ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK R. ZANA,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 50786

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RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. THE DISTRICT COURT PROPERLY PERMITTED TESTIMONY AND FACTS TO BE CONSIDERED BY THE TRIAL JURY EVEN THOUGH A PENNSYLVANIA COURT AND HENDERSON JUSTICE COURT HAD SEALED/EXPUNGED RECORDS.
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STATEMENT OF THE CASE AND FACTS

The Defendant was charged with nine (9) counts of Lewdness With a Child Under the Age of 14 and twelve (12) counts of Possession of Visual Presentation Depicting Sexual Conduct of a Person Under the Age of Sixteen.

An investigation by the Henderson Police Department was conducted because a young girl named Melissa Marcovecchio reported that her fifth grade teacher, Mr. Zana, had committed lewd acts against her. 6AA 1246. The investigation revealed that the Defendant had a long history of touching young girls and that he possessed child pornography on his home computer, including one child pornography video titled "Dee Goes to the Head of the Class". 8AA 1583. The investigation also revealed that criminal charges had been brought against Mr. Zana twice before for touching young girls in almost identical ways. In 1992 Mr. Zana, 25 years old and living in Pennsylvania at the time, pinned a 13 year old girl down on his bed, reached underneath her shirt, and touched her breast. In 1998 Mr. Zana, now living in Nevada, enticed a female student to reach into his pocket and touch his penis. All of Mr. Zana's victims were extremely young and were abused in front of other children by either being enticed to reach into Mr. Zana's pocket for candy or by being touched inappropriately on their breasts. None of the victims from these three separate cases knew each other. However, a few of the victims from the latest investigation knew each other.

The latest investigation was not a dragnet and the police did not attempt to contact each and every one of Mr. Zana's former students. Mr. Zana's victims were from many different years and most of them did not know each other. Mr. Zana's victims were independently contacted by the police because there was reason to think they had been abused. The victims from this latest investigation had little to no interaction with other victims during the investigation. More victims came forward after the news media began covering the case and their stories of abuse were identical to the previous victim's stories even though the news media had not published specifics about how exactly the girls had been abused. Many of Mr. Zana's victims had independently disclosed the abuse to friends and relatives long before being questioned by the police.

The State will not attempt to address in this brief the nearly identical allegations of each victim because of space limitations. However, two victims in particular deserve special attention: Ms. Marcovecchio and Ms. Newcombe.

Meliss Marchovecchio: was in Mr. Zana's 2003-2004 fifth grade class at Kesterson Elementary in Nevada. 6AA 1244. 6AA 1254. By September of 2005 Melissa had moved to Colorado. It was then that she told Hugo Aguirre, a friend, about what Mr. Zana had done to her. 6AA 1250. In front of another student, Mr. Zana had reached his hand down Melissa's shirt and touched her nipple. 6AA 1258-59. He put his hand down her shirt again on a separate occasion but did not touch her nipple. 6AA 1268. After talking about the abuse, Melissa and Hugo decided they should tell Melissa's mom. 6AA 1251. Melissa had also seen Mr. Zana touch Summer Dano, Chelsea McGriff, and Iris Camacho during reading time. 6AA 1266. Melissa also saw Iris Camacho and Summer Dano put their hands in Mr. Zana's pockets. 6AA 1267. Based on this information, the police decided to open an investigation and began contacting these other victims.

Amber Newcombe: and her mom decided to come forward after learning about the case against Mr. Zana on the news. 6AA 1351. Amber Newcombe testified that she was abused during the summer of 2001. Since then, Amber has dropped out of school, obtained a GED and had a baby. 6AA 1342. While helping Mr. Zana move into a new classroom with another student, Mr. Zana approached Amber from behind, tickled her, and touched her breast. 6AA 1347. When Amber was in 6th grade she told her friend Scarlet about the abuse. 6AA 1349-50. Amber also told her boyfriend Tyler about the abuse four months before being contacted by the police or hearing about the investigation. Id. Amber's boyfriend told her mom about the abuse. 6AA 1351. Amber does not know Lauren Judd. 6AA 1352. Amber does not keep in contact with anyone from Kesterson Elementary School. 6AA 1360-61.

Other Victims: Lauren Judd was Mr. Zana's student during the 2000-2001 school year at Kesterson Elementary School. 6AA 1306. During that time, Mr. Zana enticed Lauren Judd to reach into his pocket to get candy. 6AA 1312. This happened one or two times, maybe

more. Id. She also testified that Mr. Zana would touch her inappropriately during reading group and that this caused her to sit in the back of the reading group so that she would not be touched. 6AA 1318-19. Lauren Judd testified that she mentioned the touching to her parents but she "didn't go into detail as much 'cause it was just something I just let go." 6AA 1320. Years later, the police interviewed Lauren Judd at her high school and she told them about the lewd acts. 6AA 1321. The interview occurred before she heard or saw any of the news coverage about Mr. Zana. 6AA 1324-25.

Alexia Mair had Mr. Zana for fifth grade at Kesterson Elementary during the 2001-2002 school year. 6AA 1394. During reading time, Mr. Zana told her that if she wanted a piece of candy she should reach into his pocket and get one. When she did so, she felt his penis because Mr. Zana had purposefully positioned himself so that she would feel it. 6AA 1384. Mr. Zana's penis was semi-erect at the time. Id. On another day, Mr. Zana put two fingers in her mouth while playing with her face. 6AA 1386.

Iris Camacho was in Mr. Zana's class during the 2003-2004 school year. 6AA 1445. Iris often played a game with Mr. Zana that involved a coin. Iris reached into Mr. Zana's pocket while playing the coin game. 6AA 1437. While reaching into his pocket, Iris felt Mr. Zana's penis. 6AA 1439. Mr. Zana also touched and rubbed her inappropriately. 6AA 1439-41. Iris also saw other girls reach into Mr. Zana's pocket to get candy. Id.

Keisha Ricamona was in Mr. Zana's class during the 2002-2003 school year. 6AA 1469. Mr. Zana touched her on the back, chest, and legs while the class was watching movies. 6AA 1471. Sometimes he touched her underneath her clothing through her sleeve and touched her bra. 6AA 1472. While she would reach into his pocket for candy, he would touch her back and chest. 6AA 1474. While reaching into his pocket, she felt his genitals and noticed that his face turned red. 6AA 1474-75. At the end of her fifth grade school year she spoke to her mom to find out if it was wrong if a teacher touched her in certain ways. 6AA 1476.

Outcome: The Defendant was ultimately found not guilty of all but one of the 'reaching in pocket' allegations (Counts 3, 5, and 8). The one 'reaching in pocket' count for which he

was found guilty was Count 1, and he was found guilty of the lesser included gross misdemeanor, Open and Gross Lewdness. The jury probably convicted Mr. Zana of this count and not the others because it was the only 'reaching in pocket' count that occurred on the playground.

Concerning the other Lewdness charges, the Defendant was accused of touching the breasts of two girls and the bra of one girl. The jury found him guilty regarding two girls (Counts 2, 6, and 7) and not guilty for the other girl (Counts 4). And lastly, the Defendant was found not guilty for rubbing the thigh of a girl (Count 9). The jury ultimately found the Defendant guilty of six (6) counts of possession of child pornography and not guilty of six (6) other counts.

The child pornography was admitted into evidence during the trial after an evidentiary foundation was established through the testimony of Officer Daniel Leath of the Henderson Police Department. (7AA 1517 and 1523). Because the images were admitted into evidence the jury was able to view and draw their own conclusions as to the pornographic nature and age of the people depicted. Although the State maintains that it was not statutorily required to call an expert witness, the State called Dr. Michael Zbiegien to testify to the age of the girls depicted in the videos. (8AA 1574). Dr. Zbiegien is a pediatrician in Sunrise Hospital's emergency room. (8AA 1572). He testified that based upon his training and experience it was his opinion that some of the charged images included girls who were under the age of 16. (8AA 1578-1584).

The Defense called Dr. Charles Hyman as an expert witness regarding child pornography and the age of children in pornography. (8AA 1607). He testified that there is no medical method to determine the chronological age of children in images. (8AA 1609). Dr. Hyman utilized enlarged print-outs from internet pornography websites which purported to be images of adult models which were of legal age but were very youthful in appearance. (8AA 1619).

At the conclusion of the trial the jury was released from their service. Several weeks after the return of the verdict, but prior to the sentencing, the court was contacted by a juror

who told the court's judicial executive assistant that another juror had conducted some form of independent internet research concerning pornography and that he had shared his findings with the other jurors. (3AA 600). The court thereafter summoned the parties to court and advised both sides of the juror's phone call. (3AA 600). The court determined that all jurors would be subpoenaed to court to provide testimony as to any jury misconduct that occurred during the trial. The court instructed neither side to contact any of the jurors until that hearing was held. (3AA 603).

On October 8, 2007, the parties and jurors appeared in court. (3AA 479). The jurors testified concerning various events that occurred during the deliberation phase of the trial. The exclusionary rule was followed during the hearing with jurors being excluded from the courtroom while they were not testifying. (3AA 479).

Juror Marques is the juror who called the court and advised of possible misconduct which occurred during deliberations. (3AA 480). She testified during the post-trial hearing that during the Monday deliberation session another juror said that he looked at pornography to see if he could determine that ages of the people in the videos. (3AA 481). He told the others that he did not learn anything from his viewing of the pornography. (3AA 501). His research indicated that he could not learn anything from his viewing of the pornography. (3AA 482 and 491). The matter of the one juror looking on the internet was not discussed very long, perhaps for a couple minutes (3AA 482-483). Juror Marques testified that the jury discussed the whole issue of the age of the children in the images, not so much the internet research of the one juror. (3AA 489). The jury considered all evidence. (3AA 489-91).

Juror Marques further testified that between the Friday and Monday deliberation sessions, she had looked at young people and concluded that it is hard to determine their ages. (3AA 485). And, another juror mentioned having similarly looked at young people and thought that it was difficult to determine their ages. Id. Most jurors testified that they did not recall that being discussed during the Monday deliberations and those that did recal

it said that the two jurors told the others that they could not tell the age of the young people when they looked at them. (3AA 503, 514, 518, 523, 525, 528, 533, 538, 540, 544, 551).

Juror Thurman testified that during the weekend between the Friday and Monday deliberation sessions he had been on a computer doing fantasy football activities and at some point he decided to look at pornography. (3AA 507). Juror Thurman testified that he sees nothing wrong with pornography and he occasionally looks at pornography on the internet. Id. He further explained that he located internet pornography by typing in search terms such as 'large breasts', which apparently is what he normally views. (3AA 506-07). In the process he decided to look for the website that had been on the graphic used by defense expert Dr. Hyman. Id. Thurman wanted to see the site because the images on Dr. Hyman's exhibit were not clear and he wanted to see better quality images. (3AA 500). He was unsuccessful in finding the site contained on Dr. Hyman's exhibit, so he abandoned looking for it. (3AA 500). During that process Juror Thurman saw other sites with young people, but no sites with extremely young people (3AA 507). Juror Thurman did not conduct any research regarding Defendant Zana. (3AA 500). Juror Thurman recalls that when the jury resumed deliberations on Monday he told the other jurors of what he found on the internet after which the jury took an initial vote and he voted not guilty. (3AA 502). Juror Thurman testified that "At that time I was – I was strongly in favor that I couldn't determine it so I felt not guilty at that time, that's why I said I couldn't – I couldn't determine whether they were absolutely over the age of 16, and that's what – that's all I had said." (3AA 510). The jury then handled the charges in order with the Lewdness charges being handled first and then the pornography charges. (3AA 498 and 510).

