IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CASTANEDA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 64515

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it excluded expert testimony.
2. Whether the State committed prosecutorial misconduct.
3. Whether there was sufficient evidence to convict Appellant beyond a reasonable doubt.
4. Whether the district court abused its discretion by admitting evidence of prior-bad-acts.
5. Whether the district court abused its discretion in rejecting Appellant's proposed jury instructions.
6. Whether the district court erred in denying Appellant's motion to vacate.
7. Whether the district court abused its discretion in denying Appellant's motion for a mistrial.
8. Whether the district court erred regarding juror inattentiveness.
9. Whether cumulative error warrants reversal.

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STATEMENT OF THE CASE

On April 20, 2011, Appellant Anthony Castaneda was charged by way of Information as follows: Counts 1 through 15- Possession of visual presentation depicting sexual conduct of a child (Felony- NRS 200.700, 200.730). I AA 15. On February 5, 2013, the State filed an Amended Information. I AA 135. On July 8, 2013, the State filed a Second Amended Information that simply changed the names of the district attorneys involved. I AA 177.

On July 8, 2013, Appellant's jury trial began. III AA 510. On July 16, 2013, Appellant was convicted on all counts. II AA 288. On October 13, 2013, Appellant was sentenced as follows: Counts 1 through 15- twenty-eight (28) to seventy-two (72) months, suspended, with Counts 2 through 15 to run concurrent to Count 1. VIII AA 1693, 1696. Appellant was also sentenced to a term of probation for a fixed term of five (5) years, with the conditions mandated by NRS 176A.410.

On December 13, 2013, A Judgment of Conviction was entered. II AA 373. Appellant filed a Notice of Appeal on November 25, 2013. II AA 361. Appellant filed Appellant's Opening Brief on June 3, 2014. The State hereby answers as follows.

STATEMENT OF THE FACTS

In roughly February of 2009, Michael Landeau, Tami Hines, and Hines' daughters moved into Appellant's house. On February 6, 2010, Appellant's former

roommate, Michael Landeau, was unpacking after having recently moved out of Appellant's house with Hines and her daughters. VI AA 1238. At the time, Landeau was in a relationship with Hines. IV AA 849. Prior to recently having moved out, Hines had previously lived with Appellant on two separate occasions, leaving the second time on less than amicable terms. IV AA 859, 849, 861. While unpacking, Landeau found a flash drive containing pictures of prepubescent girls engaging in oral sex with adult men. VI AA 1238. Further, Landeau found documents containing Appellant's birth certificate, social security card, military experience, class certificates, and images of adult pornography on the same flash drive. IV AA 869. Landeau woke Hines up and showed her the photos. IV AA 853. Hines then reached out to a parole officer who she knew, who in turn put her in touch with Detective Shannon Tooley of the Las Vegas Metropolitan Police Department (LVMPD). IV AA 875, 909.

Officers of the LVMPD executed a search warrant on Appellant's home computers, including a shuttle computer, two laptops, free-standing hard drives, and other desktop computers. V AA 1038-1040. Images of child pornography were found on a laptop and desktop computer. VI AA 1274, 1277. Appellant admitted that his computer contained a large amount of pornography, VI AA 1286, but denied downloading images of child pornography, VI AA 1307.[1]

[1] Relevant facts as to each issue are incorporated into the argument.

SUMMARY OF THE ARGUMENT

First, the district court did not abuse its discretion in deciding not to allow Appellant to call an unendorsed expert witness for the following reasons: 1) Appellant was given sufficient notice of the State's experts and their potential testimony; and 2) Appellant did not comply with the applicable rules regarding notice of an expert witness.

Second, the State did not commit prosecutorial misconduct for the following reasons: 1) the State did not shift the burden to Appellant; 2) the State did not improperly vouch for a witness; 3) the State did not misstate evidence; 4) the State's comments regarding Appellant's objections were sustained and quickly neutralized; and 5) Appellant cannot show prejudice.

Third, the State presented sufficient evidence to convict Appellant beyond a reasonable doubt on all 15 counts. Images of child pornography were discovered on three different mediums belonging to Appellant.

Fourth, the district court did not abuse its discretion in admitting evidence of Appellant's supposed prior-bad-acts without a hearing because: 1) the supposed acts do not qualify as prior-bad-acts; and 2) there is a sufficient record for this Court on appeal; and 3) the result would not have been different absent the evidence.

Fifth, the district court did not abuse its discretion in settling jury instructions for the following reasons: 1) the district court did not arbitrarily make its decision;

2) instructions were a correct statement of law; and 3) other instructions adequately covered Appellant's proposed instructions.

Sixth, the district court did not err in denying Appellant's motion to vacate Counts 2 through 15 because his conduct did not constitute a singular act of possession, but rather, constituted 15 separate acts of possession.

Seventh, the district court did not abuse its discretion in denying his motion for a mistrial based on alleged witness perjury because the statements were not material.

Eighth, the district court did not abuse its discretion when it denied Appellant's request to hold a hearing regarding Juror 6 because Appellant's concerns were based on mere speculation, and Appellant extensively questioned Juror 6 during the selection process.

Finally, cumulative error does not warrant reversal. Appellant has failed to show any error, and, therefore, cannot show cumulative error.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECIDING NOT TO ALLOW APPELLANT TO CALL AN UNENDORSED WITNESS.

Appellant provides no basis for why he was entitled to ignore the requirement that he provide the adequate notice to call an expert witness. Essentially, Appellant appears to be arguing that he was surprised by Detective Ehlers' testimony because

Detective Ehlers gave an opinion on a matter that was not written verbatim into a report.

At first, Appellant made the request to call an expert witness because of the fact that Detective Ehlers gave an opinion on why he believed certain images that were found during his forensic examination were previously deleted by a human user. VI AA 1148. The following day, Appellant tacked on the argument that he should be entitled to now call two expert witnesses because of the issue that he argued the day before as well as the fact that he did not like how Detective Ehlers defined certain terms. VII AA 1422.

This Court reviews whether to allow an unendorsed witness to testify for abuse of discretion. Mitchell v. State, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Although a strong presumption exists in favor of allowing late-disclosed witnesses to testify, see Sampson v. State, 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005), the right to present testimony is not absolute and must be balanced against "countervailing public interests," Taylor v. Illinois, 484 U.S. 400, 414 (1988). However despite noting this interest, this Court further held that the calling of an unnoticed witness by the defense can cause an "unfair surprise to the State." Sampson, 121 Nev. at 828. This Court went on to say that "[F]airness during trial is not one-sided and applies both to the defendant and the State." Id.

