IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN BARRAL)
)
Appellant,)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)

CASE NUMBER: 64135
(District Court Case No. C269095)

APPELLANT'S OPENING BRIEF

(APPEAL FROM JUDGMENT OF CONVICTION)

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this case pursuant to NRAP 4 and NRS 177.015(3). The Appellant's Notice of Appeal was timely filed on September 27, 2013 after the Appellant's Judgment of Conviction was entered against him on September 23, 2013 based on a jury verdict on May 31, 2013. (*See* Appendix, hereinafter "App" at p. 45-46, 85-90, Volume I).

STATEMENT OF THE CASE

On or about August 29, 2011, the Appellant DUSTIN BARRAL (hereinafter "Appellant," "Dustin" or "Mr. Barral") was arraigned and charged by Information with Count I-SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony, NRS 200.364, 200.366) by digital vaginal penetration and Count II-SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony, NRS 200.364, 200.366) by digital anal penetration based on events occurring on or about July 10, 2010. (*See* App at p. 14-16, Volume I).

Following a three and a half day jury trial that commenced on May 28, 2013,

the Appellant was found guilty of both of the above counts on May 31, 2013. (*See* App at p. 45-46, Volume I). The Appellant filed a Motion for Acquittal or in the Alternative a New Trial on June 7, 2013. (*See* App at p.47-59, Volume I). The State filed its reply on June 20, 2013. (*See* App at p.60-74, Volume I). The Defense filed a supplemental reply on June 28, 2013. (*See* App at p. 75-80, Volume I). Said motion was heard on July 8, 2013 and denied by the court below. (*See* App at p.83-84, Volume I). The Appellant was sentenced on September 18, 2013 and the Judgment of Conviction was entered on September 23, 2013. (*See* App at p.85-86, Volume I). The Notice of Appeal was filed on September 27, 2013. (*See* App at p.87-90, Volume I).

On January 28, 2014, Counsel for the Appellant filed a Motion for Extension of Time due to the length of the trial transcript and the complexity of the issues to be raised on appeal. (*See* App at p.91-94, Volume I). This Court granted the same. (*See* App at p.95, Volume I). On February 28, 2014, Counsel for the Appellant requested a second brief extension. (*See* App at p.96-99, Volume I). The Request for the same was granted. (*See* App at p.100, Volume I). This Opening Brief due on March 17, 2014 follows.

STATEMENT OF THE FACTS

The State alleged in C269095 that the Appellant sexually assaulted his then four (4) year old niece J.C. as she slept on a futon couch while spending the night

at his residence. Specifically, the State alleged that the Appellant came into the bedroom where J.C. was sleeping with her cousin Joshua Barral (hereinafter "Joshua") and dug into her vaginal and anal openings with his fingers. (*See* App at p.1-4, Volume I). J.C. had been spending the night at the Barral residence because her mother Nicole Hammonds had recently undergone surgery. (Id.).

Prior to trial commencing on May 28, 2013, the Appellant filed a Request for Admissibility of Prior Sexual Conduct. Three days before trial, the Defense was provided with nine pages of notes from J.C.'s therapist referencing multiple sessions in which J.C. describes sexually based contact with several individuals other than the Appellant. (*See* App at p.17-36, Volume I). The State filed its reply on May 29, 2013. (*See* App at p. 37-44,Volume I). The Court heard oral argument as to the same and summarily denied the Appellant's request on May 29, 2013 without the benefit of an evidentiary hearing. (*See* App at p.309-313, Volume IV).

On May 28, 2013, after voir dire had already started, Counsel approached the bench and reminded the Honorable Douglas Smith (hereinafter "the court" or "Judge Smith") that he had failed to swear in the jury venire. Further, Mr. Becker asked the court to admonish the jury to give truthful answers. The court refused, stating "I don't swear them in until the end." (*See* App at p.133-135, Volume I).

Over the course of two days of trial, several witnesses whom J.C. purportedly told the allegations to testified including Nicole Hammonds (J.C.'s mother), Joanna Hammonds (J.C.'s grandmother) and Megan Barral (the Appellant's then wife). (*See* App at p. 345-396, Volume II, App at p. 432-492, Volume II and App at p. 547-620, Volume III). J.C. also testified. (*See* App. at p. 415-431, Volume II). None of the above witnesses gave any clarification as to whether any sexual assault actually occurred other than to state that J.C. reported that Dustin "digged" into her privates. (Id.)

Dr. Sandra Cetl took the stand as a State's expert witness. She testified that there were no physical findings with the exception of a minor case of vaginitis which could have been caused by poor hygiene. (*See* App at p. 658, 661, 669, 672-673, Volume III).

Finally, Sergeant Timothy Hatchett (a former Las Vegas Metro Juvenile Sex Assault Detective) testified. Like the other witnesses, he was not able to provide any clarification as to what took place between the Appellant and J.C. other than to state that J.C. reported that Uncle Dustin was "digging in her private area." (*See* App at p.708, Volume III).[1]

On May 31, 2013, following approximately three hours of deliberations, the

[1] Katherine Denny (J.C.'s Great Aunt) and Michael Hammonds (J.C.'s Uncle) also testified. However, neither had any first- hand knowledge of J.C.'s statements. (*See* App at p 492-505, Volume II and p.621-642, Volume III).

jury returned a verdict of guilty as to all charges. (*See* App at p. 811-812, Volume IV).

