to show her what a clit was?
>
> [The investigator]: Yes, she had indicated that he had reached his hand up the pants leg of her shorts.
>
> [The prosecutor]: Okay.
>
> [The investigator]: He was trying to get her -- get his hand inside of her underwear and she stepped away from him and told him no.

The investigator's testimony is consistent with Victim II's testimony that she "backed away when he was going to show me" what a clitoris was. However, Victim II indicated to the investigator that Crawford *tried* to get his hand inside of her underwear (presumably trying to make contact with her genitalia). The reasonable inference drawn from Victim II's and the investigator's testimony is that Crawford was attempting to touch the genital area under Victim II's underwear, but touched Victim II outside of her genital area and did not touch her external genitalia.

Taken together, the evidence and all reasonable inferences do not lead to the conclusion that Crawford touched Victim II's genitalia during the kitchen incident; rather, the evidence and inferences lead to the opposite conclusion. For this reason, I would hold that defense counsel provided deficient performance by failing to move for judgment of acquittal, as it would have been objectively reasonable to make such a motion. I would also conclude that appellate counsel provided deficient performance by failing to raise the issue of sufficiency of the evidence, as this issue was clearly stronger than the issues presented in the first appeal. Prejudice is shown in both instances because a favorable ruling would have led to Crawford being acquitted of Count II.

B. Response to the Jury Question

Finally, Crawford asserts that defense counsel provided ineffective assistance of counsel by failing to request that the court define genital in response to part of a jury question or provide an affirmative response to the first part of the same jury question. During jury deliberations, the jury asked the court a two-part question, which stated, "In order to have committed manual-genital contact, does it require touching the vaginal area? Does touching of the breast area constitute manual-genital contact?" Crawford's defense counsel recommended a single answer, saying, "No." The court responded, "No, the answer is reread the instructions. I'm not going to

define for them manual-genital." The court then referred to the prosecutor, and the prosecutor expressed her view that the jury asked a two-part question: "I think they have a two-part question, does it include the vaginal area and does it [ ] include breast. So, I mean, how can you say no?" Following the prosecutor's remarks, the court decided that it would instruct the jury to reread the instructions.

The majority concludes that the jury's question "does not indicate difficulties or confusion as to the law that could not be adequately resolved by the instructions given." I disagree; so, too, did the panel on direct appeal. *State v. Crawford*, Docket No. 38787 at 3 (Ct. App. June 27, 2012) ("By asking, 'In order to have committed manual-genital contact, does it require touching the *vaginal* area? Does touching of the breast-area constitute manual-genital contact?' the jury expressed doubt or confusion on a point of law not adequately covered in the jury instructions and pertinent to this case, thereby revealing a defect, ambiguity, or gap in the instructions. Thus, the district court had the duty to give additional instructions on the law reasonably necessary to alleviate the jury's doubt or confusion."). As this Court explained in the prior unpublished opinion, in general, it is within the trial court's discretion to determine whether, and the manner in which, to respond to a question posed by the jury during deliberations. *State v. Sheahan*, 139 Idaho 267, 282, 77 P.3d 956, 971 (2003). This grant of discretion is premised on the assumption that the instructions as given are clear, direct, and proper statements of the law. *Id.* Consequently, if a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury, but it is under no duty to do so. *Id.* However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *Id.* Under this reasoning, we held in the direct appeal that the district court had the duty to give additional instructions on the law reasonably necessary to alleviate the jury's doubt or confusion concerning manual-genital contact. *See Crawford*, Docket No. 38787 at 3.

The last issue raised by Crawford in this appeal, though, is not whether the district court erred when it failed to give clarifying instructions, but whether counsel provided ineffective assistance of counsel. I would hold that it was objectively unreasonable for defense counsel not to request that the court otherwise clarify the law to alleviate the jury's doubt or confusion. Had

defense counsel requested the court to otherwise clarify the law to alleviate the jury's doubt or confusion, and the court given the instruction, there is a reasonable probability that Crawford would have been acquitted by the jury.

In summary, the district court erred by granting the State's motion for summary dismissal. As for Crawford's cross-motion for summary disposition, there is no genuine issue of material fact, and Crawford is entitled to judgment as a matter of law on each of the three ineffective assistance of counsel claims; accordingly, the district court erred by denying Crawford's cross-motion for summary disposition.