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IN THE SUPREME COURT OF THE STATE OF NEVADA

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JOHN H. ROSKY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO. 47407

FILED

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APPELLANT'S REPLY BRIEF

APPEAL FROM JUDGMENT AFTER JURY TRIAL AND SENTENCING

Second Judicial District
State of Nevada

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06-22677

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STATUTES, AMENDMENTS, CODES AND RULES

I. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, WHEN IT PERMITTED THE ARRESTING DETECTIVE AND THE PROSECUTOR TO STATE LEGAL OPINIONS REGARDING THE APPELLANT'S GUILT WHICH WERE INCONSISTENT WITH THE GOVERNING LAW.

The State concedes that the opinion testimony of Detective Reid at TT2:39-40 (AA:96-97) was inaccurate and thus, the admission of the same was erroneous. The State should also concede that because the testimony lessened the State's burden of proof on the contested "against the will of the victim" element of NRS 200.366, this Court will reach this issue on a "plain error" standard per Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481 (2000) and Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151 (1998).

The State's strongest (but not strong enough) position is that the jury instructions in this case, and particularly Instruction No. 27, cured the prejudice of Detective Reid's erroneous testimony.

Rosky concedes that the jury instructions (particularly Nos. 25 and 27) constituted accurate statements of law.

That concession, however, by no means ends the analysis.

In determining whether accurate jury instructions cure error, this Court considers how reasonable jurors would have understood the charge as a whole. Cage v. Louisiana, 498 U.S. 39, 41 (1990); Francis v. Franklin, 471 U.S. 307, 319-21 (1985). Thus, the exercise this Court goes through, in determining whether a jury instruction cured error, is whether the jury could have convicted, notwithstanding the correct instruction, because

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of the error involved. See: Sharma v. State, 118 Nev. 648, 656-57, 56 P.3d 868 (2002) [reversed].

However, prejudicial error cannot usually be cured by a proper instruction which does not call attention to and dispel the specific error in question. See: State v. Estrada, 738 P.2d 812, 825 (Haw. 1987).

Here, Instruction No. 25, taken from McNair v. State, 108 Nev. 53, 57, 825 P.2d 571 (1992) and Dinkens v. State, 92 Nev. 74, 78, 546 P.2d 228 (1976), advised the jury:

> A victim of sexual assault is not required to do more than his or her age, strength, surrounding facts and all attending circumstances make it reasonable for him or her to do in order to manifest his or her opposition.

(AA:191)

The problem is that Detective Reid's testimony gave conclusive weight to C.J.'s age. His testimony morphed that instruction into "a 13-year-old victim of sexual assault is not required to do anything in order to manifest his or her opposition." That instruction, so construed, eliminated the necessity of proof on the sole contested issue of fact viz. the "against the will" element. Viewed in that way, the error was more than plain: it was structural. See: Powell v. Galaza, 328 F.3d 558, 56667 (9th Cir. 2003), and cases cited therein [reversal of denial of *habeas*].

Had there been contradicting testimony to Detective Reid's, the analysis would be different. However, his was the only opinion testimony, and thus the only evidence, on the subject.

Exacerbating the problem was the prosecutor's closing

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argument. The court not only has the duty to instruct the jury properly on all elements of the charged offense, it also has the duty to correct misstatements of counsel that are sufficient to mislead the jury regarding the applicable law. People v. Bastin, 937 P.2d 761, 764 (Colo. App. 1996).

Here, the prosecutor's statement, while not technically inaccurate, was terribly misleading. Mr. Rosky concedes that a 19-year old male who impregnates his 15-year old girlfriend violates NRS 200.368. But when the trial prosecutor said: "That's what that is, that's statutory sexual seduction," (AA:159) she clearly mislead the jury into believing that that is the only factual scenario that fits NRS 200.368. Clearly, that opinion is incorrect, and the State would have to concede at oral argument that it is incorrect.