ARGUMENT

I. THE COURT BELOW ERRED BY FAILING TO SWEAR IN THE JURY VENIRE PRIOR TO COMMENCING VOIR DIRE

A new trial is required because the Appellant suffered a structural error during jury selection affecting his fundamental rights as the jury venire was never sworn in by the court below prior to voir dire commencing.

There are two classes of constitutional errors, "trial error" and "structural defects." Arizona v. Fulminante, 499 U.S. 279, 307–08, 309–10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Trial errors are subject to harmless-error review because these errors "may ... be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 307–08, 111 S.Ct. 1246. Conversely, "structural defects affect the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 309–10, 111 S.Ct. 1246. "Such errors are grounds for reversal because they "defy analysis by 'harmless-error' standards." Id. at 309, 111 S.Ct.1246.

NRS 16.030(5) regarding the drawing an examination of jurors and the oath or affirmation that must be conveyed says in relevant part:

> Before persons whose names have been drawn are examined as to their qualifications to serve as jurors, the judge or the judge's clerk **shall administer an oath** or affirmation to them in substantially the following form (*emphasis added*):
> Do you, and each of you, (solemnly swear, or affirm under the pains and penalties of perjury) that you will well and truly answer all questions put to you touching upon your qualifications to serve as jurors in the case now pending before this court (so help you God)?

After voir dire began, Lead Counsel Michael Becker noted that the swearing in had not occurred and asked to approach the bench to inform the court of the same. The following exchange took place:

Mr. Becker: My recollection may not be correct, but I think it's possible that the panel was not sworn in.

The Court: They aren't.

Mr. Becker: Okay.

The Court: **I don't swear them in until the end.**

Mr. Becker: Okay. In other words, admonish that they are to give truthful answers to all the questions.

....

The Court: We're just going to—I don't swear my jury in until they come back from lunch. If –even if we break like tonight—

Mr Becker: Okay.

The Court: --I won't swear them in.

Mr. Becker: Okay.

The Court: Because the ones who are sworn in; that's the panel.

Mr. Becker: Right.

The Court: And if somebody doesn't show up then we're stuck.

Ms. Fleck [prosecutor]: **But we do have to give them the oath they have to tell the truth.**

The Court: No.

(*See* App at p. 133-135, Volume I)(emphasis *added*).

Of significance is that prior to this exchange, the prosecutor expressed doubt as to juror number 7's claim that she could be impartial. (*See* App at p.131-133, 134. Volume I). Further, without being sworn in, other jurors were somewhat evasive in terms of whether or not they could be impartial. (*See e.g.* App at p.139-141, Volume I). During oral argument on the Appellant's Motion for a New Trial before the court below in which this same issue was raised, Judge Smith opined that it was standard practice in his court to not swear in the panel during the voir dire process. (*See* App at p. 820, Volume IV).

The Defense submits that the court's failure to swear in the jury venire in contradiction of statute constitutes a structural defect as it affected the very framework of the trial itself, namely the essential duty of the court to convey to juors the solemn necessity of telling the truth during voir dire.

Although the Nevada Supreme Court has not specifically ruled that errors in jury selection with regard to swearing in a jury are structural in nature, this Court has held in the context of Batson challenges that jury selection issues are structural in nature. *See* Diomampo v. State, 124 Nev. 414, 422-23, 185 P. 3d 1031 (2008) ("Discriminatory jury selection in violation of Batson constitutes structural error, or error that affects the framework of a trial"). Structural error necessitates automatic reversal because such error is "intrinsically harmful." Cortinas v. State, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008).

Although not a neighboring jurisdiction, the Alabama courts have divided juror oath problems into two categories: "defective oath situations" and "no-oath situations". Treating a situation where the jury venire was administered an oath before voir dire but the petit jury was not administered an additional oath after it was empaneled as a "defective-oath situation", the court still acknowledged reversibility if "some objection was taken...during the progress of the trial, based on that [defect]." Ex parte Deramus, 721 So.2d 242 (Ala.1998). Additionally, in Fortner v. State of Alabama, 825 So.2d 876 (Ala.2001), the Alabama Supreme Court makes clear that the same analysis would apply in a scenario where the petit jury was administered the oath but the jury venire was not. (*See* also Brooks v. State, 845 So.2d 849 (Ala.Crim.App.2002).

Further, the Michigan Supreme Court in remanding a defendant for a new trial has recently held that the failure to swear in a jury panel is structural in nature because "the absence of a sworn jury renders the defendant's trial fundamentally unfair and is an unreliable vehicle for determining guilt or innocence...[and] **seriously affects the fairness, integrity or public reputation of the judicial proceedings...**" *See* People v. Allen, 299 Mich App 205, 829 NW 2d. 319 (2013) (*emphasis added*). While Allen dealt with the swearing in of the jury panel as opposed to the jury venire in the case at bar, the same principal applies, namely that "the required oath is not a mere formality which is required only by tradition. It represents a solemn promise on the part of each juror to do his duty according to the dictates of the law to see that justice is done." Id.