In the instant matter, Appellant attempted to untimely endorse two expert witnesses during trial in violation of NRS 174.234(2)(a) & (3)(b). See NRS 174.234(2)(a)&(3)(b) (providing that both parties have a continuing duty of disclosure regarding expert testimony, with each side having to file and serve a written notice within 21 days of trial). Essentially, Appellant claims the district court erred in excluding the testimony of any unnoticed defense expert witnesses because Detective Ehlers gave "surprise" testimony when he answered that he believed some of the pornographic files had been deliberately deleted. AOB at 8. According to Appellant, he also wanted to give a complete account of Detective Ehlers' answers, which he felt were lacking. VI AA 1422.

Appellant, both during trial and in this appeal, has consistently argued that there is no way Detective Ehlers could testify the way that he did because such testimony was not specifically memorialized in a report. However despite Appellant's continuous assertions, Detective Ehlers' testimony is entirely unremarkable. During cross-examination, Detective Ehlers was asked the following:

> Q: You don't know if anyone has opened any of these file, do you?
>
> A: I - I would have to disagree with that and –and I would say that because of the few files that were accessed and interaction with them done. And I would say that because of the few files that were found in unallocated space that were deleted; there would have to be interaction placing them there. VI AA 1141.

Appellant simply does not like the answer that Detective Ehlers, who was noticed as an expert, I AA 131, gave. Detective Ehlers responded that in his opinion, and based upon his forensic examination of the items in question, he believed that a person had worked with and deleted some of the pornographic images.

Further, Detective Elhers' testimony on direct was centered on installation dates, VI AA 1096-1097, "linkage" between the mediums, VI AA 1100, digital fingerprints, VI AA 1101, file structures, VI AA 1103, transfer dates, VI AA 1103-1106, and anti-virus software, VI AA 1106. Appellant cannot now claim he was surprised by testimony he opened the door to and in which he didn't like response to.

Appellant then went on to challenge Detective Ehlers on the fact that his testimony was never memorialized in his forensic examination of the computers. VII AA 1142. Detective Ehlers explained that the information is in fact in the report. VII AA 1146. The exchange went as follows:

> Q: You testified that they (the images) were deleted right?
>
> A: Yes
>
> Q: But you don't know that because you didn't do the analysis correct?
>
> A: Well, there's not an analysis to be done to necessarily see if it can be deleted. That is common – it – that is indicative that if the file is in this type of space then it was deleted. It couldn't have gotten there any other way except being placed in there. So yes, that is what I believe occurred. VII AA 1146.

The facts in the record indicate that the information of the images found in unallocated space were absolutely put into the record. The fact that Detective Ehlers did not specifically write in a report that the images in unallocated space were likely deleted is of little consequence. The *information* of what was found during the examinations was completely in the report. The fact that Detective Ehlers did not write down every single possible significance to every single piece of evidence examined is absolutely normal. For example in a differing context, a forensic report could explain that blood was found on a piece of evidence. However, the definition and biological makeup of blood is most likely not something that would actually be written on the report. The same is true here. Detective Ehlers documented his findings that pornographic images were found in unallocated space. As an expert, he was able to give his reasonable opinion that the facts and circumstances of this case indicate that the items were deleted.

Appellant also argues that this evidence prejudiced him because the testimony of Detective Ehlers contained proof of knowing and willful possession. AOB p.6. However, Detective Ehlers only indicated that he believed that the images had been deleted by a human. He did not testify that Appellant was the one who had deleted those images. Detective Ehlers' testimony was only a small portion of the entire evidence that was adduced against the Appellant at trial.

In exercising its discretion, the district court denied Appellant's request, holding that Appellant had adequate time to retain and notice an expert for rebuttal. VI AA 1154. The district court made this determination based on the previous representations by Appellant that a continuance would be needed in order to secure an expert for trial. I AA 125, 126. However, in the six months that existed between Appellant's request to continue the trial and the trial that eventually took place, an expert witness notice was never filed. Appellant failed to provide this notice despite the fact that they had hired and consulted with a forensic computer examiner. VI AA 1156. However since no notice was ever filed, one can only assume that the strategic decision was made not to call an expert witness at trial.

The district court noted the same when it explained to Appellant that the State's expert had been the subject of extensive cross-examination, VII AA 1423, that he adequately explained how he came to his conclusions, VII AA 1423, that Appellant certainly had the ability and opportunity to call the expert he consulted before trial that had examined the particular hard drives, VII AA 1422, and that any decision to not call the expert was strategic, VII AA 1424.

In the instant matter, the State provided notice of two experts, Detective Ehlers, and Detective Vicente Ramirez. I AA 131. In the notice, Detective Ehlers and Ramirez were listed as experts as to the forensic examination of computers and electronic devices for the purposes of discovering child pornography. I AA 131.

Further, Appellant was put on notice to the type of opinions each expert would offer. For instance, at the preliminary hearing, Detective Ramirez testified, I AA 35, and identified that the images in the unallocated space had been deleted, I AA 42. Although Detective Ramirez did not state at that time that the deletion was a willful, intentional act by a human, and that Detective Ehlers subsequently testified to that at the trial, Appellant was put on sufficient notice of the potential testimony.

Further, Appellant conceded his consulted expert had access to the preliminary hearing when reviewing the case and all other files, VI AA 1153, but was not sure if he reviewed it, VI AA 1153. Inadequate review of an expert should not supersede the requirements set forth in NRS 174.234(2)(a)& (3)(b).

The record clearly establishes Appellant had notice of the expert witnesses, had information regarding the deletion aspect of the State's evidence, and had hired an expert witness of their own to consult. Because of this, there was no abuse of discretion in denying Appellant's request to present evidence in the form of an unendorsed expert witness.

II.
THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Appellant argues that the State committed burden shifting during its closing argument and rebuttal, but this argument also lacks merit. When considering claims of prosecutorial misconduct, this Court engages in a two-step analysis: first, this Court determines whether the prosecutor's conduct was improper; second, if the

conduct was improper, this Court determines whether the improper conduct warrants reversal. Valdez v. State, 124 Nev. 1172, 196 P.3d 465 (2008).

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. Id. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. If the error is of constitutional dimension, this Court applies the Chapman v. California standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. Id. If the error is not of constitutional dimension, this Court will reverse only if the error substantially affects the jury's verdict. Id.

Prejudice from prosecutorial misconduct results when a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due process. Browning v. State, 188 P.3d 60, 72 (2008). When reviewing for prosecutorial misconduct, the challenged comments must be considered in context, and a "criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." Id.

a. The State did not shift the burden.