Further, the State has to concede, per Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307 (1987) that it is forensically improper for a prosecutor to invoke her office's "policy" as her justification for charging a defendant. Yet, that is what this trial prosecutor did.

Had the trial prosecutor said nothing about her office's policy and had she not made this clearly misleading statement, the State would certainly have a better (albeit not a winning) argument for the jury instructions curing Detective Reid's testimonial error. However, with the combination of the testimonial error and the misleading argument, and the trial court's refusal to take swift corrective action and dispel either

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misstatement of law, Mr. Rosky's chance at a Constitutionally fair trial was obliterated. Based upon the testimony and the argument, the jury could and undoubtedly did read Instruction No. 27 (AA:193) to mean that a 38-year old defendant can never have a reasonable and good faith belief that a 13-year old minor can ever voluntarily consent to engage in sexual intercourse. With that read of that instruction, a jury could never have a reasonable doubt about a defendant's criminal intent, regardless of the facts of the case, simply by reason of the relative ages alone.

If at oral argument one of the Justices were to ask, "But counsel, isn't that true? Isn't it true that a 38-year-old man could never have a reasonable and good faith belief that a 13-year-old girl ever could voluntarily consent to engage in sexual intercourse?", the answer is: "for NRS 200.368 purposes, that is true. For NRS 200.366 purposes, neither you nor I can make that call. Only a jury can make that call. That's why the Ninth Circuit mandated *habeas* in Harmon v. Marshall, 69 F.3d 963, 966 (9th Cir. 1995)."

Clearly, the jury instructions did not cure the errors herein. A new, Constitutionally fair trial must ensue upon reversal.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR, IN VIOLATION OF APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, WHEN IT DISALLOWED AN ILLEGALLY-OBTAINED TAPE RECORDING INTO EVIDENCE FOR THE PURPOSE OF IMPEACHING THE PROSECUTRIX'S KEY INCULPATORY TESTIMONY.

As to this assignment of error, we start with the substance

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first. Appellant contends that even if illegally intercepted telephonic communications cannot be admitted into evidence as substantive evidence per Lane v. Allstate Insurance Co., 114 Nev. 1176, 1181, 969 P.2d 938 (1998), they can be used as impeachment evidence in a criminal case, when the contents of the intercepted recording directly impeaches a witness' testimony.

The State relies upon Lane and NRS 200.620 for the proposition that illegally intercepted telecommunications conversations cannot be admitted into Nevada for any purpose, including impeachment, in any trial, whether civil or criminal. But NRS 200.620 says nothing about "impeachment evidence" or of such evidence being "inadmissible for any purpose."

It is true that, per Montana v. Egelhoff, 518 U.S. 37 (1996), while the due process clause inarguably guarantees a defendant the right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged, the states have the right to exclude otherwise relevant evidence on a number of bases and to declare evidence, otherwise relevant, as incompetent, privileged or otherwise inadmissible. Egelhoff, 518 U.S. at 41-42. But as noted at pp. 17-18 of the Blue Brief, there is simply nothing in either Lane, NRS 200.620 or NRS 179.410 that is that broad-based and peremptory viz. intercepted impeachment evidence. Indeed, Lane, a civil case, simply could not have had a criminal defendant's Sixth Amendment rights in mind within the scope of the judge-made rule therein. Key to this issue is not Lane, but

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the scope of NRS 179.505, for reasons stated at pp. 15-18 of the Blue Brief. The scope of the statute simply is not that exclusionary.

Lane is a civil case with a judge-made exclusionary rule. But in construing a statute, the rules of construction are different in a civil case than in a criminal case. In a civil case, a court interprets the statute in harmony with other statutes, and if a statute is ambiguous, the court looks to what reason and public policy would indicate the legislature intended. Nevada Power Co. v. Haggerty, 115 Nev. 353, 364, 366, 989 P.2d 870 (1999).