It is anticipated that the State will once again rely on the California case of People v. Carter, 117 P.3d 476, 36 Cal.4th 1114 (2005) for the proposition that if the jury understands that it was required to answer truthfully the questions posed, then failure to administer the oath is not prejudicial to a Defendant. (*See* App at p. 62, Volume I). The Appellant's case is easily distinguishable from Carter. In Carter, the Court relied on the fact that prior to the beginning of voir dire, jurors had been provided with a questionnaire that admonished them as to "the gravity of the matter before them and the importance of being truthful and thereby ameliorated at least in part the trial court's failure to timely administer the oath..."

Carter, 117 P. 3d at 518-519, 36 Cal. 4th at 1176-1177. The Carter Court concluded: "we believe the jury understood that it was required to answer truthfully the questions posed during the voir dire examination." In the case at bar, no such admonishment was ever given prior to commencing voir dire. (*See* App at p. 110-111, Volume I).

The present case clearly falls in the category of a "no oath situation." Further, the Appellant submits any juror, whether prospective or empanelled, has the same solemn responsibility to tell the truth which is ensured by the oath that is required by NRS 16.030(5). By failing to ensure that this was done, the court below committed a structural error by abrogating its duty to protect the Appellant's fundamental right to trial by an impartial juror because there was no guarantee that potential jurors felt obligated to give accurate and truthful responses.

Given that jury selection is a fundamental part of the trial process, it can hardly be argued that this error was not structural in nature. Accordingly, reversal is required.

II. THE COURT BELOW ERRED BY COMMENTING FROM THE BENCH HOW THE EVIDENCE SHOULD BE INTERPRETED BY THE JURY

The court below erred by improperly putting the prestige of the court behind what weight the jury should give to a witness's testimony.

This Court has wisely opined:

> Firmly embedded in our tradition of even-handed justice-and indeed its very cornerstone-is the concept that the trial judge **must, at all times, be and remain impartial.** So deeply ingrained is this tradition that it is now well settled that the trial judge **must not only be totally indifferent as between the parties, but he must also give the appearance of being so.**

Kinna v. State, 84 Nev. 642, 646-647, 447 P.2d 32, 35 (1968) (*emphasis added).*

This Court has further stated that judges should be mindful of the influence that they wield noting in part:

> [T]he average juror is a layman; **the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the trial judge**. Human opinion is ofttimes formed upon circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury....

Parodi v. Washoe Medical Ctr., 111 Nev. 365, 367-68, 892 P.2d 588, 589-90 (1995) (*emphasis added).*

Judicial misconduct must be preserved for judicial review and failure to object or assign misconduct will generally preclude review by this Court. Oade v. State, 114 Nev. 619, 621-22, 960 P. 2d 336, 338(1998). However, this Court has reviewed judicial misconduct, absent the appellant's failure to preserve adequately the issue for appeal, under the plain error doctrine. Id. at 369–70, 892 P.2d at 591.

In the present case, J.C. testified on cross-examination that family

members including her mother helped her "practice" what she was going to say in court. (*See* App p. 422-424, Volume II.). The State tried to clarify what J.C. meant by this statement by recalling her mother Nicole Hammonds to the stand. The following exchange then took place on cross-examination:

Q. Well, did you also speak to Betsy Morgan?

A. I would speak to her. Yes.

Q. And were you aware that she had told Betsy that she was wanting to practice for testifying in court?

A. No.

Q. Are you aware that she testified that she practiced with you in the days leading up to testifying in court?

Ms. Edwards : I'd object, misstates the child's testimony.

The Court: **Yeah. And I'm not sure if we could really elicit out of her what practice meant.** If it was just coming into court—

Mr. Becker: Well—

The Court: Come and see a guy wearing a—

Mr. Becker: I'd say the record speaks for itself, Your Honor.

The Court: --black dress. **And sitting up here seven years old, I would be nervous.**

Mr. Becker: Your honor—

The Court: I'd want to—

Mr. Becker: I'm going to ask that the Court strike the statements as editorial from the bench.

The Court: **This is my courtroom and [I] will editorialize when I feel it's necessary to control the courtroom. Thank you so much.**

Mr. Becker: May I get a ruling on my objection?

The Court: Overruled.

(*See* App p. 646-647, Volume III)(*emphasis added).*

The above exchange demonstrates that the court below abandoned any semblance of impartiality by interjecting its opinion into what weight the jury should give to J.C.'s comments about what practicing meant. Given that the credibility of the named victim was the primary tool by which the jury had to measure whether to find the Appellant guilty, the court's comments were especially egregious because they belied the court's role as a neutral and encouraged the jury to find J.C.'s testimony credible. Accordingly, the actions of the court below prejudiced the Appellant's right to a fair trial and reversal is required.

III. THE COURT BELOW ERRED BY DISPARAGING DEFENSE COUNSEL IN THE PRESENCE OF THE JURY

The court below erred by repeatedly expressing impatience with Defense

Counsel throughout the course of the case. The errors cited below were clearly erroneous, cumulative, and had a prejudicial effect on the Appellant's case.

