IN THE SUPREME COURT OF THE STATE OF NEVADA

GUILLERMO RENTERIA-NOVOA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 61865	Electronically Filed Oct 07 2013 09:46 a.m. Tracie K. Lindeman Clerk of Supreme Court

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether the State lawfully exercised peremptory challenges against three minority veniremembers.
2. Whether the State charged Appellant with specificity.
3. Whether the district court properly excluded evidence of Roxana's pregnancy by her boyfriend at the time she reported Appellant's abuse.
4. Whether the district court properly admitted certain of Roxana's prior consistent statements to rebut a charge of fabrication.
5. Whether the State's proper reference to Roxana as a "victim" prejudiced Appellant, and whether Detective Jaeger vouched for Roxana.
6. Whether Appellant confessed freely and voluntarily, and knowingly, voluntarily, and intelligently waived his Miranda rights.
7. Whether the State committed any Brady violation with respect to evidence that Roxana had received a U visa.
8. Whether the district court properly admitted evidence of Appellant's phone records and Roxana's phone number.
9. Whether the trial court properly admitted "evidence" of Roxana's reference to the repetitive nature of Appellant's conduct.
10. Whether sufficient evidence supported Appellant's thirty-six convictions.

11. Whether Appellant's convictions arising from multiple sex acts over the course of a single encounter implicated double jeopardy.
12. Whether the district court appropriately settled jury instructions.
13. Whether the State committed any acts of prosecutorial misconduct.
14. Whether cumulative error exists.

STATEMENT OF THE CASE

On May 22, 2012, the State charged Guillermo Renteria-Novoa ("Appellant") by way of Second Amended Information with: Sexual Assault With a Minor Under the Age of 14 (Category A Felony – NRS 200.364, 200.366) (Counts 1, 2, 4, 5, 6, 9, 10, 12, 13, 14, 15, 17, 18, 20 & 21); Lewdness With a Child Under the Age of 14 (Category A Felony – NRS 201.230) (Counts 3, 7, 8, 16, 19 & 22); Sexual Assault With a Minor Under the Age of 16 (Category A Felony – NRS 200.364, 200.366) (Counts 23, 24, 25, 26, 27, 28, 29 & 30); Open or Gross Lewdness (Gross Misdemeanor – NRS 201.220) (Counts 11, 31 & 36); and Sexual Assault (Category A Felony – NRS 200.364, 200.366) (Counts 32, 33, 34 & 35). Volume I, Appellant's Appendix, 224-33.

On May 21, 2012, jury trial commenced, and on May 25, 2012, the jury found Appellant guilty on all thirty-six counts. II AA 281-90; III AA 422. On September 6, 2012, Appellant appeared in court with counsel for sentencing and was SENTENCED as follows: COUNTS 1, 2, 4, 5, 6, 9, 10, 12, 13, 14, 15, 17, 18, 20, 21 - LIFE with the possibility of parole after TWENTY (20) YEARS; - COUNTS 3, 7, 8, 16, 19, 22 - LIFE with the possibility of parole after TEN (10)

YEARS; - COUNTS 23, 24, 25, 26, 27, 28, 29, 30 - LIFE with possibility of parole after TWENTY FIVE (25) YEARS; - COUNTS 11, 31, 36 - TWELVE (12) MONTHS Clark County Detention Center (CCDC) ; - COUNTS 32, 33, 34, 35 - LIFE with the possibility of parole after TEN (10) YEARS, with 762 DAYS credit for time served. FURTHER COURT ORDERED, COUNT 3 TO RUN CONSECUTIVE TO COUNT 1; COUNT 6 TO RUN CONSECUTIVE TO COUNTS 1 & 3; COUNT 23 TO RUN CONSECUTIVE TO COUNTS 1, 3, & 6 AND COUNT 32 TO RUN CONSECUTIVE TO COUNTS 1, 3, 6 & 23; REMAINING COUNTS TO RUN CONCURRENT. FURTHER COURT ORDERED, a special SENTENCE OF LIFETIME SUPERVISION is imposed upon release from incarceration and pursuant to NRS 179D.450, Appellant must register as a Sex Offender within 48 hours of release from custody. II AA 291-98. The court entered its Judgment of Conviction on September 17, 2012. Id.

On October 5, 2012, Appellant filed a Notice of Appeal from the Judgment of Conviction. II AA 299-305. Appellant filed his instant Opening Brief ("AOB") on August 27, 2013. The State responds as follows:

STATEMENT OF THE FACTS

In 2002, Roxana Perez moved from Mexico to Las Vegas. V AA 965-66. In 2003, she moved into the Libertwo Apartments in, where her mother met, and began to date Guillermo Renteria-Novoa ("Appellant"). V AA 968. In 2004,

Roxana, her mother and sister, Appellant, Roxana's cousin Yahir, and an uncle moved into University Apartments. V AA 969-70. At University, Roxana developed a relationship she described as "just kissing and being together" with Yahir. V AA 972. They never had sex. V AA 973.

University

While at University, Appellant walked in on Roxana and Yahir together. V AA 973-74. In 2005, the family moved from a two bedroom into a three bedroom (still at University), and once at this apartment, Appellant began to threaten Roxana that he would tell her family what he had seen her doing with Yahir. V AA 974-76. Roxana, by this point 12 or 13 years old, became scared and embarrassed by this threat, and Appellant began his assaults on Roxana shortly after he learned he could blackmail her with this information. V AA 976-77.

1. Appellant told Roxana to come into his room and take off her clothes one afternoon after school. V AA 979. He had her lie down on some blankets on the floor, where he then placed his hands on her breasts, his finger in and his mouth and tongue on her vagina, and placed his tongue on and in her anus. V AA 979-983.
2. Appellant again told Roxana to come into his room one afternoon after school AA 984-85. This time, Appellant likewise (under threat of revealing Roxana's relationship) licked Roxana's vagina and anus, touched her breasts, and placed his fingers inside Roxana's vagina and anus. Id.
3. Appellant also once touched Roxana's vagina and his own penis (under his clothing) simultaneously. V AA 986-87.

Andover (under Age 14)

In 2006, Roxana's family moved to Andover Place. V AA 988. She was 13 at the time, and turned 14 in August of 2007, while they were still living at Andover. V AA 989. Roxana was attending Orr Middle School at the time.

1. Appellant made Roxana go into his bedroom, through the same threats of revealing her relationship with her cousin to her family, where he then touched her butt while she was walking around. V AA 990.
2. Appellant made Roxana pull her shorts down and began to lick her vagina. V AA 992. He touched her breasts, and put his fingers inside her vagina and anus. V AA 992-93. He then turned her around and licked her anus.
3. Appellant, sleeping next to Roxana in the bed they shared with Roxana's mother, began to rub Roxana's butt over her clothes, and try to touch her vagina inside her clothing. V AA 994-95.
4. Appellant again, during the day, touched Roxana's breasts and placed his fingers and tongue inside her anus and vagina. V AA 995-96.
5. Appellant grabbed Roxana's hand and placed it on his penis over his clothing. V AA 996. Appellant then took his penis out and had Roxana began to touch it, after which point he masturbated himself to ejaculation. V AA 996-97.

Andover (over Age 14)

Roxana turned 14 on August 30, 2007, while living at Andover. V AA 997.

1. Appellant again threatened Roxana to come into his room, where he touched her in substantially the same manner as his previous assaults.
2. Appellant asked Roxana to lick his penis, which she refused to do. V AA 1000.

Tamarus Park

In the end of 2007, Roxana moved to Tamarus Park, and she began attending Del Sol High School that fall. V AA 1000-01. Roxana's mother was home in the afternoons during this time, and Appellant gave Roxana a respite from his

attentions while they lived at Tamarus Park. V AA 1002-03. However, he continued to threaten to reveal her relationship with her cousin. Id.

Southern Cove

In 2008, Roxana moved to Southern Cove Apartments. V AA 1003. She was in the 10th grade, still at Del Sol High School. Id. Roxana got a cell phone, after which Appellant began calling and texting her incessantly. V AA 1003-05, 1040-45. Appellant saw Roxana at a party while at Southern Cove, and again reiterated his threat to reveal her secret. V AA 1007-08. He also began to show up to the same places as Roxana. V AA 1009.

1. Appellant abused Roxana in substantially the same manner at Southern Cove. V AA 1009-11.
2. Appellant also, on a different day, had Roxana touch his penis, after which he ejaculated. V AA 1011-12.

Riverbend

In August 2009, Roxana turned 16, and moved from Southern Cove to Riverbend Village Apartments. AA 1012-14. One last instance of abuse occurred at Riverbend. V AA 1014-21. During this time, Roxana had been getting more mature and confident, and angrier with Appellant's abuse. Id.

Ultimately, Appellant became frustrated with Roxana's rejecting his abuse, and told Roxana's cousin that Roxana needed to get back in touch with him. V AA 1021-24. This spurred Roxana to tell her Aunt Janet about Appellant's abuse. Her

aunt then took her to see a counselor, told her mother, and ultimately, Appellant was reported to the police in December 2009. V AA 1024-28.

Confession

On February 18, 2010, Detective Ryan Jaeger with the Las Vegas Metropolitan Police Department left a business card with Appellant's girlfriend asking Appellant to call him back. II AA 387-88. Appellant voluntarily called Det. Jaeger back a few hours later and left a voicemail. Id. Det. Jaeger then called Appellant back and spoke with him. Id. He promised Appellant that if Appellant came down to give an interview he would not be arrested that day—a promise Det. Jaeger kept. II AA 395. Det. Jaeger also told Appellant that if he did not come give a statement an arrest warrant would eventually issue for him based on Roxana's statement. II AA 397.

Appellant drove himself down to the police station on March 6, 2010, for his interview. II AA 389, 397. Det. Jaeger Mirandized Appellant and conducted an interview that lasted twenty-nine minutes. II AA 393. Although the room was small, Det. Jaeger did not handcuff or restrict Appellant in any way, deny him the opportunity to use the restroom, deny him food or water, or threaten him. II AA 390, 393. When the interview terminated, Appellant left under his own power. II AA 395.

During the course of the interview, Appellant admitted that the abuse started after he caught Roxana kissing her cousin. V AA 191. Appellant further admitted to seeing Roxana's "body parts," to seeing her "naked," to kissing her breasts, to masturbating in front of her, to seeing and touching her vagina (over clothing), and attempting to entice Roxana to have sex with him. V AA 190-91, 194-95, 197-98, 206.