But in the case of a criminal statute, the court narrowly construes ambiguous statutes, and construes exemptions to penal statutes in the light most favorable to the accused. Houtz v. State, 111 Nev. 457, 462, 893 P.2d 355 (1995). Thus, the court liberally construes inconsistencies or ambiguities in criminal provisions in the defendant's favor. Bergna v. State, 120 Nev. 869, 873, 102 P.3d 549 (2004); Cleveland v. United States, 531 U.S. 12, 25 (2000). And with criminal statutes, courts are not to resort to legislative history to cloud statutory text that is clear. Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994), and cases cited therein.

The fact that a party can file a motion to suppress an improperly-intercepted telecommunication per NRS 179.505 does not answer the question of whether that communication can be used for impeachment purposes. See: Blue Brief at 17-18. Thus, NRS

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179.410 et. seq. are ambiguous in that regard; and the ambiguity must be construed in Mr. Rosky's favor.

This issue should really come down to the basic point argued by the State, which is whether trial counsel's offer of proof was adequate to preserve the issue. That question, however, should be answered in the affirmative.[1]

It is clear that three times, the trial court ruled that the issue was more than one of (mere) authentication of voices on the tape, and more than the contents of the conversation: the only relevant issue was whether C.J. consented to the taping of the phone call. If she did not (which she didn't), then in the opinion of the trial court it was simply inadmissible for any purpose. See: AA:112, 113, 114.

It is true that excluded relevant evidence must be made via a proper offer of proof in order to be considered on appeal. Cosio v. State, 106 Nev. 327, 329, 793 P.2d 836 (1990). However, once the trial court makes a definitive ruling admitting or excluding the evidence, at or before trial, a further offer of proof is unnecessary. Fed. R. Evid. Rule 103(a); Weinstein's Federal Evidence, 2d ed., § 103-21[2], p. 103-41.

Next, the State argues that because in his offer of proof trial counsel wanted the tape-recorded conversation in to prove not the truth of the matters asserted therein, but that per the words C.J. uttered she had knowledge about sex (AA:112), but the

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[1]This tape was of a conversation in about mid-January of 2000, well before Mr. Rosky was arrested.

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argument here is that the evidence was admissible to impeach C.J., that this Court cannot review this assignment of error.

It is true that an offer of proof should state the specific purpose for which the offer is made (State v. Nystedt, 79 Nev. 24, 26, 377 P.2d 929 (1963)), and the scope of appellate review depends on the purpose stated in the offer of proof. (See: McCall v. State, 97 Nev. 514, 516, 634 P.2d 1210 (1981)). However, trial and appellate counsel are talking about the same thing in different words. Indeed, this is why this Court reached the result it reached in Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985): Where the state's position is that a child victim must have been molested by the defendant as she describes, but in fact she has sexual knowledge from other sources, her credibility gets called into question, and the criminal defendant's Sixth Amendment rights to question her credibility trumps NRS 50.090. See: Summitt, 101 Nev. at 162.

Very similarly, C.J.'s testimony that Mr. Rosky forced her to have sex, she did not know what to do, and she felt violated would appear to be questionable if in fact extrinsic evidence established that she had sexual knowledge from consensual sexual activity - especially with Mr. Rosky.

Thus, this argument of the State's is without merit.

Finally, the State argues that this Court cannot review this assignment because trial counsel did not adequately describe the exact contents of the conversation between Mr. Rosky and C.J. This argument is without merit as well. A specific offer is not

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required if the substance of the proffered evidence is apparent from the context in which it is offered. NRS 47.040(1)(b). A formal offer of proof is not necessary if it is clear from the transcript that the trial court is aware of the general nature of the evidence to be offered. Charter v. Chleborad, 551 F.2d 246, 248-49 (8th Cir. 1977). Where the offer may depend on the substance of records, and the trial court rules that the records are inadmissible, the failure to explain precisely is what contained in the records is excused. See: United States v. Jimenez, 256 F.3d 330, 342-43 (5th Cir. 2001).

