IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CASTANEDA)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
)

No. 64515

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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The statute granting jurisdiction to review this judgment is NRS 177.015. The State filed the Judgment of Conviction on December 31, 2013. Appellant filed the Notice of Appeal on November 25, 2013.

ISSUES PRESENTED FOR REVIEW

I. The trial Court violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the Nevada Constitution by excluding expert rebuttal testimony.

II. The prosecutor violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by committing misconduct.

III. The State failed to prove Castaneda's guilt beyond a reasonable doubt.

IV. The Court violated Castaneda's due process and fair trial rights by admitting other bad acts without satisfying *Petrocelli v. State.*

V. The Court erred in rejecting proposed defense Jury Instructions.

VI. The Court erred in denying dismissal of Counts II-XV.

VII. The Court erred in denying dismissal based on witness perjury.

VIII. The Court erred in refusing to conduct a hearing regarding a juror's perceived inattentiveness.

IX. Cumulative error warrants reversal of these convictions.

STATEMENT OF THE CASE

The State filed a complaint on March 4, 2011, alleging ten counts of Possession of Visual Presentation Depicting Sexual Conduct of a Child. (I 2). On April 11, 2011, the State filed an Amended Criminal Complaint adding additional counts. (I 7). On April 14, 2011, Castaneda was bound over to District Court after the preliminary hearing. (I 14). On April 20, 2011, the State filed an Information. (I 15). On April 21, 2011, Castaneda entered a plea of not guilty at arraignment. (II 378). On February 5, 2013, the State filed an Amended Information. (I 135). On July 8, 2013, the State filed a Second Amended Information. (I 177). The parties stipulated that the images constituted visual presentations depicting sexual conduct of children. (I 184, 188). On July 16, 2013, jurors convicted on all counts. (II 288). The Court

sentenced Castaneda to 28 to 72 months, suspended for five years, concurrent on all counts, in addition to conditions under NRS 176A.410. (VIII 1693).

STATEMENT OF THE FACTS

Appellant Anthony Castaneda met Tami Hines when they lived at the Budget Suites in Las Vegas in 2008. The two remained friends even after both moved out of the Budget Suites. (IV 845-46). In February of 2009, Hines and her daughters needed a place to stay, and Castaneda allowed them to live with him at his house on Beverly Way. Castaneda did not charge any rent. Hines moved out in June, 2009. (IV 846-48; 859). In November of 2009, Hines returned to Castaneda's home with her four daughters and her new boyfriend, Michael Landeau, and an agreement that Hines and Landeau would pay rent. (IV 849). After what Landeau described as a "heated argument" about the rent, Castaneda served Hines with an eviction letter in January of 2010. (IV 854; VI 1233). In early February, 2010, Hines, her daughters, and Landeau moved out and rented a condominium. (IV 851). Hines admitted that she and Landeau were not on good terms with Castaneda and harbored animosity toward him; Landeau described their last argument as a "huge fight." (IV 861).

Shortly after they moved into the condo, Hines was asleep on the sofa while Landeau was on his computer. Landeau claimed he found a flash drive

in one of his moving bins. Landeau loaded the drive onto his laptop and saw some documents and images of young girls in sexual situations. (VI 1238). Landeau woke Hines to show her the photos. (IV 853). The images included copies of Castaneda's driver's license, birth certificate, Social Security card, and military records. (IV 869). Hines called a Metro officer she knew, who gave her the number for Detective Shannon Tooley. Hines and Landeau met Det. Tooley and gave her the flash drive. Hines told Tooley that she had found the drive and made no mention of Landeau's involvement. (IV 875, 909).

Upon execution of a search warrant on Castaneda's two home computers, detectives conducted a forensic examination of the shuttle computer in the living room, an HP laptop, and a Dell laptop. (V 1038). Detective Ehlers found no images of child pornography on Castaneda's son's laptop, on the Dell laptop, on two free-standing hard drives, or on CDs and DVDs taken from the home. (V 1039-40). However, images containing child pornography were found on a laptop and a desktop computer. (VI 1274). These images can be found on multiple websites and were identified many years ago as images of child pornography. (VI 1277).

Castaneda spoke with Det. Tooley and acknowledged that his computers contained a large amount of adult pornography. (VI 1286). Castaneda

repeatedly denied intentionally downloading or possessing images of child pornography. (VI 1307). Castaneda denied copying any of the images to the flash drive. (VII 1352). Numerous images of legal adult pornography were found on the computers and on the flash drive. (VII 1342). During the interview, Castaneda denied over fifty times that he had intentionally downloaded, copied, or accessed any images containing child pornography. (VII 1365). Although she failed to tell police this allegation, Hines claimed at trial that she had seen the flash drive on Castaneda's key ring. (IV 871). Landeau also claimed he recognized the flash drive as Castaneda's. (VI 1237). Although State experts could not testify with certainty regarding the source of the images or how they came to be on the drive and the computers, jurors convicted on all counts.

SUMMARY OF THE ARGUMENT

This case involved complex evidence and testimony regarding how these images were copied or downloaded to a flash drive and two computers. Because the State never proved that Anthony Castaneda knowingly or willfully possessed these images, these convictions hinged on the jury's willingness to believe two witnesses regarding the source of the images on devices used by multiple members of a household with shared passwords and equal access to the Internet. The trial Court insured convictions in this case

by refusing to allow a rebuttal expert witness to testify for the defense in response to highly damaging surprise testimony from a State expert to the effect that the computers contained proof of knowing and willful possession of these images by the defendant. Although Hines's credibility was the cornerstone of the State's case, she admitted to committing perjury and to hiding from detectives her history of antipathy toward Castaneda. The State failed to prove these charges beyond a reasonable doubt, and this Court cannot deem the trial Court's admission of prejudicial and irrelevant bad acts harmless error. Finally, the trial Court erred in multiple legal and evidentiary rulings and the State committed significant acts of prosecutorial misconduct, warranting reversal of these convictions.

ARGUMENT

I. The trial Court violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the Nevada Constitution by excluding expert rebuttal testimony in support of the defense theory of the case.

The State noticed Metro Detective Paul Ehlers as an expert witness and disclosed that he would testify "as to the forensic examination of computers and/or electronic devices for the presence of child pornography." (I 113). In response to defense cross-examination regarding whether Ehlers actually

knew if any of the files had been intentionally opened by a user, Ehlers testified that some of the files had been deliberately deleted based on remnant files located in the unallocated space on the computers. Ehlers claimed, "there would have to be interaction placing them there." (VI 1141). In response to further defense questioning regarding the fact that Ehlers had never made these observations in any written analysis or report, the State objected, and the Court conducted a hearing outside the presence of the jury.

The defense noted that Ehlers could not have verified that these remnants or "carved" files resulted from intentionally deleted files, and that they could have resulted from incomplete image downloads. The defense immediately sought leave to call a rebuttal witness based on Ehlers' surprise testimony to the effect that in his opinion, the remnant or "carved" files in the unallocated space had previously been deleted through the intentional act of a human user. (VI 1148). The State responded that the unallocated space evidence had been referenced at the preliminary hearing and was not a surprise. (VI 1153). The Court ruled that the defense had had adequate time to retain and notice an expert for rebuttal and denied the defense request to admit expert testimony in rebuttal. (VI 1154).