SUMMARY OF THE ARGUMENT

Appellant asserts fourteen claims in his Opening Brief—all of which must fail. The State lawfully exercised peremptory challenges against three minority veniremembers. Appellant was charged with sufficient specificity to put him on notice of the charges against him. At trial, the district court properly excluded improper and irrelevant evidence that Roxana was pregnant by her boyfriend at the time she reported Appellant's abuse. The district court also properly admitted certain of Roxana's prior, consistent statements, to rebut a charge of fabrication in her testimony. After Roxana reported Appellant's abuse, he voluntarily went to the police station and, after being lawfully Mirandized, made a knowing, voluntary, and intelligent waiver of those rights followed by a voluntary confession. The State committed no Brady violation with respect to any allegedly exculpatory evidence that was never even in the State's possession, and this alleged violation was not prejudicial, as Appellant presented evidence of this information at trial. At trial, the

district court likewise properly admitted evidence of Appellant's phone records and Roxana's phone number. The trial court's admission of one passing reference to Appellant's repetitive conduct did not constitute "bad acts," and was neither error nor prejudicial to Appellant. As demonstrated, sufficient evidence supported Appellant's thirty-six convictions, none of which implicated double jeopardy. The district court also properly settled jury instructions. In closing argument, the State committed no acts of prosecutorial misconduct. Finally, as Appellant can demonstrate *no* error prejudicial to him, Appellant's claim of cumulative error is without merit.

ARGUMENT

I. The State Lawfully Exercised Peremptory Challenges Against Three Minority Veniremembers

Appellant first alleges that the State's improperly used peremptory challenges against three minority veniremembers. AOB 12. However, these challenges were wholly proper.

A. Standard of Review

Under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), where the defense objects to the State's use of a peremptory challenge on a minority veniremember:

> (1) the opponent of the peremptory challenge must show a prima facie case of racial discrimination; (2) the proponent of the peremptory challenge must then present a race-neutral explanation; and (3) the trial court must determine whether the parties have

> satisfied their respective burdens of proving or rebutting purposeful racial discrimination.

Hawkins v. State, 127 Nev. Adv. Op. 50, 256 P.3d 965, 967 (2011) (quotation marks omitted).

Appellate review of a Batson challenge gives deference to "[t]he trial court's decision on the ultimate question of discriminatory intent." Id. at 966 (quoting Diomampo v. State, 124 Nev. 414, 422–23, 185 P.3d 1031, 1036–37 (2008)). Where "the prosecutor's explanations for removing the jurors did not reflect an inherent intent to discriminate, and [Appellant] failed to show purposeful discrimination or pretext," this Court will not overturn on review. Hawkins, 256 P.3d at 968.

The State cannot merely give a "pretextual" reason for its choice to strike the minority veniremember. Id. at 968. Some indications of pretext might be:

> (1) the similarity of answers to voir dire questions given by [minority] prospective jurors who were struck by the prosecutor and answers by [nonminority] prospective jurors who were not struck, (2) the disparate questioning by the prosecutors of [minority] and [nonminority] prospective jurors, (3) the use by the prosecutors of the "jury shuffle," and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.

Id. at 967 (alterations in original).

However, where the trial court did not act unreasonably in deeming the prosecutor's explanation "race-neutral," alleged pretext comes down to a credibility determination by the trial court judge. See Id. Even when a prosecutor's

stated reason for striking a juror "lame," assuming a race-neutral explanation and absent evidence of discrimination, "the lower court[s] decision to reject the *Batson* challenge [is] 'a finding of fact, which stands unless clearly erroneous.'" Id. (quoting United States v. Roberts, 163 F.3d 998, 999 (7th Cir. 1998)).

B. As the Trial Court Found, The State Properly Excused Three Minority Veniremembers

At trial, the State exercised peremptory challenges on six Caucasian and three minority veniremembers. IV AA 917. Notably, only one of the three minority veniremembers shared Appellant's ethnicity.[1] Id. Appellant's trial counsel asked, pursuant to Batson, for race-neutral reasons the State excused these veniremembers. The venire was quite diverse, making it literally impossible to avoid excusing minority veniremembers:

> [W]e had a [sic] obviously diverse panel. I think with even just in the box from the beginning we had five African-American—once we settled it we had five African-Americans, a number of Hispanics, a number of Asians, and I think even in the minority white. So both sides really had no option but to kick people of—that were minority.

IV AA 898.

Moreover, the trial court also observed:

> Mathematically, with the number of people in the box and the number of challenges, if everybody exercised their perempts, somebody has to kick a minority.

[1] On the other hand, Appellant's trial counsel excused three veniremembers who shared Appellant's ethnicity.

IV AA 905. Ultimately, six minority veniremembers remained on the impaneled 14-person jury. IV AA 904-05.

Regardless, after this mathematical explanation, the State then gave specific, race-neutral reasons for its strike of each veniremember:

(1) Ms. Martinez (Juror No. 69)

The State described its strike of Ms. Martinez, a Filipino veniremember, for the following race-neutral reason:

> She said at one point in time, If the State can't decide their case, how can I. [The trial court] went on to ask her, well, you know it's the State's burden, yes, and could you find him not guilty, yes.
>
> But her body language . . . told me that she was not comfortable with the process and that she was uncomfortable with the idea of having to determine guilt on a person. And I don't know if it was the language barrier or if that's how she felt, but I need a juror who is able to deliberate and is able to weigh the evidence and is able to then go make a determination.

IV AA 898-99.

Moreover, the State specifically canvassed Ms. Martinez with respect to her capacity to determine guilt or innocence, and the record demonstrates her answers were not compelling:

> [The State]: If we prove our case beyond a reasonable doubt, do you have any problem finding the defendant guilty?
>
> [Ms. Martinez]: I don't know.
>
> [The State]: You don't know?
>
> [Ms. Martinez]: No.

IV AA 866. While Ms. Martinez was ultimately re-canvassed and did answer affirmatively that she could find someone guilty, the State clearly met its burden with this race-neutral reason for excusing her.

The trial court agreed, stating:

> [I]n any event, I was a little bit concerned because her statement . . . said if the State doesn't know how am I supposed to know, which sort of suggests the State is supposed to make the decision for her.
> . . . .
>
> But anyway, I just note that for the record as one of my concerns with Ms. Martinez. So I can understand why she was challenged, because—because that answer caused me come concern. So I find that the State's reasons for excusing Ms. Martinez are race neutral.

IV AA 909-10.

Appellant claims the State's reason for excusing Ms. Martinez was the language barrier, which, when the State did not further question her on, supposedly demonstrated a "sham and a pretext for discrimination." AOB 16. However, the State's concern with Ms. Martinez was her evident discomfort with the burden of determining guilt or innocence, shown supra. Additionally, although the trial court made no specific findings with respect to Ms. Martinez's body language, this was not necessary where it described her discomfort as a satisfactory reason for her excusal. See, e.g., Snyder v. Louisiana, 552 U.S. 472, 479, 128 S. Ct. 1203, 1209 (2008).

As such, under the deferential standard this Court accords the trial court on review, Appellant makes no showing that the trial court erred in finding no discrimination or pretext with respect to Ms. Martinez's excusal.

(2) Mr. Aguilar (Juror No. 68)

The State described its strike of Mr. Aguilar, a Hispanic veniremember, for the following race-neutral reason(s):

> I made numerous challenges for cause on [Mr. Aguilar]. He is the person who even with the use of the interpreter who we brought in yesterday for his assistance and then had him today, he was not able to answer any questions in an appropriate way. He was non-responsive.
>
> I don't think he was trying to be, but I really don't think that he understood or could grasp what was going on. He was confused. He was nervous. He was uncomfortable, which he said many times. He appeared confused and he appeared uncomfortable. So, you know, I tried to get him kicked as many times as I could for cause and I didn't feel comfortable with his uncomfortableness.

IV AA 898.

Mr. Aguilar did indeed demonstrate *marked* discomfort with the proceedings from the very beginning. First, in response to a different question, he indicated his English was not good. IV AA 505. While the presence of an interpreter *somewhat* helped, Mr. Aguilar was not responsive to certain questions—even with the assistance of interpretation:

> [The Court]: Do you think you might know anything about this case other than what you've heard in the court today?

[Mr. Aguilar]: No. Because my degree in my school up to the grade ten, I don't have much—

[The Court]: I'm not sure what he said.

[Mr. Aguilar]: I mean, I don't have too much experience.

[The Court]: No. I—

[Mr. Aguilar]: [Unintelligible] listen to the language because I don't understand it.

[The Court]: Okay. The question is: Do you think that you might know something about this case; for example, maybe you think you saw it on the Internet or heard it on the news or read about it in the newspaper?

[Mr. Aguilar]: No, no. Not me.

IV AA 583-84.

Additionally, Mr. Aguilar was not responsive to the State's canvas, and repeatedly and consistently stated that he was uncomfortable with the proceedings:

[The State]: Mr. Aguilar, now that you have an interpreter helping you, how do you feel now about participating in the trial?

[Mr. Aguilar]: Well, I've listened to several experiences, unfortunate ones that I haven't happened, unfortunate ones that I haven't happened.

[The State]: You mean while we were going through this process?

[Mr. Aguilar]: Yes.

[The State]: So you mean other things that people have disclosed?

[Mr. Aguilar]: No.

> [The State]: I don't understand. Have you—now that you have the use of an interpreter, how do you feel about sitting as a juror, about the entire process?
>
> [Mr. Aguilar]: As far—as far as the questions that have been asked, I feel uncomfortable being here.
>
> [The State]: What part makes you uncomfortable?
>
> [Mr. Aguilar]: On the part of the accused, what he's accused about.
>
> [The State]: So the crime themselves make you uncomfortable?
>
> [Mr. Aguilar]: Yes, the crime.
>
> [The State]: Okay. I mean, is that just—is it that you feel uncomfortable because they're of the nature of the crime, or is there something about the accused and his position that makes you feel uncomfortable?
>
> [Mr. Aguilar]: I'm not used to being in these kind of situations, but it's uncomfortable for me that somebody commits a crime.

IV AA 793-96.

Mr. Aguilar specifically indicated that his discomfort stemmed in part from his concern over his inability to comprehend the proceedings, even with the assistance of interpretation:

> [The State]: So with the use of an interpreter, even with the help of an interpreter, do you still feel that uncomfortable and that you would not be a good juror for this case?
>
> [Mr. Aguilar]: Yes. I feel very uncomfortable.
>
> [The State]: Okay. So and I'm not trying to—I'm not trying to like drag something out of you that you don't want to say, but I need you to kind of explain to me and to the judge, to the defense why you think you wouldn't be a good juror, why you're uncomfortable.

> Everybody's uncomfortable with the charges. Is there something different for you that makes you feel like you should not be on thus jury?
>
> [Mr. Aguilar]: There's not a difference at all, but in this particular kind of situations I get very nervous.

IV AA 795-96.