Juror Thurman also testified that he was having trouble believing the girls' testimony concerning putting their hands in the Defendant's pants pockets while the Defendant was seated. He did not think it was as easy as the girls had described it and he was pushing for not guilty on those counts (3AA 497-98). So over the course of the weekend while he was wearing pants he put his cell phone and keys in his pocket, sat down, and then reached into his pocket to see how difficult it was to remove the items from the pocket. Id. Juror

Thurman indicated he conducted this brief experiment in order to advocate for his position of not guilty on those charges. Id. As explained above, the jury found the Defendant not guilty of the charges concerning the girls reaching into his pocket during the reading groups. (3AA 508). Several of the jurors recalled something about that having been mentioned and many other recalled nothing about it. (3AA 514, 517, 522, 525, 527, 533, 538, 540, 544, 551).

Juror Sheets testified that one juror remarked about looking at young girls on the computer and she told the juror that the judge would not appreciate that. (3AA 512). Juror Sheets did not recall the jury discussing what the one juror had mentioned. Id.

All of the testimony was consistent regarding what the one juror told the others about his observations made during his internet viewing. None of the jurors contradict the fact that Juror Thurman told the others that based upon what he saw on the internet he could not determine the age of the people in the charged images. None of the jurors claim that Juror Thurman brought any written materials into the deliberation process. None of the jurors claim that Juror Thurman verbally conveyed to the other jurors information that he had obtained from a learned treatise or other resource. The jurors were relatively consistent in their memories that Juror Thurman mentioned his internet observation early in the morning on Monday, the matter was discussed very briefly, and that the child pornography charges were the final matter considered on Monday.

ARGUMENT

I

THE DISTRICT COURT PROPERLY PERMITTED TESTIMONY AND FACTS TO BE CONSIDERED BY THE TRIAL JURY EVEN THOUGH A PENNSYLVANIA COURT AND HENDERSON JUSTICE COURT HAD SEALED/EXPUNGED RECORDS

Pennsylvania Incident: Mark Zana was the gymnastics instructor for Christina Butler's boyfriend in Baden, Pennsylvania (2AA 266). In 1992, when Ms. Butler was 13 years old, she went to Mr. Zana's home with her 14 year old boyfriend (2AA 267). Mr. Zana was 25 years old at the time (2AA 268). Mr. Zana was the gymnastics coach for Ms. Butler's boyfriend. Mr. Zana, Ms. Butler, and her boyfriend went into Mr. Zana's bedroom where

Mr. Zana pushed her onto his bed and pinned her down. Then, Mr. Zana pulled up her shirt and fondled Ms. Butler's breast. 2AA 274. Mr. Zana then heard a noise and sprung up off the bed, and he then grabbed a pencil and made a reference to Ms. Butler's boyfriend being a "pencil dick". 2AA 274. Criminal proceedings were initiated against Mr. Zana and three other victims came forward with similar stories. 2AA 300-01. The records from that case were eventually expunged.

Henderson Incident: On January 26, 1999, a criminal complaint charging Mr. Zana with Annoying a Minor was filed in Henderson, Township in Case Number 98MH 0193X. A trial date was scheduled for May 18, 1999. The victim in that case was Ms. Jillian Lozano. When Ms. Lozano was in second grade, Mr. Zana asked her if she wanted a piece of candy and told her to reach into his pocket to get it. 2AA 320. While searching for the candy, Ms. Lozano felt Mr. Zana's genitals. 2AA 322. The case was dismissed without a conviction and thereafter the records from that case were sealed.

Following a Petrocelli Hearing held by the District Court, The District Court properly ruled that the witnesses from the other incidents would be allowed to testify. The District Court ruled that "the sealing of the records in the two cases does not prevent the individuals involved in the case from coming in and testifying about what exactly happened to them." 2AA 234. The court went on to say that the sealing of records only prevents the witnesses from talking about the court system in general. 2AA 235.

On March 5, 2007, the State made a motion to unseal the records from the Henderson incident because the statute of limitations on that crime had not run and the State was considering charging the Defendant again for that crime. RA 1. The motion was filed in case 98MH0193X. Under NRS 179.295 the State is permitted to unseal previously sealed records if the State uncovers new evidence of the same or similar crime. The new evidence that justified unsealing the Henderson records was: the information about other lewd acts that occurred before and after the Henderson incident. These other lewd acts corroborated Jillian's story and provided additional evidence that the State could use to prosecute Mr. Zana for the Henderson incident. The State up until now has decided not to prosecute Mr.

Zana for the Henderson incident. The Defendant unsuccessfully appealed the Justice Court's Order to unseal the Henderson Records. (RA 10).

A. The District Court Properly Permitted Testimony Of Witnesses Pertaining To Mr. Zana's Previous Bad Acts.

Mr. Zana makes the following argument: "The district court permitted witnesses to testify as to the events surrounding the two prior incidences, even though the records of such incidences have been ordered sealed by a court. This in essence is the same effect as unsealing the prior records." Appellant's Opening Brief, pg. 25.

This argument is without merit because allowing witnesses to testify based off of their memories and experiences is not the same as unsealing records. Baliotis v. Clark County, 102 Nev. 568, 571, 729 P.2d 1338, 1340 (1986). "The statute does not, however, impose any duty on members of the public who are aware of the conviction to pretend that it does not exist." Id. "Nor can [defendants] force persons who are aware of an individual's criminal record to disregard independent facts known to them." Id.

The witnesses in this case were instructed not to mention court proceedings, although at the Defendant's request the witnesses were allowed to mention "proceedings". 6AA 1170. During trial, there was a reference to a courtroom that was made. 6AA 1165. The Defendant requested before trial that he be allowed to refer to "prior proceedings" because he realized that in the transcript that he intended to use it had references to the trial and he wanted to be able to use it for impeachment purposes. 6AA 1170. After the singular mention of a "courtroom" instead of a "proceeding", the Defendant moved for a mistrial and the District Court denied the motion. 6AA 1172.

In Pennsylvania v. Butler, 448 Pa.Supp. 582, 672 A.2d 806 (1996), the Pennsylvania Supreme Court addressed whether the Commonwealth could introduce evidence concerning prior expunged incidents at subsequent criminal proceedings. The Pennsylvania Supreme Court reviewed the underlying reasons for expunged records and stated "The purpose of allowing an individual to expunge his record is to protect that individual from the difficulties and hardships that may result from an arrest on record. (citation omitted) There is no doubt

that this information can be harmful to one's reputation and opportunities for advancement in life." Butler, 672 A.2d at 808. The Court then adopted the holding of a Connecticut court:

> "...an expungement is limited to the erasure of the record and does not erase the memory of those personally involved. [..] **The court concluded that evidence of the underlying conduct of an expunged arrest which is based upon personal knowledge is not precluded.** The court emphasized that the testimony should be limited to the conduct, and any reference to the arrest or the record should be precluded. We find this reasoning to be persuasive and logical, as well as consistent with the language of section 9102 and the purpose of expungement." (emphasis added)

Pennsylvania v. Butler, 671 A.2d at 809, citing, Connecticut v. Morowitz, 200 Conn. 440, 512 A.2d 175 (1986). Hence, the court upheld the introduction of evidence concerning the underlying conduct which was the basis of the expunged records.

The Connecticut opinion which was relied upon by the Pennsylvania court is directly on point with the issue presently before the Court. In Connecticut v. Morowitz, the defendant, a doctor, was convicted of sexually assaulting a patient. At trial the state offered 'other bad act evidence' concerning a similar sexual assault committed by the defendant against a different patient three years prior to the charged crime. The defendant objected to the admission of the earlier sexual assault evidence on several grounds, one of which was that the earlier case had been expunged/erased after he had successfully completed an accelerated rehabilitation program. The Connecticut court rejected his argument. In ruling, the court acknowledged the purpose of the erasure statute is to protect innocent persons from the harmful consequences of criminal charges which have been dismissed. The court held that the expungement of records can cause the records to be erased but not the memory of an earlier victim. Hence, a victim's memory is not rendered inadmissible at a subsequent trial as a result of the expungement or erasure of records. The court stated:

> "The statute does not and cannot insulate him from the consequences of his prior actions. Although the records of the defendant's prior prosecution were erased, the prior victim's memory of the assault remained. Because the disputed testimony was based upon the personal knowledge independent of the erased records, (the expungement statute) did not bar its admission."

Connecticut v. Morowitz, 200 Conn. 440, 451, 512 A.2d 175, 182 (1986). The Connecticut Supreme Court affirmed the admission of testimony of the earlier sexual assault victim

despite the fact that the records surrounding the earlier prosecution had been erased. Hence, the law of Pennsylvania is abundantly clear that the expungement of the records concerning the Defendant's 1992 incident does not render the testimony of the victim of that incident inadmissible.

There are no Nevada opinions as directly on point as the Morowitz decision. However, the Nevada statutes and case law are consistent with the laws of Pennsylvania and Connecticut that the sealing statutes only seal records and not the independent memories of persons involved in the underlying events.

The Defendant relied upon NRS 179.255 when he petitioned to seal the records concerning his 1998 Henderson Justice Court case. NRS 179.285 explains the effect of NRS 179.255, and other similar sealing statutes. NRS 179.285(1)(a) indicates that:

> All proceedings recounted in the record are deemed never to have occurred, and the person to whom the order pertains may properly answer accordingly to any inquiry, without limitation, an inquiry relating to an application for employment, concerning the arrest, conviction, dismissal or acquittal and the events and proceedings relating to the arrest, conviction, dismissal or acquittal.

Hence, the plain language of these two statutes makes it clear that the only thing sealed by the statutes are the records concerning the proceedings related to the arrest, conviction, acquittal, or dismissal of the charges.

The order of the Henderson Justice which sealed the records concerning the 1998 incident states: IT IS HEREBY ORDERED that the following **records** of summons in lieu of arrest be sealed: Date of Summons: 1-28-99, Charge: Annoy a Minor, Henderson Justice Court Case #: 98MH0193X, Final Disposition: Dismissal of charge." 1AA 53 (emphasis added). The order then directed that a copy of the order be served upon the various agencies to "seal the **records** in its custody which relate to the matters contained in this Order." Id (emphasis added). Hence, the sealing order of the Henderson Justice Court only affected 'records.'