This Court has stated:

> A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience or participation in the examination of witnesses, * * * may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.
>
> Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. **In addressing counsel, litigants or witnesses, he should avoid a controversial manner or tone.**

Kinna v. State, 84 Nev. at 647, 447 P.2d at 35 (*emphasis added).*

This Court has also stated that:

> Litigants who bear the brunt of trial levity promoted by trial judges are faced with a "Hobson's choice" of either objecting to the misconduct (with the attendant risks of antagonizing the judge and exasperating the jury), or refusing to assume the risks posed by such objections, thereby jeopardizing their right of appellate review. We are reluctant to fault appellants' counsel for choosing the latter option, particularly when the cumulative effect of the judge's conduct could not be known until after it became obvious that the judge would persist.

Parodi, 111 Nev. at 369, 892 P.2d at 591.

The Parodi Court went on to state that failure to object will not always preclude appellate review in instances where judicial deportment is of an inappropriate but non-egregious and repetitive nature that becomes prejudicial

when considered in its entirety. Id. at 370, 892 P. 2d at 591.

The Oade v. State case is directly on point for this Court's consideration. In Oade, the Court found that judicial misconduct had taken place when throughout the trial the district court judge repeatedly expressed his impatience with Oade's counsel in the presence of the jury. Oade, 114 Nev. at 623, 960 P.2d at 339. The Court went on to state: "It must be remembered that the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby." Id.

Like in Oade, judicial misconduct has taken place, as the Court below repeatedly expressed impatience and discourtesy towards Defense Counsel during the course of the trial as evidenced by the following examples:

1. During Voire Dire.

Mr. Becker: I'd approach. I'd ask to approach.

The Court: Okay. We approach a lot. **We take—we im—we impose on the jury's time but go ahead.** Let's try and cut this down.

[Bench conference begins]

Mr. Becker: Well, I don't like to make cause challenges in front of the juror's because it—I risk, you know, if I lose it, I alienate the juror…

(*See* App p. 142, Volume I) (*emphasis added).*

2. During direct examination of Michael Hammonds.

Q. Did you encourage her (Megan Barral) one way or the other as far as her cooperation with the detective?

A. Yeah. Yeah, of course. I told her, you know, what's your concern about going to see him and hear his questions, you know?

Q. And what did you find out as a result of that?

Mr. Castillo: Objection, calls for a hearsay response.

The Court: **Calm down.** Ask that question again please.

(*See* App p. 635, Volume III) (*emphasis added).*

3. **During Direct Examination of Dr. Sandra Cetl**

Q. And your Honor, I'm going to ask to go sidebar and it may be a good time to have an afternoon recess if we're going to have one.

The Court: Well, come up—approach the bench**. And I'll control my courtroom; not you. Thank you.**

(*See* App p. 659, Volume III) (*emphasis added).*

Q. But if you don't see consistent with sexual abuse that's also consistent with sexual abuse?

Ms. Fleck: Judge, I'm going to object. She does not have—she's never here to make a legal conclusion. To infer that Dr. Cetl is working somehow for the State-especially when there's no findings.

Mr. Becker: Well, I'd object to a speaking objection.

The Court: I'll sustain the objection and you'll treat her with respect; I know she's earned it.

Mr. Becker: Well—

The Court: I know I've earned it.

(*See* App p. 683, Volume III) (*emphasis added).*

These above stated examples are in addition to the Court chastising counsel for objecting to the Court editorializing from the bench as referenced in the Appellant's second argument (*supra* at p.11-14). As a result, the Constitutional right of the Appellant to a fair trial has been openly violated by the lower court. Taken as a collective whole, the Court's comments are a symptom of bias and prejudice, and together with the cumulative error found in this record, fairness demands a new trial for the Appellant. *See* Kevin Allen Big Pond v. Nevada, 692 P.2d 1288, 101 Nev. 1, (1985).

IV. THE COURT BELOW ERRED BY DENYING THE APPELLANT THE OPPORTUNITY TO EFFECTIVELY CROSS EXAMINE THE NAMED VICTIM

The Court below committed reversible error by failing to grant the Appellant the ability to effectively cross-examine the named victim.

A defendant must be able to expose facts from which the jury can draw inferences regarding the reliability of a witness. Davis v. Alaska, 415 U.S. 308,

318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974). While the trial court has discretion to limit the scope of cross-examination, that discretion only comes into play if as a matter of right sufficient cross-examination has been permitted to satisfy the Sixth Amendment. *See e.g.* United States v. Lindstrom, 698 F.2d 1154 (11th Cir.1983).

This Court has held that a defendant in a prosecution in which the rape shield is applicable "must, upon motion, be given an opportunity to demonstrate that due process requires the admission of such evidence because the probative value in the context of that particular case outweighs its prejudicial effect on the prosecutrix. Chapman v. State 117 Nev. 1, 5, 16 P.3d 432, 434 - 435 (2001). For example, a child-victim's prior sexual experiences may be admissible to counteract the jury's perception that a young child would not have the knowledge or experience necessary to describe a sexual assault unless it had actually happened. *See* Summitt v. State, 101 Nev. 159, 163-64, 697 P.2d 1374, 1377 (1985).