Further, Mr. Aguilar indicated that his poor memory contributed to his nervousness and discomfort:

> [The Court]: Are you saying that you would be so nervous and so uncomfortable that you wouldn't be able to perform your duty as a juror?
>
> [Mr Aguilar]: Yes. I consider that, because what I listen to, I forget things.
>
> [The Court]: I'm not—I'm not sure what you're saying. You don't—you forget things?
>
> [Mr. Aguilar]: Yes. In general a lot of the questions from yesterday, I don't even remember them.
>
> [The Court]: Do you have any medical conditions that interfere with your memory, or is it just that you generally have a bad memory?
>
> [Mr. Aguilar]: Yeah, I think that in general I have a very bad memory.
>
> . . . .
>
> [The Court]: [D]o you think that you would be able to . . . with the assistance of a notepad and a pen be able to render your service and to listen to the evidence and be fair and impartial?
>
> [Mr. Aguilar]: I will try.

IV AA 796-97. The State attempted to challenge Mr. Aguilar for cause immediately after this discourse, which the defense opposed.

Understandably, the State was concerned with Mr. Aguilar as a witness to a *thirty-six count charge*. The trial court agreed:

> Mr. Aguilar did give some answers which were a little concerning for me. He indicated that he would be so nervous—the answer that concerned me the most frankly, was that he doesn't remember anything. And so whether or not he has a bias, whether or not he can be fair and impartial, if the juror can't remember anything, especially in a case where there are 37 counts, that was a little bit of a concern to me.
> . . . .
>
> But again, my own personal concern was in a case with 37 counts, a guy with a memory problem is—there's a question about whether or not he actually can do the job even if he says he can. And so on that one I find that the State's reason is not pretextual because, as I indicated, I was actually somewhat concerned about Mr. Aguilar.

IV AA 907.

While Appellant asserts four other veniremembers "expressed similar discomfort with the charges[,]" this claim is both incorrect and illogical. AOB 16-17. First, the record reflects Mr. Aguilar was the only juror uncomfortable with the proceedings due to a literal inability to remember the questions or evidence before him. Second, Mr. Aguilar never said he was uncomfortable with the crime of sexual assault against a minor, as those other veniremembers did—simply that he was uncomfortable when somebody commits a crime. AOB 17, IV AA 794. Indeed, Mr. Aguilar's discomfort arose from practically everything with respect to

the proceedings. Third, any asserted discomfort those four members expressed appeared—if anything—to weigh in the State's favor, based on their respective experiences with young children, and it would have been illogical for the State to excuse them on that basis alone. AA IV 693-98, 700-01, 720-22, 828-29, 884.

Additionally, Appellant's assertion that the State declined the trial court's invitation to question Mr. Aguilar with respect to his language difficulties—although this was not the State's basis for his strike—is nevertheless baseless and belied by the record as well, shown supra. V AA 793-95.

Likewise, under the deferential standard this Court accords the trial court on review, Appellant makes no showing that the trial court erred in finding no discrimination or pretext with respect to Mr. Aguilar's excusal.

(3) Ms. Temple (Juror No. 64)

Finally, the State described its strike of Ms. Temple, a black veniremember, for the following race-neutral reason:

> Additionally, the things that made me concerned about her was that when you first asked if she knew anyone who had been sexually abused, if she had any experience with that, she said no. And then I didn't get an opportunity to flesh any of that out with her.
>
> Then when Mr. Feliciano got up and talked with her, then all of the sudden she had numerous experiences with sexual assault victims in her past, and some of them, you know, with the five-year-old and then with the 16-year-old who was lying. I—having not had an opportunity to ask her, since she wasn't forthright the first time around, I didn't feel comfortable having her on my jury because I don't understand why she didn't tell me the first time.

IV AA 901.

Most critically with respect to the State's challenge against Ms. Temple, the State exercised another peremptory challenge against a Caucasian veniremember (Mr. Winings) for the exact same failure to either remember or be forthright about issues of sexual abuse in his past with respect to people he knew. IV AA 903. In fact, Mr. Winings was the State's first peremptory challenge. Id.

Ms. Temple was asked whether she or anyone close to her had ever been a victim of sexual abuse. IV AA 781. Appellant wishes to split hairs with respect to whether or not Ms. Temple was "close" to these people, and whether or not this "closeness" truly meant she was not forthright, when Ms. Temple herself stated that one of the people was a "close friend" of her son. AOB 17-18; IV AA 854. Appellant alleges that the State had an opportunity to question Ms. Temple about her failure to be forthright, and that a failure to conduct a meaningful voir dire examination on this subject is evidence that the explanation is a sham. AOB 18. However, the State did not attempt to question the other, non-minority veniremember on the same topic. The State's concern was not over some type of belief, but a lack of truthfulness, which further voir dire does not develop—especially in situations where, as the State noted, "I'm sorry, you don't forget something like that." IV AA 903.

The trial court ultimately agreed:

> At least the State has given a reason which they've also applied to a white juror.
>
> And so since they have taken a criteria, even if the criteria may not be something that you agree with, if they apply the same criteria to other jurors who are the different racial groups, which in this case it at least appears that they have with respect to Mr. Winings, Juror No. 22, then based on that I find that the State's reason is race neutral and not pretextual.

IV AA 920.

Ultimately, under the deferential standard this Court accords the trial court on review, Appellant makes no showing that the trial court erred in finding no discrimination or pretext with respect to Ms. Temple's excusal.

II. The State Charged Appellant with Specificity

The State prepared a Second Amended Information charging Appellant with thirty-six counts. III AA 442. Appellant's counsel did not object to this charging document. Id. Appellant now alleges the State did not charge him with adequate specificity. AOB 19-21. This claim must fail.

A. Standard of Review

Because a challenge to the sufficiency of a charging document involves a constitutional issue, this Court reviews "de novo whether the charging document complied with constitutional requirements. West v. State, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003).

This Court has recognized that where an appellant raises a challenge to the sufficiency of the information after the verdict, the verdict cures any technical

defects unless the defendant has been prejudiced by the defective charging document. Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 670 (1970). Additionally, where a defendant raises a question of the sufficiency of an information for the first time on appeal, the information "will not be held insufficient to support the judgment, unless it is so defective that by no construction, within the reasonable limits of the language used, can it be said to charge the offense for which the defendant was convicted." Id.

Nevada law is well-settled that "there is no requirement that the State allege exact dates [in a charging document] unless the situation is one in which time is an element of the crime charged." Wilson v. State, 121 Nev. 345, 368, 114 P.3d 285, 301 (2005), cert. denied 546 U.S. 1040, 126 S.Ct. 751 (2005); see also Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984); Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965); Martinez v. State, 77 Nev. 184, 360 P.2d 836 (1961). While NRS 173.075(1) requires an indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged[,]" time is not an element for sexual crimes, and "crimes involving the sexual abuse of a child victim often prove especially difficult cases to pin down an exact time frame due to the age of the child and the child's reluctance to testify." See Wilson, 121 Nev. at 368 n. 52, 683 P.2d at 301 n. 52.

For sexual abuse crimes against minors, the State may "provide approximate dates on which it is believed that the crime occurred." Id. at 369, 683 P.2d at 301. In Cunningham, this Court held the State may "give a time frame for an offense instead of a specific date, provided that the dates listed are sufficient to place the defendant on notice of the charges." Id. "Otherwise, convictions for criminal misfeasance would only be valid when the State correctly guesses the exact date of an offense." Id. (alterations and quotation marks omitted).

B. The State Charged Appellant with Adequate Specificity

The Information charged Appellant with various acts that occurred between the time frame of February 1, 2005, and December 31, 2009, and acts that occurred before Roxana turned fourteen (14) and sixteen (16) respectively. I AA 23-24. As the State noted:

> There are a lot of dates in this case. And fortunately, we are able to tie dates with places that Roxana lived. She moved, basically, on a yearly basis, and so that helps us in determining her age at certain times.

VI AA 1381.

Appellant asserts that it is "exceedingly difficult to identify with certainty which charges pertain to which of Roxana's allegations." AOB 21. However, the State noted with meticulous detail in its opening argument each period of time within which the alleged acts occurred. V AA 942-55. Roxana herself testified to specific occurrences at each apartment she lived in, which grade she was attending,

and how old she would have been at that time. V AA 978-1021. The State then reiterated those times and dates on closing argument. VI AA 1382-90. Appellant avers that, because the State could have narrowed "the time frame for each encounter," this failure to do so violated his constitutional rights and Nevada law. However, the standard in Nevada is clear and unambiguous: where the State alleges some timeframe within which the abuse occurred, its charges will not fail for lack of due process.

Moreover, Appellant's citation to Simpson v. Eighth Judicial District Court, 88 Nev. 654, 660, 503 P.2d 1225, 1229 (1972) is inapposite. Simpson addressed whether a murder indictment was sufficient to put a defendant on notice where it alleged "nothing whatever concerning the means by which the crime was committed." Id. at 655, 503 P.2d at 1226. This Court has made the standard with respect to child sexual abuse cases clear, supra. Although Appellant notes the State has codified the Sixth Amendment's requirements under NRS 173.075(1), this Court has already reconciled that standard with timeframes in child sexual abuse cases in Wilson. AOB 20. As such, based on the law this Court applies on review, this claim is without merit.

III. The District Court Properly Excluded Evidence of Roxana's Pregnancy by Her Boyfriend at the Time She Reported Appellant's Abuse

A. Standard of Review

The decision to admit or exclude evidence is within the sound discretion of the district court. Johnson v. State, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997). This Court has noted that the district court's decision to admit or exclude evidence will not be disturbed absent manifest abuse of discretion. See Hughes v. State, 112 Nev. 84, 88, 910 P.2d 254, 256 (1996).

NRS 50.090 is (or should be) clear:

> In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime, the accused may not present evidence of ***any previous sexual conduct*** of the victim of the crime to challenge the victim's credibility as a witness[.]

(Emphasis added).

This "rape shield" law exists to "protect rape victims from degrading and embarrassing disclosure of intimate details about their private lives and to encourage rape victims to come forward and report the crimes and testify in court protected from unnecessary indignities and needless probing into their respective sexual histories." Johnson, 113 Nev. at 776, 942 P.2d at 170 (alterations and quotation marks omitted) (citing Summitt v. State, 101 Nev. 159, 161, 697 P.2d 1374, 1375 (1985)).

Additionally, as this Court has specifically held:

> Although a criminal defendant has a due process right to 'introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case,' ***that right is subject to the rules of evidence***." Rose v. State, 123 Nev. 194, 205 n. 18, 163 P.3d

408, 416 n. 18 (2007) (quoting Vipperman v. State, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980)).

Fields v. State, 125 Nev. 785, 796, 220 P.3d 709, 717 (2009) (emphasis added).