Here, trial counsel simply indicated in so many words that the contents of the tape established Mr. Rosky and C.J. speaking sexually intimately with each other. (AA:114) As far as the trial court was concerned, C.J. and Mr. Rosky could have been discussing with anatomical, gynecological precision, the scenes of a future adult video which they were planning to produce starring one another, and it would not have mattered to the trial court. The trial court was not going to admit the tape based upon its perception of Lane and NRS 200.620. Trial counsel simply did not need to say anything more.

In any event, should this Court believe that this issue rests on this point, Appellant notes that the tape was marked as Exhibit 8. Pursuant to NRAP 10(b)(1) and NRAP 30(d), this Court can require the Clerk of the Second Judicial District Court in Case No. CR00-0678 to transmit that tape to the Clerk of this Honorable Court for its independent review.

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Whether the Court chooses to listen to the said Exhibit 8 or not, however, reversal must ensue. This tape was properly admissible for impeachment purposes, impeachment of C.J. was central to the Appellant's exercise of his Sixth Amendment rights, and the offer of proof viz. Exhibit "8" was both sufficient and excused in view of the trial court's ruling of inadmissibility.

III. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, WHEN IT PERMITTED EVIDENCE OF UNCHARGED MISCONDUCT RE: ANIMAL CRUELTY, STALKING AGAINST A THIRD PERSON AND FURNISHING ALCOHOL TO OTHER MINOR CHILDREN, WITHOUT CONDUCTING A PETROCELLI HEARING, AND THEN FAILED TO IMPOSE A LIMITING INSTRUCTION THEREON.

What cannot be seriously disputed is that: a) Acts of animal cruelty, stalking against a third person, and furnishing alcohol to other minor children fall within the scope of NRS 48.045(2); b) This Court will review NRS 48.045 issues, both in terms of admission of the same and instruction to the jury of the same, even in the absence of objection. See: Tavares v. State, 117 Nev. 725, 729-30, 30 P.3d 1128 (2001); Meek v. State, 112 Nev. 1288, 1295, 930 P.2d 1104 (1996); c) No limiting instruction was ever given within the meaning of Meek or Tavares; d) The trial court did not hold a Petrocelli hearing before allowing this evidence to be admitted, thus setting up a "presumed error" situation per Qualls v. State, 114 Nev. 900, 902-04, 961 P.2d 765 (1998).

When trial counsel filed his generic Motion in Limine regarding uncharged misconduct, and the trial prosecutor

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indicated pre-trial that the State would comply with Petrocelli (AA:56), the trial prosecutor had to know that the subject would come up on cross-examination of C.J. of her continuing to visit Mr. Rosky and continuing to drink alcoholic beverages with Mr. Rosky after the so-called "rape." After all, this was a second trial after a reversal and remand. It seems awfully unlikely that the trial prosecutor would not have discovered what C.J. would have had to say in response to that only for the first time after cross-examination on this de facto second trial.[2] For that reason, Mr. Rosky does not concede that this is a "plain error" issue, particularly under Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249 (2002). Under these circumstances, the in limine motion should have been sufficient to preserve the record. Insofar as that goes, however, per Tavares and Meek, it really shouldn't matter. Either way, this Court must reach the merits of this assignment of error.

Undoubtedly acknowledging as such, the State's principal position is that the trial counsel opened the door for the

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[2]Appellant attaches as his Supplemental Index the cross-examination of C.J. from the first, since-reversed April of 2003 trial. (SAA:220-42) C.J. claimed there not to remember going over to Appellant's apartment after the sexual encounter (SAA:230); but after reading her prior testimony of August 9, 2000, changed her testimony and admitted going there. (Id. at 231) She claimed not to remember why she went back to his place (Id. at 231). Then she changed her story, and said she went back because Appellant "bought her things." (Id. at 233)

This is why a Petrocelli hearing would have been a good idea. When a witness changes her story this many times, no reasonable jurist could label her "new story" as "clear and convincing."

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admission of this NRS 48.045 evidence by cross-examining C.J. in such fashion, and thus even if the trial court had held a Petrocelli hearing, the trial court nevertheless would have admitted this "so-called clear and convincing" evidence; thus the argument goes, there is no error.

