IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 52127

RESPONDENT'S ANSWERING BRIEF

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

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Respondent.	)	

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Appeal from Judgment of Conviction and Sentence in Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUE(S)

1. WHETHER THE ADMISSION OF CO-DEFENDANT WILSON'S STATEMENTS VIOLATED THE CONFRONTATION CLAUSE.
2. WHETHER ADMISSION OF CO-DEFENDANT WILSON'S GUILTY PLEA DURING APPELLANT'S TRIAL WAS REVERSIBLE ERROR.
3. WHETHER APPELLANT'S TRIAL COUNSEL MADE ERRORS SUFFICIENT TO WARRANT SUA SPONTE REVERSAL OF APPELLANT'S CONVICTION.
4. WHETHER THE TRIAL COURT'S FAILURE TO GRANT APPELLANT'S MOTION TO SUPPRESS WAS CLEAR ERROR.
5. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION OF APPELLANT BEYOND A REASONABLE DOUBT.
6. WHETHER THE SENTENCE IMPOSED UPON APPELLANT WAS CUMULATIVE AND EXCESSIVE.
7. WHETHER JUROR ABERNATHY WAS PROPERLY DISMISSED.

STATEMENT OF THE CASE

On April 20, 2007, the State filed an Information charging Narcus S. Wesley (hereinafter "Appellant) and Delarian K. Wilson (hereinafter "Wilson) with multiple counts of Conspiracy, Burglary, Robbery, Assault, Kidnapping, Sexual Assault, Coercion,

and Open or Gross Lewdness, all with use of a deadly weapon. 1 AA 16-24. Co-Defendant Wilson entered into negotiations with the State and pleaded guilty to two counts of Robbery with Use of a Deadly Weapon and one count of Sexual Assault.

Meanwhile, Appellant filed a Motion to Suppress Fruits of Illegal Search on March 11, 2008, claiming that the Henderson Police Department (hereinafter "HPD) intentionally misrepresented material facts in the affidavit in support of a search warrant. 1 AA 30, 34. Specifically, Appellant claimed that the HPD knew that Appellant did not have power in his name at the address located for him by Nevada Power and therefore, proceeding on this information was an intentional misrepresentation. 1 AA 35. Furthermore, Appellant argued that since the HPD did not have a valid search warrant, statements by Appellant indicating his involvement in the above-related crimes should be suppressed. 1 AA 36. The State filed its Opposition on March 24, 2007. 1 AA 58. At the April 9, 2008, hearing on the Motion to Suppress, the district court heard the testimony of Detective Curtis Weske, Nevada Power Company Employee Donna Lamonte, and Narviez, Angela, and Narcus Wesley. 1 AA 135. The court recognized that there was misinformation on the application for the search warrant, but concluded that it was not done intentionally or recklessly. 2 AA 246. The court further noted that the misinformation on the application was not noticed by HPD in time to correct it, and that even if it had been, it would not matter because the remainder of the information in the application was sufficient to reach the level of probable cause. 2 AA 246. The court finally noted that HPD Mirandized Appellant and informed him that he had the right to have an attorney and also that Appellant could stop the questioning at any time. 2 AA 247. The court denied Appellant's Motion to Suppress on April 9, 2008.

Appellant's jury trial began on April 9, 2008, and concluded on April 18, 2008. The jury convicted Appellant of all eighteen (18) counts alleged in the Second Amended Information. 1 AA 116-21. On July 3, 2008, Appellant was adjudged guilty of all eighteen (18) counts and sentenced as follows[1]: as to Counts I and XVIII – TWELVE (12) months; as

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[1] The State filed a Motion to Correct Illegal Sentence as to Counts 12-15, and 17 as the court had previously given Wesley EIGHT (8) to TWENTY (20) years instead of TEN (10) to

to Counts II, III, and XI – TWENTY-EIGHT (28) to SEVENTY-TWO (72) months; as to Counts IV, VI, VII, and IX – SIXTY (60) to ONE HUNDRED EIGHTY (180) months plus an equal and consecutive term of SIXTY (60) to ONE HUNDRED EIGHTY (180) months for the use of a deadly weapon; as to Counts V and VIII – TWENTY-FOUR (24) to SEVENTY-TWO (72) months; as to Count X – SEVENTY-TWO (72) to ONE HUNDRED EIGHTY (180) months plus an equal and consecutive term of SEVENTY-TWO (72) to ONE HUNDRED EIGHTY (180) months for the use of a deadly weapon; as to Counts XII – XV, and XVII – TEN (10) years to LIFE plus an equal and consecutive term of TEN (10) years to LIFE for the use of a deadly weapon; and as to Count XVI – TWENTY-FOUR (24) to SEVENTY-TWO (72) months plus an equal and consecutive term of TWENTY-FOUR (24) to SEVENTY-TWO (72) months for the use of a deadly weapon; all counts to run concurrently. 1 AA 127-32. Judgment of Conviction was filed on July 18, 2008, and an Amended Judgment of Conviction reflecting a correction in the sentence to Counts XII – XV, and XVII was filed on October 8, 2008. 1 AA 122, 127. Appellant filed a Notice of Appeal with the Supreme Court of Nevada on July 24, 2008.

STATEMENT OF THE FACTS

On February 18, 2007, Ryan Tognotti, Clint Tognotti, Aitor Eskandon, and Justin Foucault (hereinafter "Justin F.), were watching a movie at 690 Great Dane, Henderson, Nevada, when there was a knock at the door. 4 AA 818. Ryan answered the door and saw two men, a short and stocky African-American male later identified through confession to be Co-Defendant Wilson, and a tall and more slender African-American male later identified through confession to be Appellant. 5 AA 977. Claiming to be looking for Grant, Wilson and Appellant became agitated when Ryan informed them that he did not know a Grant nor did a Grant live at the house. 5 AA 978. The men then lifted guns out of their waistbands, pointed them at the four men in the living room, and barged inside. 5 AA 978.

TWENTY (20) as called for under the Statute. 1 AA 132. The court corrected the sentence at a hearing on September 23, 2008. Defendant was present with counsel during said hearing. The corrected sentence is listed above.

Wilson and Appellant ordered Ryan, Clint, Aitor, and Justin F. onto the floor, face down, with their arms over their heads stacking their hands on top of each other in the middle of the circle. 4 AA 889. They then asked if anyone else was in the apartment. 5 AA 979. Ryan indicated that Justin Richardson (hereinafter "Justin R.) and Danielle Browning were sleeping in Justin R.'s room down the hall. 5 AA 979. Wilson went into Justin R.'s room and yelled at them to get up and walked them at gunpoint out into the living room to join the others. 4 AA 818-19. Appellant said that he had a gun and told all six not to move. 4 AA 823, 892. Wilson demanded all of the cash, cell phones, and wallets that the six had in their possession. 4 AA 828. Upon finding only $20 between them, Wilson became upset and told them that he and Appellant needed more money or they were going to shoot them all. 5 AA 980. Since none of the victims had any more cash, Wilson asked who had money in their bank accounts. 5 AA 981. Ryan and Justin F. said they did and were subsequently ordered to hand over their ATM cards and pin numbers. 4 AA 828. Wilson took Ryan at gunpoint to get his car keys. 5 AA 981. Before Wilson and Ryan left the apartment, Wilson told all of the victims that, "If you guys fuck up, I am going to have my boy shoot you and then I am going to shoot your friend. 1 AA 60. Wilson then forced Ryan at gunpoint to drive to two separate ATMs in the area, keeping the gun pointed at Ryan's hip the entire time. 5 AA 981-82, 983. In total, Ryan withdrew $500 from Justin F.'s account and $400 from his own account. 1 AA 49.