On appeal, Appellant alleges the State unconstitutionally shifted the burden during its closing argument. Appellant asserts that the State's discussion of constructive possession shifted the burden. AOB at 17. Appellant takes issue with

one statement where the State in explaining the concept of constructive possession argued, "you have the power and intention to exercise dominion and control over something…[and having] the ability to use those computers…[is] why he possessed them" (paraphrased). VII AA 1454. Appellant objected, VII AA 1454, to the inclusion of constructive possession, and the mischaracterization of constructive possession and the law, VII AA 1454, 14556. On appeal, Appellant asserts that the use of 'ability to use" minimized the states burden of proof. AOB at 17.

As stated before, any potential statements should be viewed in context and not as comments standing alone. Here, the State was required to prove a number of material elements beyond a reasonable doubt. Per the crimes with which Appellant was charged, the State was required by law to prove that Appellant willfully and knowingly possessed images of child pornography. The State was required to speak about possession because the images themselves were found within other electronic devices.

Throughout the closing argument, the State continuously reiterated that the burden was beyond a reasonable doubt, VII AA 1452-1453, 1463, 1480, and that it needed to prove Appellant willfully and knowingly possessed the images, VII AA 1453, 1456, 1462, 1463, 1469. The State's PowerPoint presentation also gives proof that the State did not eliminate the necessity of proving the "willfully and knowingly" element of the crimes. VIII AA 1703.

Second, Appellant asserts that the State's rhetorical question "what evidence do you have in this case to determine that Tami made up anything," constituted burden shifting. AOB at 17; VII AA 1469-1470. Appellant objected, but was overruled. VII AA 1469-1470. Third, Appellant asserts the State's comments regarding Ms. Hines' discovery of the thumb drive, and whether there was any evidence presented that this was a set-up, VII AA 1480, constituted burden shifting as well, VII AA 1480; AOB at 17. In addition, Appellant objected to the State's comments regarding the lack of evidence for the defense theory, VIII AA 1569, 1569, the State's PowerPoint slide discussing the evidence presented at trial, VIII AA 1577, the State's characterization of Appellant's argument, VIII AA 1574, and the State's discussion regarding Appellant's credibility, VIII AA 1575.

Appellant's arguments, however, fail for several reasons because nothing about the State's argument amounted to improper burden shifting. The State was merely rebutting Appellant's defense, that is, that there was not any evidence to suggest a virus had been placed on his computer, or that Ms. Hines was setting up Appellant over animosity between the parties. See Cook v. Schriro, 538 F.3d 1000, 1020 (9th Cir. 2008) (holding that prosecutors may comment on the failure of defense to produce evidence to support an affirmative defense so long as it does not directly comment on the defenses failure to call a witness). Further, the State was merely commenting on the evidence presented during trial. Bridges v. State, 116

Nev. 752, 762, 6 P.3d 1000, 1008 (2000) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.").

In addition, the State's comments rebutted the Appellant's attack on Ms. Hines' credibility. This argument is proper as it is consistent with the jury's role of the "lie detector" in a criminal case. U.S. v. Scheffer, 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-67 (1998) ("A fundamental premise of our criminal trial system is that the jury is the lie detector. Determining the weight and credibility of witness testimony…has long been held to be the part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.") (internal citations omitted).

b. The State did not improperly vouch for a witness.

To the extent that Appellant claims the State vouched for Detective Ehlers, his claim lacks merit because the State simply explained the manner in which Detective Ehlers testified.

Generally, vouching for a witness occurs when the prosecution places the prestige of the government behind a witness by offering personal assurances of the witness's veracity. Browning, 120 Nev. at 359, 91 P.3d at 48. When a defendant challenges the credibility of the State's witnesses, a reasonable response to those challenges do not qualify as vouching if they do not place the prestige of the

government behind the witnesses or offer personal assurances of the witnesses veracity. Evans v. State, 117 Nev. 609, 630, 28 P.3d 498, 513 (2001).

In the instant matter, Appellant contends that during the rebuttal, the State improperly vouched for a witness when it asked the jury to judge the demeanor of Detective Elhers, and to remember that he was being asked difficult technical questions during his direct and cross-examination. VIII AA 1568-1569. Appellant objected on vouching grounds, but was overruled. VIII AA 1569.

The State did not vouch for the witness because it did not place the prestige of the State behind the victim by offering personal assurances of his veracity. Inasmuch as Appellant argues the State vouched for Detective Elhers because it informed the jury he was just trying to educate them on computer terminology, and was being asked difficult technical questions hard to comprehend, the State was merely responding to Appellant's closing arguments. During closing, Appellant directly attacked the credibility of Detective Elhers, implying that because his answers weren't as concise and quick as other experts, he lacked experience and knowledge. See VIII AA 1517-18. The State was merely making reasonable responses to those challenges.

c. The State did not misstate the evidence or ignore party stipulations.

During trial, Appellant objected to the statements made by the State

regarding the creation dates of the files, VIII AA 1581-1582, comments regarding Appellant's internet search history, VIII AA 1586, comments regarding why Appellant downloaded these images, VIII AA 1585, comments regarding websites, VIII AA 1588-1599, comments regarding his driver's license being on a flash drive, VIII AA 1564, and comments regarding the anti-virus software, VIII AA 1570.

Arguments of counsel are not evidence and do not establish the facts of the case. Jain v. McFarland, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993). Counsel is allowed to argue any reasonable inferences from the evidence the parties have presented at trial. Id. During closing arguments, counsel enjoys a wide latitude in arguing facts and drawing inferences from the evidence. Id.

During rebuttal, the State argued the creation dates were similar to birthdates, as it is the date that the media is introduced to the device for the first time. VIII AA 1581. Evidence was presented through the testimony of the State's experts regarding creation dates, and making this analogy is, at the very least, a reasonable inference from the evidence presented, if not a complete and accurate statement. Further, Appellant objected on the grounds that it was an oversimplification that misstates the evidence. VIII AA 1581. An oversimplification does equal a misstatement of evidence.

Further, the State discussed the fact that Appellant had searched for the term "young" on various pornographic websites, VIII AA 1585, and the fact that

Appellant may have downloaded the images "because they were pretty," VIII AA 1585. Evidence was presented at trial that Appellant did in fact search for "young" and the statement regarding the images containing pretty girls, was a statement made by Appellant. To infer that Appellant did not accidently download these images, is a reasonable inference based on the evidence presented at trial.