Ehlers ultimately testified that three carved images in the allocated space on the shuttle and the laptop showed that "a user actually had contact or

interaction" with the files, and that the presence of the carved files implicitly proved that the files had been viewed or touched by a human user and had not been downloaded or deleted by an automated program. (VI 1190). Although Ehlers eventually admitted that the files could have been deleted by an automated program, or by being overwritten, the prejudice of his testimony cannot be overstated. Jurors heard from a State expert that the presence of the carved images in unallocated space essentially proved willfulness and knowledge on Castaneda's part. (VI 1195). In addition, Ehlers offered descriptions of security software that he claimed to remember from his analysis of the drives, although he admitted that he had never mentioned this software in any written report. (VI 1121-22). During Closing Argument, the State argued that the carved images on the unallocated space constituted proof that someone had actively tried to delete the images. (VII 1469). The Court overruled the defense objection to this mischaracterization of the evidence. (VII 1469). The State also showed jurors a PowerPoint slide to the effect that this alleged deletion "showed knowledge" and constituted evidence of guilt, to which the defense also objected. (1704-1705).

At a hearing to memorialize the bench conference on this issue, the defense made a specific record regarding the need for a defense rebuttal expert. (VII 1422). The defense noted that Ehlers' testimony included definitions of

"access" and "modified" that fell outside the mainstream use of these terms, and that his conclusions about the intentional deletion of the carved images was an unfounded leap in logic that required expert testimony to rebut. (VII 1422-23). The Court denied the defense motion because the defense had not noticed an expert. (VII 1424).

The defense offered to file an offer of proof with the Court regarding the testimony that would have been introduced had the Court permitted the defense to call a rebuttal expert. (VII 1422). The Court responded, "All right," and allowed the defense to make a record of additional argument that had taken place during a bench conference. (VII 1421). On October 7, 2013, the defense filed a written offer of proof detailing the rebuttal testimony that would have been offered had the Court granted the defense motion to call a rebuttal witness, along with expert Leon Mare's C.V. (II 303).[1]

This Court reviews a district court's decision to allow an unendorsed

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[1] The State filed a Motion to Strike the offer of proof. (II 350). The defense filed a memorandum and motion to reconsider the Court's decision to exclude the expert rebuttal witness. (II 356). The defense acknowledged that the motion could be properly treated as a response to the State's Motion to Strike the offer of proof, and that the offer of proof had been submitted to complete the record. (VIII 1676). Although the Court subsequently stated that the Court's response of "All right" was not intended to evince permission to file the offer of proof, the record is clear that this was the defense understanding of the Court's statement at the time. (II 357; VIII 1673). The Court ultimately denied the State's motion to strike the offer of proof while noting that the offer was not a factor in the Court's ruling during trial. (VIII 1681).

witness to testify for an abuse of discretion. *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Here, the Court erred in denying the defense motion to introduce expert testimony in rebuttal to Ehlers' surprise testimony. Although the State argued that these opinions had been elicited at the preliminary hearing, Det. Ehlers did not actually testify at the preliminary hearing. Det. Ramirez testified for the State at the preliminary hearing; while Ramirez briefly referenced the carved images in the unallocated space, Ramirez's testimony was far less specific and far less damaging than Ehlers.' Although Ramirez testified that the images in the unallocated space had been "deleted," he did not opine that the deletion was a willful, intentional act by a human user. (I 42). Ehlers did not include this specific opinion in any written report produced to the defense. (II 357). Thus, the Court erred in denying the defense an opportunity to offer expert testimony where Ramirez's preliminary hearing testimony did not contain the same potential for prejudice as Ehlers' trial testimony.

This Court should reverse the District Court's narrow view of the admissibility of expert rebuttal testimony where the exclusion of this evidence deprived Castaneda of his right to present a defense: "The due process clauses in our constitutions assure an accused the right to introduce into evidence any testimony or documentation which would tend to prove the

defendant's theory of the case."

Pineda v. State, 88 P.3d 827, 834 (2004) (citations omitted). Similarly, the defense expert could have provided the jury with objective opinions buttressing Castaneda's defense: that carved images in unallocated space could have resulted from incomplete or partial downloads by an automated program or a virus, or from deletions by an automated program.

Both the Due Process and Compulsory Process Clauses of the Constitution protect the right of the criminal defendant to call witnesses. *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988). In *Crane v. Kentucky*, 476 U.S. 683 (1986), the United States Supreme Court noted the breadth of the right to present a defense:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23 (1967); Davis v. Alaska, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." (Citations omitted). . . We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.

Id. at 690. In evaluating prejudice from the wrongful exclusion of expert testimony, courts take a broad view of how the testimony might have bolstered the theory of the case:

> The final question is whether the defendant was unduly prejudiced by the exclusion of the proffered expert testimony. . . . The defendant's claim of self-defense hinged on giving some rational explanation of

> how the victim could have absorbed five shots while maintaining his aggressive assault . . . An explanation of the effects of cocaine intoxication may have persuaded the jury to decide that guilt was not proved beyond a reasonable doubt. The defendant should have an opportunity to present that testimony to a jury.

State v. Plew, 155 Ariz. 44, 50, 745 P.2d 102 (1987). Similarly, the defense expert would have offered a "rational explanation" of how the carved images came to exist in unallocated space, and would have demonstrated that Ehlers' conclusion that they resulted solely from intentional deletions was unreliable, baseless, and highly unlikely. In the offer of proof, the defense noted Leon Mare's specific opinions regarding Ehlers' testimony about the remnant images and numerous additional opinions that veered far from accepted expertise in this area: the features of graphic programs; the ability to visually inspect for viruses; the meaning of terms like "access" and "last modified" dates; and additional specifics of Ehlers' testimony that had never been provided to the defense. (II 303-311).

NRS 174.234(3)(b) provides that both parties have a continuing duty of disclosure regarding expert testimony. Each side must file and serve, not less than 21 days before trial, a written notice containing "a brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his testimony." NRS 174.234(2)(a) (emphasis added). Had the defense known the substance of Ehlers' anticipated testimony,

Castaneda would have retained a defense expert to rebut the evidence. The Court denied the defense request on the grounds that the defense had failed to notice an expert. This ruling ignores the fact that Castaneda was not aware of the need for an expert because Ramirez's testimony at the preliminary hearing did not contain the specific opinion that only deliberate human intervention could have caused the carved images in the unallocated space, and because Ramirez's prior testimony did not contain the other novel and speculative opinions offered by Ehlers. Similarly, no report produced prior to trial contained these opinions. Thus, the Court's ruling ignored the State's failure to provide notice of the substance of Ehlers' testimony.

In *Grey v. State*, this Court ruled that "[i]f a party fails to provide notice of an expert rebuttal witness, the court in its sound discretion may prohibit the expert witness from testifying..." *Grey v. State*, 124 Nev. 110, 119-120, 178 P.3d 154, 161 (2008). However, in *Grey*, the State had failed to notice an expert rebuttal witness in response to the noticed defense expert, and the Court held that "the State has not sufficiently shown why its intent to have Dr. Karagiozis testify as an expert rebuttal witness was uncertain before trial." *Grey*, 124 Nev. at 119. In the instant case, while the defense had notice of the State's intent to call Ehlers, the defense had no notice that Ehlers would offer such explicit and damaging opinions regarding the deleted files

and the features of viruses and automated programs. The defense would have had no need for an expert had Ehlers remained consistent with Ramirez's testimony at the preliminary hearing or had the State produced a report containing the substance of Ehlers' anticipated testimony.