The State's position is without merit for the following reason:

As a general rule, in order to justify admitting the State's inadmissible evidence, such evidence has to be in response to the defense introducing prejudicially inadmissible evidence on the same issue. See: State v. Fukusaku, 946 P.2d 32, 67 (Haw. 1997) [remanded], citing *McCormick on Evidence*, § 57, at 83-84 (4th ed. 1992) and *Wigmore on Evidence*, § 15 at 731-51 (1983). Although the Government may prevent a defendant from using rules of evidence to select and enter pieces of evidence wholly out of context, the Government may not shore up a prosecution by pushing through the open-door evidence not "necessary to remove any unfair prejudice" created by defense counsel's tactics. I.e., the range of otherwise-inadmissible evidence that may be squeezed through an "open door" is limited. United States v. Brown, 921 F.2d 1304, 1307-08 (D.C. Cir. 1990); United States v. Davis, 183 F.3d 231, 256 (3d Cir. 1999).[3]

This Court has twice recognized this basic principle of law

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[3]This concept was discussed at great length in the briefs and the oral argument held September 8, 2006 in Voss v. State, Case No. 45046. In the event that the Voss disposition becomes a published opinion, there may be language therein responsive to this point.

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in the context of uncharged misconduct in Roever v. State, 114 Nev. 867, 871, 963 P.2d 503 (1998) [reversed second conviction after reversal and remand of first conviction] and Jezdik v. State, 121 Nev. Ad. Op. 15, 110 P.3d 1058 (2005). Where the defendant specifically puts his character into issue, by testifying for example that he has never been accused of anything previously in his life or is a peaceful person who would never hurt a fly, he may be cross-examined about the specific instances of misconduct; and in that instance, if he denies them, his false testimony opens the door to cure the admissibility of the specific contradiction evidence. Compare: Roever, 114 Nev. at 871 with Jezdik, 110 P.3d at 1063-64.

Here, however, there is nothing prejudicially improper about trial counsel's cross-examination; the cross-examination had nothing to do with Mr. Rosky's character; and Mr. Rosky himself did not "open the door" by testifying. As in Roever, the prosecution cannot credit the accused with "fancy defenses" in order to rebut them.

Thus, "opened door" does not work for the State as a matter of law.

Next, the State argues that the evidence was relevant to Mr. Rosky's defense of consent. (Red Brief at 15) However, the uncharged misconduct must not only be relevant to one of the categories in NRS 48.045(2), but that category must also be a trial issue in the case. See: Honkanen v. State, 105 Nev. 901, 902, 784 P.2d 981 (1989); Elsbury v. State, 90 Nev. 50, 53-54,

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518 P.2d 599 (1974). "Consent" is not one of the exceptions listed in NRS 48.045(2). Therefore, the evidence had no probative value as a matter of law.

At oral argument, one of the Justices might rejoin: "But counsel, 'motive' is one of the statutory exceptions contained within NRS 48.045(2), and C.J.'s 'motive' in visiting and drinking with Mr. Rosky after the sexual encounter was in fact a trial issue. Why wouldn't the evidence come in under the 'motive' exception to the statute?"

Here is the simple answer to that inquiry: The plain meaning of NRS 48.045(2) goes to the actor's motive, meaning Rosky's motive. Indeed, that is a fair reading of this Court's opinion in Richmond. "Motive" applies to establish the identity of the criminal, or to prove his malice or specific intent. "Motive" may also be applicable where the charged crime was motivated by his desire to hide his prior bad act. See: Richmond, 118 Nev. at 932-33.

Put basically, the "motive" exception in NRS 48.045(2), or Fed. R. Evid. 404(b), is the impetus which supplies the reason or explanation why the person committed the criminal act. United States v. Benton, 637 F.2d 1052, 1056-57 (5th Cir. 1981). So, "motive" evidence must establish a material element of the charged offense. United States v. Palmer, 990 F.2d 490, 495-96 (9th Cir. 1993). "Motive to lie" is not within the scope of this statute/rule. United States v. Farmer, 923 F.2d 1557, 1567 (11th Cir. 1991).