If, after balancing the probative value of such evidence against its prejudicial effect, the trial court determines that the evidence should be admitted, the opportunity to be afforded the defendant is simply "the opportunity to show, by specific incidents of sexual conduct, that the prosecutrix has the experience and ability to contrive" a charge against him. Id.

This Court generally reviews a district court's evidentiary rulings for an

abuse of discretion. However, whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo." Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009)*(internal citations and quotation marks omitted).*

As previously stated, three days prior to trial the Defense was provided with nine pages of notes from Betsy Morgan, a therapist at the Compass Counseling Center containing her notes from sessions conducted with the named victim. (*See* App at p. 20, 25-32, Volume I). In the notes, J.C. references sexual contact involving her privates in interactions other than with the Appellant. (*See* App. at p. 20, Volume I).

In particular, J.C. referenced a prior touching incident with her friend Neco in which he touched her privates and kissed her shoulders during a voluntary interview with Detective Hatchett on July 15, 2010. (*See* App. at p. 34-35, Volume I).

The Appellant argued before the court below that J.C.'s prior allegations regarding her privates were relevant in order to establish that she had the prerequisite knowledge and experience necessary to describe a sexual touching. The Defense asked in its motion for permission to ask a limited series of questions regarding the prior incidents to counteract any perception that the named victim

would not have the knowledge or experience necessary to describe the current charges unless it actually took place. (*See* App at p. 21, Volume I).

Oral argument as to the Appellant's motion took place outside of the presence of the jury on day two of the trial. (*See* App at p. 309-312, Volume II). Defense Counsel asked for the opportunity to cross-examine J.C. on the issues raised in the motion. The court below denied the Defense request without even giving the Defense the opportunity to examine J.C. outside of the presence of the jury to determine the relevance of the above referenced topics. (Id.). By failing to grant the Defense the opportunity to examine J.C. as to her prior sexual encounters, the court below failed to "undertake to balance the probative value of the evidence against its prejudicial effect, and focus upon potential prejudice to the truthfinding process itself, *i.e.,* whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis. Summitt, 101 Nev. at 164, 697 P.2d at 1377 (*internal quotations omitted).*

In sum, the Court below erred by denying the Appellant the right to demonstrate in accordance with Summitt that J.C. had the experience and ability to contrive a charge against him.

///

V. THE STATE COMMITTED MISCONDUCT BY MISCHARACTERIZING THE TESTIMONY PRESENTED

In the case at bar the State committed misconduct by mischaracterizing the testimony of Officer Hatchett after he inadvertently mentioned that J.C. previously stated that she had been kissed by a four year old [Neco] on the arm and her private parts. (*See* App at p. 697-698, Volume III). Further, the State also misstated key testimony regarding a baby monitor during closing arguments. (*See* App. at p. 803, Volume IV).

In reviewing assertions of prosecutorial misconduct, the Nevada Supreme Court engages in the following two-step process: First, a determination must be made whether the whether the prosecutor's conduct was improper. Second, if the conduct was improper, a determination must made as to whether the improper conduct warrants reversal. With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) *(internal citations omitted).*

The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. If the error is of constitutional dimension, then the Court applies the Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (U.S.1967) standard and will reverse unless the State

demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. If the error is not of constitutional dimension, then this Court will reverse only if the error substantially affects the jury's verdict. Valdez, 124 Nev. at 1188-1189, 196 P.3d at 476.

It is also well settled law in Nevada that "the prosecutor may not vouch for the credibility of a witness either by placing the prestige of the government behind the witness or by indicating that information not presented to the jury supports the witnesses' testimony." Evans v. State, 117 Nev.609, 633, 28 P. 3d 498, 515 (2001); Lisle v. State, 113 Nev. 540, 937 P.2d 473 (1997).

In the present case, the record indicates that Officer Hatchett inadvertently mentioned the touching of J.C. by Neco during the direct examination by the State. [2] The State then tried to misstate the testimony of Officer Hatchett by stating that J.C. simply said that the boy at school had only kissed her on the shoulder. (*See* App at p. 697, Volume III). Defense Counsel objected that this misstated the testimony that was presented. A bench conference then commenced which lead to a discussion outside of the presence of the jury. (*See* App at p. 697-706, Volume III). An agreement was reached for the State to start off by re-asking the last question and for the Defense to refrain from asking any questions about

[2] It is noteworthy that the State never on the record admonished Officer Hatchett to refrain from mentioning J.C.'s interactions with Neco during the NRS 51.385 hearing which preceded his testimony in front of the jury. (*See* App at p. 511-530, Volume III).

Neco. (*See* App at p. 705-706, Volume III). Instead of doing the same, the State once again misstated the testimony of Officer Hatchett and stated: "you were stating at some point you had spoken to J.C. that a little boy, four years old, Neco had kissed her on her shoulder..." (*See* App at p. 707, Volume III). The Defense objected and the court overruled the same. Id.

Turning to the analysis required by Valdez, the first prong is met because the State's conduct was improper because the prosecutor knowingly misstated the evidence presented by Officer Hatchett that she herself elicited by failing to properly admonish her own witness. The second prong of Valdez is also met because it can hardly be said that this was harmless error: By allowing the misstatement to be conveyed, the jury was left with the erroneous impression that J.C.'s testimony was other than what was stated, and the prosecutor was permitted to misinform the jury. By doing so, the State improperly shifted the burden of proof onto the Appellant and reversal is merited.