Meanwhile, Appellant stayed with the remaining victims. 4 AA 830. He told the victims that if any of them moved, he would shoot them. 5 AA 898. At no point from entering the house until Wilson left with Ryan, did Appellant utter a word of protest against Wilson's actions. 4 AA 830-31. At no point after Wilson left him alone with the remaining victims did Appellant try to call the police or release any of the victims. 4 AA 830-31.

When Ryan and Wilson returned, Wilson informed the victims that they were 90% done but that there remained 10% more to finish. 5 AA 984. Wilson then ordered Justin R. and Danielle to take off their clothing and have sex. 4 AA 832. Overcome by the stress of the situation, Justin R. was unable to sustain an erection, enraging Wilson. 4 AA 832.

Wilson told the victims that if Justin R. did not perform, that he would start killing everyone. 4 AA 832, 906. The suspects then ordered Danielle to perform fellatio on Justin R. to help him sustain an erection. 5 AA 904. When this did not work, Wilson ordered them to perform mutual oral sex on each other. 5 AA 919. At this point Wilson noted that if Justin R. could not "get it up that either he or Appellant would do it. 4 AA 835. During this time, Appellant was standing in the background "egging Wilson on, telling him that if Justin R. could not have sex with Danielle, he could. 5 AA 910. Since Justin R. was unable to become aroused sufficient to have sex with Danielle, Wilson ordered Ryan to get "hard , otherwise he or Appellant would have to. 5 AA 910. Wilson handed Ryan a bottle of lotion and told him to masturbate. 4 AA 872. Both Appellant and Wilson were egging Ryan on, encouraging him to get hard so he could have sex with Danielle. 4 AA 835. Ryan too was unable to sustain an erection. 4 AA 835. Wilson asked if anyone could "get it up, to which Appellant responded, "I'm hard, I can have sex with her. 5 AA 1015.

Wilson ordered Danielle to the staircase. 4 AA 836. Appellant walked over and told Danielle that if Justin R. could not have sex with her, he could. 4 AA 839. Appellant moved Danielle to a nearby recliner. 4 AA 839. Appellant told her that he was hard and he wanted to have sex with her. 4 AA 839. He asked her "if she liked it. 4 AA 839. She said no. 4 AA 839. She repeatedly told Appellant that she did not want to engage in sexual relations with him but he stated, "I have a gun so I'm in charge. 4 AA 841. Appellant told Danielle to spread her legs and put them directly in the air. 4 AA 841. Danielle was shaking so badly that she could not keep her legs in the air. 1 AA 63. Appellant told Danielle that if she did not stop shaking he was going to shoot her. 5 AA 1013. Danielle still could not stop shaking, so Appellant held her legs up and began touching her. 1 AA 63. Appellant then put his finger inside Danielle's vagina. 1 AA 63. Wilson eventually told Appellant to stop because they had to go. 4 AA 842. Appellant reluctantly stopped. 4 AA 842-43.

Appellant and Wilson grabbed all of the victim's cell phones and carried them outside. 1 AA 50. They told the victims that they were going to leave, they had better count to two minutes before moving, and that no one better call the police or they know people that

will come back and kill them. 1 AA 50. While the victims were counting out the two minutes, Wilson reentered the house and yelled that he saw someone move. 4 AA 844. The victims said that no one had moved, and Wilson told them that he was just joking and that he had put the phones outside. 4 AA 844. All of the cell phones, except Danielle's cell phone, were later found outside of the house. 4 AA 845. After counting to two minutes, the victims got up and locked the doors. 5 AA 927-29. Shortly thereafter the victims went to Clint's apartment where they called the police. 4 AA 846. After taking the statements from the victims, the HPD began searching for Danielle's cell phone. 6 AA 1046. Detectives also began looking into the previous residents of 690 Great Dane to see if they could find a "Grant. 6 AA 1046.

HPD Detectives Hartshorn and Weske were able to locate Grant Hieb, a former resident of 690 Great Dane, Henderson, Nevada. 5 AA 1038. Grant agreed to go to the Henderson Police Station and assist in the investigation. 5 AA 1038. Grant was able to identify Delarian Wilson as a friend who had previously robbed him. 5 AA 1039; 6 AA 1042-43. A little while later HPD received word that Danielle's cell phone had been used in the vicinity of Circus Circus. 6 AA 1046. Wilson was detained while playing cars at Circus Circus and admitted to going to 690 Great Dane with the intention of robbing Grant of his money and marijuana. 6 AA 1047, 1066. Wilson stated that he was with his friend Narcus who played football at UNLV, which was similar to the name "Marcus which the victims had remembered hearing. 6 AA 1074.

Detectives went to UNLV to check the football roster and found that a Narcus Wesley played UNLV football and used 2372 Valley Drive in Las Vegas as his address. 6 AA 1074. Detectives contacted Nevada Power to determine whether Appellant had power at that address. 6 AA 1074. HPD Detectives were advised that there was no longer power in Appellant's name at that address, but that the power had been turned on at 4232 Gaye Lane, Las Vegas. 6 AA 1074. HPD Detectives faxed over their subpoena information to Nevada Power and headed to the Gaye Lane Address. 6 AA 1074. Upon arriving at the Gaye Lane address, the Detectives observed a 2005 Chrysler 300M registered to Appellant parked in the

driveway, the same car Wilson stated his partner was driving. 6 AA 1075. The Detectives obtained a search warrant for that address as well. 6 AA 1075. SWAT entered the premises and served the search warrant. 6 AA 1075.

Officer Weske advised Appellant of his Miranda rights, confirmed that Appellant understood those rights, and then proceeded to interview him. 1 AA 67. Appellant stated that Wilson asked him to go get some marijuana. 6 AA 1086. Wilson also asked if Appellant knew where Wilson could get some money, but Appellant did not. 1 AA 67. Appellant then stated that once they arrived at the 690 Great Dane address Wilson told him to knock on the door and get out of the way. 1 AA 67. Appellant then claimed that he only simulated having a gun. 1 AA 67. When Wilson recognized that Grant did not live there, Wilson decided that he needed the money anyway so they continued to rob the victims. 1 AA 68. Appellant stated that he went along with Wilson for the most part, but that Wilson was the person in charge. 1 AA 68. He stated that he told Wilson he could perform when all the other guys could not because "he did not want to seem like a punk. 6 AA 1087. He admitted that he did rub the top of Danielle's vagina after asking her if it was ok, but that Danielle did not seem like she enjoyed it. 6 AA 1087. Appellant never stated that he was afraid or give any indication that he was afraid of Wilson. 6 AA 1087. Appellant indicated that at one point, he thought the entire robbery was funny, because it was like being in the movies. 6 AA 1087. Appellant indicated that he stayed at the house after Wilson left because he was dressed in a t-shirt, it was cold outside, and he did not know where he was, despite having six victims on the floor who could tell him the address. 6 AA 1087. Finally, Appellant identified the clothes he was wearing during the robbery. 6 AA 1087. After hearing the testimony of all six (6) victims, who identified Appellant by body-type, as well as the officers who responded to the scene and heard Appellant's confession, the jury convicted Appellant of all eighteen (18) counts. 6 AA 1114.

