IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. SCHOFIELD,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 65193

RESPONDENT'S ANSWERING BRIEF

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

KAREN K. WONG, ESQ.
Wong Appellate Law
Nevada Bar #013284
9484 S. Eastern Ave., #408
Las Vegas, Nevada 89123
(702) 830-6080

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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STATEMENT OF THE ISSUES

1. Whether the State committed prosecutorial misconduct when arguing NRS 200.310 during closing arguments
2. Whether NRS 200.310 applies to non-custodial parents
3. Whether the district court abused its discretion regarding instructing the jury on kidnapping
4. Whether the State presented sufficient evidence to support Appellant's first-degree kidnapping charge

STATEMENT OF THE CASE

On January 29, 2013, the State filed an Information against Michael John Schofield (hereinafter "Appellant") charging him with Count 1: Burglary; Count 2: Battery constituting Domestic Violence – Strangulation; Count 3: Child Abuse,

Neglect or Endangerment; and Count 4: First Degree Kidnapping.[1] 1 Appellant's Appendix (hereinafter "AA") 1-3.

Appellant's jury trial commenced on January 27, 2014. 1 AA 23. After a 6-day trial, the jury found Appellant guilty on Count 3: Child Abuse, Neglect or Endangerment, and Count 4: First Degree Kidnapping. 5 AA 1215-16.

On July 21, 2014, the district court sentenced Appellant to the Nevada Department of Corrections as follows: Count 3: maximum of 60 months with a minimum parole eligibility of 13 months, and Count 4: maximum of 15 years with a minimum parole eligibility of 5 years, with 561 days credit for time served. 7 AA 1563. On July 28, 2014, the Judgment of Conviction was filed. 7 AA 1562-63. Appellant subsequently appealed his conviction.

STATEMENT OF THE FACTS

On January 6, 2013, Appellant arrived at his mother and stepfather's home, in order to visit with his fourteen-year-old son, Michael Joshua Schofield (hereinafter "Michael Joshua."). 2 AA 476-79. Appellant's mother and step-father, Norman and Patricia Duplissie, have legal guardianship over Michael Joshua and have had guardianship over him for years. 2 AA 474; 3 AA 688-90. Initially, when he arrived,

[1]On January 27, 2014, the State filed an Amended Information with the same charges. 1 AA 20-22.

Appellant indicated to his mother and his son that he wanted to go outside and play catch with Michael Joshua, which Michael Joshua agreed to do. 2 AA 482-83.

Later, Appellant decided that he want to take Michael Joshua, in his vehicle, to the store. 2 AA 485. Appellant explained that he forgot his food stamp card at the store. Id. However, Michael Joshua did not want to go with Appellant, and Patricia did not want Michael to go. 2 AA 486; see 5 AA 1020. Norman also did not want Michael Joshua to go with Appellant because it appeared to him that Appellant was impaired. 3 AA 698. When Michael Joshua continued to refuse to go with Appellant, Appellant became angry, yelling at Michael Joshua that "you're going to listen to me, I'm your father, and if you don't listen, I'm going to break your teeth." 2 AA 486-87. Michael Joshua started to turn to leave and Appellant grabbed him by the hand. 2 AA 487. Michael Joshua broke free and Appellant chased Michael Joshua into and around the house. 2 AA 488-89. Once he caught up to Michael Joshua, Appellant grabbed Michael Joshua from behind by the neck and placed him in a headlock, in such a way that it prevented Michael Joshua from breathing. 2 AA 491-92. Michael Joshua could not breathe nor catch his breath for some time after the incident and had injury on his neck where Appellant had strangled him. 3 AA 508-12.

While Appellant was strangling Michael Joshua, Norman attempted to stop the Appellant, telling him he was going to kill Michael Joshua but Appellant refused

to let go. 2 AA 703-06. At this point, Appellant said, to Michael Joshua, "You fucking little bitch. You're going to do what I fucking tell you and getting in that fucking car because I'm you're fucking father and you'll do what I tell you to do." 2 AA 705. At one point, Michael Joshua was able to break free from Appellant and breathe, however Appellant grabbed onto him once again around the neck and dragged him outside to his car, kneeing Michael Joshua in the back to get him to move. 2 AA 494-96. At no point did Normal or Patricia give Appellant permission to take Michael Joshua from the house. 2 AA 485-86; 3 AA 712-13; 5 AA 1020-22.