Evidence was also presented that Appellant had copied his driver's license to a USB drive, and making an inference that the USB drive in question, was also the same USB drive that contained the images, is well within the wide latitude attorneys enjoy during closing arguments. Further, statements regarding the fact that appellant had an anti-virus program was a reasonable inference, considering the State's experts, and Appellant's experience in the computer industry.

d. The State's comments were quickly objected to and sustained.

Appellant further contends that comments regarding his objections, VIII AA 1560, 1565, 1573, 1574, amounted to prosecutorial misconduct.

A prosecutor may not disparage legitimate defense tactics, Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004), and challenges to comments must be considered in the context they are made, Hernandez, 118 Nev. at 525, 50 P.3d at 1108.

Frist, Appellant's objections were sustained; therefore any resulting misconduct was neutralized. See Valdez, 124 Nev. at 1188, 196 P.3d at 476 (2008).

Specifically, when the State commented that Appellant appeared to be objecting quite a bit during its rebuttal, VIII AA 1560, the district court sustained the objection, VIII AA 1561. Further, when the State commented on the fact Appellant continued to object, the district court admonished the State, stating that "counsel…is required to make contemporaneous objections if he feels they're required" and instructed the jury that lawyers had to make objections. VIII AA 1573. Further, when commenting to the judge regarding the Appellant's objections, VIII AA 1574, the State was again admonished, and although this particular objection was not sustained, the State was told to "live with it" and "move on," VIII AA 1574. Because the comments were quickly objected to, sustained, and or resulted in the State being admonished, any potential harm was minimal.

e. Appellant cannot show prejudice.

Lastly, even if this Court determines the State's closing argument was improper, Appellant did not and cannot show any prejudice. To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process, Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004), and must consider such statements in context, as a criminal conviction is not to be lightly overturned, Id.

When evidence of guilt is overwhelming, even a constitutional error can be insignificant. Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991); State v. Carroll, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993).

In the instant matter, the evidence against Appellant was overwhelming. As discussed *infra*, the State proved well beyond a reasonable doubt Appellant knowingly and willfully possessed child pornography.

III.
THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION.

"'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, 124 Nev. at 121, 178 P.3d at 162 (quoting Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006) (emphasis in original)); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979)). Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

On appeal, Appellant contends the State failed to prove beyond a reasonable doubt that he knowingly and willfully possessed these images, AOB at 28, because

the State failed to show that the programs were not downloaded and opened by a virus or an automated program, AOB at 31, numerous individuals had access to these devices, AOB at 32, Ms. Hines was not credible as a witness, AOB at 32, and detectives of the LVMPD conducted an inadequate investigation, AOB at 34.

NRS 200.730 states that "[a] person who knowingly and willfully has *in his or her possession for any purpose* any film, photograph, or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating, or assisting others to engage in or simulate sexual conduct" is guilty of a category B felony. NRS 200.730 (emphasis added).

Further, possession is the fact of having, or holding property, in one's power; the exercise of dominion over property. United States v. Flyer, 633 F.3d 911, 918 (9th Cir. 2011) (quoting United States v. Romm, 455 F.3d 990, 999 (9th Cir. 2006) (quoting Black's Law Dictionary 1183 (7th ed. 1999)). To establish possession, there must be a "*sufficient connection* between the defendant and the contraband to support the *inference* that the defendant exercised dominion and control over [it]." Id. (emphasis added) (internal quotation omitted) (alteration in the original).

At trial, the State presented sufficient evidence to support an inference that Appellant willfully and knowingly possessed images of child pornography to the extent that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. For instance, the State provided testimony of Ms.

Hines, who testified that her boyfriend found a USB stick while unpacking. IV AA 864. She further testified that on the USB stick, she found a copy of Appellant's driver's license, birth certificate, social security card, IV AA 864, Appellant's military records, IV AA 869, and "vulgar…repulsive…scary" images of child pornography, IV AA 874. Ms. Hines also testified that she had previously seen the USB stick attached to Appellant's key ring, IV AA 871, which he kept on his person, "unless he was going to bed or something," IV AA 872. Ms. Hines then testified that the very next day, she turned it over to authorities. IV AA 874.

Finally, Ms. Hines testified that while living with Appellant, she saw him using the "main" house computer, IV AA 877, "every waking hour of the day," IV AA 878, and that she, and her children, only used the computer once or twice, IV AA 878.

The State also presented evidence from Michael Landeau. VI AA 1230. Mr. Landeau testified that after moving out of Appellant's house, he was going through some "rummage" and discovered a flash drive. VI AA 1236. He further testified that he had seen Appellant in possession of the flash drive the "whole time [he] lived with" Appellant. VI AA 1237. Mr. Landeau intended to keep it so Ms. Hines' daughter could use it for school, VI AA 1236, and inserted it into his computer, VI AA 1236. He then testified that he discovered various personal documents of Appellant and pictures of underage girls. VI AA 1236.

Further, the State provided the testimony of Vicente Ramirez, a detective with LVMPD's Crimes against Youth and Family division. V AA 948-949. Detective Ramirez testified that he came into possession of Appellant's thumb drive after executing a search warrant, V AA 958, and performed a forensic analysis on the device, V AA 961. Detective Ramirez testified that he typically looks for ownership, contents, and various items to get an idea of what's within the drive. V AA 961. Detective Ramirez testified that during his examination of the thumb drive, he discovered a folder labeled "adult," V AA 965, which contained a number of sub-folders, V AA 965. During his examination of the sub-folders, he discovered a number of photographs, V AA 965, some of the being child pornography, V AA 977.

The State then provided the testimony of Paul Ehlers, V AA 1030, a detective with the LVMPD, V AA 1031. He testified that on April 7, 2010, he assisted in the execution of a search warrant of Appellant's home. V AA 1032. Detective Ehlers further testified that he examined a number of seized items, including a HP laptop, V AA 1039, a desktop computer, V AA 1054, and the aforementioned USB stick, V AA 1054. All of these contained images of young girls engaged in sexual acts with adult men. V AA 1039, 1054.

Evidence was also presented by Detective Shannon Tooley. VI AA 1250. She testified that while members of the LVMPD were examining Appellant's

computers in his residence, Appellant was shown images of young girls that were discovered on his computer. VI AA 1279-1280. She further testified that, after being confronted with evidence that his computer contained images of child pornography, he "casual[ly]" said, "yeah, those are kids, I'm sorry." VI AA 1280.