Instead, Ehlers' opinion was outside the mainstream and in conflict with Detective Ramirez's candid admissions regarding the uncertainty of "last modified" and "access" dates, as well as Ramirez's acknowledgement that a carved image could result equally from human action, viral activity, or partial downloads. Where a party's witness offers inferences that are "contrary to the facts," Courts may permit the introduction of rebuttal or explanatory evidence about the subject matter. *State v. Davis*, 731 S.E.2d 236, 243 (N.C. App. 2012). "Admission of rebuttal evidence, particularly when the [party] 'opens the door' to the subject matter, is within the sound discretion of the district court." *U.S. v. Burch*, 153 F.3d 1140, 1144 (10th Cir. 1998). This Court must distinguish *Grey* and find that the trial Judge abused her discretion in excluding the defense expert:

> The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony.

Taylor v. Illinois, 484 U.S. 400, 410-411 (1988).

The proposed testimony would have been specific and limited, and the Court could have taken a brief recess to permit the State an opportunity to prepare. This Court has found error in trial courts' rejection of the defendant's right to present sur-rebuttal evidence and witnesses. *Berner v. State,* 104 Nev. 695, 697, 765 P.2d 1144, 1146 (1988) (conviction reversed in part because . . . "the court refused to allow appellant to put on a surrebuttal witness, who might have been able to shed some light on the meaning" of evidence presented by the State). Where a district Judge permitted the State to call an unnoticed expert, this Court found no error in part because the State had not demonstrated bad faith and because the defendant failed to show prejudice regarding his substantial rights. *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Similarly, the State in the instant case failed to allege or demonstrate bad faith on the part of the defense in failing to notice an expert witness, and the State could not have shown prejudice where the State's own expert had introduced the subject matter of the proposed rebuttal testimony.

This testimony went to the heart of this case and implicated Castaneda's constitutional right to present a defense. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to

defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Davis v. Alaska*, 415 U.S. 308, 317 (1974), *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). This Court must reverse these convictions on the grounds that the trial Court improperly restricted Castaneda's right to present his defense. The exclusion of the defense expert left jurors with an inaccurate impression of the evidence in the case as it related to the State's burden of proving knowing and willful possession of the images at issue. This ruling violated Castaneda's due process rights, his right to a fair trial, and his right to present a defense under the Sixth and Fourteenth Amendments.

II. The prosecutor violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by committing misconduct.

At the close of rebuttal, the defense brought a mistrial motion based on cumulative prosecutorial misconduct during rebuttal argument. (VIII 1593). The defense added a cumulative objection to the State's rebuttal PowerPoint presentation as a misstatement of the evidence and the defense theory of the case. (VIII 1594). The Court denied the motion. (VIII 1595). The defense renewed the motion after the verdict as a motion to reconsider. The Court denied the motion. (II 312; VIII 1656).

The State Shifted the Burden of Proof

The Court erred in denying the defense motions where prosecutorial misconduct denied Castaneda a fair trial. The State engaged in a lengthy and damaging transfer of the burden of proof to the defense. (VII 1460-61). This pattern commenced in Closing Argument when the prosecutor stated that constructive possession was merely the ability to exercise control over an item, and that Castaneda "had the ability to use those computers and that's why he possessed them." The Court overruled the objections. (VII 1455-56). In fact, the mere "ability to use" a device is a misleading minimization of the State's burden of proving that Castaneda knowingly and willfully possessed the images in question. The defense also objected during rebuttal to the prosecutor's burden-shifting when he asked jurors "what evidence do you have in this case to determine that Tami made up anything?" The Court overruled the defense objection. (VII 1469-70). The defense objected again when the prosecutor argued, "So if this is all a setup, if this is all a conspiracy, apparently Tami somehow knew which folders to pick to try to frame the defendant," and "Is there any evidence that you have heard, though, to suggest that, ladies and gentlemen?" (VII 1480). The Court overruled the defense objections to this burden-shifting and misstatement of the evidence. (VII 1480). The Court subsequently denied the defense motion for a mistrial. (VII 1482-84).

The defense objected again during rebuttal when the prosecutor argued, "No, there was no evidence that any of the defense theory happened here," and "There is no evidence in this case that a virus put that child pornography on the thumb drive, the shuttle, or the HP laptop." The Court overruled the objections. (VIII 1568, 1569). The defense objected again when the State argued to jurors and showed a PowerPoint slide during rebuttal suggesting that the defense had failed to present evidence that Tami had framed Castaneda. The Court overruled the objections. (VIII 1577; 1711-1733). The defense objected when the prosecutor mischaracterized the defense argument as suggesting that Castaneda's computer "automatically plays music and searches out child pornography to go with that music." Defense counsel noted that this argument completely mischaracterized the defense's closing argument and constituted inappropriate burden-shifting. The Court overruled the objection. (VIII 1574). The defense renewed the objection when the State continued to argue that jurors should discount the defense because Castaneda admitted that he didn't have an Ipod. The defense also objected to the PowerPoint slide to this effect. The Court advised jurors that the defense argument had merely been an analogy but did not strike the prosecutor's statements. (VIII 1575; 1711-1733).

The State's sustained argument that there was "no evidence" of the

defense theory suggests that the accused, rather than the state, has the burden of proving or disproving the crime. Such a suggestion is clearly impermissible:

> It is a fundamental principle of criminal law that the State has the burden of proving the defendant guilty beyond a reasonable doubt.... The tactic of stating that the defendant can produce certain evidence or testify on his or her own behalf is an attempt to shift the burden of proof and is improper.

Barron, 105 Nev. at 778, 783 P.2d at 451. These comments constitute an unconstitutional shifting of the burden of proof. This Court should not countenance this type of burden shifting because "[i]t suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate." *Barron v. State*, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). "*It is error even to intimate to the jury* that any burden of persuasion rests upon the defendant on the trial of the general issue (guilt or innocence)." *Phillips v. State*, 86 Nev. 720, 722, 475 P.2d 671, 672 (1970) (citation omitted) (emphasis added).

Where the State's gamesmanship undermined the presumption of innocence and sent the jury into deliberations with an inaccurate understanding of the burden of proof, this Court must find reversible error:

> When judged by the applicable standard, the error cannot be deemed harmless beyond a reasonable doubt. This appears to have been a close case, not with regard to culpability, but with regard to the degree of culpability to attach to the crime. Although the trial transcript is not

> that long, the jury spent three hours in deliberation before rendering a verdict. It is quite probable that the jury took into account in its deliberating process the prosecutor's suggestions that appellant was responsible for gaps in the evidence, had the burden of proving or disproving the crime, and was hiding the truth. Although the jury was instructed to draw no inferences from appellant's silence, this instruction was not a sufficient cure for the prosecutor's unconstitutional remarks. We conclude that the errors were prejudicial. Accordingly, we reverse appellant's judgment of conviction, and we remand this matter for a new trial.

Harkness v. State, 107 Nev. 800, 804-805, 820 P. 2d 759, 761 - 762 (1991). Similarly, the instant case involved repeated arguments and an entire PowerPoint presentation to the effect that the defense was responsible for any gaps in the evidence and that the defense had the burden of proving that something other than intentional human action resulted in the accessing and copying of these images. (1711-1733). Because this was not a case of overwhelming evidence, this Court must find reversible error as a result of the State's burden-shifting during closing and rebuttal and in the State's PowerPoint presentations during closing and rebuttal. (1704-1705; 1711-1733).