The State further misstated evidence during closing arguments when the issue of the baby monitor (discussed in more detail in the Appellant's eighth argument, *infra* at p. 33-35) was raised by both parties.

The Defense argued during closing that it would be objectively absurd and unreasonable for the Appellant to engage in the alleged conduct when there was a baby monitoring device in Joshua's room where his wife would be able to actively

listen to what purportedly took place. (*See* App at p. 777, Volume IV). Megan Barral clarified on cross-examination that the volume switch was only on the unit in the master bedroom. (*See* App. at p. 613, Volume III.) The State during its rebuttal argument stated that Megal Barral testified that "you could manipulate the volume in Josh's room to turn down the volume" without mentioning that this issue was cleared up on cross-examination. Defense Counsel properly objected to this mischaracterization. (*See* App. at p. 803, Volume IV).

The first prong of Valdez, is met in this case as well because the prosecutor knowingly misstated a crucial piece of evidence for the jury's consideration as to the accuracy of the allegations, namely whether or not the Appellant had the ability to turn down the volume of the baby monitor in the room where J.C. was sleeping.

Further, the second prong of Valdez is also met because by allowing this misstatement to be conveyed, the jury was left with the erroneous impression that the Appellant had the ability to manipulate the volume in the room, thereby lending credibility to J.C.'s accusations. Accordingly, it can hardly be said that this error was harmless as it was a key point of contention between the parties for the jury's consideration.

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VI. THE COURT BELOW ERRED BY FAILING TO GRANT THE APPELLANT'S MOTION FOR AN ACQUITTAL BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN HIS CONVICTIONS FOR SEXUAL ASSAULT

The State failed to submit legally sufficient evidence to sustain the jury's convictions for both counts of sexual assault.

The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charged has been proven beyond a reasonable doubt. Fiore v. White, 531 U.S. 225, 228-29, 121 S. Ct. 712, 148 L. Ed. 2d 629 (2001); Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). Further, an acquittal must be granted by a district court when there is insufficient evidence to support a conviction.

NRS 175.381(2) provides that the trial court may set aside a verdict and enter a judgment of acquittal "if the evidence is insufficient to sustain a conviction." *See also* Evans v. State, 112 Nev. 1172, 1193; 926 P.2d 265, 279 (1996) (the district court may set aside a jury verdict of guilty and enter a judgment of acquittal only when there is insufficient evidence to support a conviction). Insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, **even if such evidence were believed by the jury."** Evans, 112 Nev. at 1193; 926 P. 3d at

279. (*emphasis added).* **When there is truly insufficient evidence, a defendant must be acquitted.** State v. Purcell, 110 Nev. 1389, 1394-95; 887 P. 2d 276, 279 (1994) (*emphasis added).*

The exercise by the trial court of the right to grant a new trial or acquittal will be presumed correct and proper by the appellate court until the contrary is shown by the appellant. State v. Crockett, 84 Nev. 516, 518; 444 P. 2d 896, 898 (1968). Additionally, the Nevada Supreme Court has stated that in determining the sufficiency of the evidence on appeal, "the critical question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Mejia v. State, 122 Nev. 487, 492; 124 P. 2d 722, 725 (2006), *quoting* State v. Walker, 109 Nev. 683, 685; 857 P. 2d 1, 2 (1993). However, "mere suspicion or speculation cannot be the basis for a jury's conclusion that an essential element has been satisfied." United States v. Free, 841 F. 2d 321, 325 (9th Cir. 1988).

In the case at bar, the evidence presented by the State was insufficient as a matter of law and the convictions should be set aside because the State failed to establish that the Appellant subjected the named victim to sexual penetration.

NRS 200.366 states in relevant part:

A person who subjects another person to sexual penetration against

> the victim's will or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct is guilty of sexual assault.
>
> NRS 200.364 defining sexual penetration states:
>
> "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.

Here, a rational trial of fact could not have found the Appellant guilty of these charges based upon the testimony of the witnesses presented at trial. It was made clear to the jury that there were no physical findings substantiating digital or anal penetration to the named victim through injury or the Appellant's DNA through the testimony of Dr. Sandra Cetl during direct and cross examination. (*See* App at p. 658, 661, 669, 672-673, Volume III). Accordingly, the State's entire case hinged on the statements of the named victim J.C.

Nicole Hammonds, J.C.'s mother (hereinafter "Nicole") was the first to take the stand as to the same. She testified only that J.C. told her that Dustin "came in the room to check on the baby, sat on the futon, looked at her privates, touched her privates, and dug in them." (*See* App at p. 352, Volume II). Nicole did not ask any follow up questions (*See* App at p. 354, 390, Volume II) and nowhere in her testimony was it established that J.C. told Nicole that actual penetration of the genital openings occurred.

J.C. then took the stand. On direct, J.C. testified that "he digged in my privates" but initially was not able to state where her privates were. (*See* App at p. 417, Volume II). Although she stated inside my privates, J.C. did not know whether the touching was over or under the clothes. (*See* App at p.418, Volume II). On cross examination, J.C. did not provide further clarification other than Dustin dug in her privates. (*See* App at p. 428-429, Volume II). She also stated that her therapist Betsy and her mother helped her practice what to say in court. (*See* App at p. 422-423, Volume II).