Further, evidence was presented that Appellant has searched for the term "young" on several pornography sites. VI AA 1186. Detective Ehlers testified that while examining Appellant's computer, and under the "Tony" account, several sexual sites were visited by the user, and a handful of them had the term "young" placed into their search index. VI AA 1186-1187. Detective Ehlers further testified that it could not have been the work of an automated system. VI AA 1187. In Zana v. State, this Court held that evidence of a defendant inappropriately touching young girls can reasonably suggest contact with young girls sexually gratifies the defendant. 125 Nev. 541, 550, 216 P.3d 244, 250 (2009). Further, this Court held that it would reasonable to infer from that evidence that he did not possess child pornography accidentally, but rather knowingly and willfully. Id. In the instant matter, evidence of Appellant search for "young" on various pornography sites, allows for a reasonable inference that the images found on three different devices owned by Appellant were not there accidentally, but rather because the images of young girls sexually gratified Appellant.

To the extent that Appellant now argues on appeal that the State failed to prove beyond a reasonable doubt that he willfully and knowingly possessed images of child pornography because of the aforementioned issues, it is not the role of this Court to assess the credibility of the witnesses or weigh the evidence. Jackson, 443 U.S. at 319-20, 99 S.Ct. at 2789. It is the role of the jury to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences. Id. The jury heard the testimony, weighed the evidence, assessed the witnesses' credibility, and found Appellant guilty on all counts.

Furthermore, Appellant's argument as to the insufficiency of evidence to support a conviction seems to be establishing that the case was not proven beyond any doubt. The State is required to prove the facts beyond a reasonable doubt; the State is not required to prove the case beyond any doubt or to negate every possible negative inference that is raised at trial. Appellant argued to the jury all of the issues which he contends should support reversal in this matter and the jury in weighing all the evidence and arguments chose to convict Appellant of the crimes charged. Therefore, the State met its burden and this case should not be disturbed because of an insufficiency of evidence.

IV.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE OF APPELLANT'S PRIOR-BAD-ACT.

Appellant meshes two entirely different issues that took place during the

course of the trial. Appellant first made a motion to preclude the State from making any mention of child pornography other than of the fifteen images that were charged. III AA 518. This motion was made in response to the fact that when the detectives examined the evidence, there were initially over four hundred images of suspected child pornography. After a lengthy discussion, the district court indicated that it would allow the State to argue the process in which the evidence was examined and that the investigation ultimately led to the fifteen images of child pornography found. III AA 541. Furthermore, the State also agreed that it would lead the witnesses past the four hundred plus suspected images as to make this a non-issue. III AA 540. Throughout the direct examinations of Detective Ramirez and Detective Ehlers, the detectives who forensically examined the evidence, the State never elicited any testimony about the roughly four hundred images of suspected child pornography.

In an abundance of caution, the State then raised an issue with the district court based upon the lengthy prior discussion that had just taken place about the reference of other child pornographic images. The State informed the court that there was an additional piece of evidence of the Appellant's audio statement to Detective Tooley. III AA 546. The State informed the district court that it had redacted portions of the audio, and that Appellant's counsel, had previously agreed to the redactions. However, during the interview, Detective Tooley confronts Appellant with a statement that they found fifty-six images of child pornography.

III AA 548. It is important to note that Appellant denies any knowledge of fifty-six or even a single image of child pornography on any of his devices.

The district court ruled that police, in conducting their investigations, can use a number of tactics during an interrogation and that the quotation of fifty-six images was not a problem since only fifteen images were charged. III AA 548. Even Appellant at the time agreed that this issue was different from the prior issue of the suspected four hundred images of child pornography that were found. III AA 549. Appellant at the time said, "It's a difference between something that's being quoted as part of an interview versus something that an expert has determined." III AA 549. He concludes by saying, "So I think it's two different issues to tell you the truth." III AA 549. As the discussion comes to a conclusion, the Appellant again says, "[i]f I find something objectionable, I'll object at the time. I just think these are two separate issues at this point." III AA 550. However, despite the Appellant's prior acknowledgements that there were two separate issues, he now argues that they are the same and constitute grave error.

After the issues had been decided and agreed upon, the State called Detective Tooley to testify. Part of her testimony included playing the audio recording of her interview with Appellant. Appellant did object during the playing of the audio recording and a record was made after the conclusion of the audio recording. Appellant incorrectly argued that the State had already agreed to withdraw any

reference to the fifty-six images that are mentioned during the interview. VI AA 1267. Appellant also incorrectly informed the court that the State agreed it would not ask about the fifty-six images from its experts and that it could only ask about the fifteen images that were charged. VI AA 1267. Appellant stated this to the court despite the clear record to the contrary.

Police are able to use deceptive tactics during interrogations. Sheriff, Washoe County v. Bessey, 112 Nev. 322, 324 (1996). This court's prior holdings on the subject matter generally have dealt with the voluntariness of a confession rather than the idea that referencing an untrue statement in the course of an interview constitutes a prior bad act.

In this case, the Appellant was confronted by Detective Tooley about fifty-six images that were found. The only reference to fifty-six images was during the Appellant's audio interview. Detective Tooley, nor any other witness for the State, was asked to testify about any images other than the fifteen that were charged in this case. Based upon the lengthy conversations that took place, there was absolutely no mention of uncharged bad acts.

A district court's determination regarding the admissibility of prior-bad-act evidence is reviewed for an abuse of discretion. Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002); Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991). This Court will not disturb a decision on the admissibility of such evidence

absent manifest error. Braunstein, 118 Nev. at 72, 40 P.3d at 416. Evidence of prior-bad-acts is admissible when it does not violate NRS 48.045 and: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1065 (1997). Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show that the person acted in conformity therewith; however, it is admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). The foregoing factors should be considered by a district court judge outside the presence of the jury. Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). "Failure to conduct a Petrocelli hearing on the record is grounds for reversal on appeal *unless* either the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad act evidence as set forth in Tinch…or where the result would have been the same had the district court not admitted the evidence. King v. State, 116 Nev. 349, 355, 998 P.2d 1172, 1175 (2000) (emphasis added).

On appeal, Appellant contends the district court abused its discretion when it allowed the recorded interrogation conducted by Detective Tooley, which contained references to several other images of child pornography that were not the subject of

the trial. AOB at 36-38. Appellant moved to exclude all references to the additional images before trial, III AA 517, and the district court agreed so long as Appellant did not open the door to the images, III AA 542-544. At the time, the State had not decided whether to use the aforementioned recording, and therefore, Appellant did not object. III AA 551. At trial, Appellant objected to the admission of the recoding, arguing that his statement when confronted with the fact they had found 56 images could be viewed as an admission that he thought he only had 15 images. V AAI 1265-67. The district court overruled the objection after a bench conference. VI AA 1262-1263.