The State Improperly Vouched for a State Witness

The defense objected to the prosecutor's witness vouching when she made excuses for Det. Ehlers' lack of knowledge by arguing that the State had asked the wrong questions, that he simply didn't understand defense counsel's questions, and that he was just "trying to educate everybody on the

lingo." The Court overruled the vouching objection. (VIII 1569). The State violated the Fifth, Sixth, and Fourteenth Amendments by vouching for Ehlers. "It is improper for the prosecution to vouch for the credibility of a government witness." *Lisle v. State*, 113 Nev. 540, 553, 937 P.2d 473 (1997). Prosecutors who vouch for their own witnesses court danger because jurors "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled." *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985).

By vouching for Ehlers, the prosecutor improperly injected her personal assessments of the credibility of witnesses into closing arguments. This constitutes an unfair use of the imprimatur of the prosecutor's office, and a violation of the Nevada and United States Constitutions. *State v. Teeter*, 65 Nev. 584, 647, 200 P.2d 657 (1948). This type of opinion evidence infringes on the duty of jurors to make credibility determinations and implicates the Sixth Amendment right to a fair trial. *U.S. v. Sanchez*, 176 F.3d 1214, 1220 (9th Cir. 1999).

The State Misstated the Evidence and the Defense Argument and Ignored the Parties' Stipulation

The defense objected to the prosecutor's mischaracterization of the

defense argument by claiming that the defense tried to explain why Castaneda had not gone to the police. In fact, defense counsel had never made this argument, and the Court sustained the objection. (VIII 1558-59). The defense also objected to the prosecutor's oversimplification of digital file "creation dates" and written dates during rebuttal argument. The Court overruled the objection, leaving jurors with an inaccurate impression that these dates could be viewed as concrete evidence of the dates on which the images were introduced to the media in question, when even the State's own witnesses had acknowledged that these dates could be overwritten or modified in numerous ways. (VIII 1581-82).

The defense objected to the prosecutor's suggestion in rebuttal that Castaneda had downloaded these images after conducting a search with the term "young" on several legal adult sites. (VIII 1586). The defense objected that the State's rebuttal argument misstated the evidence and essentially urged jurors to look at the images when the parties had already stipulated that the images constituted child pornography. (VIII 1586). The Court reminded jurors of the stipulation but did not sustain the objection. (VIII 1586). The prosecutor's argument was misleading in several ways. First, the prosecutor wrongly claimed that Castaneda implicitly admitted to accessing these images because he found the subjects "pretty" but that he denied that it was

because they were "young": "Pretty versus young. He still chose them." (VIII 1585). In fact, Castaneda did not admit that he "chose" these particular images because they were "pretty." Further, the prosecutor misstated the defense by claiming that Castaneda had implied that he accidentally downloaded the images: "You take a look at those and there is no way that you will think that somebody would have chosen those images – and said that they were pretty, and there's no way that somebody would have looked at those images and chose them because they were young." (VIII 1586). By urging jurors to examine the images in response to a non-existent defense argument, the prosecutor clearly sought to inflame jurors against Castaneda and ignored the fact that they defense had already stipulated that the images constituted child pornography. The defense also objected to the prosecutor's mischaracterization of the defendant's statement when the prosecutor claimed Castaneda admitted he obtained the images from the referenced websites, and to the related PowerPoint slides. The Court overruled the objections. (VIII 1588-89). The defense also objected to the PowerPoint rebuttal slide that stated, "Defendant himself says he copied his Driver's License – USB drive." (VIII 1564-66). The defense noted that the State had mischaracterized the evidence to suggest that Castaneda had admitted copying his license to the specific flash drive in evidence when he had admitted only to using a flash

drive. The Court overruled the objections. (VIII 1566).[2]

The defense also objected to misstatement of the evidence when the prosecutor argued during rebuttal that Ehlers verified the existence of valid anti-viral software on Castaneda's system and that Castaneda would not have allowed a virus to remain on his computer for three years. The Court overruled the objection. (VIII 1570). In fact, Ehlers could not verify that current, valid anti-viral software had been running, and there was no evidence that Castaneda had any notice that a virus could have infected his system.

A prosecutor may not make statements unsupported by the evidence adduced at trial. *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992). This Court has noted that "factual matters outside the record are irrelevant and are not proper subjects for argument to the jury." *State v. Kassabian*, 69 Nev. 146, 153-54, 243 P.2d 264 (1952). "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." *U.S. v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). "The prosecutor's job isn't just to win, but to win fairly, staying within the rules." *Id.* By repeatedly misstating the evidence and the defense theory of the case, and by ignoring a stipulation and attempting to inflame jurors, the prosecutor committed

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[2] Simultaneous with the filing of this brief, the defense has requested that the District Court transmit the exhibit at issue, State Exhibit 79: Audio Exhibit, to this Court.

repeated acts of misconduct.

The Prosecutor Disparaged Defense Counsel

The prosecutor commented several times on defense counsel's objections during rebuttal and argued to jurors that "apparently defense counsel wants to get up and try to, again, interrupt my rebuttal and give his own rebuttal argument to himself." (VIII 1560; 1565). The Court sustained the defense objections to this improper denigration of defense counsel. (VIII 1560; 1565). The prosecutor ignored the Court's sustainment of the prior objections to these comments and continued to denigrate counsel: "And since defense counsel continues to object..." Again, the Court sustained the defense objection to this comment and admonished the prosecutor to refrain from commenting on defense counsel's objections. (VIII 1573). However, the prosecutor continued after the next defense objection, "I don't know why he has to object every other . .. " (VIII 1574). The defense also objected to the prosecutor's characterization of Hines being "led" by the defense to call her prior statement a lie. The Court overruled the objection.

Prosecutors may not undermine the defense by making inappropriate and unfair characterizations. *Riley v. State*, 107 Nev. 205, 212, 808 P.2d 551, 556 (1991). By expressing exasperation with the defense counsel's attempts to simply do his job, the prosecutor disparaged the defense, attempted to turn

jurors against defense counsel, and committed misconduct. By advising jurors that she "didn't know why" the defense attorney repeatedly "interrupted" her argument, the prosecutor implied to jurors that defense counsel was acting improperly and being rude. By voicing her frustration and arguing that defense counsel improperly "led" Hines to admitting her perjured statements, the prosecutor injected an inappropriately personal assessment of defense counsel designed solely to inflame and prejudice jurors against Castaneda.

"If the issue of guilt or innocence is close, if the State's case is not strong, prosecutor misconduct will probably be considered prejudicial." *Garner v. State*, 78 Nev. 366, 374, 374 P.2d 525 (1962). This Court has noted, "[d]isparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct." *McGuire v. State*, 100 Nev. 153, 157-158, 677 P.2d 1060 (1984).

In sum, because the prosecutor repeatedly shifted the burden of proof; because the prosecutor vouched for a witness; because the prosecutor misstated the evidence and the defense theory of the case; and because the prosecutor insulted defense counsel in front of the jury, this Court should reverse these convictions based upon prosecutorial misconduct. In determining whether prosecutorial misconduct deprived a defendant of a fair

trial, this Court examines "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." *Rudin v. State*, 120 Nev. 121, 86 P.3d 572, 582 (2004). Where prosecutorial misconduct infects the trial with unfairness, the resulting conviction violates due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). This Court recognizes the potential for misconduct to cast doubt on the verdict:

> In order for error to be reversible, it must be prejudicial and not merely harmless. See Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 529 (1962). The test is whether "without reservation . . . the verdict would have been the same in the absence of error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988). The guilty verdict must be free from doubt. (Citations omitted).