J.C.'s grandmother, Joanna Hammond, took the stand and testified that J.C. told her that Dustin had "touched her and dug up in her." (*See* App at p. 449, Volume II). Like Nicole, Joanna did not ask any follow up questions of J.C. as to whether or not any penetration occurred. (*See* App at p. 449-450, Volume II).

Megan Barral was then called to the stand. She testified that J.C. stated: "Uncle Dustin touched me and he hurt me." (*See* App at p. 577, Volume III). J.C. did not provide clarification and Megan was denied the opportunity to conduct follow up questioning. (Id. at p. 577-578).

The final witness called to testify as to what J.C. stated was former detective Timothy Hatchett (hereinafter "Officer Hatchett"). During the direct examination

the majority of J.C.'s voluntary statement via video was played for the jury.[3] J.C. initially stated that no one had touched her privates other than her parents. (*See* App at p. 8, Volume I. and p. 707, 726 Volume III). She also stated that she did not know why her privates were hurting. (*See* App at p. 9, Volume I). It is only after Officer Hatchett elicits testimony through the use of leading questions that J.C. finally states: "Levi's daddy dug in my privates." (*See* App at p. 9, Volume I. and p. 708, 726-727 Volume III). Officer Hatchett also indicated that J.C. used the words digging and sinking. (*See* App at p. 9, Volume I. and p. 709, Volume III). After further prompting, J.C. indicated to Officer Hatchett that the Appellant dug in her butt. (*See* App at p. 12, Volume I. and p. 709-710, Volume III).

Throughout the interview, Officer Hatchett failed to definitively clarify through precise questions whether or not digital penetration of J.C.'s vaginal and rectal areas actually occurred [4]

Taken as a whole, J.C.'s testimony on the stand, video voluntary statement and her NRS 51.385 hearsay exceptions conveyed by other witnesses failed to establish beyond a reasonable doubt that the digital sexual penetration alleged in counts 1 and 2 actually occurred.

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[3] *See* transcript found at App at p. 5-13. The Appellant has requested that the Video CD be forwarded to the Court via separate motion.

[4] It should be noted that J.C. does not describe any touching of her bottom during her direct testimony or on cross examination. (*See* App at p. 415-431 Volume II).

The Nevada Supreme Court has held that "[a]lthough the victim's testimony need not be corroborated...'the victim must testify with *some* particularity regarding the incident in order to uphold the charge." LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). Given that J.C. testified only that the Appellant "digged" in her privates, did not know whether the touching was over or under the clothes, initially denied in her voluntary statement that any touching occurred by anyone other than her parents, and that Officer Hatchett elicited testimony from her through the use of leading questions, it can hardly be said that J.C. testified with enough particularity to uphold the charge. Most importantly, J.C. does not definitively clarify that actual penetration of her vaginal and anal areas, however slight, actually occurred as required by NRS 200.364.[5] Accordingly, the State failed to produce the minimum threshold of evidence upon which a conviction for sexual assault may be based and an acquittal should be granted by this Court.

VII. THE COURT BELOW ERRED BY FAILING TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL BASED ON THE CONFLICTING EVIDENCE THAT WAS PRESENTED

Alternatively, the Appellant respectfully requests a new trial based on the conflicting testimony of the named victim and Megan Barral during the course of the trial.

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[5] The State also conceded during oral argument at the Appellant's Motion for a New Trial that the jury relied on the words dig, dug and sink as their basis for finding digital penetration occurred. (*See* App at p 818-819., Volume IV).

Motions for a new trial in criminal cases are governed by NRS 176.515 which states in pertinent part:

1. The court may grant a new trial to a defendant if required as a matter of law or on the grounds of newly discovered evidence.

4. A motion for a new trial based on any other grounds must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

The Nevada Supreme Court has consistently held that pursuant to the provisions regarding "other grounds," the district court may grant a motion for a new trial based on an independent evaluation of the evidence. Purcell, 110 Nev. at 1393; 887 P.2d at 278. Historically, Nevada has empowered the trial court in a criminal case where the evidence of guilt is conflicting, to independently evaluate the evidence and order another trial if it does not agree with the jury's conclusion that the defendant has been proven guilty beyond a reasonable doubt." Washington v. State, 98 Nev. 601, 604; 655 P.2d 531, 532 (1982) (quoting State v. Buscher, 81 Nev. 587, 589; 407 P.2d 715, 716 (1965). A conflict of evidence occurs where there is sufficient evidence presented at trial which, if believed, would sustain a conviction, but this evidence is contested and the district judge, in resolving the conflicting evidence differently from the jury, believes the totality of evidence fails

to prove the defendant guilty beyond a reasonable doubt. State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2 (1993).

Accordingly, the "totality of the evidence" evaluation is the standard for the district court to use in deciding whether to grant a new trial based on an independent evaluation of conflicting evidence. Purcell, 110 Nev. at 1394; 887 P.2d at 278-279 (1994). The exercise by the trial court of the right to grant a new trial or acquittal will be presumed correct and proper by the appellate court until the contrary is shown by the appellant. State v. Crockett, 84 Nev. 516, 518; 444 P. 2d 896, 898 (1968).