Once outside and at the car, Appellant forced Michael Joshua inside the car, however Appellant was unable to close the door because Michael Joshua used his legs to block the door. 3 AA 502-04. While this was occurring, Patricia was on the phone with 911 frantically asking for the police to respond in order to keep Appellant from taking Michael Joshua. See 5 AA 1020. In the meantime, and prior to police arriving, two neighbors, both off-duty police detectives, responded and took control of Appellant until uniformed officers arrived. 3 AA 505, see 4 AA 766-75. Even once police arrived, Appellant refused to comply with their instructions. 4 AA 798.

SUMMARY OF THE ARGUMENT

Appellant only challenges his Kidnapping charge, and readily admits that he committed child abuse. He first contends that the State improperly interpreted NRS 200.310, Nevada's Kidnapping statute, and argued this improper interpretation to

the jury during its closing arguments. However, Appellant failed to object to this alleged misconduct during closing arguments, and as a result, failed to preserve the issue for appeal. Second, Appellant alleges that NRS 200.310 should not apply to parents. However, not only did Appellant not preserve this issue at the district court, but it is also inconsistent with the position he took in his pre-trial Petition for Writ of Habeas Corpus.

Third, Appellant makes two challenges in regards to jury instructions. Appellant first alleges that the district court abused its discretion in not sua sponte instructing the jury about whether the kidnapping was incidental to the child abuse. However, Appellant never requested a jury instruction on this issue, thus it is now considered waived. Appellant next alleges that the district court abused its discretion for declining to include a lack of consent element to Jury Instruction No. 10, which defined kidnapping pursuant to NRS 200.310. But, Jury Instruction No. 10 was a correct statement of law and the parties both argued lack of consent during closing arguments. As such, the district court did not abuse its discretion in this regard.

Finally, Appellant alleges that the State failed to present sufficient evidence to support Appellant's Kidnapping conviction. However, based on the evidence at trial that Appellant forcibly removed Michael Joshua from the legal guardians' house, and dragged him to his vehicle, with the intent to confine him there and take him to the store, it is clear that the state presented sufficient evidence to support the

Kidnapping conviction. As such, this Court should affirm the district court's Judgment of Conviction.

ARGUMENT

I. APPELLANT FAILED TO PRESERVE HIS ARGUMENT REGARDING THE STATE'S ALLEGED IMPROPER CLOSING ARGUMENT, HOWEVER REGARDLESS THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

It appears that Appellant alleges prosecutorial misconduct, contending that the State made improper arguments during closing arguments regarding the "intent to keep" requirement of NRS 200.310, Nevada's Kidnapping statute. AOB 11-12 (contending that the State improperly "collapsed the specific intent requirement of *intent to keep* into the general intent requirement of consciously taking Michael away" and "misinterpreted keep . . . by assuming that a momentary possession satisfies that requirement"). However, during the State's closing argument, Appellant failed to object to this alleged misconduct. See 5 AA 1134-35. As such, Appellant fails to preserve this issue for appeal. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

However, if this Court wishes to address this issue, the State did not commit prosecutorial misconduct because it made a reasonable interpretation of the Kidnapping statute and argued that interpretation to the jury during closing arguments. The statute at issue, NRS 200.310(1), defines kidnapping in Nevada, as follows:

> A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person, and a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.

Further, the jury was provided an instruction reflecting the relevant provisions of NRS 200.310:

> Every person who leads, takes, entices, or carries away, or detains, any minor, with the intent to keep, imprison, or confine the minor from his parents, guardians, or any other person having lawful custody of the minor is guilty of kidnapping in the first degree.

5 AA 1196.

During closing arguments, the State did not commit prosecutorial misconduct because the argument was based on the plain language of the statute. Specifically, the State argued that Appellant's actions and statements demonstrated that he took Michael Joshua with the intent to keep/confine him from his legal guardians as they went to the store. 5 AA 1134-35. Further, during rebuttal, the State explained that

the Kidnapping statute does not require Appellant to intend to permanently keep Michael Joshua. 5 AA 1167. This is a reasonable interpretation of NRS 200.310, and consistent with the way the State pled its case in the Information. 1 AA 20-22.