Ross v. State, 106 Nev. 924, 928 (1990) (emphasis added). This misconduct met the "high degree" of necessity for declaration of a mistrial, and this Court must find reversible error in the Court's refusal to grant the motion. *Hylton v. Eighth Judicial District Court*, 103 Nev. 418, 421, 743 P.2d 622 (1987). This Court has noted the particular damage caused by misconduct in rebuttal, when the defense lacks the opportunity to respond on the record. *Mahan v. State*, 104 Nev. 13, 17, 752 P.2d 208 (1988). The cumulative effect of these multiple instances of misconduct warrants reversal of these convictions.

III. The State failed to prove Castaneda's guilt beyond a reasonable doubt.

This Court must reverse a conviction when the state fails to present evidence to prove an element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *Martinez v. State*, 114 Nev. 746, 961 P.2d 752 (1998). This Court has jurisdiction to determine whether the State presented evidence sufficient to sustain the conviction. *State v. Van Winkle*, 6 Nev. 340, 350 (1871). "The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Carl v. State,* 100 Nev. 164, 165, 678 P.2d 669 (1984); *Oriegel-Candido v. State*, 114 Nev. 378, 382, 956 P.2d 1378 (1998). The standard of review when analyzing the sufficiency of evidence in a criminal case 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." *Grey v. State*, 178 P.3d 154, 161 (Nev. 2008) (emphasis in original; internal citations omitted).

The State Failed to Prove that Castaneda Knowingly and Willfully Possessed these Images

The State failed to prove beyond a reasonable doubt that Castaneda knowingly and willfully copied, downloaded, transferred, or possessed these images. Detective Ramirez admitted that a file can be "accessed" without

being "opened," and that even automated programs can "access" files without any direct user involvement. (V 1024). Every time a virus protection program checks a file, the program accesses that file. (V 1022). Ramirez admitted that because flash drives contain no registry, there is no way to tell whether the last access was by a user or an automated program. (V 1023). Ramirez admitted that there is no way to tell who accessed a file, or if it was even accessed by a human user; Ramirez admitted that an automated system, a virus scanner, a photograph viewing program, or some other program could have "accessed" these files on the dates in question. (V 1024). Although Ehlers claimed that the computers had updated security systems, Ehlers admitted that he kept no record of his security software analysis on the shuttle and laptop. (VI 1120). Ehlers admitted that he did not know whether the security software was current, updated, or under contract with the software providers. (VI 1124). Ramirez also admitted that if a person downloaded a large zip file of photographs, the user would not know the source of the files or the contents of every image in the zip file. (V 1010). Ramirez admitted that a user could download large files without seeing any kind of thumbnail or graphic representation of the contents. (V 1014). Ehlers admitted that viruses can download files, including image files, onto a computer without the user's knowledge. (VI 1128-29). Even if the user removes the virus, the files can

sometimes remain on the system. (VI 1129). Ramirez admitted that some programs automatically search for files and create access logs without human intervention. (V 1027). This testimony, alone, warrants reversal of these convictions based on the State's failure to prove that it was Castaneda, and not a virus, automated program, or another individual who knowingly and willfully possessed these images.

Further, the State's own forensic analysis supports a conclusion that these images were, in fact, accessed by automated programs, and not by human users. Ehlers admitted that the "access" dates on the laptop on March 24, 2010, comprised only seven seconds for all fifteen images. (VI 1134). He admitted that other files could have had identical access dates, and that a human could not have accessed the images this fast. (VI 1134). Ehlers admitted that on April 1, 2010, and April 2, 2010, access also occurred in a matter of a few seconds for multiple images. (VI 1134). Ehlers admitted that on August 11, 2007, an image entitled new-35.jpg was modified on the shuttle at 2:06:30 a.m. At the same time, a file named new-33.jpg was also modified on the same computer. A second earlier, new-35.jpg was modified on the HP laptop, and two seconds earlier, new-33.jpg was modified on the laptop. (VI 1138-40). Based on the fact that these files were modified seconds apart on two different computers, the evidence is consistent with the defense

theory that automated software was accessing the files and that a human user could not have conducted these modifications at these times. (VI 1140-41).

Ramirez testified that the some of the other "last written" dates, or the dates when a file is created on or downloaded to a computer, for the flash drive images were August 9, 2007; August 11, 2007; August 13, 2007, and February 7, 2010. (V 984-87). The "file created" date, when the files were allegedly moved to the flash drive, was November 25, 2008. (V 990). The "last access" date, when the device is plugged into a computer and the file opened, was February 7, 2010. (V 992). Although the State claimed that 2007 was prior to Castaneda's friendship with Hines, the State's experts admitted that these dates are not reliable. Ramirez admitted that the last written dates could be manually changed or could change when a new operating system was installed. (V 1014-15). Ehlers also admitted that some security software can change access dates, and that cataloguing programs can also change access dates. (VI 1114-16). Thus, the State failed to prove that Castaneda was the person who conducted these actions; that Castaneda was present in town accessing these images on these dates; and that Castaneda was knowingly and intentionally involved in these actions. Based on the testimony presented at trial, the evidence was just as consistent with a virus or an automated program accessing these files as with human action.

Numerous Individuals Had Access to these Devices

The evidence revealed that multiple other members of the household had access to these computers and had used them at various times. Hines admitted that she and her daughter used Castaneda's main computer. (IV 878). They also used Castaneda's second computer. (IV 879). Hines admitted that family friends also used Castaneda's computers. (IV 880). Hines admitted that her daughters downloaded pictures and accessed Facebook and other websites. (IV 880). Hines admitted that she and her daughters had Castaneda's administrative passwords for his computers. (IV 891). Ehlers admitted that all user accounts on Castaneda's system had download privileges. (VI 1171-72). The system contained a user account named "the_girls" and "Craig" in addition to the "Tony" account. (V 1052-53). Det. Ramirez also admitted that one of the images, Exhibit 12, was created, copied, or downloaded onto the flash drive on February 7, 2010, when Hines had possession of the drive. (V 1005-06). Thus, the State could just as easily have charged Hines with possession of this image. In sum, Ramirez admitted that he did not know who owned the flash drive, that he did not know who put the photos on the drive, where the pictures originated, or if Castaneda ever viewed the photos, warranting reversal for insufficient evidence. (V 1029).

The State's Key Witness was Inconsistent and Unreliable

Hines's testimony was replete with inconsistencies. Hines initially told Det. Tooley that she had found the drive, but subsequently claimed that Landeau found the drive and woke her up to view the images. (IV 896). Although she claimed at trial that she immediately knew that Castaneda owned the drive, Hines failed to tell Tooley that she had seen Castaneda with the drive in his possession. (IV 896). Hines admitted that when asked at the preliminary hearing about the drive, she had testified under oath that she did not immediately know who owned the drive. She admitted that she not mentioned seeing the drive in Castaneda's pocket, on his key ring, or on his desk. (IV 898). Hines ultimately admitted that she had lied under oath at the preliminary hearing. (IV 899).