The Nevada Supreme Court addressed the question of whether a conviction which has been sealed can be the basis to reject an application for a license. Baliotis v. Clark County, 102 Nev. 568, 729 P.2d 1338 (1986). Baliotis had been convicted of one or more felonies

and after time passed he successfully petitioned to have the convictions sealed. Thereafter he applied for a private investigator license. The Las Vegas Metropolitan Police Department recommended against granting the license, in part because of his felony conviction. Baliotis commenced a suit in District Court seeking to stop the County Commission from considering his sealed felony conviction. The District Court rejected Baliotis' argument that his sealed felony conviction could not be considered by the police and by the Commission. Baliotis then appealed to the Nevada Supreme Court which affirmed the ruling of the District Court. In so doing, the Court noted that the legislative history for the sealing statutes indicates that the sealing statute was enacted to remove ex-convicts' criminal records from public scrutiny and to allow convicted persons to lawfully advise prospective employers that they have had no criminal arrests and convictions with respect to the sealed events. The Court stated:

> The statute was enacted to enhance employment and other opportunities for such formerly convicted persons. It was intended to remove the stigma associated with the conviction of a crime and to give those individuals another chance, so to speak, unencumbered by that stigma. **That statute does not, however, impose any duty on members of the public who are aware of the conviction to pretend that it does not exist.** In other words, the statute authorizes certain persons to misrepresent their own past. It does not make that representation true. [...] It is clear, however, that such authorized disavowals cannot erase history. **Nor can they force persons who are aware of an individual's criminal record to disregard independent facts known to them.**

Baliotis v. Clark County, 102 Nev. at 571 (emphasis added).

Mr. Zana alleges, without a specific pin citation, that this Court in Yllas v. Nevada 112 Nev. 863, 920 P.2d 1003 (1996), explained that Baliotis is only applicable in licensing cases. Appellant's Brief, pg. 26. This allegation is without merit. Appellant may be referring to the footnote on pg. 866 of the Yllas decision, however that footnote is simply a summary of the Baliotis decision and should not be read to limit Baliotis in anyway because that does not appear to be the intent of the footnote. The Yllas case was about the sealing of records concerning a felony conviction, whereas in this case Mr. Zana was not convicted in either of his previous two sealed cases. Such a distinction is legally insignificant. The fact remains that in the instant case no sealed records were used. In this case the State was not

attempting to ask about sealed records, it was introducing admissible previous bad acts via independent witnesses.

The Nevada Supreme Court also examined the effect of the sealing of records in the case of Nevada DMV v. Frangul, 110 Nev. 46, 867 P.2d 397 (1994). The Court cited to the legislative history of the sealing statutes and to the Baliotis opinion for the proposition that sealing orders can not "erase history." Frangul, 110 Nev. at 50. It is interesting to note that the Commonwealth of Pennsylvania has a similar decision to that of the Frangul opinion. In McLaughlin v. Pennsylvania DMV, 751 A.2d 714 (2000), the Pennsylvania court rejected a claim similar to that made by Frangul. The court reasoned that the expungement sealed only the records concerning the arrest and not the memories of those personally involved.

The law is abundantly clear that the purpose of the sealing, expungement, and erasure laws, both in Nevada and Pennsylvania, is to allow certain persons to lie about their past criminal histories so that they can proceed with their lives without the records of their histories impeding their rehabilitation, such as their ability to obtain work. The laws do not erase history or the independent memories of those who witnessed the events which were the basis of the sealed records.

Therefore, the Court should reject Mr. Zana's argument that the expungement of the Pennsylvania records or the sealing of the Henderson Township Justice Court records prohibited the earlier victims from testifying at trial. The Butler and Morowitz opinions suggest that the proper approach is to allow witnesses to testify concerning the underlying facts but prohibit any mention of the charges, prosecution, or court hearings, due to the sealing and expungement orders. That was the approach taken in this case.

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II

MR. ZANA IS NOT ENTITLED TO A NEW TRIAL BASED UPON THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS

NRS 48.045(2) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-1065 (1997).

Ultimately, the decision to admit or exclude evidence lies within the discretion of the court. And such a decision will not be reversed absent manifest error. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992); Halbower v. State 93 Nev. 212, 562 P.2d 485 (1977). The decision to admit or exclude evidence of separate and independent offenses rests within the sound discretion of the trial court, and will not be disturbed unless it is manifestly wrong. Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983).

On June 27, 2006, the State filed a Motion to Admit Evidence of Other Crimes. 1AA 70. 3AA 644-660. On July 18, 2006, Mr. Zana filed an Opposition. 1AA 10. The court heard oral arguments on July 25, 2006. 3AA 644. On February 9, 2007, a Petrocelli Hearing was held. On March 1, 2007, the court ruled that the Pennsylvania Incident involving Christina Butler and the Henderson incident involving Jillian Lozano both met the Tinch v. State requirements and would be allowed in at trial. (2AA 235).

It should also be noted that a third prior bad act was held inadmissible by the District Court. The State sought to introduce evidence from the 'Video Camera Incident' but was denied. Another teacher at Kesterson Elementary, Ms. Alina Deitch, had by chance discovered that Mr. Zana had been secretly video taping his classroom. 1AA 74. This

evidence matched perfectly with the State's theory that the Defendant would have kept 'trophies' of his victims.[1] The denial of the State's motion to admit evidence regarding the 'Video Tape Incident' shows that the District Court carefully evaluated the prior bad act evidence that would be allowed in at trial.

A. The Evidence Regarding Prior Bad Acts Was Not Offered to Prove the Character of the Defendant.

In the instant case, as outlined *supra*, the Defendant committed numerous sexual acts against multiple very young female students. All of the acts alleged to have been committed took place in the Defendant's classroom. In each case, the Defendant developed a relationship as a teacher with each child and used his position of influence and the physical set up of his classroom to commit these lewd acts against his students. The charged lewd acts consisted of Mr. Zana fondling the breasts of some girls and encouraging other girls to reach into his pocket during which they touched and/or came close to his genitals. The 'other act' evidence admitted was strikingly similar to the charged acts.

During trial, the defense argued that the victims made up their molestation allegations due to media coverage of Mr. Zana's arrest. The defense argued that the girl victims joined a witch hunt against Mr. Zana. Additionally, the defense insinuated that the only touching of students by Mr. Zana was innocent, routine contact that any teacher would have with students.

The testimony from the Pennsylvania victim and the Henderson victim were relevant and admissible to show Mr. Zana's motive and that the touching in the instant case was not innocent and was not a mistake or accidental touching. The Defendant's actions in these previous cases as well as in the instant case were motivated by a desire for sexual gratification. The State proved that the Defendant's touching was sexually motivated and

[1] It is likely that Mr. Zana set up the secret video camera because he became sexually aroused when he touched his 5th grade students' breasts and when his students touched his penis, and he wanted to relive the moments again at a later date for his own sexual gratification.

not as a result of a mistake or accident. The direct, blatant manner in which the Defendant fondled the breast of the girl in Pennsylvania was highly probative of the issues in this case.

The Pennsylvania and earlier Henderson incidents were also extremely relevant concerning Mr. Zana's claim that the charges were caused by media coverage of his arrest. The two 'other acts' took place long before any media coverage of the instant case. The 'other act' victims did not know or have any connection with the charged victim in this case. Hence, it was extremely relevant that Mr. Zana fondled the breast of a 13 year old girl in Pennsylvania and enticed a first grader to touch his genitals while taking candy from his pocket; the very same allegations made by the victims in this case.

B. The Pennsylvania Incident – 1992

The court admitted the prior alleged bad act of Mr. Zana concerning the 1992 Pennsylvania incident. At trial, the victim, Ms. Christina Butler, testified that Mr. Zana, when he was 25 and she was 13, had held her down on his bed, reached his hand under her shirt, and groped her breast. 6AA 1107. She also testified that these acts occurred in front of her boyfriend Buddy. Id. Those facts came out on direct examination and on cross examination Mr. Zana's attorney asked Ms. Butler if Buddy was prepared to testify in Mr. Zana's defense at the courthouse. 6AA 1124.

During cross-examination of Christina Butler, Mr. Zana's attorney, Mr. Pitaro, opened the door to questions about witnesses at the Pennsylvania courtroom proceeding when he specifically asked Ms. Butler about who was going to testify on Mr. Zana's behalf. Id. Specifically, Mr. Pitaro asked:

Q: You're aware that Buddy was interviewed by the police, right?

A: Yes.

Q: And you're aware that Buddy actually came down as a witness for Mark Zana, aren't you?

A: No

Q: You've never spoken to Buddy again?

A: No, I never did.

Q: But you're aware you went down and talked to the police?

A: I know Buddy went and talked to the police, yes.

Q: Any you know he didn't come down with you?

A: He wasn't in the same room with us.

6AA 1124 (emphasis added). This was an entirely new line of questioning because the State did not ask any questions during direct examination related to other witnesses from the Pennsylvania case. In fact, the State ended their line of questioning well before the point in time when the criminal proceedings began against Mr. Zana. 6AA 1112. By opening the door with questions about witnesses at the criminal proceedings in the Pennsylvania case, Mr. Zana opened the door to follow up questions about the witnesses on re-direct.

The State's follow up questions were extremely limited because every effort was taken to respect the District Court's ruling regarding the Expunged records. On re-direct, the State briefly revisited Mr. Pitaro's line of questioning by asking:

Q: Mr. Pitaro asked you about Buddy going somewhere as a witness for Mr. Zana. Do you remember that question that you were asked?

A: Yes.

Q: You said that he wasn't in the room with you, is that correct?

A: That's correct.

Q: Where was that at?

A: At the courthouse.

Q: And were there any other young ladies in the room with you that day?

A: There were three that I knew.

[...]

Q: What were the age of those people?

A: Thirteen, twelve, and ten.

6AA 1126-27. The questions by the State were very limited and clearly the State abided by any restrictions placed upon it by the trial court in response to any objections the Defense may have made. Since the defendant asked her who *was not* there with her, it was proper for

the court to allow her to testify to who *was* with her. Furthermore, the questions were so general in nature that the jury would not have known that the other girls were also Mr. Zana's victims. The three girls could have been friends or family members of Ms. Butler that were there to support her. Mr. Zana could not be harmed by such general statements.

C. The Prior Bad Acts Were Not Remote in Time

Mr. Zana's lewd acts against young girls were constant, steady and were not remote in time. In 1992 multiple witnesses in Pennsylvania were willing to testify to his lewd acts against them. Six years later, in 1998, the Defendant committed a lewd act against Jillian Lozano. 6AA 1135. The first charged lewd act in the instant case was against Lauren Judd and that occurred during the 2000-2001 school year. Another occurred in the Summer of 2001, another during the 2001-2002 school year, two lewd acts occurred during the 2002-2003 school year, and four lewd acts occurred during the 2003-2004 school year.[2]

Although Mr. Zana's previous bad acts occurred in 1992 and 1998, the passage of time did not render these highly probative similar bad acts irrelevant. See Braunstein v. State, 118 Nev. 68, 73, 40 P.3d 413 at 417 (2002)("This court has generally held inadmissible prior acts that are remote in time and involve conduct different from the charged conduct. In this case the previous bad acts were nearly identical to the current alleged crimes. In Findley v. State, this Court said that "[a]lthough the other acts of molestation [that occurred nine years earlier] were remote in point of time, and may for that reason impeach credibility to some degree, it does not destroy admissibility." Findley v. State, 94 Nev. 212, 214-15, 577 P.2d 867, 868 (1978), overruled on other grounds Braunstein, 118 Nev. 68, 40 P.3d 413. In Bolin v. State, this Court found that there were sufficient similarities between the defendant's 1975 rape and kidnapping convictions and the victim's 1995 murder to warrant admission of the defendant's prior convictions for the limited purpose of establishing identity under NRS 48.045(2). Bolin v. State 114 Nev. 503, 960 P.2d 784 (1998) abrogated on other grounds by Richmond v. State, 118 Nev. 924, 937, 59 P.3d 1249, 1258 (2002).