Appellant makes a variety of additional challenges. First, Appellant contends that the plain language of the NRS 200.310 requires the State to prove the defendant had the specific intent to permanently keep. AOB 10-13. However, this argument is belied by the actual language of the statute wherein there is no language indicating a need for the defendant to intend to keep or confine a minor *permanently*. In fact, had the legislature intended this, it would have included this language, as demonstrated by other Nevada statutes. For example, in NRS 200.5092, the Legislature specifically included this language in regards to exploitation of older persons and vulnerable persons:

> 2. Exploitation means any act taken by a person who has the trust and confidence of an older person or a vulnerable person . . . to:
>
> (a) obtain control, through deception, intimidation or undue influence, over the older person's or vulnerable person's money, assets or property *with the intention of permanently depriving* the older person or vulnerable person of the ownership, use, benefit or possession of his or her money, assets or property.

(Emphasis added). Similarly, Nevada defines Theft, in part, as when "a person knowingly . . . controls any property of another person with the intent to *deprive* that person of the property." NRS 205.0832. Further, NRS 205.0824 defines "deprive"

as "to withhold a property interest of another person *permanently* . . . ." (Emphasis added). Thus, the plain language of NRS 200.310, which refers to taking a minor with the intent "to keep, imprison, or confine the minor from his . . . guardians," clearly indicates that the Legislature did not intend to require a defendant to intend to keep or imprison or confine a minor permanently, as there is no such "permanent language. Accordingly, the State argued the plain language of NRS 200.310.

Next, Appellant alleges that "[e]ven if [this] Court were to find that a plain English construction of *intent to keep* does not require the *intent to keep permanently*, [this] Court should nevertheless strictly construe *keep* to require a permanent or indefinite keeping in order to avoid absurd and unreasonable results." AOB 13. However, this argument conflicts with this Court's precedent regarding kidnapping, wherein a majority of the upheld Kidnapping convictions did not involve a permanent intent. Isler v. Sheriff, 92 Nev. 248, 250, 548 P.2d 1373, 1374 (1974) (defendant's Kidnapping conviction upheld when he robbed a 7-11 and the victim was driven a mile away from the store and released); Hutchins v. State, 110 Nev. 103, 106, 867 P.2d 1136, 1138 (1994) (affirming defendant's Kidnapping conviction when he dragged victim through her apartment, bound her, raped her, then left); Garcia v. State, 121 Nev. 327, 331, 113 P.3d 836, 839 (2005) (upholding a Kidnapping conviction when the defendants robbed the victims, ordered them outside, bound them up, then fled after ransacking the store). Further, were this

Court to conclude that a person can only be convicted of First Degree Kidnapping if they intend to permanently keep someone, this would lead to absurd results because, for example, the typical kidnapping, taking someone for ransom, would no longer be considered kidnapping because the defendant did not intend to permanently keep them, but intended to keep them for ransom.

Finally, Appellant contends that if "intent to keep" is construed broadly, then it would be unconstitutional under the Fourteenth Amended as vague and overbroad. AOB 16-18. Again, as discussed above, the language of NRS 200.310 is plain on its face, and Appellant fails to provide any legal authority to support this contention. Additionally, while Appellant claims that "a prosecutor could bring charges against almost anyone in this State who cares for another person's child," this is absurd and can be distinguished from the facts of the instant case because in Appellant's hypothetical the person that is caring for another person's child would have had permission to take and care for the child. In the instant case, Appellant did not have permission to take Michael Joshua from his legal guardians.

Accordingly, Appellant fails to demonstrate that the State committed prosecutorial misconduct as it pertained to NRS 200.310.

II. APPELLANT'S ARGUMENT THAT NRS 200.310 DOES NOT APPLY TO NONCUSTODIAL PARENTS IS INCONSISTENT WITH HIS PRETRIAL PETITION AND WAS NOT PROPERLY PRESERVED, AND FURTHER, IS BELIED BY THE PLAIN LANGUAGE OF NRS 200.310

Appellant claims that the Kidnapping statute, NRS 200.310, "is ambiguous and should not apply to the keeping away of a minor from one parent or guardian by another." AOB 19.