Further, Hines admitted that she never informed detectives that she had contacted a lawyer to fight the eviction. (IV 889). Tooley admitted that Hines never mentioned Landeau to her. (VI 1292). Tooley admitted that Hines never mentioned that Castaneda had evicted her after a heated argument or that she had retained a lawyer to fight the eviction. (VI 1293). Where the identity of the person in possession of the drive on the access dates comprised a key component of the State's burden of proof, and where the State's primary witness against Castaneda admitted to committing perjury regarding the facts of this case, this Court must find that the State failed to sustain the

burden of proof and reverse these convictions.

Detectives Conducted an Inadequate Investigation

Despite the fact that the origin of these images was a crucial component of this investigation, Landeau admitted that officers never asked him about the flash drive. (VI 1245). The flash drive was never checked for fingerprints. (V 1017).

Police never searched Hines' laptop. Police never searched Landeau's laptop, although they had used these laptops to view the flash drive. (IV 900). Tooley admitted that although Castaneda said Hines' husband, Richard Hines, had also used his computers, officers never conducted further investigation into his use. (VII 1363). Tooley admitted that she never conducted any investigation into Landeau's computer use. (VII 1437).

Ramirez admitted that Castaneda's computers were networked, and that no one checked to see whether the router had password protection. (V 1015-16). Ehlers admitted he did not check the shuttle or the laptop for evidence of computer viruses. (VI 1108). Ramirez admitted that some child pornography images can be associated with computer virus links. (V 1008). The images found on the drive had been around for many years and had been the subject of many other criminal cases. (V 1008). Further, Tooley admitted she never investigated Castaneda's travel for work on the relevant dates to verify

whether he was home on the dates the files were accessed, copied or downloaded. (VII 1443-44). Tooley admitted that although Castaneda told her he occasionally used "site mirroring," a technique that would download a group of images from a website en masse, she never ordered the forensic detectives to investigate whether these images had been downloaded in this fashion. (VII 1357-58). Tooley admitted that she never requested that the forensic detectives investigate Castaneda's use of virtual private networking and foreign networks. (VII 1358-59). Thus, many important aspects of this case were not pursued in a diligent fashion during Metro's investigation, particularly where the presence of a computer virus on a networked system could have provided an explanation for the source of these images.

Allowing these convictions to stand abrogates the duty of this Court to insure that the State proves convictions beyond all reasonable doubt. "[W]e cannot sustain a conviction where the record is devoid of an essential element of a charged offense. To do otherwise, would imperil our system of justice by undermining the presumption that those charged with crimes are innocent until proven guilty beyond a reasonable doubt." *Batin v. State*, 118 Nev. 61, 66-67, 38 P.3d 880 (2002). Because the State failed to prove these crimes beyond a reasonable doubt, reversal is warranted.

IV. The Court violated Castaneda's due process and fair trial rights by

admitting other bad acts without satisfying *Petrocelli v. State.*

The defense moved under NRS 48.045(2) to exclude all references to additional images not included in the fifteen charged counts. (III 517). The defense noted that the State had not brought a bad acts motion, and that any reference to these additional images would be irrelevant, not based on clear and convincing evidence, and highly prejudicial. (IIII 518). The defense noted that allowing the State to suggest that any images beyond the charged fifteen constituted "suspected child pornography" was highly inflammatory because jurors would naturally assume that only a legal technicality prevented the State from charging additional counts, or that the State picked only the clearest images from a wide selection of child pornography. (III 529-33; 536-38). The Court agreed that as long as the defense did not ask any open-ended questions that opened the door to the other images, the State would limit direct examination and instruct the detectives not to suggest that other illegal images had been found. (III 542-44).

During this discussion, the State noted that the audio recording of Det. Tooley's interview with Castaneda also contained references to the additional images. (III 546). Prior to trial and prior to the defense motion to exclude references to any other images, a member of the defense team had agreed to other redactions to the recording. (VI 1394-95). The defense noted that at this

point in the case, the State had not decided whether to use the recording; defense counsel stated, "At this time we don't have a general objection to the as redacted transcript." (III 551).

During trial, however, the defense contemporaneously objected to the admission of Castaneda's recorded interrogation by Det. Tooley, during which Tooley referenced the allegation that "56 images" had been found on the computer several times. (III 547; VI 1265-67). The defense objected to the playing of the recording for jurors at a bench conference; the Court overruled the objection. (VI 1262-63).[3] The Court allowed counsel to memorialize the bench conference after the State played the recording. The defense objected that the recording contained multiple prejudicial references to Castaneda's predilection for Internet pornography and to the presence of additional images of child pornography on his computers. (VI 1265-66). The defense noted that Castaneda showed surprise at Tooley's allegation that he had 56 images, and that the jury would view this as an admission that he thought he only had fifteen images. (VI 1267-70). The defense moved for a mistrial based on the inclusion of these references. (VI 1270). The Court denied the motion for a mistrial. (VI 1272).

[3] Simultaneous with the filing of this brief, the defense has requested that the District Court transmit the exhibit at issue, State Exhibit 79: Audio Exhibit, to this Court.

These references to multiple uncharged images of child pornography constitute inadmissible evidence of other crimes. NRS 48.045 prohibits evidence of other crimes, wrongs, or acts as proof of a person's character, but permits admission to prove intent, identity, or absence of mistake or accident. This Court regards other bad acts with disfavor, describing this evidence as frequently "irrelevant and prejudicial." *Rhymes v. St.*, 107 P.3d 1278, 1281-82 (Nev. 2005), *citing Richmond v. St.*, 118 Nev. 924, 932 (2002); *Braunstein v. St.*, 118 Nev. 68, 73 (2002). This situation violated Castaneda's due process rights and Nevada law regarding prior bad acts. To overcome the presumption of inadmissibility, the State must demonstrate the relevance of the evidence at a pre-trial hearing, and the State must prove by clear and convincing evidence that the act occurred. The State must also prove that the act's probative value is not substantially outweighed by the danger of unfair prejudice. *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985); *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Here, no pre-trial hearing occurred, and the Court failed to provide a limiting instruction to jurors regarding the uncharged acts.

This evidence undoubtedly inflamed jurors against Castaneda and implied that he was a serial offender. "The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict

the accused because the jury believes the accused is a bad person." *Walker v. State*, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000). Here, jurors heard references to multiple uncharged crimes. "Every defendant, be he a sinner or a saint, has the right to expect that his fate will be fixed with reference only to the circumstances of the crime with which he is charged." *People v. Donaldson*, 8 Ill. 2d 510, 519 (Ill. App. Ct. 1956). The trial Court erred in denying the mistrial based on the admission of this inflammatory and prejudicial evidence, and reversal is warranted. *Hylton v. Eighth Judicial District Court*, 103 Nev. 418, 421, 743 P.2d 622 (1987).

V. The Court Erred in Rejecting Proposed Defense Jury Instructions.

In reviewing jury instructions, this Court grants district judges broad discretion and will affirm unless the district court abused that discretion. *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). In general, this Court "reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error." *Berry v. State,* 212 P.3d 1085, 1091 (Nev. 2009).