First, this is not a prior-bad-act, and is therefore not subject to standards set forth in Petrocelli. The recording[2], in relevant part, recorded a conversation between Detective Tooley and Appellant. During the interview, Detective Tooley confronted Appellant with the potential discovery of 56 images of child pornography. In response, Appellant essentially stated that it couldn't have been that many[3]. This is a statement made by Appellant, and is therefore admissible against him as a party statement. See NRS 51.035(3)(a).

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[2] Simultaneous with the filing of Appellant's Opening Brief, Appellant requested transmission of the recording to this Court.

[3] Appellant contends that he was referring to the fact that it would have been impossible to find that many due to the amount of storage available; however, it is the role of the jury to determine how to interpret statements. Jackson, 443 U.S. at 319-20, 99 S.Ct. at 2789.

Second, failure to conduct a Petrocelli hearing does not result in automatic reversal if the record is sufficient for review or the result would have been the same had the evidence not been admitted. King, 116 Nev. at 355, 998 P.2d at 1175. In the instant matter, the record clearly demonstrates that the other images found on Appellant's computers were relevant, as they were discovered at the same time as the images that were the basis for the underlying charges, and negate any defense of accident or mistake. In addition, there is sufficient evidence on the record to show that the State could have proven the act by clear and convincing evidence. As discussed *supra*, these images were discovered on Appellant's computers after execution of a search warrant. Finally, as discussed *supra*, there was sufficient evidence to support Appellant's conviction outside of this reference to a number of other potential images of child pornography. The reference in question was a small aspect of a 90 minute interview, which was a small part of seven day jury trial. Therefore, Appellant cannot show that the result would have been different if not for this aspect of the recoding, and cannot show a danger of unfair prejudice.

V.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SETTLING THE JURY INSTRUCTIONS.

Appellant argues that the district court should not have instructed the jury on the elements of constructive possession, which was memorialized in Instruction 12. II AA 262. According to Appellant, instructing on constructive possession somehow

minimized the State's burden of proof to also show that the possession of child pornography was both willful and knowingly done.

Certainly Instruction 12 by itself would be insufficient to sustain a conviction for the charges. However, Instruction 12 was not the only instruction given. Jury Instruction 2 informed the jurors that they are to consider all the instructions and are prohibited from ignoring others, II AA 262, JURY Instruction 6 instructed the jury on reasonable doubt, II AA 271, and Jury Instruction 11 instructed on the elements of Possession of Possession of Visual Presentation Depicting Sexual Conduct of Child. II AA 276. Moreover, Jury Instruction 13 was another instruction regarding what constitutes a knowing act and that such act was not the product of "ignorance, mistake, [and] accident." II AA 278.

In light of the instructions that were given, "District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). This court reviews a decision to settle a jury instruction for an abuse of discretion. Id. A defendant is not entitled to redundant instructions when his theory of the case is substantially covered by other instructions. Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147,

94 S.Ct. 396, 400-401 (1973)). Further, the district court only abuses its discretion with regard to jury instructions when the court's "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). De novo review applies, however, as to whether the instruction was an accurate statement of the law. Funderburk v. State, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009).

On appeal, the defense objected to the constructive possession language in Instruction 12, arguing that it minimized the State's burden of proving willfulness and knowledge. II AA 277; VII AA 1398-1400. As a preliminary matter, Appellant fails to provide relevant legal authority for his argument that it minimized the State's burden. The failure to support an argument with legal authority is fatal. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n. 38, 130 P.3d 1280, n. 38 (2006) (court need not consider claims unsupported by relevant authority).

There was nothing improper about Instruction 12 because it was a correct statement of law. NRS 200.730 states that "[a] person who knowingly and willfully has *in his or her possession for any purpose*" is guilty of a felony. (emphasis added). NRS 200.700 does not define possession in the context of child pornography; however, this Court has endorsed other authorities' definition of possession. See Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996). In Palmer, this Court endorsed Black's Law Dictionary's definition. Id. see also Black's Law Dictionary

1163 (6th ed. 1990) ("The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person, who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.").

At trial, the State argued Instruction 12 was an appropriate possession instruction, as it instructed the jury regarding the constructive exercise of dominion and control over an item. VII AA 1398-1399. Appellant objected on the grounds that it differentiated between different types of possession, and suggested constructive possession is enough. VII AA 1399. The district court held that it was an appropriate instruction under the facts and circumstances of the case, because the "defendant did not have actual physical possession of the images at…a particular time[.]" VII AA 1401. Further, the district court noted that there was a lot of "discussion about who all had access" and that it wouldn't' "confuse the jury." VII AA 1401. It is clear from the record that the district court considered the instruction within the context of the entire case, and therefore, did not abuse its discretion in settling the instruction.

In addition, Appellant argues the district court erred when it rejected an instruction regarding the issuance of a search warrant. AOB at 41; see II AA 255-258. Appellant argues that testimony from Detective Tooley suggested search warrants were evidence of guilty, and wanted an instruction stating they cannot deemed as evidence of guilt. AOB at 41. The proposed instruction read, in relevant part, that search warrants did not require proof beyond a reasonable doubt, only probable cause, and that probable cause is not sufficient for a conviction. VII AA 1417. The district court held the instruction went "into a lot of detail about trying to define what probable cause is," VII AA 1418, that Appellant was just "clouding the issue further and further," VII AA 1419, and that it could "confuse[]" the jury, VII AA 1418. First, a jury instruction is erroneous if it tends to confuse or mislead the jury. Carver v. El–Sabawi, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005). Second, the record clearly establishes that the district court did not arbitrarily reject Appellant's instruction.

Next, Appellant argues the district court abused its discretion in rejecting an instruction regarding evidence susceptible to two interpretations. AOB at 41. Appellant, however, concedes that the instruction was not required, AOB at 41, and is merely permissible, AOB at 41. See II AA 253-254. The district court held the reasonable doubt instruction adequately covered it. VII AA 1413. First, Appellant concedes this instruction was not necessary. Second, a defendant is not entitled to

redundant instructions when his theory of the case is substantially covered by other instructions. Earl, 111 Nev. at 1308, 904 P.2d at 1031.