In the present case, there was conflicting evidence presented between J.C. and Megan Barral. In contrast to J.C.'s story, Megan testified that Dustin told her that when he was asked to check on their son Joshua he accidentally sat on J.C. while she was sleeping on the futon. (*See* App at p. 565-566, Volume III). This was also conveyed to Joanna Hammonds. (*See* App at p. 570-571, Volume III).

Further, the baby monitor in Joshua's room became a focal point of discussion during Megan's testimony and during closing arguments. Megan testified that Dustin went into the room to check on Joshua after she heard Joshua fussing on the monitor and that it was "his turn." (*See* App at p. 563-566, Volume III). She stated on cross that he came right back to the room. (Id. at p. 594). After being shown the photograph of the baby monitor admitted as Defense Exhibit "A,"

Megan stated the volume switch was on the master unit in her bedroom and that if the unit in Joshua's room was unplugged it would emit a high pitched sound. (Id. at p. 608-609, *see also* p. 612-613). Megan also stated that she was attuned to the sound of her child's crying and that she did not hear anything strange or unusual from the monitor while Dustin was in the room with Joshua and J.C. (Id. at p. 594-595).

Conversely, J.C. states in her video interview with Officer Hatchett that Dustin was quite vocal while he was in the room with her stating in part that she told him to "stop, but he didn't stop." (*See* App. at p. 10, Volume I). J.C. also relayed in the interview that Dustin purportedly stated to her "I want to do it again and again" (Id. at p. 11).

The evidence of guilt is conflicting because the jury in finding the Appellant guilty of both sexual assault charges arguable resolved the conflicting evidence by relying on J.C.'s rendition of events to Officer Hatchett and disregarding or ignoring not only Dustin's rendition of events to Megan Barral that he accidentally sat on J.C., but also her testimony as to how long Dustin was out of the room, and that she did not hear anything on a very sensitive baby monitor.

Given J.C.'s lack of credibility including but not limited to her memory issues and inconsistent testimony as to what took place, it is submitted that the evidence is conflicting because believing that these events actually occurred

necessarily hinges on believing J.C.'s testimony versus Megan's. In accordance with State v. Walker, the evidence is clearly contested between J.C.'s and Megan's version of events, and the court below erred by failing to find that the conflicting evidence merited a new trial.

Accordingly, based on the conflicting evidence presented, this Court should alternatively order another trial based on an independent evaluation of conflicting evidence.

VIII. THE APPELLANT'S CONVICTIONS SHOULD BE REVERSED FOR CUMMULATIVE ERROR

The Appellant's conviction is invalid due to the cumulative errors presented throughout the course of the trial proceedings. Cumulative error may deny a defendant a fair trial even if the errors, standing alone, would be harmless. Valdez, 124 Nev. at 1195, 196 P.3d at 481 (2008). "When evaluating a claim of cumulative error, this Court consider the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Id. (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854–55 (2000)).

In the case at bar, the Appellant's conviction and sentence are invalid due to the cumulative errors presented in the pre-trial evidentiary rulings, jury selection, the conflicting evidence presented at trial and the misconduct by the

State and the court below during the trial. Appellant incorporates each and every factual allegation contained in this petition as set forth herein. Here, the cumulative effect of the errors demonstrated in this petition was to deprive the proceedings against the Appellant of fundamental fairness and to result in a constitutionally unreliable verdict. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice to Appellant. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless. Rather, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced the Appellant. *See*, Big Pond, 692 P.2d 1288, 101 Nev. 1.

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CONCLUSION

Based on the Points and Authorities herein contained, it is respectfully requested that the conviction and sentence of the Appellant DUSTIN BARRAL be set aside and a new trial date be set, or in the alternative, an evidentiary hearing be granted.

Dated this 4th day of April, 2014.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Appellant's Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and has been prepared in a proportionately spaced typeface using Times New Roman in font type 14.[6]
2. I further certify that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.
3. Finally, I certify that this brief complies with all applicable rules of the Nevada Rules of Appellate Procedure, particularly NRAP 28(e), which requires every assertion in the brief regarding matters of record to be supported by a reference in the page of the transcript or appendix where the matter relied on is to be found.
4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

Dated this 4th day of April, 2014.

By:

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[6] Along with this Opening Brief, Counsel has filed a Motion to exceed page limit in a separate filing.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **APPELLANT'S OPENING BRIEF** was made this 4th day of April, 2014 upon the appropriate parties hereto by electronic filing using the ECF system which will send a notice of electronic filing to the following and/or by facsimile transmission to:

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DECLARATION OF MAILING

Jennifer Alemain, an employee with the Las Vegas Defense Group, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the _____day of April, 2014, declarant deposited in the United States mail, a copy of the Appellant's Opening Brief in the case of State of Nevada vs. Dustin Barral, Case No. 64135, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to DUSTIN BARRAL, #11008615, High Desert State Prison, P.O. Box 650, Indian Springs, NV 89070, that there is a regular communication by mail between the place of mailing and the place so addressed.

Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 4th day of April, 2014.

An employee of Las Vegas Defense Group