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[2] Most of the witnesses testified that inappropriate touching was a regular occurrence in the classroom, so it is highly likely that there are many more victims who did not come forward.

On similar questions on the admissibility of prior bad act evidence, Nevada statutes and case law holds that convictions under ten years old are relevant. See NRS 50.095(1) (convictions used as impeachment evidence); Foster v. State, 116 Nev. 1088, 13 P.3d 61 (2000) (Defendant's conviction, eight years earlier, for possession of marijuana was not too remote in time to be relevant in a later prosecution for possession of crack cocaine). While this Court has considered six- and ten-year-old threats of harm against a victim as too remote in time to be relevant to the defendant's intent, that the defendant's past conduct in the instant case occurred in 1992 and 1998 does not lessen the likelihood that the defendant's criminal conduct was motivated by an sexual attraction to the young girls he encountered because of his teaching and coaching positions. See Walker v. State, 116 Nev. 442, 447, 997 P.2d 803, 806-07 (2000).

Even if the District Court had ruled that the prior bad acts were not admissible, the Defendant would have opened the door to their admission because of the theory of his case. The Defendant cross examined the witnesses extensively on the media coverage of the case and argued that the witness's allegations were a result of negative media coverage of Mr. Zana. The prior bad acts were relevant and probative to prove that these current allegations were not fabrications.

D. Ledbetter v. State of Nevada is Applicable because the Facts of the Instant Case are Nearly Identical and Highly Probative of Mr. Zana's Motive When He Touched His Young Female Students.

On March 16, 2006, the Nevada Supreme Court filed an opinion in Ledbetter v. State, 129 P.3d 671, 129 P.3d 671 (2006). The court affirmed the conviction of the defendant John Ledbetter for 14 counts of sexual assault on a minor under 14 years old and 12 counts of sexual assault on a minor under 16 years old. In its decision the Court affirmed the trial courts admission of prior bad acts under the motive exception of NRS 48.045(2).

> Evidence of separate acts of pedophilia or other forms of sexual aberration are not character evidence, but are admissible for the "other purpose" [under NRS 48.045(2)] of explaining why a crime of sexual deviance was committed. The mental aberration that leads a person to commit a sexual assault upon a minor child, not proving a legal excuse to criminal liability, does explain why the event was perpetrated.

Ledbetter, At 677

The court further ruled with regard to the motive exception: it therefore remains the law in Nevada that "whatever might 'motivate' one to commit a criminal act is legally admissible to prove 'motive' under NRS 48.045(2)," so long as the three-factor test for admissibility is satisfied[3]. Ledbetter, At 678.

> The probative value of explaining to the jury what motivated Ledbetter, an adult man who was in a position to care for and protect his young stepdaughter L.R. from harm, to instead repeatedly sexually abuse her over so many years was very high. The evidence of Ledbetter's prior acts of sexual abuse of T.B. and J.M. showed Ledbetter's sexual attraction to and obsession with the young female members of his family, which explained to the jury his motive to sexually assault L.R.

Ledbetter. at 679.

Just like the Ledbetter case, the probative value of explaining to the jury what motivated the Defendant, an adult male who was in a position to care for and teach each one of the students, to have his female students touch him and him touch them is very high. The prior Pennsylvania incident and the Henderson incident show the Defendant's sexual attraction to young females, and, thus, the Defendant's motive for committing the aforementioned crimes.

The Defendant has asserted that the admission of the other act evidence has unfairly prejudiced him. As the Court noted in Ledbetter, *supra*, the use of such other act evidence in an otherwise relatively weak case has a heightened likelihood of unfair prejudice. However, the concerns of unfair prejudice did not exist in Ledbetter because even without the other act evidence the remaining direct and circumstantial evidence overwhelmingly supported the convictions. Similarly, there is strong evidence against the Defendant even without the other act evidence. A weak case is not being bolstered by the admission of other act evidence. Thus, the risk of unfair prejudice does not substantially outweigh the probative value of the other act evidence concerning the issues of motive and absence of mistake or accident.

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[3] Richmond v. State, 118 Nev. 924, 937, 59 P.3d 1249, 1258 (2002); see also id. At 942-43, 59 P.3d at 1260-61 (Shearing, J., concurring in part and dissenting in part); Rosky, 121 Nev. at 196-97, 111 P.3d at 698-99. In Rosky, the defendant was convicted of sexual assault and indecent exposure, both of which involved a minor. Id. At ----, 111 P.3d at 697-99.

Mr. Zana alleges that Ledbetter was decided only on its own narrow facts. Appellant's Brief, page 32. Mr. Zana also alleges that the facts of Ledbetter are different from the instant case because "Ledbetter dealt with constant abuse of a similar nature which took place over the span of several years." Appellant's Brief pg. 33. However, in the instant case the sexual abuse from each prior bad act was highly similar to the charged crimes. In each prior bad act Mr. Zana was in a position of authority, each involved young girls that said they were touched in ways that were very similar to the charged crimes, and each bad act was committed in front of another child.[4] These prior bad acts show Mr. Zana's motivation to commit a crime of sexual deviance, were properly admitted, and served to rebut the Defendant's claim that the allegations were a result of negative media coverage of Mr. Zana.

III

MS. MARCHOVECCHIO'S POOL PARTY TESTIMONY WAS NOT AN IMPLIED PREJUDICIAL BAD ACT

Melissa Marchovecchio was in Mr. Zana's fifth grade class. She later moved to Colorado with her family and in 2005 they contacted the police and reported that Mr. Zana had touched Melissa inappropriately on two occasions.

Mr. Zana's brief misstates Ms. Marchovecchio testimony. Appellant's Brief says that "Over the defense objection, the court permitted the witness to state the class party was odd because Mr. Zana was the only adult **present** with the other children." Appellant's Brief pg. 34 (emphasis added). In fact, Ms. Marchovecchio stated at trial that Mr. Zana was the only adult **in the pool** with the children. On cross examination Ms. Marchovecchio further states that there were other adults that attended the pool party, but none of these other adults were in the pool. 6AA 1226. During direct examination, Ms. Marchovecchio testified to observations she made when she arrived at the pool party to pick up her child. 6AA 1223-25.

[4] It is likely that Mr. Zana hoped that by committing the crimes in front of others it would lead the victims to think that the touching was appropriate.

The Defendant objected based upon relevancy. The District Court overruled the objection and permitted the witness to answer the question. The witness was properly permitted to testify concerning her observations as to how the Defendant interacted with the students.[5] Mrs. Marcovecchio's testimony was equally relevant to assist the jury in understanding Mr. Zana's relationship and interaction with his students. It is also important to note that Mr. Zana called as a witness Mr. Dano, the person who hosted the pool party in question. Mr. Dano testified that in his opinion there was nothing wrong with Mr. Zana's behavior at the pool party. In short, the District Court properly permitted the relevant testimony of both Mrs. Marcovecchio and Mr. Dano.

The decision to admit or exclude evidence, after balancing the prejudice to the defendant with the probative value, is within the discretion of the trial judge. Halbower v. State, 93 Nev. 212, 215, 562 P.2d 485, 486-87 (1977); see also, NRS 48.035. The trial court's determination will not be reversed absent manifest error. Lucas v. State, 96 Nev. 428, 431-32, 610 P.2d 727, 730 (1980).

Since Defendant lost the relevancy argument at trial, on appeal he has a new argument different from his trial objection: that the incident was a prior bad act that should have been considered at a Petrocelli hearing.[6] Appellant's Brief pg. 35. However, this argument is without merit. Mr. Zana has waived this argument by not objecting to it at trial. Failure to object at trial precludes appellate consideration. Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 814 (1977). As such, Defendant is not entitled to relief.

The incident in question was not a prior bad act. Mr. Zana committed no crime by being the only adult to swim with the kids at the pool party. The event was merely used to elucidate the entirety of the circumstances surrounding the crime and evidence Defendant's state of mind and relationship with his students. Since no bad act took place, no Petrocelli

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[5] Throughout the trial there was much testimony concerning the Defendant as a teacher. Both sides asked questions as to how Mr. Zana ran his classroom and how he interacted with students.

[6] In fact, this evidence was highly relevant because the Pennsylvania lewdness charge involved a pool as well.

Hearing was required. Accordingly, Defendant is not entitled to the relief sought. Furthermore, this objection was waived since it was not made at trial.

IV

THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE OF ALLEGED JUROR MISCONDUCT.

"Not every instance of juror misconduct requires the granting of a motion for a new trial. 'Each case must turn upon its own facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting.' The district court is vested with broad discretion in resolving allegations of juror misconduct." Meyer v. State, 119 Nev. 554, 562, 80 P.3d 447 (2003), citing, Tanksely v. State, 113 Nev. 997, 1003 P.2d 148 (1997).

In order to warrant a new trial due to jury misconduct a defendant must establish by admissible evidence the occurrence of juror misconduct and prejudice. In very egregious cases of misconduct, such as jury tampering, there is a conclusive presumption of prejudice. The Nevada Supreme Court rejected the proposition that all forms of extrinsic influence on a jury are automatically prejudicial. Meyer, 119 Nev. at 564. The Court explained, '...other types of extrinsic material, such as media reports, including television stories, or newspaper articles, generally do not raise a presumption of prejudice. Jurors' exposure to extraneous information via independent research or improper experiment is likewise unlikely to raise a presumption of prejudice. In these cases, the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." Meyer, 119 Nev. at 456.

The factors to be considered when determining whether prejudice has occurred include: how the information was introduced; the length of time it was discussed by the jury; the timing of the introduction; whether the information was ambiguous, vague, or specific; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence such as other bad acts of the Defendant. Meyer, 119 Nev. 565-566.

This Court noted that while jurors are confined to the evidence and facts elicited during trial, jurors may rely upon their common sense and experience. Meyer, 119 Nev. at 568. However, the two allegations of misconduct raised in Meyer pertained to issues which were more akin to expert testimony than everyday, common sense experiences which jurors bring to a trial. This court acknowledged there was no Nevada authority addressing that issue, thus this court examined the authority of several other jurisdictions and adopted the rule from the New Mexico Supreme Court, that: "a juror who has specialized knowledge or expertise may convey their opinion based upon such knowledge to fellow jurors. The opinion, even if based upon information not admitted into evidence, is not extrinsic evidence and does not constitute juror misconduct. However, a juror is still prohibited from relating specific information from an outside source, such as quoting from a treatise, textbook, research results, etc." Meyer, 119 Nev. at 570-571.