ARGUMENT

I.

THE ADMISSION OF CO-DEFENDANT WILSON'S STATEMENTS DID NOT VIOLATE THE CONFRONTATION CLAUSE

Appellant claims that a vast majority of the evidence incriminating Appellant was Co-Defendant Wilson's statements and since Wilson was not called to testify, Appellant's Confrontation Clause rights were violated. OB, pp. 8-9. Further, Appellant claims that "absent the statements and confessions of Co-Defendant Wilson, [Appellant] could never have been convicted beyond a reasonable doubt. Id. However, Appellant fails to identify any specific statements of Wilson that he claims violated the Confrontation Clause leaving this Court and the State to speculate about the factual basis for this claim. Notably, Wilson's taped interview by HPD was offered by Appellant and played for the jury over the objections of the State:

> **Ms. Kollins**: Based on the motions filed pretrial, this Defendant was deprived of his right to confront Delarian Wilson, and now they are playing the very tape that implicates to some extent their client, they understand and have made that strategic decision.
> For purposes of counsel, I'd ask counsel to put that on the record.
>
> **Mr. Landis**: Without doubt, Judge.
> Just to be clear judge, in my motion to sever I had a number of issues.
> Bruton issues were one.
> A second ground, as we say, with Grant testifying we intended to introduce that testimony about Delarian Wilson's prior robberies, that would have not been admissible if he was sitting here, and you are right, we are making the reasonable decision after talking to each other, ***and talking to his client***, to admit his statement of plea and plea canvas, and we're not flying off the cuff to make this, I assure you this.
>
> **Ms. Kollins**: I guess then because this is a decision the Court has made, I would ask Mr. Banks and Mr. Landis to reiterate their decision to still play this based on that ruling, because I mean, they made a decision to play this tape and waive ***any confrontation based on the playing of the entire tape***, and if that has affected their strategy or decision at all, they need to make a record it hasn't, and they are happy with the portion that is going to be played.
> I'm just looking to preserve the record, Your Honor.
>
> **Mr. Banks**: Yeah, we think the whole thing should be played, with that part that concerns the Court be redacted.
> I guess if – I don't know if it's a time issue.
>
> **The Court**: It's not a time issue, just that it serves no purpose, it's totally irrelevant to listen to fabrications by Wilson. That serves no point.
> Everybody admits they were inconsistent stories.

6 AA 1099, 1101 [emphasis added]. The Defense then offered Wilson's taped statements to police into evidence which were subsequently played to the jury. 6 AA 1102. During the playing of the tapes, Defense counsel continued to ask questions highlighting the inconsistencies in Wilson's statements. 6 AA 1103. Finally, highlighting the inconsistencies between Wilson's statements to police, the testimony of the victims in this case, and Wilson's subsequent guilty plea, the Defense offered Wilson's guilty plea agreement into evidence. 6 AA 1105. Accordingly, Appellant waived any Confrontation Clause violations through his counsel when he proffered Wilson's statements to the police over the objections of the State. Defense counsel also waived any Confrontation Clause violations on the record after speaking to their client. 6 AA 1099.

The Confrontation Clause is meant to protect Defendants from testimonial evidence ***offered by the State*** where the Defendant would not be given an opportunity to confront witnesses against him or her. DeRose v. First Judicial Dist. Ct., 115 Nev. 225, 230-1, 985 P.2d 157, 160-1 (1999); see U.S. Const. Amend. VI., Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065 (1965) [emphasis added]. The right to confrontation may be waived by the failure to object to the use of such evidence at trial, Ford v. State, 122 Nev. 796, 806, 138 P.3d 500, 507 (2006), or where a defense attorney continues to question a witness regarding the testimony objected to. See Dias v. State, 95 Nev. 710, 715, 601 P.2d 706, 709 (1979). The test for the validity of a waiver of a fundamental constitutional right is whether the defendant made an intentional relinquishment or abandonment of a known right or privilege. Raquepaw v. State, 108 Nev. 1020, 1022, 843 P.2d 364, 366 (1992). Counsel may not waive defendant's right of confrontation over his client's objections. Id.

It is clear from the record that statements made by Wilson were offered at the insistence of defense counsel for the purpose of painting Wilson as the perpetrator of the crimes. The State asked the Defense specifically to acknowledge that the decision to offer these statements was a strategic decision. 6 AA 1099. Defense counsel stated on the record "without a doubt that they did not enter into decision to admit Wilson's plea and plea canvas lightly. 6 AA 1099. Mr. Landis stated that this was a reasonable decision that they

made after talking to each other (Mr. Landis and Mr. Banks) and after talking to their client. 6 AA 1099. Appellant was present during this conversation between the parties and the court and did not manifest any disagreement. 6 AA 1099. It is clear from the record that the decision to admit Wilson's statements was the result of planning on the part of the Defense. Since Appellant was present in court when the exchange took place, and his counsel stated that they spoke with their client about admitting this statements, Appellant through his attorneys made an intentional relinquishment or abandonment of his confrontation clause claims. See Raquepaw, 108 Nev. at 1022, 843 P.2d at 366. Appellant's confrontation rights were not violated when he intentionally offered the statements of his former Co-Defendant. In fact, Appellant did not even reserve this issue for appeal since his counsel offered these statements over objections by the State. Appellant's claim has no merit and should be denied.

II.
ADMISSION OF CO-DEFENDANT WILSON'S GUILTY PLEA DURING APPELLANT'S TRIAL WAS NOT REVERSIBLE ERROR

Appellant contends that the admission of Wilson's guilty plea is inadmissible and mandates a reversal of Appellant's conviction and a remand for a new trial. OB, p. 9. Furthermore, Appellant contends that, although it was trial counsel's idea to bring in Wilson's guilty plea, it was Judge Bixler's decision to allow the "improper and inflammatory information to be presented to the jury. Id. at p. 10. He states that this decision was never discussed with him nor did he consent to the presentation of such evidence. Id. This issue was not preserved by Appellant for appeal and therefore should be summarily dismissed. Mclellan v. State, 182 P.3d 106 (Nev. 2008). Furthermore, the evidence was proffered by the Defense in an attempt to show that Co-Defendant Wilson was the person responsible for the crimes committed. 6 AA 1099. Just because this strategy did not lend itself to an acquittal by the jury does not now mean that Appellant should be able to challenge it; in fact Appellant should be estopped from raising any objection to such evidence on appeal.

The district court heard the following arguments concerning Co-Defendant Wilson's guilty plea:

The Court: . . .You want to present before this jury evidence that Delarian Wilson has pled guilty to the charges he plead guilty to last week?