B. The Trial Court Did Not Abuse Its Discretion by Refusing to Admit Evidence of Roxana's Pregnancy by Her Boyfriend at the Time

Appellant claims the trial court erred by not allowing him to admit evidence that Roxana was pregnant by her boyfriend at the time she told her family of Appellant's abuse. AOB 22. Appellant asserted this evidence was "central to the defense case theory[.]" AOB 23. To wit: this pregnancy apparently gave Roxana motive to fabricate the charges against Appellant, because she would get in less trouble for being pregnant if she also claimed she was the victim of sexual abuse. AOB 22-23.

In addition to being logically unsound, this evidence was not relevant. The trial court expressed confusion by Appellant's trial counsel's request to introduce evidence of Roxana's pregnancy by her *boyfriend* in a case where she was sexually abused by her mother's boyfriend: "I'm still not sure why factually her pregnancy by someone who's completely unconnected with the case gives her motive to lie about [Appellant]." III AA 438.

However, even if this evidence were relevant, Appellant claims—as his trial counsel did at trial—that he "did not seek to inquire about Roxana's prior sexual conduct[,]" only her pregnancy. AOB 24. Absent evidence that Roxana somehow

became pregnant without sexual conduct, this frankly absurd statement exemplifies a distinction without a difference. Moreover, Appellant's trial counsel wanted to introduce this evidence of sexual conduct to demonstrate Roxana's motive to fabricate the charges—challenging her credibility in flagrant violation of NRS 50.090—which is *exactly* the kind of embarrassing disclosure the rape shield law exists to prevent. Additionally, Appellant cannot demonstrate any prejudice for this lack of opportunity to show Roxana "fabricated" the charges, as the jury heard his admission to sexual conduct with her. See infra Part VI & X.

Appellant argues he was entitled to present evidence of this defense under NRS 50.085(3), and that NRS 50.090 "cannot be applied in a way that impedes a defendant's constitutional right to present his theory of defense." AOB 23-24. Rose specifically undercuts this argument, and as the State noted at trial, if the asserted defense required the admission of evidence notwithstanding NRS 50.090:

> [T]he defense could come up with any reason that they want to say that somebody has a motive or bias or something, and that's how they overcome the rape shield.

III AA 458. The trial court judge agreed, denying the motion. III AA 477.

To the extent Appellant argues the denial of admission of this evidence "gutted" his defense, this Court should not be moved by this argument, as any alleged fault lies squarely on Appellant's trial counsel for attempting to base a defense theory around obviously inadmissible evidence. AOB 32. At the very least,

as the trial court noted, Appellant's trial counsel should have presented the theory before the *first day of trial*:

> I mean, frankly, this should have been, you know, like I said, done before today so I could have read this stuff and specifically looked at this stuff before I came in here.
> . . . .
>
> And in this case it sounds like [the State] relied on [you] to not file a motion which [it] might otherwise have filed, and so I'm a little bit concerned about there being a possible misrepresentation in this case that—especially if the conversation happened a month ago.
> . . . .
>
> I mean, it sounds like if you planned to take it up, you should have done it in a motion, and then you could have gotten a ruling and you could have taken it up—we could have continued the trial.
> . . . .
>
> I mean, this is really procedurally not a good way of doing things. You're saying that this is the heart of your case. Well, did it become the heart of your case this morning, or did you know about it before today, is my question.

III AA 439, 452-54

Clearly, no *manifest* abuse of discretion exists here with respect to the trial court's decision to exclude patently inadmissible evidence. Appellant's defense theory was still subject to the rules of evidence, notwithstanding due process, and the subjective expectations of Appellant's are of no consequence. As such, this claim is without merit.

IV. The District Court Properly Admitted Roxana's Prior Consistent Statements to Rebut Appellant's Charge of Fabrication

A. Roxana's Prior, Out of Court Statements Were Permissibly Introduced Under NRS 51.035(2)(b)

NRS 178.598 ("Harmless error") states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." However, harmless-error review applies only if the defendant preserved the error for appellate review. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Again, the decision to admit or exclude evidence is within the sound discretion of the district court, see Johnson, 113 Nev. at 776, 942 P.2d at 170, which this Court will not disturb absent manifest abuse of discretion, see Hughes, 112 Nev. at 88, 910 P.2d at 256.

During Roxana's cross-examination, Appellant's trial counsel attempted to impeach her with her "various accountings of the purported abuse." AOB 26; V AA 1084-1133. However, Appellant's trial counsel struggled with the cross-examination, and numerous objections and bench conferences occurred during the course of cross. Id. As the trial court specifically noted, by the time the State conducted redirect examination on Roxana, the record was "horrible" because "no one [knew] what [Appellant's trial counsel was] talking about." V AA 1122-23.

NRS 51.035 reads:

> "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:
> 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

> (b) Consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

In order to demonstrate that her previous statements to her counselor or the police were not *inconsistent* with anything she testified to, just perhaps not as expansive as they could have been, out of embarrassment, the State sought to reintroduce Roxana's previous out-of-court statements as prior consistent statements under NRS 51.035(2)(b). V AA 1133-53. Appellant's trial counsel objected, and the trial court overruled the objection. V AA 1139, 1144-45. Thus, this Court reviews for harmless error.

The trial court was within its sound discretion to admit this evidence, and its introduction did not affect Appellant's substantial rights. The jury had already heard this evidence on Roxana's direct examination, and Appellant's trial counsel made a point on cross to demonstrate any alleged inconsistencies. Ultimately, the State did not introduce any impermissible hearsay, and Appellant was not prejudiced by these out-of-court statements.

B. The Trial Court Properly Permitted the State to Question Roxana in a Leading Fashion on Redirect

"NRS 50.115(3)(a) provides that leading questions are generally impermissible on direct examination '***without the permission of the court***.'" Leonard v. State, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001) (emphasis added). "Thus, the statute provides some discretion to the court in this area." Id.

Furthermore, "whether leading questions should be allowed is a matter mostly within the discretion of the trial court, and any abuse of the rules regarding them is not ordinarily a ground for reversal." Id. (quotation marks and citations omitted). Appellant's trial counsel specifically objected to the nature of the State's questions on redirect as leading. V AA 1139.

As NRS 50.115(3)(a) allows the trial court to permit the State to ask leading questions, and as this is not "ordinarily a ground for reversal," no prejudicial error exists sufficient to warrant reversal as to the arguably leading manner in which the State questioned Roxana on redirect examination.

V. The State's Reference to Roxana as the "Victim" Did Not Prejudice Appellant, and Detective Jaeger Did Not "Vouch" for Roxana

The trial court denied Appellant's Motion in Limine to preclude the use of the term "victim" to describe Roxana at trial. I AA 140, 158-59. This court reviews a district court's ruling on a motion in limine for an abuse of discretion. Whisler v. State, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005).

NRS 217.070(3) defines "victim" as: "A minor who was sexually abused, as 'sexual abuse' is defined in NRS 432B.100." NRS 432B.100, in turn, states that a minor who was the victim of lewdness (including open or gross), abuse, or seduction was sexually abused. In order for the State to charge the crime, a victim must exist. II AA 153. The State had the burden to prove that Roxana was the victim of Appellant's conduct. Appellant fails to cite to any *binding* legal authority

that explains why the trial court abused its discretion by allowing the State to follow *Nevada* law and refer to a statutorily-defined victim as a victim. Moreover, a jury instruction explained Appellant's presumption of innocence, and this Court presumes "that juries follow district court orders and instructions." II AA 272; Summers v. State, 122 Nev. 1326, 1334, 148 P.3d 778, 783 (2006).

Appellant further states that "by using the term 'victim' in the jury instruction(s), the trial court implied that a crime had been committed; that there was, in fact, a victim; and that [Appellant's] contention to the contrary lacked merit." AOB 32. Appellant's argument is circular. The whole process of charge and trial implies a crime has been committed. Appellant might as well argue that his trial and every piece of evidence presented against him prejudiced his rights.

Likewise, Appellant's argument that Det. Jaeger "vouched" for Roxana is specious. AOB 30. Notwithstanding Appellant's Motion in Limine to preclude the use of the term victim, Appellant did not object to any of these instances of alleged vouching at trial. Therefore, this Court reviews for plain error, which must be an error so unmistakable that it is obvious from a casual review of the record. Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). For an error to be plain it must, *at a minimum*, be clear under current law. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1224, 1232 (2005). This error does not require reversal unless the defendant demonstrates the error affected his substantial rights by

"actual prejudice or miscarriage of justice." Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992), which Appellant cites, is inapt. AOB 31-32. Lickey, citing Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987), actually held: "An ***expert*** may not comment on the ***veracity*** of a witness." Id. Det. Jaeger made no comment on Roxana's veracity, and the trial court did not commit any plain error "in permitting [the police] to refer to the complaining witness in this case as the 'victim,' inasmuch as such reference did not, as urged, constitute a vouching for the credibility of said complainant[.]" Pulido v. State, 566 So. 2d 1388, 1389 (Fla. Dist. Ct. App. 1990).

Ultimately, the trial court did not abuse its discretion by denying Appellant's attendant Motion in Limine, and Appellant makes no showing of plain error or how he was actually prejudiced by this reference to Roxana as victim.

VI. Appellant Knowingly, Voluntarily, and Intelligently Waived His Miranda Rights, and the Admission of His Freely-Given Confession Did Not Violate His Rights

The trial court held a Denno[2] hearing to determine the admissibility of Appellant's statements about his behavior toward Roxana. II AA 380-421. The trial court found that Appellant 1) knowingly, voluntarily, and intelligently waived

[2] Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964).

his Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) rights, and 2) voluntarily confessed. II AA 415-16, 418.

A. Standard of Review

(1) Confession

On appeal, if substantial evidence supports the district court's finding that the confession was voluntary, the district court did not err in admitting the confession. Brust v. State, 108 Nev. 872, 874-75, 839 P.2d 1300, 1301 (1992). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. Id.

"A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement." Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). A confession is voluntary only if it is the product of a "rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208, 80 S.Ct. 274, 280 (1960).

"To determine the voluntariness of a confession, the Court must consider the effect of the totality of the circumstances on the will of the defendant. The question in each case is whether the defendant's will was overborne when he confessed." Passama, 103 Nev. at 214, 735 P.2d at 323; see also Alward v. State, 112 Nev. 141, 912 P.2d 243 (1996). In Passama, the Nevada Supreme Court, citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973), delineated the

following factors to be considered when evaluating the voluntariness of a confession:

> [T]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

Passama, 103 Nev. at 214, 735 P.2d at 323.

The prosecution has the burden of proving by a preponderance of the evidence (1) the voluntariness of the confession, as well as (2) the waiver of a suspect's Fifth Amendment Miranda rights as being voluntary, knowingly, and intelligently made. Falcon v. State, 110 Nev. 530, 874 P.2d 772 (1994).