The Supreme Court then applied that rule to both of the allegations of misconduct raised by Defendant Meyer. This court found that the nurse juror's comments regarding the scalp burns did not constitute the introduction of extrinsic evidence from an outside source because she had not relied upon any texts, treatises, or other outside sources when she conveyed her information to the jury. Hence, the actions of the nurse juror explaining her opinion about the scalp bumps did not constitute misconduct. Regarding the second allegation of misconduct, concerning a juror researching the PDR and conveying her information to other juror, this court found that it did constitute misconduct since it brought outside information into the trial. This court noted that the jury's exposure to the information was brief and occurred at the beginning of deliberations. It was unknown how long the information was discussed. But, the information was relevant to a material issue in the case and tended to undermine defendant Meyer's position that the injuries on the victim were the result of the medication or falling and not the result of violence inflicted by Meyer. This court concluded that an objective reasonable jury could have been affected by that extraneous information and thus the introduction of the PDR information constituted misconduct and was prejudicial. Hence, Meyer was entitled to a new trial.

In the instant case, the District Court found one instance of juror misconduct but also found that it did not prejudice Mr. Zana. Appellant's Brief also mentions other allegations of juror misconduct that were found by the District Court to not have been juror misconduct. Each of those allegations must be reviewed separately.

A. The Juror's Internet Search And Sharing His Observations With Fellow Jurors Did Not Prejudice The Defendant.

Juror Thurman's act of sharing his information concerning internet pornography was biased in favor of the Defendant and not prejudiced against him. Juror Thurman surfed the internet and told the other jurors that he could not find the website from Dr. Hyman's courtroom exhibit. 3AA 496. He also told them that while he was looking for the site he saw other websites with legal aged women who actually looked younger than the girls in the charged images. 3AA 527. That information would have hurt the State's case and not prejudiced the Defendant.

This court must apply the factors set-forth in the Meyer case to determine whether juror misconduct was prejudicial. Juror Thurman's information was cumulative of the information offered by defense expert Hyman. The information was discussed for only a very short period of time. The information was introduced at the start of the morning deliberation session and the pornography charges were not considered until the last item in that session. The information was very general and vague and did not include reference to studies, resources, or research. And, the information did not address inadmissible issues such as other bad acts of Mr. Zana. In fact, the information corroborated the information already introduced by the defense during trial. This information would not have affected a reasonable, objective jury and instead would have merely caused a jury to apply the law to the evidence already admitted during the trial. That appears to be precisely what happened in this instance, as shown by the jury's mixed verdicts concerning the pornography charges. The jury appears to have thoughtfully examined each count and returned guilty verdicts only to the counts which they determined had been proven beyond a reasonable doubt.

The defense asserts that Juror Thurman may have lost credibility with other jurors after he disclosed his misconduct and he may have lost an advantage he otherwise would have had. Appellant's Brief pg. 43. That assertion should be rejected for a variety of reasons. First, the District Court had an opportunity to listen to and observe the demeanor of Juror Thurman during the October 8, 2007, evidentiary hearing. Juror Thurman appeared steadfast in his view that there is nothing wrong with pornography. In fact, during his testimony, without being asked he explained his usual pornographic viewing habits. 3AA 507-08. This testimony was given after he had been challenged by other jurors regarding the propriety of his actions and during a hearing in which it was readily apparent that the actions of the jurors were being scrutinized. Hence, it seems unlikely that the juror would have wilted during deliberations when the other juror questioned his actions. And second, the mixed verdicts concerning the pornography counts illustrates that Juror Thurman did not abandon his position and instead continued to advocate for the notion that the age of the children in some images had not been established beyond a reasonable doubt.

The defense also asserts that Juror Marques was so affected by the misconduct that she was unable to carry on with her normal life, thus, establishing the significance of the misconduct. Appellant's Brief pg. 44. In fact, Juror Marques explained her delay in reporting the incident in a different way. 3AA 492-94. First, despite Defendant's assertion, Juror Marquest never testified that she was unable to carry on with her normal life. Id. Second, she testified that the whole trial was traumatic, not the action of the one juror. Id. Third, she testified that at the time none of the other jurors seemed to think anything about it, which illustrates that the comments of Juror Thurman were actually insignificant when put into the context of the entire deliberation process. Id. And fourth, she indicated that when she called the court she was still unsure of whether the one juror's comments had been appropriate or inappropriate, which again illustrates the fact that the misconduct was insignificant. Id.

Hence, the District Court properly found that the internet information relayed by Juror Thurman to the jury, despite being juror misconduct, was not prejudicial. The Defendant has

failed to establish that he was prejudiced by the alleged misconduct. The Defendant received a fair trial and he was permitted to challenge all of the evidence which was offered against him. The alleged misconduct did nothing to undermine that process. In fact, the alleged misconduct tended to undermine the State's case rather than prejudice the Defendant. Thus, the District Court properly denied the Defendant's motion for a new trial.

B. The Information From Two Jurors That They Looked At Young People And Could Not Determine Their Ages Does Not Constitute Misconduct.

The comments made by two jurors regarding having looked at young people and not being able to determine their ages amounts to opinions based upon everyday, common sense experiences which jurors are allowed to convey to their fellow jurors. As stated in Meyer, jurors are permitted to rely upon their everyday, common sense experiences. In fact, jurors with specialized knowledge, such as a nurse, can even convey to their fellow jurors an opinion based upon their specialized knowledge as long as they do not relate specific information from an outside source, such as a treatise, textbook, or other research.) Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003). In the instant case, the comments by the two jurors are clearly the type of opinions that jurors are allowed to discuss with their fellow jurors during the deliberation process.

Moreover, in addition to the fact that the comments are not 'misconduct', the comments were also not prejudicial. The defense presented Dr. Hyman as a medical expert who indicated that there is no medical method to determine the chronological age of the children in pornography. 8AA 1607. The comments of the two jurors were consistent with, and cumulative of, Dr. Hyman's testimony. Hence, the comments of the jurors can not be said to have prejudiced the Defendant.

Therefore, the district court properly rejected the Defendant's claim that the jurors conduct constitutes misconduct which warrants the granting of a new trial. (3AA 640). The district court also properly found that the comments did not prejudice Mr. Zana. Id.

C. The Information From A Juror Concerning His Difficulty Removing Items From His Pants Was Not Misconduct And Was Not Prejudicial.

Juror Thurman testified that during the weekend between the Monday and Friday deliberation sessions he tried to remove items from his pockets while he wore pants. 3AA 496. He did this because he thought it was not as easy to remove the items as the victims had testified and he wanted to advocate for not guilty on the counts in which the victims said that activity had occurred. Id. He reported his opinion to his fellow jurors when they resumed deliberations on Monday. Most people already have experience removing items from pockets and have an understanding of the logistics involved in such a task. Hence, Juror Thurman did not offer an opinion to his fellow jurors regarding a novel subject. Therefore, the district court properly found that this did not constitute "juror misconduct" that warranted the granting of a new trial.

Additionally, there was absolutely no prejudice resulting from the conduct of Juror Thurman or his sharing of his opinion with his fellow jurors. Juror Thurman asserted his opinion that it was more difficult to remove items from a pocket than the victims claimed in order to advocate for his position of not guilty on those counts. An objective jury would not have been affected by that information and would not have been persuaded to convict a defendant based upon the information. If anything, the information constitutes a bias in favor of the defendant because the information undermined the State's charges which pertained to that activity.

As stated above, the jury in the instant case acquitted Defendant Zana of the counts pertaining to the girls reaching into his pockets during the reading groups. Hence, the District Court properly inferred that since the incident was not juror misconduct, it could not have prejudiced the jury. This information would not have affected a reasonable, objective jury since the record is already clear that Defendant Zana was not prejudiced by the juror sharing his opinion with the other jurors.

Hence, the District Court properly found that Juror Thurman's action of removing items from his pocket to refute the girls' testimony did not constitute misconduct. And, the

District Court properly found that Defendant Zana was not prejudiced by the sharing of the information with the jury.

V

THE EVIDENCE PRESENTED TO THE JURY WAS ADMISSIBLE PURSUANT TO NRS 51.385

On August 8th, 2007, outside of the presence of the jury, the court ruled that Jillian Lozano's mother and grandmother would be allowed to testify as to what Jillian said about reaching into Mr. Zana's pocket to get a Jolly Rancher. 6AA 1092-93. Jillian had said that "Mr. Zana told me to get the Jolly Rancher out of his pocket... but what was that squishy thing in his pocket?" (6AA 1163). Specifically, the court ruled that

> I read the transcript of the child's testimony and then I read the transcript of the adults as well. In looking at those, I don't see that there's any motive to make up any stuff. It seems – the statements seem consistent to me. And so I am finding with regards to those statements that at the time the child made to her mother and grandmother, that there are sufficient guarantees of trustworthiness, and those can be admitted under 51.385

6AA 1092-93. Mr. Zana alleges that Jillian's mother, Ms. Spence, should not have been allowed to testify because her testimony was "hearsay upon hearsay". Appellant's brief pg. 46. However, a careful reading of the transcript reveals that Ms. Spence's testimony was not hearsay upon hearsay. 6AA 1191. The State asked "And what did Jillian tell you happened?" Id.

Since Ms. Spence was testifying to exactly what Jillian told her, it was not hearsay within hearsay. At most, Defendant can only allege that it was plain hearsay. Ms. Spence then testified that her daughter had stated that she got to sit at Mr. Zana's desk and receive five pieces of candy from his pocket, but that she had to reach in his pocket to get them. Id. When Jillian reached into his pocket for the candy she felt Mr. Zana's penis. Id.

Ms. Spence's testimony was primarily focused on what her daughter had told her. Ms. Spence's testimony did briefly mention the conversation with her mother. Id. But that conversation was discussed simply to lay a foundation and not to offer hearsay testimony. That statement was admissible under the courts ruling. 6AA 1093.

The Appellant states that "In the instant case, the State was permitted to parade the mother and grandmother of one of Mr. Zana's alleged victim's to testify and recount Jill's story. Interesting enough, Jill had not yet testified at trial and there had been no attack on her motive at trial." Appellant's Brief, pg. 47. This statement is factually false. Appellant has confused two witnesses with similar first names. In fact, Jillian Lozano testified *before* her mother and grandmother at trial. 6AA 1129. On cross examination, the Defendant cross examined Jillian on inconsistent statements. 6AA 1141. Defendant also cross examined Jillian on her motive to lie. 6AA 1148. There is no confrontation clause issue since Jillian, the declarant of the statements to her mom and grandmother, testified and was cross examined.