Mr. Landis: Correct.

* * *

The Court: I think if I remember correctly, I specifically had to ask Defendant Wilson in regards to the sexual assault charge upon what basis he was entering a plea in the sexual assault, and he specifically described it as an aider and abettor to Co-Defendant Wesley. . .

The point is, if you are going to get into this, you got to be able to get into it all the way. You really are not going to be allowed to pick and choose that information that you want the jury to hear and exclude any of the other relevant information.

I think that that is something you are going to have to decide.

I don't – or ***I do think that if you guys think strategically that is the right thing to do, I think you should be allowed to do it.***

Again, you have to decide if you want to have all of that information presented.

But I think the full picture of his plea is going to have to be presented in order to make it fair.

Mr. Landis: Okay. We can live with that ruling, Judge.

That would include a redacted copy of the guilty plea agreement? …

The Court: Anything, whether it's in the guilty plea agreement, the canvas, anything that pertains to anything touching upon penalty, has to be redacted. . .

That he understands, and other than that, other than any information regarding the penalty, I don't care how you do it, if it's a guilty plea agreement, if it's a canvas, if it's the Information, I think however we get it, it has to be the full picture. . .

Ms. Luzaich: Then – But I also get to go into Delarian Wilson's statement where he tells the police, yeah, I was there, yeah, I did this, but he and Narcus Wesley had the gun, and he and Narcus Wesley committed the sexual assault, if they are going to bring that in, I get to do that as well.

Mr. Landis: We are not arguing any different.

The Court; All right. We are all on the same page.

Again, this all stems from their decision how they want to handle it.

If they choose not to allow any of it in, that's fine, ***but if they choose to bring it in, then that is the rule, that's how we'll approach it.***

6 AA 1057-58 (emphasis added). Thus, at the insistence of Appellant's trial counsel, Co-Defendant Wilson's guilty plea canvas and agreement were entered into evidence for strategic purposes. The statements were proffered in an attempt to show that Wilson was the person responsible for the crimes committed. 6 AA 1099.

This issue is not properly before this court since Appellant did not preserve this issue below. In fact, Appellant offered this evidence, did not object to its admission at trial, and argued vehemently for its admission over the objections of the State. Since Appellant proffered this evidence, he should now be estopped from challenging it on appeal just because its admission did not have the intended effect on the jury. Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005). In Carter, the Nevada Supreme Court found that a sexual assault defendant was estopped from raising any objection that admission of evidence of his prior drug involvement was error, where defendant himself elicited evidence of his illegal drug use. Id. The Court determined that since the defendant participated in the "alleged error , he should be estopped from raising any objection on appeal. Id. This ruling has applied in other cases as well. See Sidote v. State, 94 Nev. 762, 587 P.2d 1317 (1978) (Defendant may not consciously invite district court action perceived as favorable to him and them claim it as error on appeal); Van Valkenberg v. State, 594 P.2d 707 (1979) (defense counsel agreed at trial to instruction so they could not challenge it on appeal). While it is generally true that a guilty plea or conviction of one person is not admissible against another charged with the same offense, Hilt v. State, 91 Nev. 654, 662, 541 P.2d 645, 650-51 (1975), where such evidence is introduced by defense counsel as part of the trial strategy the rule has no application. See People v. Burch, 22 Ill.App.3d 950, 317 N.E.2d 136 (1974). Strategy decisions by counsel are "tactical decisions and will be "virtually unchallengeable absent extraordinary circumstances. Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996).

Appellant's claim that the decision to seek the admission of Co-Defendant Wilson's guilty plea was never discussed with him nor did he consent to the presentation of the evidence to the jury is belied by the record. The State requested that the Defense submit on the record that their decision to enter Co-Defendant Wilson's statements to the police and guilty plea agreement was a strategic decision and that they were in fact waiving Confrontation Clause violation claims. 6 AA 1099. Defense counsel stated that they were making this "reasonable decision after speaking to each other and to their client and that

they were not flying "off the cuff. 6 AA 1099. Appellant was present in court when this conversation was taking place. Claiming now that he did not consent to this and that this was never discussed with him is false and is belied by the record.

Finally, Appellant's reliance upon Bruton v. United States and "Walden v. State to support his claims that Co-Defendant Wilson's statements were improperly admitted is misplaced. While it is true that the admission of a codefendant's confession in a joint trial has been found to violate a criminal defendant's right of cross-examination, Bruton v. United States, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622 (1968), this was not a joint trial. Furthermore, Appellant's case is distinguishable from "Walden v. State, 113 Nev. 853, 944 P.2d 762 (1997). The case referenced is actually titled Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997) and Appellant's case is distinguishable. First, Appellant's attorneys were not seeking to enter into evidence any exculpatory statements offered by Co-Defendant for Appellant. Instead, trial counsel focused on Wilson admitting to his participation in the crime and later argued that since he consistently changed his story, and Appellant did not, Appellant's version of his limited involvement is the correct version. 6 AA 1103. Secondly, Appellant's trial counsel offered Wilson's statements with the intent of highlighting the inconsistent statements, not to provide exculpatory statements, which the district court judge acknowledged. 6 AA 1101. His decision to allow them into evidence was not patently unreasonable given the demonstrated defense theory. Since the admission of evidence is an abuse of discretion review, and Appellant does not demonstrate how the district court abused its discretion, Appellant's claim should be denied.

III.
APPELLANT'S TRIAL COUNSEL DID NOT MAKE ERRORS SUFFICIENT TO WARRANT SUA SPONTE REVERSAL OF APPELLANT'S CONVICTION

Appellant claims that Appellant's trial counsel was "on a frolic of their own when they admitted during opening statements that the victims had been victimized. OB, p. 11. He claims that his trial counsel admitted his guilt without discussing it with him and that he had no option to accept his counsel's "ill-fated tactics. Id. He argues that sua sponte reversal is required because Appellant's seeking and allowing Wilson's guilty plea hearing

and statements to police to be played before the jury either: "(1) had a prejudicial impact on the verdict when reviewed in the context in the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings. Id. at p. 12.

Claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal. Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Furthermore, Appellant's trial counsel at most conceded only that certain crimes occurred but not that his client participated or was guilty of those crimes. Since the issue in this case was not whether the crimes occurred but whether Appellant aided and abetted or conspired to assist in those crimes, Appellant's claims of prejudice is without merit.

Appellant's trial counsel provided the following statements to the jury with regards to the crimes that night during his opening statement:

> **Mr. Landis**:
> I assure you when this case is over, you will realize the truth, and the truth is Delarian Wilson is the one who is responsible for what happened. Delarian Wilson is the monster.