(2) Ruse

"[C]onfessions obtained through the use of subterfuge are not vitiated so long as the methods used are not of a type reasonably likely to procure an untrue statement." Sheriff v. Bessey, 112 Nev. 322, 325, 914 P.2d 618, 620 (1996). While subterfuge may cause a suspect to confess, this alone does not constitute coercion; "if it did, all confessions following interrogations would be involuntary because it can almost always be said that the interrogation caused the confession." Id. (Internal citations and quotation marks omitted).

This "ruse" is just part of the totality of the circumstances this Court considers when determining whether a defendant's statements were volunatary. Id. at 326, 914 P.2d at 621. "[A]n officer's lie about the strength of the evidence

against the defendant is, in itself, insufficient to make the confession involuntary." Id. at 325, 914 P.2d at 619. Where the treatment of a suspect or the setting of the interrogation was not coercive, ruse is permissible, and the trial court properly did not suppress a confession based on this tactic. Id. at 326, 914 P.2d at 621.

"As long as the techniques do not tend to produce inherently unreliable statements or revolt our sense of justice," they do not violate substantial rights. Id. at 328, 914 P.2d at 622. Unacceptable techniques which might tend to force an unreliable confession include representing that "welfare benefits would be withdrawn or children taken away unless there is a confession or suggestion of harm or benefit to someone." Id. at 322, 914 P.2d 618, 620-21.

(3) Miranda Waiver

The inquiry as to whether a Miranda waiver is knowing and intelligent is a question of fact, which is reviewed for clear error. Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006). The question of whether a Miranda waiver was voluntary is a mixed question of fact and law that this Court reviews de novo. Id. "A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent. A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement." Id. at 277, 130 P.3d at 181-82. Notably, a "written or oral statement of the waiver of the right to remain silent is not invariably necessary.

Rather, a waiver may be inferred from the actions and words of the person interrogated." Id.

B. Appellant Freely and Voluntarily Confessed

Appellant claims he did not freely and voluntarily confess. AOB 33. However, substantial evidence supported the trial court's finding at the Denno hearing that Appellant voluntarily confessed. II AA 418. Police interviewed Appellant, a 48-year-old man, for less half an hour, well within acceptable time limits for interrogations in similar circumstances, especially considering Appellant was denied neither a break nor sustenance. See Stringer v. State, 108 Nev. 413, 421, 836 P.2d 609, 614 (1992) (confession after arrest admissible and no coercion found where interrogation lasted approximately one hour and forty-five minutes prior to confession); Rosky v. State, 121 Nev. 184, 193, 111 P.3d 690, 696 (2005) (confession admissible where suspect not under arrest was interrogated *over* two hours due in part to fact suspect could have asked for a break); Silva v. State, 113 Nev. 1365, 1369, 951 P.2d 591, 594 (1997) (confession admissible where police questioned suspect for approximately one to two hours and no evidence was provided suspect was deprived of food or drink).

Moreover, to the extent Appellant claims a "ruse" enticed him to the police station, the record reflects Det. Jaeger *never* lied to Appellant or threatened him. As Det. Jaeger only stated an arrest warrant would ultimately issue if Appellant did

not come tell his side of the story—which was true—Appellant had no reason to give a *false* confession in the process of telling this story in order to escape some further harm or threat. This Court has held such a ruse—not likely to produce an unreliable confession—permissible under Bessey.

As substantial evidence supported the trial court's determination that Appellant voluntarily confessed, this Court should not disturb the trial court's conclusion.

C. *Appellant Voluntarily, Knowingly, and Intelligently Waived His Miranda Rights*

Appellant next asserts that he did not voluntarily, knowingly, and intelligently waive his Miranda rights. AOB 37. This claim must likewise fail.

Whether Appellant was in fact in custodial interrogation is not at issue, as Det. Jaeger gave Appellant his Miranda rights and Appellant did, in fact, understand and waive those rights:

> [Det. Jaeger]: [Y]ou have the right to remain silent. Anything you say can be used against you in either—in a court of law. You have the right to the presence of an attorney. If you cannot afford an attorney, one will be appointed before questioning. Do you understand your rights?
>
> [Appellant]: Yes.
>
> [Det. Jaeger]: Okay. Um, do you still want to talk to me about Roxana?
> . . . .

> [Appellant]: I don't want to go see anymore family. I don't want to know nothing about that family. I think what I did a mistake, ***but I want to fix it***. Keep—keep me away from her.
> . . . .
>
> I know it was a mistake to see her, touch her and do that kind. ***But I want to fix this that's starting now***.

I AA 189, 198 (emphasis added).

As the trial court noted, when Det. Jaeger asked Appellant if he was still willing to talk about Roxana, Appellant responded by launching into a narrative about her and how he wanted to fix the mistakes he had made. I AA 415. While Appellant did not literally say "I waive my Miranda rights," he did not have to; as "waiver may be inferred from the actions and words of the person interrogated." Mendoza, 122 Nev. at 277, 130 P.3d at 182. Appellant was demonstrably eager to waive his rights and talk to Det. Jaeger about Roxana.

Moreover, Appellant's explanation that he did not fully comprehend his waiver (as a native Spanish speaker) is not persuasive. Appellant affirmatively answered "Yes" when asked if he was willing to waive his rights. I AA 189. Appellant and Det. Jaeger had a conversation on the phone without any difficulty, and arranged a future meeting at a remote location. II AA 387-88. Det. Jaeger had no problem understanding Appellant on that phone conversation, and had no indication that Appellant could not understand him. Id.

While Appellant did apparently speak heavily-accented English, at no point during the interview could Det. Jaeger not understand him, nor did Appellant give

any indication that he could not understand Det. Jaeger, and Appellant did not ask for an interpreter. II AA 391, 396. Aside from a few clarifications, Appellant's answers were always responsive to the questions Det. Jaeger posed. II AA 392. While Det. Jaeger did not affirmatively procure an interpreter, one was not required. As the trial court pointed out, "it's pretty clear [Appellant did] understand what's going on. In fact, he understands some of the questions that are pretty complex." II AA 416.

Further, the record reflects that Appellant was demonstrably *not* silent after Det. Jaeger read him his rights. The State's use of a defendant's voluntary statements does not violate that person's right to remain silent. See Lamb v. State, 127 Nev. Adv. Op. 3, 251 P.3d 700, 707 (2011). As the trial court did not commit plain error in determining Appellant intelligently and knowingly waived his Miranda rights, and as a preponderance of the evidence demonstrated that Appellant voluntarily waived his Miranda rights, his confession was admissible at trial.

VII. The State Did Not Commit a Brady Violation for Any Alleged Failure to Disclose Allegedly Exculpatory Evidence, and This "Failure" Did Not Prejudice Appellant at Trial

A. Appellant Makes No Showing of a Brady Violation or Resulting Prejudice

Under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), a prosecutor must "disclose evidence favorable to the defense when that evidence is material

either to guilt or to punishment." State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013) (citations and quotation marks omitted). Under this standard, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed. Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996). A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

To prove a Brady violation, "the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) 'prejudice ensued, i.e., the evidence was material.'" *Id.* (quoting Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000)). The State "is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers." Jimenez, 112 Nev. at 620, 918 P.2d at 693.

Appellant claims a Brady violation occurred through the State's alleged failure to provide evidence that Roxana—an illegal immigrant—had received a U visa as a result of the charges against Appellant, which allowed her to stay in this country while the case was pending. AOB 40-41. However, Appellant fails to meet any prong of the Brady requirements.

First, Appellant states this "evidence directly relates to [Roxana's] motive to fabricate and, hence, her credibility." AOB 42. As demonstrated supra in Part VI and infra in Part X, Roxana *did not* fabricate the charges: Appellant *admitted* to acts of sexual conduct with her, and the jury heard this. Additionally, the timeline for and rationale behind this alleged "fabrication," ostensibly to receive a benefit, makes no sense. Roxana alerted her family and the authorities of the charges in December 2009, and she didn't receive the U visa until January 2011, more than a year later. V AA 1069-74. Moreover, Roxana revealed the full details of Appellant's offenses more than five full months before she received the U visa. V AA 1081-82. Further, Roxana testified that she had nothing to do with getting the U visa—that it was her mother's decision. V AA 1133-34. This alleged benefit (that Roxana did not even receive until a full year had passed since she went to the authorities—exposing herself and her status as an illegal immigrant to them in the process) is in no way exculpatory for Appellant, especially where the jury heard corroborating evidence that Roxana did not fabricate the charges against Appellant.

Second, the State neither intentionally nor inadvertently withheld this information. The State did not provide Roxana with the U visa, and had *no* information about any U visa, nor did any agent of the state. II AA 361; V AA 1056-57. The only information Appellant received through discovery was a statement in Roxana's counseling records that led Appellant to believe Roxana had

received a U visa. V AA 1076. When pressed, Roxana could not even specifically say which agency she used to apply for the U visa. V AA 1071-72.

Third, any alleged violation was immaterial. The jury heard testimony from Roxana herself that she received a U visa as a result of the charges. Id., V AA 1133-35. Appellant's trial counsel reiterated the nature of Roxana receiving this "benefit" in closing argument. VI AA 1399. Appellant makes no showing of prejudice as a result of this "exculpatory" evidence, nor can he show even a reasonable possibility that the outcome would have been different if the evidence were disclosed, because Appellant was found guilty notwithstanding its disclosure. V AA 1084-85.

A. Appellant Was Not Entitled to a Mistrial as a Result of an Alleged Brady Violation

Appellant moved for a mistrial as a result of the alleged failure to disclose this evidence, which the trial court denied. V AA 1076, 1083. "It is within the sound discretion of the trial court to determine whether a mistrial is warranted." Meegan v. State, 114 Nev. 1150, 968 P.2d 292, 295 (1998) abrogated on other grounds by Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001). "Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal." Id.

Based on Appellant's foregoing failure to demonstrate a Brady violation, the trial court clearly did not abuse its discretion by failing to grant a mistrial, which this Court should not disturb.

VIII. The Trial Court Properly Admitted Evidence of Appellant's Phone Records and Roxana's Phone Number

Appellant next claims that the trial court erred by admitting evidence of his phone records and Roxana's phone number. AOB 44. Again, the decision to admit or exclude evidence is within the sound discretion of the district court, see Johnson, 113 Nev. at 776, 942 P.2d at 170, which this Court will not disturb absent manifest abuse of discretion, see Hughes, 112 Nev. at 88, 910 P.2d at 256.

As the trial court noted, Appellant did not timely object to the introduction of his phone records through AT&T representative Conner McCoy:

> Then maybe you should have objected to it before, you know, when I asked you.
> . . . .
>
> Well, I mean, the problem is they're already admitted. The jury's already seen them.