The defense objected to the constructive possession language in Jury Instruction 12 because this language minimized the State's burden of proving willfulness and knowledge. (II 277; VII 1398-1400). The Court overruled the objection. (VII 1401). As previously noted, the prosecutor compounded this

error in Closing Argument by stating that constructive possession was merely the ability to exercise control over the item, and that Castaneda "had the ability to use those computers and that's why he possessed them." The Court overruled the defense objection to this misstatement. (VII 1455-56). The Court erred in providing this instruction where the standard definition of constructive possession minimized the State's burden of proving that Castaneda knowingly and willfully possessed these images. The instruction provides, "A person who, although not in actual possession has both power and intention, at a given time, to exercise dominion and control over a thing, either directly or through another person or persons, is then in constructive possession of it." (II 277). As noted by the defense, this language creates culpability for Castaneda even if another individual copied these images to computers over which he merely exercised control, or planned to exercise control. This Court requires trial Courts to provide unambiguous jury instructions. *Culverson v. State*, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990). Jury instructions minimizing the burden of proof violate a defendant's due process rights. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Because this instruction undermined the presumption of innocence and the State's burden of proof, this Court should find that based on the facts of this case, the provision of this

instruction was erroneous.

The defense sought to instruct the jury that the issuance of a search warrant should not be deemed evidence of guilt. (II 255-58). (VII 1389). The Court ultimately rejected the proposed instructions. (VII 1419). The defense noted that this concept, while not necessary in all cases, was of particular import in the case at bar because Det. Tooley had emphasized during her interrogation that search warrants are not easy to procure. (VII 1389). The defense noted that these statements could confuse jurors into believing that the issuance of a search warrant constituted evidence of guilt. (VII 1389). A defendant is entitled to a jury instruction on a defense theory if the theory has a basis in law and in the record. *United States v. Coin*, 753 F.2d 1510, 1511 (9th Cir. 1985) (per curiam). Because the facts of this case warranted this instruction, this Court must find error in the Court's rejection of the defense request.

The defense also proposed in an instruction regarding evidence susceptible to two interpretations. (II 253-54; VII 1411). The Court rejected the instructions. (VII 1413). Although this Court has held that this instruction is not required, this Court agrees that this instruction is permissible. *Bails v. State*, 92 Nev. 95, 97 (1976).

The defense also proposed an instruction to the effect that the crime charged is a specific intent crime under *Ford v. State,* 262 P.3d 1123 (2011). (II 255; VII 1406). The Court rejected the instruction as duplicative of other instructions. (VII 1407-08). This Court does not permit trial judges to exclude proposed defense instructions on the grounds that other instructions cover similar material. *Honeycutt v. State*, 118 Nev. 660, 56 P.3d 362, 368 (2002), *rev'd in part on other grounds*, *Carter v. State*, 121 P.3d 592 (2005).

This Court has noted the necessity of fact-specific instructions:

> Even though this principle of law could be inferred from the general instructions, this court has held that the district court may not refuse a proposed instruction on the ground that the legal principle it provides may be inferred from other instructions. Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case.

Crawford v. State, 121 Nev. 746, 754 (2005). Similarly, the trial Court should have provided the proposed defense instructions. The fact that some of the concepts may have appeared in other instructions did not warrant exclusion of the defense instructions.

VI. The Court Erred in Denying Dismissal of Counts II-XV.

On October 2, 2013, the defense filed a motion to vacate the convictions on counts II through XV under *Wilson v. State*, 121 Nev. 345 (2005), double jeopardy principles, and NRS 200.730. (II 293). The defense argued that this

case involved a singular act of digital possession of items seized on the day the police took the computers into police custody. (VIII 1658). The Court denied the motion. (VIII 1668).

The Court erred in denying this motion. The Fifth Amendment protects not only against a second trial for the same offense, but also against multiple punishments for the same offense. *Whalen v. U.S.*, 445 U.S. 684, 688 (1980). In the instant case, the State failed to prove when or how the prohibited files were originally placed on Castaneda's computer network or where the files originated. The State's experts admitted that this information was unknown. Thus, Castaneda's "possession" of the files was only established on April 5, 2011, the day his computer network was seized and impounded by police. The State never proved the exact dates on which the images were downloaded, copied, or transferred; thus, at most, the evidence revealed only one act of possessing this group of images. (VIII 1659).

In a case involving charges under NRS 200.710, which prohibits the use of a minor "in producing pornography or as subject of sexual portrayal in performance," this Court determined that the unit of prosecution for NRS 200.710 was the number of "performances," rather than the number of individual photographs or images the defendant took or possessed from the performances. *Casteel v. State*, 122 Nev. 356, 131 P.3d 1(2006); *Wilson v.*

State, 121 Nev. 345, 114 P.3d 285 (2005). *Wilson* held that:

> . . . [T]he intent of the Legislature in passing NRS. 200.700 to 200.760, inclusive, was to criminalize the use of children in the production of child pornography, not to punish a defendant for multiple counts of production dictated by the number of images taken of one child, on one day, all at the same time. If the Legislature intended this statute to punish a party for every individual photograph produced of a sexual performance, it certainly could have effectuated that intent in the statute.

Wilson, at 294. The *Wilson* Court noted that for the purposes of NRS 200.700 through NRS 200.760, a "performance" is "any play, film, photograph, computer generated image, electronic representation, dance or other visual presentation."

The central element of NRS 200.730 is "possession." Since the core element or "unit of prosecution" for NRS 200.730 is possession, Castaneda should have been convicted of one count of possessing "any film, photograph or other visual presentation" where the State failed to prove that Castaneda individually possessed these images on any other date, where the images only existed in virtual form on the same computer network, and where the State failed to prove that these images were downloaded, copied, or otherwise accessed at any other time.

In *Jackson v. State*, 291 P.3d 1274, 1283 (Nev. 2012), this Court rejected Nevada's factual "same conduct" line of cases in analyzing redundancy claims, and held that the key factor is whether the Legislature authorized

cumulative punishment: "If the Legislature has authorized—or interdicted—cumulative punishment, that legislative directive controls. Absent express legislative direction, the *Blockburger* test is employed. *Blockburger* licenses multiple punishment unless, analyzed in terms of their elements, one charged offense is the same or a lesser–included offense of the other." *Jackson v. State*, 291 P.3d at 1283 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). However, *Jackson* should not apply to the instant case because the instant case involves construction of only one statute, because *Jackson* was decided after the crimes alleged in this case, and because *Jackson* specifically notes that a "unit of prosecution" analysis under *Wilson* remains valid. *Stevens v. Warden*, 114 Nev. 1217, 961 P.2d 945 (1998); *Jackson*, 291 P.3d at 1283.

Under the pre-*Jackson* analysis, this Court has noted that "where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant..." *Salazar v. State*, 119 Nev. 224, 70 P.3d 751 (2003) (*rev'd as noted by Jackson, supra*). Here, because the State failed to prove individual intentional and willful acts of possession, this Court should deem convictions on Counts II-XV redundant. *Salazar,* citing *State v. Koseck*, 113 Nev. 477, 479, 936 P.2d 836 (1997) (*rev'd as noted by*

Jackson, supra) (internal citations omitted); *see also, Braunstein v. State*, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002).

Further, if this Court interprets NRS 200.730 as the State suggests, then the statute must be deemed vague and overbroad. Under the State's theory, a person with one magazine containing several visual representations would be treated differently than a person with a single video containing thousands of images. As this Court noted in *Wilson*, film is nothing more than a series of still images. *Wilson,* 194 P.3d at 293. Possession of a video, which is comprised of thousands of still photos, counts as one violation, no matter the length of the film, the number of images on the film, or the number of subjects. Under the State's theory, if a person printed three "screen-captures" from a prohibited video, the State could charge three separate violations, although possessing the video in its entirety (including thousands of images) would result in a single conviction.