4 AA 802-3. It is apparent from trial counsel's statements that he was not conceding Appellant's guilt but rather foisting the blame for what happened upon Wilson. An attorney cannot deprive his client of the right to have the issue of guilt or innocence presented to the jury as an adversarial issue upon which the state bears the burden of proof without committing ineffective assistance of counsel. Jones v. State, 110 Nev. 730, 737, 877 P.2d 1052, 1056 (1994). A lawyer may make a tactical determination of how to run a trial, but the due process clause does not permit the attorney to enter a guilty plea or admit facts that amount to a guilty plea without the client's consent. Id. In Jones, defense counsel conceded that he thought the evidence showed beyond a reasonable doubt that his client killed the victim but that he was guilty only of second-degree murder as he was incapable of forming the requisite intent and premeditation for first-degree murder. 110 Nev. 730, 736, 877 P.2d 1052, 1056 (1994). Notably, Jones testified that he did not kill the victim and when

canvassed on the subject following the guilt phase, indicated to the trial court that he did not consent to his counsel's argument that he was not guilty of second-degree murder. Id.

Appellant's case is clearly distinguishable from Jones. Trial counsel never admitted that Appellant was guilty of any crime, only that the crimes had occurred. 4 AA 802-3. Furthermore, he placed the blame for those crimes squarely on the shoulders of Co-Defendant Wilson. 4 AA 802-3. Co-Defendant Wilson's guilt was demonstrated again through his guilty plea canvas and plea and through his statements to police. At no point did Appellant's trial counsel commit the egregious errors of Jones's trial counsel sufficient to warrant a reversal of his conviction.

Since defense counsel was not admitting Appellant's guilt, Appellant did not need to give his permission for statements admitting that the victim's were injured. While the client may make decisions regarding the ultimate objectives of representation, the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. Id. He, not the client, has the immediate-and ultimate-responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Id.

Defense counsel admitted on the record that they were using Wilson's statements to help their defense that he was responsible and not Appellant. 6 AA 1099. ("In each case [Wilson] talks about somebody else forcing him to do it, somebody else having the gun, and somebody else doing the robberies, the sexual contact, and he assumes our client's position. . . he lies three different times.) This position was not patently unreasonable considering Appellant's own admissions to the police that he digitally penetrated Danielle's vagina. 6 AA 1106. Based upon Appellant's confession and the consistency of the victim's story of events, defense counsel did the best they could in developing a believable defense theory.

Furthermore, Appellant has not demonstrated any prejudice with regards to his trial counsel's actions. Prejudice is very rarely presumed. See United States v. Cronic, 466 U.S. 648, 104, S.Ct. 2039 (1984). Appellant makes a bare allegation that trial counsel's actions

resulted in his guilty verdict. The burden is on Appellant to demonstrate prejudice sufficient to warrant overturning his conviction. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Appellant does not plead facts to show that his counsel admitting that the crimes occurred, considering there was going to be six witnesses testifying consistently about the events that occurred, prejudiced the verdict. Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002). Nor does Appellant demonstrate how counsel's "errors seriously affected the integrity or public reputation of the judicial proceedings. Id. Appellant's bare and naked allegation should be denied.

IV.
THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS

Appellant claims that the search warrant for the Gay Avenue address where Appellant was located was invalid because HPD did not have probable cause and provided false statements in an effort to mislead the issuing court regarding the existence of probable cause. OB, p. 12. Furthermore, Appellant claims that his confession to HPD was invalid because his father, with him present, had invoked his Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966) rights but HPD continued questioning him. Id. Appellant's contentions are without merit as the court found probable cause even without the alleged misinformation included in the affidavit attached to the search warrant application and Appellant never invoked his right to an attorney.

A. Motion to Suppress - *Franks* Hearing

The district court held a Franks hearing on April 9, 2008. 1 AA 133; see Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). During the hearing, the court heard from Detective Curtis Weske, who applied for the search warrant, Nevada Power Company Employee Donna Lamonte, who gave the Detectives information prior to receiving the search warrant, and Narviez, Angela, and Narcus Wesley. 1 AA 135. The court also had the following information contained in the affidavit attached to the search warrant: (1) Co-Defendant Wilson stated that he committed this crime with a Narcus who played UNLV Football, upon further investigation at UNLV Athletics, Narcus was found to be Narcus

Wesley who lived with his father at 4232 Gaye Lane Las Vegas (1 AA 56); (2) Co-Defendant Wilson stated that he and Appellant drove around in Appellant's white sedan, a white sedan was registered to Narcus Wesley at 4232 Gaye Lane Las Vegas (1 AA 56); (3) Co-Defendant Wilson had just confessed his involvement in a crime involving the use of a deadly weapon and that Appellant had been involved in the same crime (1 AA 49-52); and (4) that HPD had reason to believe Appellant could be a danger to others or potentially destroy evidence (1 AA 52-53).

After hearing the testimony of the witnesses at the hearing and reviewing the information contained the affidavit, the court ruled as follows:

> **The Court:** . . . First of all, I don't think that any of the – there is no question that there was some misinformation on that application, as I see it, and everybody understands it.
>
> All right. The question is whether it was done intentionally or recklessly.
>
> My conclusion is no, I don't think so at all under these circumstances. I think . . .it's [sic] is quite clear, the father's name, the son's name. I don't think there was by any stretch, by any stretch that it was done intentionally.
>
> I think it was all business. If it had been noticed, I think that even just a minor explanation would have sufficed, and even if it was, which I don't believe for an instant that it was, I think that the rest of the information still reaches the level of probable cause, and I think that it's the test that the Court applies is a substantial basis for concluding probable cause exculpatory was a small part of accuracy and clarity is going to be.

2 AA 246-47. The district court found no intentional or reckless misinformation in confusing the names of Narviez and Narucs in their haste to apprehend a man who had just committed a violent crime. 2 AA 246-47. Even though it is true that there was misinformation in terms of the Nevada Power Company account name, the district court determined that HPD Detectives did not knowingly and maliciously get a search warrant based solely on that information and that probable cause existed even without the misinformation. 2 AA 246-47. The interplay of the factual circumstances surrounding a search or seizure and the constitutional standards for when searches and seizures are reasonable requires the two-step review of a mixed question of law and fact: appellate court reviews the district court's findings of historical fact for clear error, but reviews the legal

consequences of those factual findings de novo. Somee v. State, 187 P.3d 152 (2008). A district court's factual findings will be given deference by this court on appeal so long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Based upon all of these factors, the testimony of Office Weske, Donna Lamonte, and the Wesley's themselves, the district court did not abuse its discretion in determining that there was probable cause sufficient to deny the motion to suppress and no bad faith on the part of police.

Additionally, Appellant's statements were not subject to suppression as fruits of the alleged invalid search warrant or arrest. A Fourth Amendment violation does not result in the suppression of any subsequently obtained confession unless the arrest was not supported by probable cause. New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640 (1990). In Payton v. New York, 445 U.S. 573, 602-03, 100 S.Ct. 1371, 1387-88 (1980) the Supreme Court held that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. The Supreme Court held in New York that the rule in Payton was designed to protect the physical integrity of the home and not to grant criminal suspects protection from statements made outside their premises where the police have probable cause for arresting the suspect for committing a crime. Id. 495 U.S. at 18, 110 S.Ct. at 1643. Since the district court determined that there was always probable cause to arrest Appellant, his statements were properly admitted.

B. Alleged Miranda Violation

Appellant's father cannot invoke his Miranda rights vicariously and therefore this claim is without merit and must be denied. The following testimony was adduced at the April 9, 2008, hearing on the motion to suppress:

> **Ms. Luzaich**: Okay. You spoke with the Defendant?
>
> **Detective Weske**: Yes.
>
> **Ms. Luzaich**: Did you give him his rights per Miranda?
>
> **Detective Weske**: Yes, I did.