NRS 51.385 is a statutory creation of an exception to the evidentiary "Hearsay" rule. It provides that the out of court statements of a child under 10 that describe sexual conduct are not inadmissible because they are hearsay. The District Court found Jillian's statements admissible under NRS 51.385. 6AA 1093.

> 1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child or any act of physical abuse of the child is admissible in a criminal proceeding regarding that act of sexual conduct or physical abuse if:
>
> (a) The court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and
>
> (b) The child testifies at the proceeding or is unavailable or unable to testify.

NRS 51.385(1)

In State v. Swan, 114 Wash.2d 613, 790 P.2d 610 (1990), the Supreme Court of Washington, sitting En Banc, found that the hearsay statements of a 3 year old child were properly admitted under a statute almost identical to Nevada's statute. The Supreme Court of Washington has listed seven factors to be applied in determining whether a child's out of court statements are reliable, many of which exist in the instant case. Id.

It would appear that courts are shifting away from the precise technical rules of evidence when dealing with children because at times, those rules often obscured rather than highlighted the truth.

For all of the above reasons, the testimony received from Jillian Lozano, Karen Bjornson, and Teresa Spense are admissible under NRS 51.385.

VI

THE COURT PROPERLY ALLOWED IMAGES FROM THE DEFENDANT'S COMPUTER TO BE ADMITTED. THE DISTRICT COURT'S DECISION NOT TO HOLD A FRANKS HEARING WAS PROPER

The search warrant application was made by Detective Rod Pena of the Henderson Police Department. 1AA 110-17. A search warrant was obtained on Detective Pena's application and during the execution of the warrant evidence was seized from the Defendant's residence. 7AA 1499. The investigation began when they were contacted by Melissa Marcovecchio, as outlined above.

The Ms. Marcovecchio advised that her fifth grade teacher was Mark Zana, the defendant. 1AA 99-100. She indicated that on two different occasions the Defendant reached into her shirt and touched her breasts. Id. The victim indicated that the Defendant reached into her shirt and touched her breast as she was standing behind another student. Id. The search warrant affidavit indicates that the other student was a girl. The Defendant takes issue with that and points out that the other student is identified as a boy in the victim's handwritten statement. The State does not dispute that the warrant application appears to be wrong; however, as will be explained below, said error does not amount to a material misrepresentation which undermines the probable cause for the search warrant.

The second incident occurred approximately one month after the first incident and took place in the classroom while other students were present. Id. The victim explained that the second incident occurred while she was leaning next to the Defendant's desk, reading a book. Id. The Defendant reached into her shirt and touched her breasts. Id. The warrant affidavit indicates that the victim's desk was next to the Defendant's desk and the Defendant

takes issue with the statement concerning the location of the victim's desk. Appellant's Brief p. 50. The location of the victim's desk is not material to the existence of probable cause within the search warrant application.

The Melissa Marcovecchio's mother also provided both a verbal and handwritten statement to the Broomfield police. 1AA 96-97. That information was passed along to the Henderson Police Department and was included in the search warrant application. The mother indicated a friend of her daughter first told the mother that her daughter had confided in the friend that the daughter had been touched by her fifth grade teacher. Id. The mother recalled that the Defendant had commented to her prior to her daughter's fifth grade year that he was looking forward to having her in his class again. Id. The warrant application indicates that the mother said that the Defendant had taught the victim in first grade. The application also indicates that the victim's mother told the police that the Defendant had used email to communicate with her daughter and that he used a digital camera to take photographs of students in the classroom. The statements in the warrant application concerning the Defendant teaching the victim in the first grade and the Defendant e-mailing the victim are not material to the existence of probable cause to believe that the Defendant committed the crimes of Lewdness with a Minor Under Fourteen and that evidence concerning the crimes may be found in the Defendant's residence.

The warrant application also indicates that other former students of the Defendant were interviewed. 1AA 110-17. Some of those students told the police that the Defendant communicated with them through email and by instant messaging, that the Defendant's computer screen name was Teacherman the 5th, and that the Defendant took digital photos of the students and that he sometimes printed out copies of the photos at his residence. One student specifically told the police that the Defendant favored female students and he rubs and touches them for encouragement while he does not do the same for boys.

The warrant application also indicated that the police had interviewed the Defendant. 1AA 110-17. The Defendant made no admissions of sexual abuse but he did admit to taking photos of his students for the yearbook and to creating DVD's to give his students as

memorabilia. 1AA 103-108. The Defendant admitted to conversing with former students on the internet. Id. The Defendant informed the police of a prior allegation of fondling by a student but that the case had been dismissed. Id. The Defendant admitted to visiting an adult porn site but denied looking at any sites which pertained to children. Id.

Lastly, the affiant explained to the signing judge that he knew, based upon his training and experience, that sexual predators are known to keep "trophies" of the crimes and that the Defendant may have kept such trophies of his juvenile victims. 1AA 114.

A. The Search Warrant Application Contained A Substantial Basis For The Magistrate To Have Found Probable Cause And The Leon Good Faith Exception Is Applicable.

"It is a well established principle that the party seeking to impeach a search warrant has the burden of establishing the matters complained of and that, if the warrant is regular on its face, it will be presumed that the magistrate properly discharged his duties in issuing it." One 1970 Chevrolet Motor Vehicle v. County of Nye, 90 Nev. 31, 33-34, 518 P.2d 38, 39 (1974). The Nevada Supreme Court has also declared that it will not "overturn a magistrate's finding of probable cause for a search warrant unless the evidence in its entirety provides no substantial basis for the magistrate's finding." Garrettson v. State, 114 Nev. 1064, 1068-1069, 967 P.2d 428, 431 (1998).

In the case of Doyle v. State, the Nevada Supreme Court clearly stated:

> Further, the issuing judge's determination of probable cause should be given great deference by a reviewing court. *Id.* at 236, 103 S.Ct. 2317. " 'A grudging or negative attitude by reviewing courts toward warrant,' is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant: 'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.' " *Id.* (alterations in original) (internal citation omitted) (quoting United States v. Ventresca, 380 U.S. 102, 108-09, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)). The duty of a reviewing court is simply to determine whether there is a substantial basis for concluding that probable cause existed. *Id.* at 238-39, 103 S.Ct. 2317; Keesee, 110 Nev. At 1002, 879 P.2d at 67. Doyle v. State, 116 Nev. 148, 995 P.2d 465 (2000), citing Illinois v. Gates, 462 U.S. at 233, 103 S.Ct. 2317 (1983).

On Thursday, March 1, 2007, the District Court ruled on the Defendant's Motion to Quash Warrant and Suppress Evidence and found that there was a substantial basis for issuing this warrant and that it was not so lacking in probable cause that the detectives couldn't rely on

it. 2AA 242. The court also found that there was clear and probable cause and that the warrant is valid. Id.

In the instant matter, the police requested a warrant to search the Defendant's residence for evidence which tended to establish that the crime of Lewdness with a Child Under the Age of Fourteen had occurred. 1AA 110-17. The warrant application clearly set-forth facts which tended to show that the Defendant committed two different acts of lewdness upon one of his female students. Id. The victim's mother, other students, and the Defendant himself indicated that the Defendant was known to take digital photos of students and that on occasion he communicated with students on the internet. The warrant further explained that the affiant knew, based upon his training and experience, sexual predators commonly keep "trophies" of their experiences and hence the Defendant may have kept such "trophies" of the victim or other victims. 1AA 114. The Nevada Supreme Court has held that judges may rely upon the training and experience of affiant law enforcement officers in determining probable cause. Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005), citing, United States v. Gil, 58 F.3d 1414, 1418 (9th Cir. 1995). The warrant application, when read in its entirety, clearly supports the conclusion that the magistrate had a substantial basis to issue a warrant to search the Defendant's residence for evidence of the crime of Lewdness with a Minor Under the Age of Fourteen. 1AA 110-17. The warrant properly authorized the police to search for all records and materials that might contain notations or markings describing sexual acts or fantasies or the dates of meetings between the Defendant and the juveniles, all computer equipment capable of storing documents and materials in electronic format; all camera and video equipment, and articles to show the identity of persons in control of the premises. Id.

In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), the United States Supreme Court conducted a detailed analysis of the underlying reasons for the suppression of evidence as a remedy to Fourth Amendment violations. The underlying reason for suppression of evidence is to deter police misconduct. Evidence is not suppressed in order to

deter or punish the errors of judges or magistrates. In fact, the Court rejected the notion that judges or magistrates would be deterred through the suppression of evidence. Id.

The Defendant has not attacked the magistrate for having abandoned his judicial role nor has he claimed the description of the place to be searched was lacking. Hence, two of the four exceptions to the Leon good faith analysis are completely inapplicable to the instant case. The Defendant has asserted that the affiant intentionally or recklessly misled the magistrate by including falsehoods in the search warrant application. The proper analysis for this reviewing court to determine whether any errors in the application were material is set-forth below. None of the errors in the application pertained directly to the probable cause for the warrant and when the errors are set-aside from the application there was still a substantial basis for the magistrate to have issued the warrant. Thus, there were not any egregious material misrepresentations in the application.

The final reason why a reviewing court should not apply the Leon good faith exception is where a warrant was based upon an affidavit that was so lacking in probable cause as to render official belief in the existence of probable cause entirely unreasonable. Clearly, that is not the case with the warrant application in the instant case. The warrant application set-forth the facts supporting the belief that the Defendant had committed different acts of Lewdness With a Minor under Fourteen and reasons why it was reasonable to believe that evidence concerning those crimes would be found at his residence. 1AA 110-17.

This Court should find that a substantial basis did in fact exist for the magistrate to issue the warrant. The Court should further find that the Leon good faith doctrine applies to the instant case. For both of those reasons the District Court properly denied the Defendant's request to suppress evidence.

B. The Defendant Was Not Entitled To An Evidentiary Hearing And There Were Not Material Misrepresentations Of Fact In The Warrant Application

The Defendant asserts that the affiant intentionally or recklessly included material falsehoods in the search warrant application. Appellant's Brief pg. 54-55. The Defendant

asserts that he was entitled to a Franks hearing. Id. The Defendant was not entitled to an evidentiary hearing because he had not made the requisite preliminary showing of bad faith to warrant holding an evidentiary hearing.

The Defendant has combed through the search warrant affidavit in an attempt to find factual errors and he then claims that the alleged errors show bad faith on behalf of the affiant. The State will address the alleged factual errors below. However, it is important to understand that even if errors exist within the warrant application the law is clear that "[a] Franks hearing is not required if the alleged falsehood in an affidavit supporting a search warrant is not necessary to the finding of probable cause." Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990). The Nevada Supreme Court's holding is based upon the Supreme Court of the United States opinion in the Franks v. Delaware, 439 U.S. 154, 98 S.Ct. 2674 (1978), which explains: "finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is require." Franks v. Delaware, 439 U.S. at 171-172. See also, Doyle v. State, 116 Nev. 148, 159, 995 P.2d 465 (2000).