VI AA 1235. Therefore, this Court reviews for plain error.

Relevant evidence is generally admissible. See NRS 48.015 & NRS 48.025. Appellant's trial counsel, notwithstanding the tardy objection, attempted to claim that Appellant's phone records were "irrelevant at this point." VI AA 1237. However, Mr. McCoy testified after Roxana. Evidence of Appellant's phone

records—where the jury had already heard testimony from Roxana that Appellant called and texted her dozens of times, and sent her picture messages of her own underwear—was clearly probative to Roxana's claims of abuse. V AA 1037-46. Moreover, the trial court specifically acknowledged that the State was going to "connect it up[,]" with further evidence later, which the State did, and overruled Appellant's trial counsel's tardy objection. VI AA 1237. This admission was not plain error, and the trial court did not manifestly abuse its discretion with its admission.

Appellant timely objected to the introduction of Roxana's phone number as hearsay. VI AA 1268. Therefore, this Court reviews for harmless error. Appellant claims that "Det. Jaeger testified to Roxana's out-of-court statement(s) describing her phone numbers." AOB 47. However, Appellant mischaracterizes Det. Jaeger's testimony at trial. The State laid a foundation for the number that did not require Det. Jaeger to testify to any out-of-court statements from Roxana. VI AA 1270-71. As such, Det. Jaeger actually testified to her phone number from his personal knowledge:

> [The State]: Okay. Do you remember [Roxana's] number off the top of your head?
>
> [Det. Jaeger]: I believe Roxana's cell number would be 426-9416.
>
> . . . .
>
> [The State]: How about her home number? Do you remember that number?

[Det. Jaeger]: 731-0162 or something.

VI AA 1284. Det. Jaeger's testimony then demonstrated that Roxana's number matched the number Appellant had called and texted repeatedly. See, e.g. VI AA 1234.

The trial court had discretion to admit this evidence, and Det. Jaeger testified to Roxana's number from his personal knowledge. Moreover, any alleged error was harmless, as the jury heard Appellant's own confession during Det. Jaeger's testimony that he had repeatedly texted and called Roxana. I AA 198-200; VI AA 1290-93. As such, this Court should not disturb the decision of the district court.

IX. Roxana's Statement that Appellant Abused Her "Two, Three Times a Week" Was Not Bad Act Evidence, and Appellant Was Not Prejudiced by Its Admission

A. Roxana's Statement Was Not "Bad Act" Evidence, but Elicited Contemporaneous with Her Testimony About Appellant's Charged Crimes

Appellant alleges that Roxana's single statement that Appellant abused her "two, three times a week[,]" amounted to prejudicial bad act evidence. AOB 49; V AA 984. As Appellant's trial counsel did not object to this evidence at trial, this Court reviews for plain error.

A review of the record demonstrates that Appellant's statement was not elicited in order to show abuse over the course of many years, or to subtly introduce hundreds of other charges. The State specifically asked Roxana how

many times this occurred at the University Apartments, to which she answered "two, three times a week," at which point the State continued to elicit testimony about other specific instances of abuse *at University* that Roxana referenced. II 984-88. As Roxana ultimately testified to three specific instances at University, and the State had a number of charges to match with these instances of abuse, this statement does not even constitute bad act evidence—it was simply a description of the acts Roxana testified to that occurred at University.

B. Should This Court Consider This Statement "Bad Act" Evidence, It's Admission Nevertheless Does Not Warrant Reversal

(1) Standard of Review

"The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). Upon review, this Court will not reverse this decision absent manifest error. Id.

To determine whether this evidence is admissible, the State must demonstrate, at a hearing 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.

Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005). Although a hearing is required, the failure to hold such a hearing and make the necessary findings will

not mandate reversal on appeal if "(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of prior bad act evidence . . . ; or (2) where the result would have been the same if the trial court had not admitted the evidence." Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006); Rhymes, 121 Nev. at 21, 107 P.3d at 1281.

(2) The Admission of This "Evidence" Does Not Warrant Reversal

This evidence was admissible to demonstrate, *inter alia*, opportunity, intent, and absence of mistake or accident—permissible purposes under NRS 48.045(2). Again, as Appellant did not object, this court reviews for plain error.

Clearly, this evidence is relevant under the test as set forth in Rhymes. Second, these acts were proven by Roxana's testimony—the same evidence that ultimately led the Appellant to be convicted of all thirty-six counts he was charged with. II AA 281-90. Third, the probative value of this evidence was not outweighed by unfair prejudice. Appellant's single, passing reference to the repetitive nature of Appellant's conduct did not rise to a sufficiently prejudicial level to warrant reversal, and the State's comment on this in closing argument did not constitute evidence, but proper argument. VI AA 1384-85.

Appellant further alleges that the trial court's failure to "proffer an instruction limiting the jury's consideration of the above-referenced bad act evidence, either upon its admission or in the jury instructions[,]" constituted error.

However, as Appellant failed to object, Appellant makes no showing why a limiting instruction would be given. Moreover, this Court stated in Rhymes that it considers "the failure to give such a limiting instruction to be harmless if the error did not have a substantial and injurious effect or influence the jury's verdict." Rhymes, 121 Nev. at 24, 107 P.3d at 1282. As described supra, based on the passing nature of this "evidence" in conjunction with the other evidence against Appellant, the failure to give such a limiting instruction was clearly harmless and this court should not reverse based on this failure.

The trial court did not abuse its discretion by admitting this evidence, and no error, plain from a casual review of the record, exists mandating reversal.

X. Sufficient Evidence Supported Appellant's Thirty-Six Convictions

A. Standard of Review

"[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). The jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Accordingly, the standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'"

McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); see also Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). In rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

"In reviewing the evidence supporting a jury's verdict, the question is not whether this Court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could have been convinced to that certitude by the evidence it had a right to consider." Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (citing Edwards v. Jackson, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974); see also Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979)).

This court has repeatedly and consistently held the uncorroborated testimony of a victim—without more—sufficient to uphold a conviction for sexual assault. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005); State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996); Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996); Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994); Rembert v. State, 104 Nev. 680, 681, 766 P.2d 890, 891 (1988); Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981); Henderson v. State, 95 Nev. 324, 326, 594 P.2d 712, 713 (1979); Bennett v. Leypoldt, 77 Nev. 429, 432, 366 P.2d 343, 345 (1961); Martinez v. State, 77 Nev. 184, 189, 360 P.2d

836, 838 (1961); State v. Diamond, 50 Nev. 433, 437, 264 P. 697, 698 (1928). Likewise, the Ninth Circuit has held, "[t]he testimony of one witness, if solidly believed, is sufficient to prove the identity of a perpetrator of a crime. When that testimony is corroborated, even greater reason exists for upholding the verdict of the jury which accepted it." U.S. v. Smith, 563 F.2d 1361, 1362 (9th Cir. 1977) (citations omitted).

B. Substantial Evidence Supports the Jury's Verdict of Guilty on all Thirty-Six Counts

Appellant contends insufficient evidence supported his convictions through either an asserted lack of evidence or failure to meet one of the various elements of his charges. However, Appellant's claim of insufficient evidence must fail with respect to every count for which he was properly convicted.

Despite the foregoing well-settled Nevada law, Appellant still attempts argue that Roxana's testimony standing alone was insufficient to convict him: "Prosecutors presented little, if any evidence, to corroborate Roxana's allegations of sexual misconduct." *The State was not required to*. Moreover, the State *did* present corroborating evidence—Appellant's own confession to a sexual relationship with Roxana.

As to the nature of Roxana's testimony, Appellant avers that Roxana generally did not testify with sufficient particularity or specificity to the counts charged. AOB 51-52. In short, Appellant somehow characterizes Roxana's

multiple accounts, shown supra, as lacking particularity. The jury clearly heard sufficient testimony of Appellant's abuse from Roxana to convict him, assuming they found her credible—which they evidently did. Moreover, this is precisely the kind of specific, definitive testimony this Court deemed appropriate to uphold a conviction of twenty counts in Rose v. State, 123 Nev. 194, 204, 163 P.3d 408, 415 (2007). Finally, Appellant's statement of Roxana's testimony as nothing more than "rote descriptions of the sexual acts" is both untrue and offensive, unless Appellant would have this Court believe it was Roxana's fault that he apparently lacked sufficient imagination to vary his routine while he abused her. AOB 52.

Appellant mischaracterizes facts or misstates the law to argue that he did not commit certain crimes. He alleges that, as to Count 6, Roxana never testified that Appellant "penetrated" her vagina with his tongue, only that he "licked" her vagina, which—he argues—is insufficient for Sexual Assault. This Court has specifically held such determinations irrelevant:

> [Appellant contends] that the evidence showed only that he had placed his tongue on the victim's vagina and not in it, and thus the requisite penetration was lacking. However, NRS 200.364 and 200.366, upon which the sexual assault counts are based, provide as follows:
>
> > 200.364 Definitions. As used in [NRS 200.366], unless the context otherwise requires:
> > . . . .
> > 2. "Sexual penetration" means *cunnilingus,* fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or

> anal openings of the body of another, including sexual intercourse in its ordinary meaning.
>
> 200.366 Sexual assault: Definition; Penalties.
> 1. A person who subjects another person to sexual penetration . . . against the victim's will . . . is guilty of sexual assault.

> Thus, while sexual penetration is required for a count of sexual assault, the act of cunnilingus is considered "penetration" according to that word's statutory definition. Based upon the testimony, the jury was properly able to determine that [Appellant] accomplished at least a slight penetration of the victim's vagina by placing his tongue on it. Accordingly, we conclude that even if it were only shown that [Appellant] had placed his tongue on and not in the victim's vagina without her consent, this constituted sufficient evidence to sustain a conviction for sexual assault.

Hutchins v. State, 110 Nev. 103, 109-10, 867 P.2d 1136, 1140-41 (1994).

Appellant further alleges with respect to Count 7 that Roxana's testimony only demonstrated that he "licked," not "touched" her breasts at University. AOB 53. However, Roxana specifically testified that Appellant touched her breasts with his hands. V AA 979. With respect to Count 11, Roxana testified that Appellant had her touch his penis before she turned 14. AOB 53; V AA 997. With respect to Counts 12-15, Roxana again specifically described acts that occurred before she turned 14. AOB 53-54; V 987-98. Again, for Count 16, Roxana testified that Appellant touched her butt over clothing. AOB 54; V AA 994. While Appellant claims that this touching over clothing cannot constitute lewdness, Appellant cites no authority to support this claim. Instead, Appellant appears to assert that a touching over clothing is not actually sexual assault. AOB 55. As this Court has

observed, "[w]hile lewd is not specifically defined in our statutes, the word conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Summers v. Sheriff, 90 Nev. 180, 182, 521 P.2d 1228 (1974). Clearly, the jury found Appellant's conduct sufficiently "lewd" to qualify for conviction under this count.