Ms. Luzaich: Did you do it by memory or from a card?

Detective Weske: I believe I was handed a card.

Ms. Luzaich: Okay, and did he express to you that he understood his rights?

Detective Weske: Yes, he did.

Ms. Luzaich: And then did he talk to you?

Detective Weske: Yes, he did.

1 AA 168. Defense counsel also questioned Appellant's father about the alleged request for an attorney:

Mr. Landis: About the attorney issue, who was present, what members of your family were present at that point in time? . . .

Narviez Wesley: All three of us, my wife, my wife – I was sitting there, my wife was in the middle, and Narcus was alongside when I asked about the attorney. So all three of us were in the room.

Mr. Landis: And what did you ask him?

Narviez Wesley: I asked him could I call my family attorney because we wanted an attorney present because they wouldn't tell us nothing. So I know that the law says you have the right to an attorney to be there or at least advised by an attorney. They told me that we didn't need an attorney there because he wasn't under arrest.

Mr. Landis; Who told you that?

Narviez Wesley: Officer Weske.

1 AA 225-6. Finally, Appellant testified about his interaction with HPD:

Mr. Landis: Did you hear your father at any point talk to the Henderson Police Department regarding an attorney being present?

Appellant: Yes.

Mr. Landis: What did he say?

Appellant: My dad asked him, he said, well, and he said, what's going on, and he said, we are going to call our family attorney, and the cop say, nobody is under arrest, so you guys don't need that. . .

Ms. Luzaich: Well, in fact, you were not under arrest at that point, is that correct? . . .Did anybody tell you you were under arrest yet? . . .

Appellant: No. . .

1 AA 236. The district court addressed the issue of Appellants alleged invocation of his Miranda rights as follows:

> **The Court:** Just as importantly, let me address the Miranda warnings.
> I am not aware that the complicity, the status of the law is such that you have to inform the defendant not only of their right to an attorney before questioning, but that you have to go on to a further explanation that includes specifically the right to have an attorney present during questioning.
> He did say that he could stop at any time that he directed him to stop.
> The Defendant acknowledged that each one of those questions was clear.
> There is nothing wrong with that argument, and the motion to suppress is denied.

2 AA 246-47.

Appellant voluntarily, knowingly, and intelligently waived the rights guaranteed under Miranda and therefore his statements were properly admitted by the trial court. In order to admit statements made during custodial interrogation, a defendant's waiver of the rights guaranteed under Miranda must be voluntarily, knowingly, and intelligently made. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966). A court should use a totality of the circumstances evaluation in order to determine whether the Miranda warnings were properly given and whether the defendant's waiver of Miranda rights was valid. Edwards v. Arizona, 451 U.S. 477, 486 n. 9, 101 S.Ct. 1880, 1885 n. 9 (1981). In resolving the question in light of the Miranda standards, the substance and not the form of the warnings should be of primary importance. Criswell v. State, 84 Nev. 459, 462, 443 P.2d 552, 554 (1968). The question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal. Echavarria v. State, 108 Nev. at 743, 839 P.2d at 595 (1992).

The district court determined that Appellant's confession to HPD was voluntarily, knowingly, and intelligently entered into. Furthermore, Appellant never states that he invoked his Miranda rights, only that his father requested an attorney. Miranda rights are personal to the defendant and can only be invoked by the defendant or his attorney, not by

his father. Goldstein v. State, 89 Nev. 527, 516 P.2d 111 (1973) (father hiring attorney is insufficient for invocation of counsel). Accordingly, once Appellant was arrested and custodial interrogation was about to take place, HPD appropriately advised Appellant of his Miranda rights and Appellant made a voluntary and knowing waiver.

V.
THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION OF APPELLANT BEYOND A REASONABLE DOUBT

Appellant claims that the State failed to prove that Appellant was the person who committed the crimes since none of the victims could identify his face, the victims could only testify what they heard, not saw, there was no out of court identification of Appellant, and the only actions clearly testified to by the victims were committed by Co-Defendant Wilson. OB, p. 14. Since Appellant confessed to being involved in the crimes, to holding the victims at what they thought was gun point while Wilson took Ryan to get his money, to splitting the money they stolen from the victims with Wilson, and to digitally penetrating Danielle's vagina, there was more than sufficient evidence presented to convict Appellant of all the counts he was charged with. This is even more true considering Appellant was charged under an aiding and abetting theory.

In addition, all of the victims identified Appellant as a man matching the physical description of the second man who was in the house that night. 4 AA 849-50, 5 AA 927, 987, 999, 1014, 1021. Since Appellant identified himself as the second man in the house that night and all of the victims testified that Appellant matched the physical description of that man, the jury reasonably concluded that Appellant was the person who helped commit these crimes. The jury was free to accept Appellant's representation that he was present for the commission of the crimes and then to disregard those portions that minimized his own behavior and believe instead the account of the six victims as to Appellant's participation.

Furthermore, there was sufficient evidence presented to convict Appellant of all counts he was charged with both under a conspiracy theory and under an aiding and abetting theory. The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a

reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). "Where there is substantial evidence to support a jury verdict, [the verdict] will not be disturbed on appeal. Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996). Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses. Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380. This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt. Jackson v. Virginia,, 443 U.S. at 319-20, 99 S.Ct. at 2789 (1979). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Id. at 319, 99 S.Ct. at 2789. A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)).

A. Conspiracy

Appellant was charged with conspiracy as a substantive crime and as a theory of liability. 6 AA 1118. Furthermore, the jury was instructed on the law relative to conspiracy. 6 AA 1126 – 1130. In Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1123 (1998) the Nevada Supreme Court concluded that a jury could infer that an agreement was formed between the codefendants when Thomas handed a gun to his Co-Defendant Hall and instructed him to collect some money. Hall subsequently collected the money and gave it to Thomas in the car. Id. at 1144. Without objection or interference Hall observed Thomas bring a loaded gun into a hotel and demand money from a clerk. Id.

Appellant stated that he went with Wilson to the house to get some drugs from a man named Grant. 1 AA 67. Wilson told Appellant to knock on the door and then get out of the way. 1 AA 67. At this point Appellant indicated that he did not have a gun but he simulated one under his shirt anyway. 1 AA 67. Once Wilson realized that the house they were at was not Grant's, Wilson decided to go through with the robbery anyway and Appellant went along with him. 1 AA 67-8. Furthermore, when Appellant was alone with the victims, he informed them that if they were cool they would not get hurt. 5 AA 898. Later, Appellant admitted to digitally penetrating Danielle's vagina. 1 AA 68.

Based upon the confession of Appellant and the corroborating testimony of all of the victims, it is obvious that there is sufficient evidence to support the conviction of appellant based upon a conspiracy theory. There was a coordinating series of events where Appellant simulated having a gun prior to entering the house, told the victims that he would not shoot them if they behaved while Wilson was away, held an object to Danielle while he was molesting her such that she thought it was a gun, digitally penetrated Danielle's vagina, and then split the proceeds of the nights adventures with Wilson afterwards. There is a clear indication that there was an agreement between Wilson and Appellant sufficient to satisfy Thomas and for a reasonable jury to conclude they conspired in the crimes.