Finally, Appellant argues the district court abused its discretion when it rejected an instruction stating the crime charged was a specific intent crime. AOB at 42; II AA 255. The district court rejected the instruction as duplicative. See Earl, 111 Nev. at 1308, 904 P.2d at 1031. The district court held that "[i]t [was] made absolutely clear that it must be shown that the defendant knowingly and willfully had in his possession the materials." VII AA 1407. The district court noted that Instruction 11 and 13 dealt with knowingly and willfully, VII AA 1407, Instruction 14 dealt with mere presence, VII AA 1407, and the statute itself dealt with knowingly and willfully, VII AA 1408. Further, the district court held that the crime only required he possessed it knowingly, not that he knew it was a crime to do so, and, therefore, it was not a specific intent crime. VII AA 1408.

Appellant's reliance on Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002), is misplaced. In the instant matter, the district court did not hold that other instructions covered similar material, rather, the district court held that the instruction was made "absolutely clear" in others. VII AA 1407. Therefore, because the instruction was duplicative per Earl, the district court did not abuse its discretion in rejecting the instruction.

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VI.
THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO VACATE COUNTS 2-15.

On appeal, Appellant contends that the district court erred when it denied his motion to vacate Counts 2 through 15, II AA 293; VIII AA 1668, because his conduct constituted a singular act of digital possession on the day the items were seized, AOB at 43.

In general, this Court reviews de novo claims regarding statutory construction, Firestone, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) (discussing whether leaving three victims at the scene of an accident constituted one offense or three presents a statutory construction questions that receives de novo review), as well as claims revolving constitutional issues, Davidson v. State, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008) (holding that a claim that a conviction violates the Double Jeopardy Clause is subject to de novo review on appeal). It is well established that the Double Jeopardy Clause protects against three abuses: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. Helvering v. Mitchell, 303 U.S. 391, 399, 58 S.Ct. 630, 633 (1938).

In dealing with a case in which a defendant is charged with multiple violations of the same statute, the primary concern is to look at the statute in question to see what act constitutes the crime. See Wilson v. State, 121 Nev. 345, 114 P.3d 285

(2005). NRS 200.730 states that "[a] person who knowingly and willfully has in his or her possession for any purpose *any* film, photograph, or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating, or assisting others to engage in or simulate, sexual conduct" is guilty of a category B felony. (emphasis added). The plain and unambiguous language of the statute makes it a crime to possess any film, photograph, or other presentation depicting child pornography. Further, the language of the statute clearly makes it a crime for each individual act.

The United States Supreme Court has held that if acts are the target of the law, then separate charges are permissible, even if the acts together constitute a common course of action. Blockburger v. United States, 284 U.S. 299 (1932). Further, this Court has held that each image of child pornography is a separate and distinct act that can be charged separately. See Wilson, 121 Nev. 345, 114 P.3d 285. In the instant matter, each charge represented a separate child or group of children, in a multitude of different acts and poses.[4]

Appellant discusses, but misconstrues Casteel v. State, 122 Nev. 365, 131 P.3d 1 (2006), Wilson, 121 Nev. 345, 114 P.3d 285, and Salazar v. State, 119 Nev.

[4] The parties stipulated that the images were child pornography, and therefore, the State did not bring in witnesses identifying the victims in each of the images. The images are of known victims of child pornography and are not related to each other or have any other connection outside of being unlawfully possessed and distributed.

224, 70 P.3d 751 (2003). Wilson and Casteel dealt with the production of child pornography. In Wilson, this Court held that the "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." 121 Nev. at 358, 114 P.3d at 294 (emphasis added). This Court reversed the conviction for three of the four production counts. Id. at 369, 302. This Court, however, did not reverse the defendant's four convictions for the possession of child pornography arising from the subsequent memorializing of his production. Id. In Salazar, this Court held that "where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant. 119 Nev. 224, 70 P.3d 751. As discussed *supra*, each image was a separate and distinct illegal act, and therefore, Salazar does not apply in the instant matter.

To the extent that Appellant claims NRS 200.730 is unconstitutional because it is vague, overboard, and fundamentally unfair, Appellant fails to meet his burden. Statutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their constitutionality. Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079 (1991). A law is vague if it fails to give fair notice of the conduct proscribed or fails to provide explicit standards for those who enforce it. Id. at 587. As discussed *supra*, the plain and unambiguous of the statute clearly identifies the conduct

prohibited and sets clear standards for authorities. In support, Appellant cites Wilson, arguing that the legislature never intended to punish defendants for "every individual photograph. AOB at 47. However, as discussed *supra*, Appellant's reliance on Wilson is misplaced.

Further, Appellant's claim that the statute is unfair is belied by the State of Nevada's stance on child pornography, as "[t]he Legislature has taken a strong stance with regard to protecting children from the harmful effects of child pornography and in doing so has enacted several statutes which impose severe penalties for persons who violate Nevada's child pornography laws." Senate Bill No. 277.

Also with regards to this issue, Appellant argued against the State referencing the four hundred plus images of suspected child pornography because it would constitute a bad act. In his argument, Appellant said, "If they [the State] wanted to charge him with 402 images…they should have." III AA 538. At the time, Appellant was willing to argue that the State had charged too few crimes. Now as it seems expedient, Appellant argues the exact opposite.

VII.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISMISS FOR PERJURY.

On appeal, Appellant contends the district court abused its discretion in

denying his motion to dismiss based upon Ms. Hines testimony. I AA 191; V AA 934. This Court reviews a district court's decision to deny a motion to dismiss for an abuse of discretion. Hill v. State, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008).

As a preliminary matter, Appellant fails to support assertions of fact with specific citations to the record. Failure to do so is fatal to the claim relying upon the alleged fact. Nevada Rules of Appellate Procedure (NRAP) Rule 3C(e)(1)(C); Thomas v. State, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004) (counsel's citation to habeas corpus petition in support of claims of error in capital murder trial did not comply with appellate rule requiring that every assertion in brief be supported by reference to specific part of transcript where matter relied upon was to be found); Rodriguez v. State, 117 Nev. 800, 811-12, 32 P.3d 773, 780-81 (2001) (no prejudicial error because capital murder defendant's brief failed to offer "cogent argument supported by legal authority and references to relevant parts of the record").

At trial, Appellant argued that Ms. Hines testimony contradicted her testimony from the preliminary hearing, and her interview with Detective Tooley. VI AA 1219. Appellant argued that because she told differing stories in regards to how she came into possession of the thumb drive, and because she is the nexus between him and the thumb drive, both the trial and the criminal bind over were improper. VI AA 1219; AOB at 49-50. Specifically, Appellant argued that Ms.