As to Counts 17, 18, 19, 20, 21, and 22, Roxana testified to a series of encounters at Andover, *after* which her testimony specifically moved into encounters that occurred after her 14th birthday. AOB 55; V AA 987-98. Moreover, Appellant's claim that Roxana did not testify that his tongue "penetrated her vagina sufficient to sustain his Sexual Assault conviction" for Counts 17 and 25 fails, per Hutchins, in the same manner his claim with respect to Count 6 does. AOB 55-56. Appellant's final claim for Counts 25 and 26, arguing Roxana's testimony did not demonstrate penetration where she stated his fingers only went "in" her vagina and anus, is a petty semantic argument. AOB 56. Again, the law under Hutchins is clear: "'Sexual penetration' means . . . any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another[.]"

Finally, although Roxana's testimony standing alone would have been sufficient to convict Appellant, Appellant confessed to and corroborated Roxana's account of many of the acts in question. Based on the foregoing, a reasonable jury

could have found sufficient evidence to convict Appellant of all thirty-six counts with which he was charged, and this Court should not disturb their verdict.

XI. Appellant's Multiple Convictions Arising from the Course of Various Single Encounters Did Not Implicate Double Jeopardy

A. Standard of Review

Nevada follows the double jeopardy test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, (1932), in which the United State Supreme Court held "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires ***proof of a fact which the other does not***." McIntosh v. State, 113 Nev. 224, 225, 932 P.2d 1072, 1073 (1997) (emphasis added).

Notably, this Court has held in both Wicker v. State, 95 Nev. 804, 603 P.2d 265 (1979), and Deeds v. State, 97 Nev. 216, 626 P.2d 271 (1981), that "separate and distinct acts of sexual assault committed as part of a single criminal encounter may be charged as separate counts, and convictions may be entered thereon." Townsend v. State, 103 Nev. 113, 120-21, 734 P.2d 705, 710 (1987). In Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004), this Court narrowly held that an uninterrupted encounter where lewdness was "intended to predispose the victim to the subsequent fellatio, his conduct was incidental to the sexual assault and [could not] support a separate lewdness conviction."

B. None of Appellant's Convictions Implicated or Violated Double Jeopardy

Appellant claims that his acts against Roxana either blended into one encounter insufficient to divide into "temporal or spatial units," or were intended to "predispose Roxana to further sexual conduct" under Crowley. AOB 57-59. What is notable is what Appellant *does not* claim: namely that the State attempted to use the same facts for multiple Count. This is because Appellant cannot. Indeed, the State did use the same encounters for various counts, alleging separate counts for each allegation of abuse that occurred during the count, as this Court specifically held permissible in Wicker and Deeds.

Without listing the entire thirty-six Count charging document here, the State alleged separate facts for each and every Count it charged Appellant with. II 242-52. To the extent that Appellant claims it is "unclear as to the manner in which these events unfolded[,]" Appellant has not shown how this is relevant where, as here, separate facts support each charge. AOB 58. Moreover, to the extent that Appellant affirmatively asserts "any touching that occurred prior to the ultimate act(s) of sexual penetration was nothing more than an attempt to predispose Roxana to a willingness to engage in sexual conduct[,]" and "the record suggests that the vaginal and anal licking were intended to predispose Roxana to the ultimate act of digital penetration of each orifice," this statement is nothing more than a mere supposition unsupported by anything in the record. AOB 59. Appellant

was entitled to introduce evidence at trial supporting this conjecture, and chose not to do so.

Additionally, Appellant argues for rejecting a dual conviction based on lewdness and sexual assault during the course of a single encounter. AOB 58. However, as this Court recognized in Gaxiola v. State, 121 Nev. 638, 651-52, 119 P.3d 1225, 1234-35 (2005):

> This court has considered the redundancy of a lewdness conviction to a sexual assault conviction in several cases.
> . . . .
>
> In Townsend v. State, this court affirmed separate convictions for fondling a victim's breasts and digitally penetrating the victim's vagina. This court stated that because "Townsend stopped [fondling the child's breasts] before proceeding further," separate acts of lewdness occurred.

(Alterations in original). Moreover, as this Court recognized in Gaxiola, the child victim's testimony is of critical importance in determining whether each encounter of lewdness and assault were distinct or meant to predispose the child to further conduct, as in Crowley. Id. Here, Roxana's testimony gave no indication of predisposition—Appellant touched her in various ways, and sometimes he masturbated, without any apparent rhyme or reason to his actions. As the State specifically addressed, the counts were merely charged sequentially and testimony was elicited in that order; lewdness was not a precursor to sexually assault, nor vice versa. VI AA 1335. Again, Appellant was entitled to present evidence to this

effect and chose not to do so, and finds no support now in the record for this claim. As such, Appellant's multiple convictions for lewdness are not redundant to his assault convictions.

Ultimately, what the facts do support are the multiple, specific, different ways in which Appellant assaulted Roxana, sometimes during the course of one encounter, sometimes not. But it would be strange public policy indeed to "encourage" abusers to carry on their abusive encounters without pause so they would only be charged with one count of abuse, instead of many, because everything occurred during one uninterrupted encounter. This suggestion defies logic. Instead, as this Court has previously held, none of Appellant's charges resulting from demonstrably different facts during the course of a single abusive encounter implicate double jeopardy, and they must all stand.

XII. The District Court Appropriately Settled Jury Instructions

A. Standard of Review

A district court has broad discretion to settle jury instructions, and this Court reviews that decision for an abuse of discretion or judicial error. Hoagland v. State, 126 Nev. Adv. Op. 37, 240 P.3d 1043, 1045 (2010) (citing Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005)). Generally, the failure to clearly object on the record to a jury instruction precludes appellate review. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). However, this court has the discretion to

address an unpreserved error if it was plain and affected the defendant's substantial rights. Id. When the issue involves a question of law, this Court applies de novo review. Hoagland, 240 P.3d at 1045.

This Court presumes "that juries follow district court orders and instructions." Summers, 122 Nev. at 1334, 148 P.3d at 783. Even if the district court errs in its instruction, where a jury would have nevertheless found Appellant guilty "absent the error," this error is harmless beyond a reasonable doubt. Grey v. State, 124 Nev. 110, 123, 178 P.3d 154, 163 (2008).

"Where the district court refuses a jury instruction on defendant's theory of the case that is substantially covered by other instructions, it does not commit reversible error." Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995) (citing Shannon v. State, 105 Nev. 782, 787, 783 P.2d 942, 945 (1989); Bean v. State, 81 Nev. 25, 34, 398 P.2d 251, 256 (1965), cert. denied, 384 U.S. 1012, 86 S.Ct. 1932 (1966)).

Appellant alleges certain of the trial court's jury instructions violated his rights. As the district court did not abuse its "broad" discretion with respect to any of the jury instructions, the State will dispose of each of Appellant's claims in turn.

B. The District Court's Instruction on Timeframe Was Proper

Appellant's trial counsel objected to the district court's instruction that the State was required to prove a timeframe within which the act took place. AOB 61,

64; II AA 264-65; VI AA 1342-43. As already discussed substantially supra in Part II, this correct statement of the law was not improper in any way. Appellant's attempt to distinguish Cunningham with the instant case, as the testifying victim in Cunningham was still a minor, is not persuasive. Nevada law is well-established—before and after Cunningham—and clear, and Appellant cites no authority countervailing this well-settled principle of Nevada law.

Appellant's further argument that the "victim's age, when alleged as part of a crime, is a material element of that offense[,]" is a technically correct statement of no consequence to the instant matter. The court specifically instructed the jury throughout the jury instructions that Roxana needed to either be under 14 or under 16 (depending on the offense) for Appellant to be guilty. II AA 242-258.

C. The District Court's Instruction on Reliable Indicia Was Proper

Appellant next alleged error was the district court's instruction that, in order to find him guilty of more than one count, the jury must find beyond a reasonable doubt some reliable indicia that the number of acts alleged actually occurred. AOB 65. As Appellant did not object to this instruction, this precludes appellate review. See Id., n. 14. However, as this correct statement of the law was not improper, it did not constitute plain error.

This Court specifically held in LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992) that it does "not require that the victim specify exact numbers

of incidents, but there must be some reliable indicia that the number of acts charged actually occurred." Likewise, this Court stated "mere conjecture" was not enough. Id. The jury instructions properly reflected this legal doctrine.

Appellant seeks to paint this jury instruction as "profoundly confusing." AOB 66. Appellant claims this instruction lessened or vitiated the State's burden of proof by requiring a lower standard than reasonable doubt—when the instruction itself specifically says "you must first find that the State has proven beyond a reasonable doubt that there is some 'reliable indicia' that the number of acts actually occurred." AOB 266. Appellant emphatically states "only proof of the alleged acts beyond a reasonable doubt is enough"—which is exactly what the jury instruction says. Moreover, the trial court explicitly told the jury that "mere conjecture" on Roxana's part was not enough—thereby specifically highlighting testimony that would *not* be sufficient for a finding of reliable indicia of multiple acts. The only thing profoundly confusing is Appellant's argument here.

Even assuming this jury instruction was confusing, this Court will not reverse a judgment based on jury confusion "by reason of an erroneous instruction, unless upon consideration of the entire case, including the evidence, it appears that such error has resulted in a miscarriage of justice." Carver v. El-Sabawi, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005). No attendant miscarriage occurred here.

Roxana testified with detailed specificity to the multiple acts, and this claim is without merit.

D. The District Court's Instruction on No Requirement of Corroboration Was Proper

Appellant's trial counsel objected to the district court's instruction that Roxana's testimony, if believed beyond a reasonable doubt, did not require corroboration. AOB 67; VI AA 1341-43. This area of the law has been exhaustively litigated and is *well-settled*, see supra Part X.A. Moreover, this Court specifically approved this jury instruction in Gaxiola, 121 Nev. at 650, 119 P.3d at 1233.

E. The District Court's Instruction on Multiple Acts as Part of a Single Encounter Was Not Error

Appellant's trial counsel objected to the district court's instruction on one encounter constituting multiple acts. AOB 70; VI AA 1343-44. Appellant specifically claims, per Crowley, that error occurred here because the trial court failed to inform jurors that "[m]ultiple sexual acts committed without interruption during a single episode cannot give rise to multiple offenses." AOB 70.