B. Aiding and Abetting

Appellant was also charged with aiding and abetting and the jury was correctly instructed on this theory of vicarious liability. 6 AA 1131-32. There was ample evidence in the record that Appellant was a participant in the crimes he was convicted of. Appellant himself admitted to being present, acting like he had a gun, watching over the victims while Wilson kidnapped Ryan and took him to an ATM machine to get money from his and Justin F.'s accounts, told Wilson that he could get hard during the sexual assaults of Justin R. and Danielle, that he rubbed Danielle's vagina and digitally penetrated her, and that he split the money with Wilson. 6 AA 1106-07. This evidence alone is sufficient to convict Appellant of aiding and abetting in the commissions of these crimes beyond a reasonable doubt.

Furthermore, all of the victims identified Appellant as a man with a body type consistent to the second person who victimized them. 4 AA 849-50; 5 AA 927; 5 AA 987; 5 AA 999; 5 AA 1014; and 5 AA 1021. Two of the victims even testified that they heard the shorter man call the taller man a name that sounded like "Marcus. 5 AA 987; 5 AA 1018. As the jury is the ultimate fact finder, and their verdict should not be disturbed absent plain error. Appellant's confession and the corroborating testimony of all six victims was sufficient for a jury to find Appellant guilty beyond a reasonable doubt. The jury verdict must be sustained and Appellant's claim dismissed.

VI.
THE SENTENCE IMPOSED BY THE DISTRICT COURT FELL WITHIN THE PRESCRIBED STATUTORY RANGE AND WAS THEREFORE PROPER

Appellant is claiming that each of his sentences relates to one alleged act of Appellant digitally penetrating Danielle and therefore his five separate ten to life sentences with consecutive ten to life sentences for use of a deadly weapon is excessive. OB, p. 14. Appellant is mistaken however that his sentences relate to a single act upon Danielle. Since his convictions were for different acts of sexual assault perpetrated upon Danielle and Justin R. it is clear that these are five separate acts and therefore five separate but concurrent sentences was appropriate.

Appellant was found guilty of all eighteen counts alleged in the Second Amended Information. 6 AA 1114. On July 3, 2008, Appellant was adjudged guilty of all eighteen (18) counts and sentenced as follows: as to Counts I and XVIII – TWELVE (12) months; as to Counts II, III, and XI – TWENTY-EIGHT (28) to SEVENTY-TWO (72) months; as to Counts IV, VI, VII, and IX – SIXTY (60) to ONE HUNDRED EIGHTY (180) months plus an equal and consecutive term of SIXTY (60) to ONE HUNDRED EIGHTY (180) months for the use of a deadly weapon; as to Counts V and VIII – TWENTY-FOUR (24) to SEVENTY-TWO (72) months; as to Count X – SEVENTY-TWO (72) to ONE HUNDRED EIGHTY (180) months plus an equal and consecutive term of SEVENTY-TWO (72) to ONE HUNDRED EIGHTY (180) months for the use of a deadly weapon; as to Counts XII – XV, and XVII – TEN (10) years to LIFE plus an equal and consecutive term of TEN (10)

years to LIFE for the use of a deadly weapon; and as to Count XVI – TWENTY-FOUR (24) to SEVENTY-TWO (72) months plus an equal and consecutive term of TWENTY-FOUR (24) to SEVENTY-TWO (72) months for the use of a deadly weapon; all counts to run concurrently. 1 AA 127-32. Basically, Appellant was sentenced to twenty years to life since the remainder of his counts ran concurrently.

Where there are multiple victims, the defendant can be charged and convicted of separate offenses relating to each individual victim. Woods v. State, 114 Nev. 468, 958 P.2d 91 (1998). Furthermore, separate and distinct acts of sexual assault committed as part of a single criminal encounter may be charged as separate counts, and convictions entered thereon. Peck v. State, 116 Nev. 840, 7 P.3d 470 (2000) (overruled on other grounds).

Since Appellant's sentence fell within the statutory range it was not excessive. A sentencing judge is accorded wide discretion in imposing a sentence and his determination will not be disturbed on appeal absent an abuse of discretion. Martinez v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998). "This discretion enables the judge to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant. Id. at 738, at 145. Indeed, the Eighth Amendment requires that defendants be sentenced individually, taking into consideration both the individual and the crime itself. Id. at 737, at 145. This Court will not interfere with the sentence imposed "s[o] long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported by only impalpable or highly suspect evidence. Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159 (1976); see also Allred v. State, 120 Nev. 410, 421, 92 P.3d 1246, 1253 (2004).

Appellant contends that his sentence was excessive because he was sentenced to five (5) separate life sentences with consecutive ten (10) to life sentence for use of a deadly weapon. OB, p. 14. Appellant contends that each of those sentences was related to one alleged act of Appellant digitally penetrating Danielle Browning. Id. However, Defendant has mischaracterized the circumstances surrounding Counts 12-15 and 17. Count 12 involved the sexual assault of Danielle and Justin R. and forcing Danielle to perform fellatio

on Justin R. 1 AA 21. Count 13 involved forcing Danielle to receive cunnilingus from Justin. 1 AA 22. Count 14 involved forcing Justin to receive fellatio from Danielle. 1 AA 22. Count 15 involved forcing Justin to perform cunnilingus on Danielle. 1 AA 22. Finally, Count 17 involved the digital penetration of Danielle's vagina by Appellant's finger. 1 AA 23.

Appellant's sentences for the sexual assaults comport with statutory mandates. NRS 200.366 provides in pertinent part:

> 1. A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim . . . is guilty of sexual assault.
>
> 2. Except as otherwise provided in subsections 3 and 4, a person who commits a sexual assault is guilty of a category A felony and shall be punished: . . .
>
> (b) If no substantial bodily harm to the victim results, by imprisonment in the state prison for ***life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served***. . .

NRS 200.366 (emphasis added).

Furthermore, NRS 193.165 (1995) provides that use of a deadly weapon during the commission of a crime compels an additional term of imprisonment for a minimum term of imprisonment prescribed by statute for the crime. Finally, NRS 176.035(1) provides that where a defendant is convicted of two or more offenses, the judge has discretion to run the sentences either concurrently or consecutively.

Appellant received a sentence of life with a minimum parole eligibility of ten (10) years for the Sexual Assault counts, plus an equal and consecutive term of life with a minimum parole eligibility of ten (10) years for the use of a deadly weapon; all eighteen counts for which Appellant was convicted were to run concurrent to one another. Clearly, Appellant's sentence was within the statutory mandates.