The Defendant asserts that there are five material falsehoods within the warrant application. Appellant's Brief, pg. 47-56. None of the factual misstatements alleged by the Defendant were material to the existence of probable cause to believe that evidence for the crime of Lewdness with a Minor Under the Age of Fourteen would be found in his residence. None of the errors undermine the existence of probable cause. Assuming the Court strikes the alleged errors from the warrant application a substantial basis still exists for the issuing magistrate to have authorized the warrant. 1AA 162: See "Exhibit A" the search warrant application with the questioned statements redacted or changed (asterisks in the right margin mark where the redactions have been made).

The Defendant points out that the affiant erred when he stated that the Defendant previously taught the alleged victim in first grade and that he told her mother prior to fifth grade that he was looking forward to having her again in fifth grade. Whether or not the

Defendant taught the victim in first grade was entirely irrelevant to the existence of probable cause concerning the Defendant having molested the victim when she was in his fifth grade class. Should the Court strike this mention of first grade from the warrant application, probable cause for the warrant still exists since that fact is not material. Additionally, it is important to note that the affiant's error does not constitute bad faith. The handwritten statement from the victim's mother stated, "When Melissa was in 1st grade, Mr. Zana taught 1st grade as well. Melissa was not in his class, but when he moved to 5th grade Mr. Zana would comment on how he was looking forward to having Melissa in his class." Thus, although the affiant erred by stating that Melissa had been in the Defendant's first grade class, there was a basis for the general statement that the affiant was making, namely, that the Defendant had previously taught first grade and sometime prior to fifth grade he had commented that he was looking forward to having Melissa in his class.

The Defendant also points to the affiant's assertion that "In the aforementioned statements Anne stated that Zana has used e-mail to communicate with Melissa and that he had used a digital camera to take photographs of students in class." The Defendant correctly points out that the mother's statements do not claim that the Defendant e-mailed with her daughter, although she did indicate that the Defendant took photos of the children. However, if the Court should strike the phrase "Zana has used e-mail to communicate with Melissa" from the warrant application it does not undermine probable cause

The Defendant also claims the officer acted in bad faith by stating that the student in the room with Zana and Melissa during the first of the two incidents was a girl rather than a boy. Appellant's Brief p. 54-55. The Defendant suggests that the affiant intentionally called the second student a girl in an effort to show that the Defendant was in the habit of only having females in his classroom after school. Id. The warrant application contains the specific statement, "One of the female juveniles interviewed informed Pena that Zana favors female students, that he pays more attention to them and rubs their backs and such for encouragement. The female stated that she never saw Zana do that with the male students."

In light of this statement, it was not necessary for the affiant to subtly make that implication by saying a girl was in the classroom with Zana and the victim.

The Defendant also asserts that the affiant lied by stating that Melissa's desk was next to the Defendant's desk. Appellant's Brief p. 55. Should the Court strike that phrase from the application probable cause still exists to think that while the victim leaned next to the Defendant's desk, irregardless of where her own desk was positioned, he reached into her shirt and touched her breast.

Lastly, the Defendant claims that the affiant made an intentional falsehood by asserting that the Defendant had acknowledged viewing several adult pornography sites when in fact the Defendant had only acknowledged on occasion viewing one such site. Appellant's Brief p. 55. It is important to note that the affiant informed the signing judge that the Defendant denied having visited any pornography sites which pertained to children. Hence, the portion of the warrant application which addressed the Defendant's admission concerning viewing adult pornography and his denial of viewing child pornography was accurately set-forth for the signing judge.

The errors pointed out by the Defendant pertained to immaterial matters which were not essential to probable cause. Hence, once those errors are set aside there is still a substantial basis for which the signed judge should have issued the warrant.

In the instant case, a former student of the Defendant provided information that she had twice been molested by the Defendant. Several people, including the Defendant, provided information that the Defendant used his computer to communicate with students and for processing digital photographs of students. And, the affiant advised the magistrate that sexual predators are known to keep 'trophies' of their crimes and that it was possible that the Defendant had kept such trophies of his victim.[7] The totality of that information constitutes a substantial basis for the magistrate to have issued the warrant. The Defendant

[7] In fact, such 'trophies' were found on the Defendant's computer. Mr. Zana's computer contained images of a disturbing nature that were not admitted at trial, including close up photographs of a young child's chest and another one of a child's crotch. Another photograph of a young child was found, and the photograph had been digitally altered to add developed breasts.

was not entitled to a Franks hearing because he had not established any intentional or reckless falsehoods which, when set aside, undermined the existence of probable cause in the warrant application.

Therefore, the District Court properly denied the motion to suppress. This Court should encourage police officers to seek judicial review of probable cause prior to searching residences, as the affiant did in the instant case.

VII

THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION ON THE EVE OF TRIAL TO SEVER THE PORNOGRAPHY COUNTS FROM THE SEXUAL MISCONDUCT COUNTS

Appellant's Brief at page 56 states that on August 6, 2007, the defense "formally moved" for severance between counts citing NRS 174.165. This claim is belied by the record. 4AA 676. In fact, moments before the prospective jurors were brought in for Voir Dire, the Defendant made an oral motion for severance for the first time and without a formal written motion. Id. The court admonished Mr. Pitaro for the timing of the motion when it said "It is a little bit of a dilemma also for the Court, Mr. Pitaro [...] that at 1:12 in the afternoon on the date of jury selection that you're now raising this issue." 4AA 679. The court accordingly denied Mr. Zana's motion to sever. 4AA 696.

The Defendant's motion was untimely. The instant case was presented to justice court over two years before the trial began. The lewdness charges and the pornography charges were both in the criminal complaint. The pornographic evidence was found during the investigation of the lewdness case. The pornographic evidence was deeply intertwined with the lewdness evidence.

NRS 173.115 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offense charged, whether felonies or misdemeanors or both, are:
>
> 1. Based on the same act or transaction; or
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The State charged Mr. Zana with Lewdness with a minor under the age of 14. To prove that charge the State had to show the state of mind of the Defendant when he touched the children, or caused the touching of the children. The pornographic evidence was highly probative of the Defendant's motive for touching his young female students.

The decision to sever is left to the discretion of the trial court. Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990). *See* Schaffer v. United States, 362 U.S. 511, 516, 80 S.Ct. 945, 948, (1960). The decision to join cases will not be reversed absent an abuse of discretion. Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976). Appellants have failed to carry the heavy burden of showing that the district court abused its discretion.

An error arising from joinder is subject to harmless error analysis and warrants reversal only if the error had "A substantial and injurious effect or influence in determining the jury's verdict. Robbins v. State, 106 Nev. 611, 619, 798 P.2d 558, 564 (1990). In the instant case, there is a strong correlation between the allegations of sexual assault and the possession of child pornography. Therefore, the District Court properly exercised it discretion by denying the Defendant's untimely motion.

VIII

THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO CONVICT MR. ZANA OF POSSESSION OF PORNOGRAPHY DEPICTING A CHILD UNDER SIXTEEN

In the instant case, there was sufficient evidence at trial to convict Mr. Zana of counts X through XXI. In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence.[8] Where conflicting testimony is presented, the jury determines what weight and credibility to give it.[9] This court must ask, "whether, after viewing the evidence in the light most favorable to the prosecution, *any*

[8] Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).
[9] Bolden v. State, 97 Nev. 71, 72, 624 P.2d 20, 20 (1981).

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[10] Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002).

In State v. Walker, 109 Nev. 683, 685 857 P.2d 1, 2 (1993), this Court delineated the proper standard of review to be utilized when analyzing a claim of insufficiency of evidence:

> Insufficiency of the evidence occurs where the prosecutor has not produced a minimum threshold of evidence upon which a conviction may be based. Therefore, even if the evidence presented at trial were believed by the jury, it would be insufficient to sustain a conviction, as it could not convince a reasonable and fair-minded jury of guilt beyond a reasonable doubt. Id.

Furthermore, the Nevada Supreme Court has ruled it will not reverse a verdict even if the verdict is contrary to the evidence where there is substantial evidence to support it. State v. Varga, 66 Nev. 102, 117, 205 P.2d 803, 810 (1949).

Moreover, this Court has specifically stated that "[c]ircumstantial evidence alone may sustain a conviction." McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992). The rationale behind this rule is that the trier of fact "may reasonably rely upon circumstantial evidence; to conclude otherwise would mean that a criminal could commit a secret murder, destroy the body of the victim, and escape punishment despite convincing circumstantial evidence against him or her." Williams v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

Before trial, the District Court ruled that the State needed to have an expert witness testify at trial regarding the age of the girls in the in the child pornography. 4AA 693.[11] Expert testimony generally is admissible to aid the jury when the subject matter is distinctly related to a science, skill or occupation which is beyond the knowledge or experience of an

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[10] Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) .

[11] This issue arose during argument on the Defendant's oral motion to sever the pornography charges from the molestation charges. The defense asserted that NRS 200.740 was not applicable to the instant case since it allows for various evidence that can be admitted to prove whether a person is a minor but that in this case the State must prove more than that the people in the pornographic images are minors, namely, that they are under sixteen years of age. In response to the Defendant's argument the District Court ruled that the State must call an expert witness. The State disagrees with that ruling and maintains that any legally admissible method should be allowable for proving that a person in an image is under sixteen. One method is to admit the images and allow the jury to make their own conclusion, without any expert testimony. When the children shown in pornographic images are of a very young age, as they were in some of the charged counts in this case, there is no need for expert testimony.

average lay person. NRS 50.275; Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 243, 955 P.2d 661 (1998). The State provided testimony from Dr. Zbiegien to assist the jury in their fact finding duties. Dr. Zbiegien was clearly qualified to offer an expert opinion and thus his testimony was properly admitted.

The State's expert witness did not produce a report before trial. The State was not provided a report from the defense's expert witness. 8AA 1570. The State did provide the Defendant with a copy of the witness's CV before trial. 8AA 1569. The State's expert, Dr. Michael Zbiegien, was highly qualified to render an expert opinion on the age of the girls in the child pornography. Dr. Zbiegien is the medical director of emergency services at Sunrise Children's Hospital. Dr. Zbiegien completed a three year Pediatrics residency at the University of Medicine and Dentistry at New Jersey in Camden, after which he completed a two year Pediatric Emergency Fellowship at Children's Hospital in Detroit, Michigan. 8AA 1572. Dr. Zbiegien is also the director of SCAN, or Suspected Child Abuse and Neglect Program at Sunrise Children's Hospital. Dr. Zbiegien helps instruct the Pediatric residents from the Nevada medical school as well as the medical students from the University of Nevada. 8AA 1573. During the course of Dr. Zbiegien's practice he routinely has occasion to view and be in a position to see young, minor children. 8AA 1574.