This is inconsistent with the position Appellant took in his pretrial writ, wherein he alleged that "a noncustodial parent attempting to remove a minor will be found guilty of Kidnapping where it is clear he removed the minor from his or her custodial parents with the intent to keep or imprison such minor from the lawful custodial parents." Respondent's Appendix 6. Thus, Appellant cannot now change his position on appeal. See Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (noting that an appellant cannot change her theory underlying an assignment of error on appeal). Further, Appellant again failed to raise this issue before the district court at trial, thus it is again considered waived. Leonard, 117 Nev. at 63, 17 P.3d at 403.

To the extent that this Court wishes to address this issue, NRS 200.310 is not ambiguous. In fact, the plain language states "a *person* who leads, takes . . . any minor with the intent to keep, imprison or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor . . . ." If the Legislature intended to prevent biological parents, who did not have custody of their biological child, from being charged with Kidnapping under NRS 200.310, it could have included such limiting language. Further, this Court has already concluded that

a parent can be convicted of Kidnapping their child, so long as the evidence demonstrates the elements of NRS 200.310. Hernandez v. State, 118 Nev. 513, 524-25, 50 P.3d 1100, 1108 (2002) (overruled in part on other grounds by Armenta-Carpio v. State, 129 Nev. ___, ___, 306 P.3d 395, 398 (2013); Sheriff, Washoe County v. Dhadda, 115 Nev. 175, 183, 980 P.2d 1062, 1066-67 (1999). In fact, in Dhadda, this Court concluded that a parent, *with legal custody*, could commit kidnapping of her child. 115 Nev. at 183, 980 P.2d at 1066-67.

Appellant further tries to compare NRS 200.310 to NRS 200.359 in an attempt to demonstrate that NRS 200.310 should not apply to parents. AOB 21-24. It appears that Appellant is arguing that he should have been charged with 200.359, which he contends is more applicable to a situation such as his. Id. However, Appellant's claim is incorrect. First, NRS 200.359 is not applicable to Appellant's situation as it specifically applies to parents who have limited legal custody rights and Appellant has no legal custody over Michael Joshua. 2 AA 474; 3 AA 688-90. Although Appellant attempts to argue that because he is Michael Joshua's biological father he is somehow allowed to disregard the custodial parent's' wishes, however, in the eyes of the law, his kidnapping of Michael Joshua should not be distinguished from a stranger abduction since like a stranger, Appellant had no legal rights to take that child.

III. JURY INSTRUCTIONS

Appellant alleges that the district court abused its discretion by not offering certain jury instructions. AOB 24-25, 28. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). 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." Id.

a. APPELLANT WAIVED HIS ARGUMENT REGARDING THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURY ON INCIDENTAL MOVEMENTS

Appellant first contends that the district court abused its discretion when it did not instruct the jury regarding whether kidnapping was "incidental to the child abuse charge." AOB 24-25 (*citing* Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006)). However, at trial, Appellant never requested a jury instruction, based on Mendoza, regarding whether the kidnapping was incidental to child abuse. As such, this issue is considered waived on appeal. Garcia v. State, 121 Nev. 327, 334, 113 P.3d 836, 840 (2005); McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998).

Appellant alleges that under Garcia, "[w]here a proposed jury instruction was not offered by the defense, the court's failure to instruct the jury is reviewed for plain error." AOB 24. However, this Court's decision in Garcia is not as broad as

Appellant proposes. In Garcia, this Court stated that the defendant "failed to offer a proposed instruction informing the jury that the false imprisonment counts could not be based on facts that are incidental to the charged robbery if a robbery conviction was returned." 121 Nev. at 334, 113 P.3d at 840. This Court concluded that "[f]ailure to offer a proposed instruction in this situation ordinarily waived the issue for appellate review." Id. However, this Court then stated that the defendant's robbery conviction violated its holding in Jefferson v. State, 95 Nev. 577, 579-80, 599 P.2d 1043, 1044 (1979), which concluded that a conviction for second degree kidnapping could not exist if the movement was not "over and above" that required to complete the robbery (or the associated crime). Id. As such, this Court decided to review this issue under plain error. Id. However, Appellant's situation is different from Garcia, because this case does not involve movement pertaining to a kidnapping and robbery conviction in violation of Jefferson, but instead, involves a kidnapping and child abuse conviction. As such, Appellant failed to preserve this claim.