In *Anthony Lee R. v. State*, 113 Nev. 1406, 952 P.2d 1 (1997), the Nevada Supreme Court held that " . . . the plain meaning of the statute's words are presumed to reflect the legislature's intent in enacting the statute. Nevertheless, statutory language should not be read to produce absurd or unreasonable results."

Id. at 6. Allowing the single act of possessing a group of images to comprise

fifteen separate felonies constitutes an unreasonable and absurd result where a video depiction of thousands of images would only constitute one crime.

A statute is "vague" if, among other things, it allows the people who enforce it unfettered discretion. *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289 (2006). Absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow police, prosecutors, and juries to "pursue their personal predilections." *Silvar* at 293. In this case, the State posits that NRS 200.730 permits multiple convictions for the simultaneous possession of a series of digital photograph files. This interpretation conflicts with the *Wilson* Court's unambiguous finding that the statutes listed in "NRS 200.700 to 200.760, were never intended to punish defendants for 'for every individual photograph.'" *Wilson*, supra, 114 P.3d at 294. Courts must resolve statutory ambiguities in favor of the defendant. *Application of Laiola*, 83 Nev. 186, 426 P.2d 726 (1967). Any other finding would render NRS 200.730 unconstitutionally vague and overbroad.

Finally, fundamental fairness under the Constitution requires procedures that "comport with deepest notions of what is fair and right and just to satisfy Due Process." *Solesbee v. Balkcom*, 339 U.S. 9 (1950) (*abrogated on other grounds, Ford v. Wainwright,* 477 U.S. 399, 106 S. Ct. 2595 (1986)). In this case, Castaneda received fifteen separate convictions for one act of digitally

possessing a group of images. He did not create or distribute these images, which remain on countless websites and computer networks to this day. To uphold Castaneda's redundant convictions for one act of digitally possessing this group of images would be fundamentally unfair and violate Castaneda's due process rights under both the Nevada and United States constitutions.

VII. The Court Erred in Denying Dismissal Based on Witness Perjury.

During trial, the defense moved to dismiss based upon Hines' admitted perjury on the stand; the Court denied the motion. (V 934). On July 12, 2013, the defense brought a motion to dismiss based upon Hines' perjury. (I 191). The defense noted that Hines' testimony directly contradicted her previous sworn testimony at the preliminary hearing and that Hines had admitted to lying under oath. (VI 1218). The Court denied the motion. (VI 1227).

Perjury occurs when a person "having taken a lawful oath or made affirmation in a judicial proceeding . . . [s]wears or affirms willfully and falsely in a matter material to the issue or point in question." NRS 199.120. At trial, Hines's story about how she "discovered" the flash drive significantly differed from her statement to Det. Tooley and her prior sworn testimony. Hines claimed for the first time at trial that she immediately "knew" the drive belonged to Castaneda when she saw it, contradicting her preliminary hearing testimony to the opposite effect. (I 29 at p. 10). When

confronted with this discrepancy on cross examination, Hines admitted she had lied during the preliminary hearing and had not been forthright with Det. Tooley.

The circumstances surrounding the discovery of the drive are material to this case where the flash drive led to the search warrant executed by officers. NRS 199.120. Because the State's experts admitted that the time and date markers regarding access to the files can be changed manually, Hines' testimony about how she came into possession of the drive is highly material. Hines's allegations made Castaneda a suspect in this case, and her description of events insured that neither she nor Landeau became suspects. It is well-settled that "if the character of material evidence is false, due process inevitably is denied the accused." *Riley v. State*, 93 Nev. 461, 462, 567 P.2d 475 (1977). In *Riley*, the Nevada Supreme Court reversed a conviction for attempted murder following a trial that involved perjured material testimony. Although there was no suggestion that the prosecutor knowingly used perjured testimony, the Court nevertheless found that the appellant's due process right to a fair trial was violated. *Id.* Even if the prosecutor does not knowingly use perjured testimony, a defendant's due process rights are implicated because the "truth seeking function of the trial is corrupted by such perjury whether encouraged by the prosecutor or occurring without his

knowledge." *Id.*

Further, Hines is the nexus between appellant and the thumb drive, making the initial bindover improper in this case:

> The rules of evidence require the production of legal evidence and the exclusion of whatever is not legal. The Constitutional guarantee of due process of law requires adherence to the adopted and recognized rules of evidence. There cannot be one rule of evidence for the trial of cases and another rule of evidence for preliminary examinations. The rule for admission or rejection of evidence is the same for both proceedings.

Goldsmith v. Sheriff, 85 Nev. 295, 454 P.2d 86 (1969). "A false statement made under oath is material and perjurious if it concerns an issue essential to the decision of the case and could influence the court if believed." *Sheriff, Clark County v. Hecht,* 101 Nev. 779, 781, 710 P.2d 728, 730 (1985) (reversing grant of writ in subornation of perjury case). Because Hines admitted to committing perjury regarding material evidence in this case, dismissal was warranted.

VIII. The Court erred in refusing to conduct a hearing regarding a juror's perceived inattentiveness.

The defense noted that Juror 6 appeared to have stopped paying attention and appeared frustrated during trial. (VI 1204). The defense noted that this juror was a native Tagalog speaker and that she may have had difficulty following the proceedings. (VI 1205). The Court refused to inquire of the

juror whether she was having difficulties with the proceedings. (VI 1206). Pursuant to state law, a person is qualified to sit as a juror in the county in which he or she resides if he or she has sufficient knowledge of the English language, has not been convicted of "treason, a felony, or other infamous crime," and is not "rendered incapable by reason of physical or mental infirmity." Nev. Rev. Stat. 6.010; Nev. Rev. Stat. 175.021 ("Trial juries for criminal actions are formed in the same manner as trial juries in civil actions"). The Supreme Court has stated that "due process means a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

The Court should have addressed defense counsel's concerns regarding this juror's perceived lack of attentiveness and comprehension. In a decision involving allegations that a juror violated the Court's admonition not to discuss the case, this Court held that " . . . a district court must conduct a hearing to determine if the violation of the admonishment occurred and whether the misconduct is prejudicial to the defendant." *Viray v. State,* 121 Nev. 159, 163-164, 111 P.3d 1079, 1082 (2005). Similarly, where a party perceives that a juror is not paying attention and appears to have difficulty understanding the proceedings, district Courts should conduct appropriate inquiries to determine the facts. The failure to do so allowed a juror who may

not have paid attention to the case to remain on the jury and deliberate in violation of Castaneda's due process and fair trial rights.

IX. Cumulative error warrants reversal of these convictions.

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). Viewed as a whole, the combination of errors in this case warrants reversal of these convictions. "[I]t is a proud tradition of our system that every man, no matter who he may be, is guaranteed a fair trial. As stated by Chief Justice Traynor in *People v. Cahan*, 282 P.2d 905, at 912 (Cal. 1955), 'Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated." *Walker v. Fogliani*, 83 Nev. 154, 157, 425 P.2d 794 (1967). Because this trial involved only circumstantial evidence, this Court should find that even if any individual error did not rise to reversible error, the cumulative effect of these errors force the conclusion that reversal is necessary.

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CONCLUSION

Based on the foregoing argument, this Court must reverse these convictions and remand for a new trial.

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This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

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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

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DATED this 2nd day of June, 2014.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of June, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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