The Defendant incorrectly asserts that "This was the first time the doctor had testified in any case with this type of content." Appellant's Brief, pg. 60. This statement is clearly belied by the record because Dr. Zbiegien *has* testified in these types of cases before. Mr. Pitaro asked Dr. Zbiegien:

> Q: Then I take it that you've never come in and testified as to the age of an individual portrayed in an adult video clip or photo?
>
> A: I don't understand your question?
>
> Q: Well, I guess when you said you've never looked at these before, this was the first time you've seen a video clip such as these, is that correct?
>
> A: **No, I've testified in these kinds of cases before, sir.**

8AA 1596 (emphasis added). Furthermore, without citation, Defendant alleges that "The State's expert witness admitted the only real way to determine a person's age is by knowing their date of birth." Appellant's Brief, pg. 61. This is a mischaracterization of Dr. Zbiegien's testimony. The State can only assume that the Defendant is referring to the following questioning by Mr. Pitaro on cross examination of Dr. Zbiegien:

> Q: Now, when you were giving your opinion, you were not giving opinion as to chronological age, were you?
>
> A: No, sir.
>
> Q: You weren't saying that this person is a chronological age at all?
>
> A: I was giving an opinion that based on the age of the patient – or the people seen in the video. Yes, sir.
>
> Q: Okay. Is there any scientific study that you consulted before you came to Court that gave you what the range would be, so that you could render this opinion?
>
> A: No, sir. It was based on my experience.

8AA 1597. The State is not required to prove the chronological age of the children in the child pornography. The State is only required to prove that the children in the child pornography are under the age of 16. NRS 200.700, 200.730. The jury is given the role of deciding whether or not the child depicted in the child pornography is under the age of 16. The jury is not required to determine the chronological age of the child depicted in the child pornography. Dr. Zbiegien provided expert testimony that was based on his medical expertise and the jury properly considered it when making their determination. Dr. Zbiegien's testimony was fair and he even testified that he believed some images were not sharp enough for him to render an opinion as to the child's age. 8AA 1880. Dr. Zbiegien also testified that, in his opinion, a child depicted in one image was over the age of 16. AA 1583.

Clearly, if a 4 year old was visually presented in an image that depicted sexual conduct then the jury would be able to convict the Defendant under NRS 200.700 and

200.730. Similarly, here the jury was presented with images of a child clearly under the age of 16 and the jury properly convicted the Defendant for possession of those images. The images of child pornography and the testimony from the State's witness were more than sufficient to support the jury's findings.

IX

THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS COUNTS X THROUGH XXI

On the eve of trial, while the Defendant was making an oral motion for the first time to sever the child pornography charges from the lewdness charges, all parties realized for the first time that the wording of the Information was inaccurate. 4AA 684.

The State charged Mr. Zana under NRS 200.730 with Possession of visual presentation depicting sexual conduct of person under 16 years of age. On the State's original Information the State listed the charges as "Possession of visual presentation depicting sexual conduct of a child (Category B Felony – NRS 200.700, 200.730). At all points of the criminal proceeding, Defendant Zana was aware of exactly what statute he was being charged under and what the State would have to prove at trial.

In the instant case, the District Court granted the State's motion to amend the Information before trial. 4AA 693. (RA 12). The Defendant unsuccessfully moved to dismiss the mislabeled counts. 5AA 1087. The grant or denial of a motion to dismiss is reviewed on appeal for abuse of discretion. State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998). An information or indictment may be amended at anytime if no additional or different offense is charged and no substantial rights are prejudiced. NRS 173.095.

> 1. The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

NRS 173.095(1).

Pre-trial complaints about lack of notice can be remedied by the State and so the State should be given leave to amend. This is because there is no prejudice to the defendant in such a case. State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998). In this case, the

amendment did not prejudice the Defendant at all because the amendment actually made it harder for the State to prove its case. Instead of simply having to prove that a minor was depicted, after the amendment the State then had to prove that a person *under the age of 16* was depicted.

Indeed, amendments on a pre-trial basis are generally recognized as the appropriate remedy for lack of notice allegations. State v. District Court, 116, Nev. 374, 997 P.2d 126 (2000). This is especially true when the defense has had notice of the charges or theory of the case and only the specifics of the notice have been challenged. Shannon v. State, 105 Nev. 782, 783 P.2d 942 (1989)(amendment permitted to allege different facts in support of same charge). However, in this case the District Court actually made a finding that Mr. Zana was on notice of the elements of the charges against him. 4AA 685.

Based on a plain reading of the Counts contained in the information, and a reading of the transcripts from all of the hearings before the start of trial, a reasonable person of common understanding would have been fully aware of what the State needed to prove at the time of trial. In fact, the Defendant, through his attorneys, articulated the elements of the crime on several instances at the preliminary hearing. Mr. Zana's attorney mentioned that the State would have to prove that the image depicted a 16 year old on at least three separate occasions at the preliminary hearing. 1AA 189-90, 193.

Within the charging documents the State cited NRS 200.730 as the charge that Mr. Zana was facing. Therefore, the elements of the charge were in the charging document via reference to the statute. 200.730 states:

> "A person who knowingly and willfully has in his possession for any purpose any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating, or assisting others to engage in or simulate, sexual conduct."

Defendant's reliance on State v. Handcock, 114 Nev. 161, 955 P.2d 183 (1998) is wholly misplaced. Hancock involved a deficiency in the charging document that impermissibly allowed the State to change its theory of prosecution or allege that the defendants in that case had used different means to accomplish their respective offenses. Id. In contrast, the State's

theory of prosecution in this case has remained consistent from Information through conviction. As such, Hancock has no application to the current facts. The appropriate remedy was to permit the State to amend the Information, not to dismiss the charges as the Defendant alleges.

X

THE DISTRICT COURT PROPERLY ALLOWED ADMISSIBLE TESTIMONY INTO EVIDENCE

Defendant alleges that multiple hearsay violations occurred at trial. However, Defendant's contentions are without merit.

Hearsay is an out-of-court statement offered at trial to prove the truth of the matter asserted, and is inadmissible unless it falls within one of the recognized exceptions to the hearsay exclusionary rule. NRS 51.035, 51.065. In addition, in a criminal trial, the statement of a non-testifying hearsay declarant is only admissible under the Confrontation Clause if it bears adequate "indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 66-67, 100 S.Ct. 2531, 2539-40 (1980)(overruled on other grounds).

Both hearsay and Confrontation Clause errors are subject to harmless error analysis. See Power v. State, 102 Nev. 381, 382, 724 P.2d 211, 213 (1986) (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, (1967)) (Confrontation Clause); Deutscher v. State, 95 Nev. 669, 683, 601 P.2d 407, 418 (1979) (hearsay).

A. Ms. Jill Lattuca's Alleged Hearsay Statements

Defendant alleges that the State introduced two of Ms. Lattuca's out of court statements which constituted impermissible hearsay. However, Defendant's contentions fail. Defendant first complains that the district court erred in allowing Ms. Lattuca's statement describing a conversation with her daughter wherein her daughter was describing what other students said regarding Mr. Zana. This statement was not objected to at trial and therefore Mr. Zana is precluded from appellate consideration on this issue. The alleged hearsay statement was:

Ms. Lattuca: She told me in the car the detective had talked to her during school, and called her in, and that some of the kids, were saying that Mr. Zana was – had been inappropriate with them.

6AA 1366. Mr. Zana alleges that this statement was objected to at trial. Appellant's Brief, pg. 63. That allegation is belied by the record because defense counsel *did not* object to this statement at trial. 6AA 1366. Defense counsel objected only to a *later* question by the State. That later question was:

Q: Okay, and what, if anything, did you say to Alexia in response to that?

A: Well, she –

MR. PITARO: Your honor, that's hearsay.

6AA 1366. Mr. Pitaro was clearly objecting to the question about Alexia's response and not to any of the witness's previous answers. Id. Failure to object at trial precludes appellate consideration. Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 814 (1977); McCall v. State, 91 Nev. 556, 557 540 P.2d 95 (1975); Clark v. State, 89 Nev. 392, 393, 513 P.2d 1224 (1973); State v. Foquette, 67 Nev. 505, 524, 221 P.2d 404 (1950). As such, Defendant is not entitled to relief.

Defendant next complains that the witness was allowed to testify, over the defense's objection, to what the witness had said to her daughter. After the District Court overruled the Defendant's objection, the witness gave the alleged hearsay statement. 6AA 1366-67.

The District Court did not give a reason for overruling this particular objection made by the Defendant. However, in response to a later hearsay objection the District Court stated that it found the witness's statements to be especially reliable because the witness had made them herself and because the witness was available for cross examination. 6AA 1371. Therefore, despite the Defendant's assertion (Appellant's Brief, pg. 64) there is no Crawford confrontation clause issue with the witness's testimony. Furthermore, this statement was not offered for the truth of the matter asserted. Instead, it was offered to explain how the matter was investigated and show that Ms. Lattuca and her daughter were not motivated to lie.

B. Ms. Ann Marcovecchio's Alleged Hearsay Statements

Defendant next complains that Mrs. Marcovecchio was permitted to testify that she had received a phone call from Hugo Aguirre stating that Melissa was upset because her fifth grade teacher had touched her. 6AA 1216. Appellant's Brief, pg. 64. The Defendant admits "That this was not objected to" at trial. Id. Failure to object at trial precludes appellate consideration. Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 814 (1977). As such, Defendant is not entitled to relief. Furthermore, the witness was not offering this statement to prove the truth of the matter asserted, namely, that her fifth grade teacher had touched her, rather the statement was given to explain what prompted the police investigation.

Defendant next complains that during direct examination of Ann Marchovecchio, she was permitted to testify that Mr. Zana had given his email address out to students and been emailing with them. 6AA 1222. Appellant's Brief, pg. 65. The District Court overruled the Defendant's hearsay objection because the testimony was not offered for the truth of the matter asserted. 6AA 1222. The testimony was offered not to prove that the Defendant emailed and communicated with his students online, rather it was offered to prove that the victims' accusations against the Defendant were motivated by more than the negative media coverage. Therefore, Defendant's argument is without merit.

XI

THERE WAS NO CUMULATIVE ERROR

This Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994)(citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers,

727 P.2d 394, 401 (Colo.App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo.App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

Insofar as Defendant failed to establish any error which would have entitled him to relief, there is and can be no cumulative error worthy of reversal. Chief Justice E.M. Gunderson observed in his dissenting opinion in LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976), "nothing plus nothing plus nothing is nothing." In the instant case, all of Defendant's claims of error amount to "nothing," therefore, cumulative error does not apply.

Furthermore, a defendant "is not entitled to a perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), citing Michigan v. Tucker, 417 U.S. 433 (1974). In the instant case, Defendant received a fair trial. The issue of Defendant's guilt and requisite state of mind were never close questions. All the errors alleged here are without merit and he is not entitled to the relief sought.

CONCLUSION

Based on the above arguments of law and fact, the State respectfully requests that Defendant's Judgment of Conviction be affirmed.

Dated this 29th day of August, 2008.

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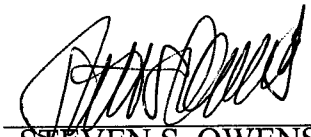
BY 

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of August, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
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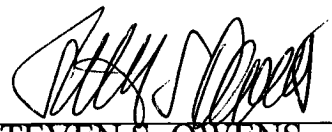
BY 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 29th day of August, 2008.

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