But, to the extent that this Court wishes to address it under plain error review, Appellant's claim is without merit and the district court was not required to sua sponte instruct the jury regarding whether the kidnapping was incidental to the child abuse. This Court clarified the state of the law regarding kidnapping and associated

offenses in Mendoza. This Court concluded, after analyzing its previous precedent,[2] as follows:

> . . . where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense, i.e., robbery, extortion, battery resulting in substantial bodily harm or sexual assault, or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged, dual conviction under the kidnapping and robbery statutes are proper.

Mendoza, 122 Nev. at 274-75, 130 P.3d at 180. Further, this Court ruled that "dual culpability is permitted where the movement, seizure or restraint stands alone with independent significance from the underlying charge. Id. at 275, 130 P.3d at 181. However, "movement or restraint incidental to an underlying offense where restraint or movement is inherent, as a general matter, will not expose the defendant to dual criminal liability under either the first- or second-degree kidnapping statutes." Id. at 274, 130 P.3d at 180.

The district court did not commit plain error when it did not sua sponte instruct the jury on incidental movements regarding Appellant's child abuse and Kidnapping charges. First, the testimony clearly showed that the child abuse was completed

[2]This Court considered Wright v. State, 94 Nev. 415, 581 P.2d 442 (1978); Hutchins v. State, 110 Nev. 103, 867 P.2d 1136 (1994); Clem v. State, 104 Nev. 351, 760 P.2d 103 (1988); Jefferson v. State, 95 Nev. 577, 599 P.2d 1044 (1979); and Garcia v. State, 121 Nev. 327, 113 P.3d 836 (2005).

prior to the kidnapping, thus the movements were not incidental. Appellant grabbed Michael Joshua from behind and placed him in a "choke hold," such that Michael Joshua could not breathe. 2 AA 491-92. Michael Joshua was then able to break the choke hold. 2 AA 494. At this point, the child abuse was complete. Appellant then grabbed onto Michael Joshua and pushed him outside, using his knee, and threw him in the car. 2 AA 495-96. These subsequent movements provided the basis for the Kidnapping charge. Thus, the movements for the child abuse were completed and separate from the movements for the Kidnapping charge. This demonstrates that the kidnapping movement "substantially exceeds that required to complete" the child abuse. Mendoza, 122 Nev. at 274-75, 130 P.3d at 180. Finally, the kidnapping movements (taking Michael Joshua from inside his guardians' house to Appellant's car) "serves to substantially increase the risk of harm to [Michael Joshua] over and above that necessarily present" in child abuse. Id. Even though Appellant abused Michael Joshua inside the house while his guardians were present, one can only imagine what he would have done to Michael Joshua had he been successful in getting Michael Joshua into his vehicle and leaving the premises. Further, the State presented testimony that Appellant was impaired at this time, which further increases the risk of harm to Michael Joshua if Appellant had driven while impaired. Thus, there was much greater risk of additional injury to Michael had he been removed

completely from his guardians. Accordingly, the district court did not commit plain error when it did not sua sponte instruct the jury.

Even if this Court determines that the district court should have instructed the jury as Appellant alleges, the district court's failure to do so was harmless error.[3] Since the evidence demonstrated that the kidnapping was not incidental to the child abuse, it is clear that the error did not substantially affect the jury's verdict. Chapman, 386 U.S. at 1189, 87 S.Ct. at 476.

b. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION FOR DECLINING TO INCLUDE A LACK OF CONSENT ELEMENT TO JURY INSTRUCTION NO. 10

Appellant argues that the district court abused its discretion in "refusing to instruct the jury regarding one of the defense theories, namely that the guardians' lack of consent is an element of first-degree kidnapping of a minor." AOB 28.