Notwithstanding Appellant's repeated assertions to the contrary, there would have been no reason for the trial court to instruct the jury thusly, because this is not a correct statement of the law. Again, as this Court has held, "separate and distinct acts of sexual assault committed as part of a single criminal encounter may be

charged as separate counts, and convictions may be entered thereon." Townsend, 103 Nev. at 120-21, 734 P.2d at 710 (citing Wicker, 95 Nev. 804, 603 P.2d 265; Deeds, 97 Nev. 216, 626 P.2d 271). This Court *narrowly* held in Crowley, 120 Nev. at 34, 83 P.3d at 285-86, that where lewdness was "intended to predispose the victim to the subsequent fellatio," in an uninterrupted encounter, this "conduct was incidental to the sexual assault and [could not] support a separate lewdness conviction."

"[T]he conclusion that district courts must provide instructions upon request incorporating the significance of a defendant's theory of the defense does not mean that the defendant is entitled to instructions that are misleading, inaccurate, or duplicitous." Crawford, 121 Nev. at 754, 121 P.3d at 589. As there was no reason for the trial court to give an incorrect statement of current law as a jury instruction, Appellant can demonstrate no error with respect to this instruction, and his claim is without merit.

F. The District Court's Instruction on Witness Credibility Was Not Error

Appellant's trial counsel objected to the trial court's instruction witness's credibility. AOB 72; VI AA 1345. Appellant cites no binding authority for this instruction, only the proposed jury instruction from California law. Id.

This Court has approved jury instructions on general witness credibility. See Nevius v. State, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985); Buckley v.

State, 95 Nev. 602, 605, 600 P.2d 227, 229 (1979). This Court has also emphasized the importance of giving an instruction on the defense theory of the case. Crawford, 121 Nev. at 754, 121 P.3d at 589. However, "[w]here the district court refuses a jury instruction on defendant's theory of the case that is substantially covered by other instructions, it does not commit reversible error." Earl, 111 Nev. at 1308, 904 P.2d at 1031. Appellant's theory of the case, generally, was that Roxana fabricated her testimony. The instant instruction specifically said that the credibility of a witness's testimony rested, *inter alia*, on their "motives" and "interests," and that if a witness has lied that the jury was entitled to disregard that portion of the testimony, or all of it. Appellant's claim of error rests on an hypertechnical, semantic distinction between his proposed jury instruction and the one the trial court properly proffered, and is without merit.

G. The District Court's Instruction on Circumstantial Evidence Was Not Error

Appellant's trial counsel objected to the trial court's instruction describing direct and circumstantial evidence. AOB 74; VI AA 1344. Appellant misapplies Bailey v. State, 94 Nev. 323, 325, 579 P.2d 1247, 1249 (1978), wherein this Court held an *additional instruction* on circumstantial evidence unnecessary where the jury had already been instructed on reasonable doubt. However, the trial court proffered no such additional instruction existed here. Instead, the trial court proffered one single instruction describing both kinds of evidence—exactly the

kind of instruction this Court has approved describing both direct and circumstantial evidence where both kinds of evidence were "introduced during the trial." See Crane v. State, 88 Nev. 684, 687, 504 P.2d 12, 13-14 (1972). As such, Appellant's claim of error here is without merit.

Appellant's claim that the jury must choose innocence where two reasonable interpretations exist pointing to guilt and innocence is inapt here. AOB 76-77. This Court specifically said in Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976):

> We have heretofore considered such an instruction in cases involving both direct and circumstantial evidence and have ruled that ***it is not error to refuse to give the instruction if the jury is properly instructed regarding reasonable doubt***. Hall v. State, 89 Nev. 366, 513 P.2d 1244 (1973); Anderson v. State, 86 Nev. 829, 477 P.2d 595 (1970); see also: Scott v. State, 72 Nev. 89, 295 P.2d 391 (1956); Kur v. State, 80 Nev. 291, 392 P.2d 630 (1964); Crane v. State, 88 Nev. 684, 504 P.2d 12 (1972); Vincze v. State, 86 Nev. 546, 472 P.2d 936 (1970); Kovack v. State, 89 Nev. 364, 513 P.2d 1225 (1973); McKinney v. State, 89 Nev. 556, 516 P.2d 1404 (1973).

(Emphasis added). As the trial court jury properly and repeatedly instructed the jury on reasonable doubt, II AA 240-80, no error exists with respect to the trial court's refusal to proffer the "two reasonable interpretations."

H. The District Court's Instruction on "Guilt or Innocence" Was Not Error

Appellant's trial counsel objected to the instruction that told jurors "they were tasked with determining [his] guilt or innocence[,]" as the "use of the term

'innocent' rather than 'not guilty' amounted to error." AOB 77-78; VI AA 1344-45.

This Court has passed upon the "guilt or innocence" language a number of times, specifically holding such language proper in Weber v. State, 121 Nev. 554, 582, 119 P.3d 107, 126 (2005). See also Guy v. State, 108 Nev. 770, 778, 839 P.2d 578, 583 (1992), cert. denied 507 U.S. 1009, 113 S.Ct. 1656 (1993); Matthews v. State, 94 Nev. 179, 181, 576 P.2d 1125, 1126 (1978). Moreover, as to Appellant's assertion that this "undercut" his presumption of innocence, by allegedly requiring a higher threshold to overcome than "not guilty" language, the trial court specifically offered an instruction that stated he was "presumed innocent until the contrary is proved." II AA 272. As this Court presumes juries follow instructions, and this "innocence" language was substantially covered in another instruction, the trial court did not abuse its discretion by instructing the jury thusly, and this claim is without merit.

I. The District Court's Instruction on "Common Sense" Was Not Error

Finally, Appellant's trial counsel objected to the district court's instruction to the jury to use their common sense. AOB 79; VI AA 1345. This argument is meritless. This Court has specifically approved this exact instruction verbatim (noting it was a "stock" common sense instruction). Lewis v. Sea Ray Boats, Inc., 119 Nev. 100, 105, 65 P.3d 245, 248 (2003). Moreover, this instruction specifically

warned the jury against "speculation or guess." II AA 276. As Appellant cites no contrary authority, simply offering the ludicrous hypothetical that the instruction "invited outside research" and "improper speculation" (notwithstanding the instruction's specific warning to the contrary), this claim is without merit.

J. No Error Exists Sufficient to Warrant Reversible Error

As the trial court did not err with respect to *any* of its proffered instructions, no error—singular or cumulative—exists sufficient to warrant reversal in the instant matter. However, even if this Court should find error, as the jury would have nevertheless found Appellant guilty "absent the error," based on the overwhelming evidence of Appellant's guilt (including his own confession), this error is harmless beyond a reasonable doubt. Grey, 124 Nev. at 123, 178 P.3d at 163.

XIII. The State Committed no Acts of Prosecutorial Misconduct, and Appellant Cannot Demonstrate Prejudice from Any Such Alleged Acts

A. Standard of Review

This Court employs a two-step analysis when considering claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the Court determines whether the prosecutor's conduct was improper. Id. Second, if the conduct was improper, the court determines whether it warrants reversal. Id. The Court will not reverse a conviction based on improper prosecutorial misconduct if it was harmless error. Id. at 1188. The Court will only

apply harmless error review if the defendant preserved the error for appellate review by objecting to it at trial. Id. at 1190, 477.

The Court considers a prosecutor's comments in context, and will not lightly overturn a criminal conviction "on the basis of a prosecutor's comments standing alone." Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citing United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038 (1985). A prosecutor may "argue inferences from the evidence and offer conclusions on contested issues." Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2007). Statements construed by the defense as "unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the evidence." Id. Moreover, where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error. King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

B. The State's Comments in Closing Argument Were Not Misconduct

Appellant argues the State's comment that Roxana would not willingly have had a sexual relationship with him amounted to disparagement. AOB 79-80. However, after the trial court overruled Appellant's trial counsel's objection, context in which the State made this comment is clear:

> She's going to have sex with a 48-year-old man who was helping raise her, who had been having sexual relationships with her mother? Of course she wasn't okay with it.

VI AA 1415. The State was very pointedly not belittling Appellant in any way, only making the permissible argument—supported by the evidence at trial—that it was unlikely for Roxana, a young teenage girl, to have a consensual sexual relationship with a much older man whom she may have looked upon as a father.

Defense counsel did not object to the State's passing reference to the defense theory, that Roxana would willingly seek out a consensual sexual relationship with a man she viewed as a father figure, as ridiculous. VI AA 1412. As such, this failure to object generally precludes appellate review. However, even on review for plain error, this was an inference permissible argued from the evidence and an appropriate conclusion on a contested issue. See Miller, 121 Nev. at 100, 110 P.3d at 59. However, even if this passing reference to the consensual sex theory constituted error, this Court should not lightly overturn this case based on one comment, especially in light of the overwhelming nature of Appellant's guilt.

(2) Vouching

Prosecutorial vouching occurs in one of two ways: "the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997). More specifically, the State places the government's prestige behind the witness when it provides personal assurances of the witness's veracity. Browning v. State, 120 Nev. 347, 359, 91

P.3d 39, 48 (2004). The State did not do that here when it described Roxana's credibility. VI AA 1416. It merely offered a permissible explanation for the purported inconsistencies in Roxana's argument, supported by the evidence at trial.

However, even if this statement did constitute vouching, "[a]s a general rule, the failure to move to strike, move for a mistrial, assign misconduct or request an instruction, will preclude appellate consideration." Clark v. State, 89 Nev. 392, 393, 513 P.2d 1224 (1973). As the record reflects Appellant's counsel did none of those things, because this passing reference to Roxana's credibility did not prejudice appellant's substantial rights, this failure precludes appellate review here.

XIV. As No Errors Exist with Respect to Appellant's Convictions, Appellant Cannot Demonstrate Cumulative Error

When evaluating a claim of cumulative error, courts consider: 1) whether the issue of guilt is close; 2) the quantity and character of the error; and 3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), cert. denied, 531 U.S. 843, 121 S.Ct. 110 (2000), (citing Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998)). Where a defendant cannot demonstrate any error detrimental to him, courts will not find cumulative error. See Mulder, 116 Nev. at 17, 992 P.2d at 855.

The issue of guilt was not close here. As demonstrated, the jury convicted Appellant of thirty-six counts of sexual assault, lewdness, and open and gross lewdness based on overwhelming evidence including Roxana's testimony and

Appellant's own confession. Furthermore, Appellant has failed to demonstrate any error detrimental to him in the instant matter. While the crime is grave, based on the foregoing, as Appellant has not demonstrated *any* error on the part of the district court, his claim of cumulative error is without merit.

CONCLUSION

Wherefore, based on the foregoing, the State respectfully requests that this Honorable Court AFFIRM the decision of the district court.

Dated this 26th day of September, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief is proportionately spaced, has a type face of 14 points or more and contains 16,983 words and 1,668 lines of text.
3. **Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 26th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 26, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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