Hines presented contradicting testimony regarding who found the thumb drive. AOB at 48. Appellant argues that because she initially said she found the drive in her bag, but then testified that it was actually her boyfriend, she committed perjury. Second, Appellant argues that because she first told police she recognized who the thumb drive belonged to, then said at the preliminary hearing words to the contrary, then re-affirmed her statements to police at trial, she committed perjury.

The district court held even if she intentionally lied at the preliminary hearing, it would not have made a difference, as there was "sufficient" evidence to meet the bind over standard. VI AA 1220. Further, the district court noted that the perjured testimony must be material, and in the instant matter, Ms. Hines testimony at trial, was consistent with the affidavit of arrest, and that "there are things that are slightly different" and that although there wasn't "as much detail" originally, it doesn't make her a perjurer. VI AA 1222.

Further, the district court noted that some witnesses on cross-examination are more susceptible to leading questions, and are more likely to agree with counsel during questioning. VI AA 1226. The district court held that it is for the jury to decide what weight to get her testimony and that there wasn't sufficient evidence of perjury to warrant a dismissal. VI AA 1226.

Further, Appellant's reliance on Riley v. State, 93 Nev. 461, 462, 567 P.2d 475 (1977), is misplaced. In Riley, the perjured statements concerned a critical issue

of whether a shooting was accidental or intentional. Id. In the instant matter, no matter how much Appellant characterizes the access dates for the files as material, the mere fact that her testimony regarding who found the thumb drive originally, and whether she immediately recognized it, or just recognized it after, was not material. Further, mere assertions by Appellant are not evidence. See Rudin v. State, 120 Nev. 121, 138, 86 P.3d 572, 583 (2004).

VIII.
THE DISTRICT COURT DID NOT ERR WHEN IT FAILED TO HOLD A HEARING FOR JUROR MISCONDUCT.

On appeal, Appellant contends that the district court erred when it failed to conduct a hearing regarding a juror's ability to understand English at his request.

The question of prejudice is a factual determination by the district court and generally will not be disturbed absent a clear showing of abuse. Canada v. State, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997); Hernadez v. State, 118 Nev. 513, 522, 50 P.3d 1100, 1106 (2002). Whether or not an examination of a juror is warranted lies within the discretion of the trial court. Jones v. State, 95 Nev. 613, 618, 600 P.2d 247, 251 (1979). A district court's failure to conduct a hearing to determine whether juror misconduct was prejudicial is not reversible error where the record indicates no prejudice resulted. Hernadez, 118 Nev. at 522, 50 P.3d at 1106.

In the instant matter, Appellant makes a number of allegations about Juror 6 without any basis to make such allegations. He argues she was inattentive during

the trial, and looked confused because of an apparent language barrier. AOB at 50. Appellant expressed concerns that the case was out of her depth and that she was not paying attention or confused. VI AA 1204. As support, Appellant claims he saw her staring at the walls, folding her hands, staring at her lap, and looking frustrated. VI AA 1204. Appellant asserts that this was due to a limited knowledge of the English language. AOB at 50.

First, mere assertions by Appellant are not evidence. See Rudin, 120 Nev. at 138, 86 P.3d at 583. Appellant offers nothing more than speculation that Juror 6 was unable to understand English. Juror 6 was extensively questioned during voir dire just like every other potential juror. VI AA 1205. Both Appellant and the State had the opportunity to ask questions, which she answered fully. VI AA 1206. Further, only brought a challenge based on her language well into trial. VI AA 1206. However despite the record that Juror 6 was a qualified Juror and was understanding the proceedings, Appellant committed its own misconduct when in his closing argument, he had a PowerPoint slide written in Tagalog that stated the Appellant was innocent. VII AA 1598. When the district court discovered what Appellant had done, the court made a record outside the presence of the jury that the Appellant's conduct was entirely inappropriate. VIII AA 1598, 1599.

Juror 6 should also not be viewed in a vacuum. Based on the entirety of the record, Appellant's accusations regarding Juror 6 seem somewhat disingenuous

when seeing how Appellant supported Juror 2, who was eventually dismissed for sleeping throughout the trial. Despite the speculative claims that Appellant has about Juror 6, Appellant was not at all concerned by Juror 2. The court made a record that it had seen Juror 2 sleeping on a number of occasions. VI AA 1502. The court indicated that her staff also noticed that Juror 2 was sleeping. VI AA 1503. However despite the court and the State both expressing that Juror 2 was nodding off, Appellant, through his attorney Mr. Westbrook, defended Juror 2 by stating, "You know, I've seen him with his head down and his eyes closed. I haven't seen him actually sleeping." VI AA 1202. Despite the court's concern that Juror 2 was sleeping through the testimony, Appellant then changed course to again accuse Juror 6 of appearing bored and disinterested. VI AA 1203.

Juror 2 was even questioned by the court outside the presence of the other jurors. During the conversation between Juror 2 and the court, Juror 2 admitted that he has been working a lot which has caused him to be tired. VI AA 1211. Moreover, Juror 2 admitted that he had missed large portions of the testimony. VI AA 1211. He also believed he fell asleep almost seven times that day alone. VI AA 1211. Yet despite all of these facts, Appellant argued against the court's decision to replace Juror 2 with an alternate juror. It seems curious that Appellant would wish to deprive a citizen who has every right to serve on the jury even with English as a second

language based purely on speculation, but simultaneously keep a juror that admits to not paying attention during the trial.

Because Appellant cannot show anything beyond mere speculation, Appellant has in no way shown that the district court erred with a clear showing of abuse.

IX.
CUMULATIVE ERROR DOES NOT WARRANT REVERSAL.

Appellant lastly alleges that the cumulative effect of error deprived him of his right to a fair trial. However, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate.

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). Appellant needs to present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)).

As explained in detail above, there was more than sufficient evidence to secure Appellant's conviction of all of the offenses charged. Thus, the issue of guilt is not close.

Further, because Appellant has failed to demonstrate any error, there can be no cumulative effect. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990)

("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added).

Finally, Appellant was not convicted of grave crimes. See Valdez, 124 Nev. at 1198, 196 P.3d at 482 (2008) (stating crimes of first degree murder and attempt murder are very grave crimes). In the instant matter, Appellant was convicted of a much lesser offense, one that allowed him to be placed on probation with a suspended sentence, and, therefore, the third factor does not weigh in Appellant's favor.

CONCLUSION

Based on the aforementioned, this Court should affirm Appellant's convictions.

Dated this 2nd day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 11,171 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of October, 2014.

Respectfully submitted

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CERTIFICATE OF SERVICE

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

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