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So, C.J.'s "motive" in 2000 for continuing to befriend Mr. Rosky, whether genuine or contrived, simply is not relevant to Mr. Rosky's "motive" in 1999 for having sexual relations with C.J. Thus, the "motive" exception of NRS 48.045(2) does not apply.

We must also note that, like the proffered uncharged misconduct in Roever, this misconduct was not "clear and convincing," as required for admissibility (See: Blue Brief at 23), but fanciful to fantastic. It simply makes no sense to say that C.J. was motivated to continue her friendship with Mr. Rosky, after he raped her, so that he wouldn't abuse his own dog. That is nonsense on the face of it! See also: Footnote 2, *ante*.

For these reasons, the admission of this evidence was clear error, whether preserved or plain, and the issue was exacerbated by the failure of the trial court to give a limiting instruction. Whether on its own or in cumulation with the other errors herein, reversal must ensue.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT ALLOWED OPINION EVIDENCE FROM THE INVESTIGATING DETECTIVE THAT COMMENTED ON THE CREDIBILITY OF APPELLANT'S OUT-OF-COURT STATEMENTS.

A distinction must be made: It certainly is not improper for a prosecutor, during closing argument, to point out inconsistencies in a defendant's statement and argue his lack of credibility therefrom. But it is very improper for a prosecutor, in her case in chief, to elicit opinion testimony from a police

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officer to the same effect.[4]

However, a prosecutor may never express an opinion during argument to the jury on the guilt of an accused. Yates v. State, 103 Nev. 200, 203, 734 P.2d 1252 (1987), and cases and authorities cited therein. Likewise, a testifying police officer cannot testify that the defendant is a liar (or was not being honest) in his statement to the police, for reasons stated at pp. 27-28 of the Blue Brief.

To say that "Detective Tone did not render an opinion about Mr. Rosky's credibility; he merely pointed out that Mr. Rosky was inconsistent in his statement" (Red Brief at p. 16) is to say, "A spade is not a spade; it is a three-edged digging implement." A spade is in fact a spade; and testimony about "inconsistencies in a statement" is testimony directly impeaching the credibility of the statement. Compare: NRS 51.035(2)(a).

The error cannot possibly be deemed harmless. Mr. Rosky did not testify. His out-of-court statement to Detective Tone essentially was his case in chief. He had no opportunity, consistent with his Fifth Amendment rights, to rebut Detective Tone's testimony. See: Atkins v. State, 112 Nev. 1122, 1132, 923 P.2d 1119 (1996), *cert. denied*, 520 U.S. 1126 (1997) [extrinsic evidence regarding a prior contradictory statement is inadmissible unless the witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded

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[4]Unlike Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481 (2000), the defense did not open this door as a matter of strategy.

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an opportunity to interrogate him thereon].

V. CONCLUSION

The cumulation of errors in this case simply did not leave Mr. Rosky with the fair trial the Sixth Amendment affords to him. He respectfully urges this Honorable Court to reverse the conviction and sentence and vacate the same.

DATED this 6 day of November, 2006.

Respectfully submitted,

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By: _____
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ATTORNEY'S CERTIFICATE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28A:

I have read this *Appellant's Reply Brief* before signing it;

To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

DATED this 6 day of November, 2006.

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Richard F. Cornell, Esquire, and that on this date I caused to be delivered via Reno/Carson Messenger Service or, deposited for mailing in the United States Mail a true and correct copy of the foregoing document, addressed to:

Washoe County District Attorney's Office
Appellate Division
1 So. Sierra St.,4th Floor
Reno, NV 89501

DATED this 6 day of November, 2006.

Marcia Griffey
Marcia Griffey, Legal Assistant
to Richard F. Cornell

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