Appellant's sentences involved two separate victims. Since the Appellant can be properly charged and convicted of separate offenses relating to each individual victim, each charge and sentence was proper. Woods, 114 Nev. 468, 958 P.2d 91. Finally, as each of those four sexual assaults involved the giving and receiving of a sexual act by each of those

victims, they involved separate and distinct acts of sexual assault sufficient to be charged as separate counts, and convictions entered thereon. Peck, 116 Nev. 840, 7 P.3d 470. Appellant also digitally penetrated Danielle's vagina. Since that had nothing to do with the fellatio she was forced to give or the cunnilingus she was forced to receive, that is clearly not cumulative as Appellant claims. Appellant's sentence was not cumulative or excessive as it comports with the statutory guidelines imposed by law, involves two separate victims, and four separate acts involving forcing those victims to perform sexual acts on each other as well as one act of Appellant sexually assaulting Danielle. Appellant's claim is without merit and must be denied.

VII.

JUROR ABERNATHY WAS PROPERLY EXCLUDED

Appellant claims in the conclusion to his opening brief that he was denied a jury of his peers because "the district attorney arbitrarily excused one of the two African-Americans eligible for the jury. OB, p. 15. Although Appellant did not address this point substantively in his brief as an enumerated claim, it is clear upon a review of the record that this claim is belied by the record and should be denied.

Defense counsel raised the issue of whether or not Juror Abernathy was dismissed because of her race in a hearing regarding his Batson challenge on April 10, 2008. Juror Abernathy gave the following testimony in voir dire:

> **The Court**: Have you ever had any kind of experience with law enforcement that would have some effect upon your sitting as a juror in this kind of case? . . .Nothing that would make you give the testimony of a police officer any greater or lesser weight than non police officer would have?
> **Juror Abernathy**: If you had asked me a year ago, I would have said yes, but I was young and stupid, and I wouldn't choose them over anyone else. . .
> **The Court**: Have you, or anybody close to you, ever been the victim of or accused of any kind of a – any other kind of criminal offense?
> **Juror Abernathy**: I was actually arrested in 2006, in Henderson, but it wasn't anything particularly formal arrest connected with that. . .
> **The Court**: What was the charge?
> **Juror Abernathy**: It was assault and battery, but it got amended to a gross misdemeanor because it was with a roommate, from a relationship. . .

> **The Court**: You and a roommate got into a beef . . . and you were the only one who got arrested?
> **Juror Abernathy**: Yes, I was, and I was also the one who called the police. . .
> **The Court**: . . . Did that cause you a problem?
> **Juror Abernathy**: No, it's always been good after, it was a year ago. ***I used to have the whole outlook about police not really doing their job***, but I think I can now admit that I was drunk, and I did give up something, and I did what I had to do.

3 AA 706-9 (emphasis added). The State later struck Juror Abernathy during an off-the-record discussion with defense counsel and the trial judge. 4 AA 733.

Defense counsel lodged a Batson challenge at the conclusion of the voir dire process. The district court heard the following arguments:

> **The Court:** . . . All right. Counsel, you wish to make a Batson challenge to the State's striking, challenging juror number five by the name of Stephanie Abernathy.
> **Mr. Banks:** Yes, Judge, Stephanie Abernathy, badge number 284.
> Defense's position is that Ms. Abernathy was part of a protected class that being that she was African American, coincidentally, the same protected class as my client.
> Based on the answers that she gave in response to the Court's questions as well as answers from the prosecution as well as the Defense, my perception is that she say anything out of the ordinary in fact, when pressed without any prior incidents with the Henderson police, she indicated that she was out of place where she was over that, that she completely set it aside, it wouldn't affect how she approaches this case at all.
> And not only that, I believe she indicated that she was a freelance makeup artist, and that she does makeup for strippers, something like that. I don't know what a – how the Court or how the State feels about that.
> I know that I have clients prosecuted where strippers are accusers, and the State in those cases put a lot of stock in what strippers say.
> So I don't think the fact that she does makeup for strippers is really a reason that, you know, what I am saying, Judge, is I don't see any reason besides the fact that she is African American, and I believe once we make that claim that the State is now in a position where they have to put forth a race neutral reason for this – for the challenge.
> **Ms. Luzaich**: Well, first of all, I wasn't convinced that she was actually African American when she sat down.
> I thought is she Mexican or black? But she is 22, and as he said, she works with strippers. It only has to be a race neutral reason.
> She talked about an arrest for domestic violence. That alone is enough. She talked about how she doesn't, or at least at one point didn't like the Henderson Police Department.
> That alone is also enough.
> The fact that she has said that she has gotten over that. So what, you know, I call bullshit on that.
> But those are just a series of race neutral reasons, and that's why we kicked her.

> **The Court:** I think that the State has identified a sufficient race neutral reason, and that I think that they have and responded appropriately to the Batson challenge, and identified they have designated a race neutral reason.

4 AA 748-50. The district court determined upon arguments from both parties that the State had a valid race neutral explanation for striking Juror Abernathy.

Discriminatory use of preemptory challenges by both the prosecution and criminal defendants based on gender, ethnic origin, or race is unconstitutional and prohibited under the Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986); United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000). In determining whether a juror was impermissibly excluded, the Court must undertake a three-part analysis. Purkett v. Elem, 514 U.S. 765, 766-67, 115 S.Ct. 1769, 1770-71 (1995); see also Doyle v. State, 112 Nev. 879, 921 P.2d 901, 907-908 (1996). First, an opponent of a preemptory challenge must make out a prima facie case of racial discrimination. Id. A prima facie case of racial discrimination can be shown by reviewing the "pattern of strikes exercised or the questions and statements made by counsel during the voir dire examination. Batson, 476 U.S. at 96-7, 106 S.Ct. at 1723. Second, once a prima facie case is made, the proponent of the strike has the burden of production and must come forward with a race-neutral explanation. Purkett, 514 U.S. at 767, 115 S.Ct. at 1770. The explanation does not have to be persuasive, or even plausible. Id. at 768, 115 S.Ct. at 1771. Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral. Id. Finally, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. Id. The issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible as measured by the prosecutor's demeanor, the reasonableness or improbability of the proffered explanation, and whether the rationale has some basis in accepted trial strategy. Miller-El v. Cockrell, 123 S.Ct. 1029 (2003). In reviewing the denial of a Batson challenge, the reviewing court should give great deference to the determining court as they are in a better position to assess whether racial discrimination was occurring. Hernandez v. New

York, 500 U.S. 352, 367, 111 S.Ct. 1859, 1870 (1990); Doyle, 112 Nev. at 889-890, 921 P.2d at 908.

The Defense utterly failed to meet its obligations under the first step to make out a prima facie case of racial discrimination and the record is devoid of any such purpose from the challenge of a single African-American juror. Unfortunately, this prerequisite is often overlooked as in the present case and the State was never under any obligation to offer a race neutral reason. Nonetheless, the State did give several race neutral reasons including that Juror Abernathy had been previously arrested for domestic violence, convicted of a gross misdemeanor, and that at least at one point she did not think that HPD did their jobs and she would have given their testimony less weight. The State was free to distrust the juror's insistence that she had put that prejudice and bias behind her, and the district court determined that the reasons were race-neutral and that no purposeful racial discrimination was shown. Such findings are entitled to deference by this Court on appeal.

CONCLUSION

WHEREFORE, the State respectfully requests that Appellant's claims are without merit and this Court should affirm the Judgment of Conviction.

Dated this 28th day of October, 2009.

Respectfully submitted,

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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.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 28, 2009. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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