At trial, Appellant objected to Jury Instruction No. 10, claiming that it was not a correct statement of law. 4 AA 935-43. Instruction 10 provided a definition of

[3]When the alleged misconduct is of a constitutional nature, this Court applies the Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824 (1967), harmless error standard, and will not reverse if "the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Id. at 1189, 196 P.3d at 476. Alternatively, when the alleged error is not constitutional, this Court "will reverse only if the error substantially affects the jury's verdict." Id. The nature of the alleged misconduct determines whether the error is or is not constitutional. Id. at 1189, 196 P.3d at 477. "Whether these distinctions make a significant difference in the ultimate analysis of harmlessness may be the subject of some debate," but there are nonetheless two standards. Id.

kidnapping.[4] 5 AA 1196. Appellant further argued that it was not correct because it did not explain that if a person has permission to take the minor, then it was not kidnapping. 4 AA 935-43. The district court denied Appellant's objection, finding that Instruction 10 was a correct statement of law and Appellant could argue that he had permission to take Michael Joshua during closing arguments. 4 AA 942-43. In closing arguments, the State made it clear that kidnapping was "taking [Michael Joshua] away without the permission of his lawful guardians," and argued that Michael Joshua's legal guardians "never gave consent." 5 AA 1136, 1167. Appellant likewise argued that he had permission to take Michael Joshua to the store with him. 5 AA 1142-45.

Appellant fails to demonstrate that the district court abused its discretion in denying his objection to Instruction 10. Instruction 10 is a correct statement of law, as it uses the exact relevant language from Nevada's Kidnapping statute, NRS 200.310. Compare 5 AA 1196 and NRS 200.310. Further, the district court's

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[4]Instruction 10 provided as follows:

> Every person who leads, takes, entices, or carries away, or detains, any minor, with the intent to keep, imprison, or confine the minor from his parents, guardians, or any other person having lawful custody of the minor is guilty of kidnapping in the first degree.
>
> A kidnapping does not require force.

5 AA 1196.

decision not to amend Instruction 10 to include a permission/consent element was the correct decision as this language is not part of NRS 200.310. Thus, the district court appropriately ruled that Instruction 10 was a correct statement of the law and it was made clear to Appellant that he was free to argue permission/consent based on the language of the statute, thereby presenting his theory of the defense. It should be noted that Appellant did just that in his closing argument.[5] 5 AA 1142-45. As such, the district court did not abuse its discretion in this regard.

Even if the district court should have amended Instruction 10 to include consent/permission, the district court's failure to do so was harmless. Neder v. United States, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 1833 (1999) (holding that "an instruction that omits an element of the offense" is subject to harmless error review because it "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence"). The parties specifically argued this to the jury, and both parties agreed that if Appellant had permission, then he should not be convicted of kidnapping. Further, several witnesses testified about whether Appellant had permission to take Michael Joshua. As such, the failure to instruct the jury on the permission issue was harmless as it was discussed throughout trial and in closing arguments.

[5]It is worth noting that Appellant could have provided permission/consent theory instructions to the district court, but chose not to.

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

Appellant contends that the State presented insufficient evidence to support his First-Degree Kidnapping conviction. AOB 29-30. Specifically, Appellant alleges that the State failed to prove Appellant's intent to "deprive" and intent to "keep." AOB 30. Further, Appellant argues that he was not successful in taking Michael Joshua in his vehicle. Id.

When reviewing a sufficiency of the evidence claim, the relevant inquiry is *not* whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the defendant guilty, the limited inquiry 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." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (quotation and citation omitted).

Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (emphasis removed). "[I]t 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) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

As previously stated, NRS 200.310 is Nevada's Kidnapping statute, and reads, in relevant part, as follows:

> . . . a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor . . . is guilty of kidnapping in the first degree which is a category A felony.

Moreover, a kidnapping does not require force. Bridges v. State, 116 Nev. 752, 765, 6 P.3d 1000, 1009 (2000). Further, "[i]t is the *fact*, not the *distance*, of forcible removal of the victim that constitutes kidnapping." Jensen v. Sheriff, 89 Nev. 123, 125-26, 508 P.2d 4, 5 (1973).

At trial, the State presented sufficient evidence to support Appellant's conviction for First Degree Kidnapping. The testimony clearly shows that Appellant took/carried away Michael Joshua from his legal guardians' house with the use of

force to Appellant's vehicle. 2 AA 495-3 AA 502, 708. Appellant even admits to this when he stated in pertinent part at trial: ". . . my intention was not to put around his neck. It was to put it around a headlock and *make him go to the car*." 5 AA 1009 (emphasis added). The testimony further demonstrated that Appellant had the intent to keep and/or confine Michael Joshua from his legal guardians. Appellant repeatedly told Michael Joshua that he was going to come to the store with him whether he wanted to or not, and as stated, Appellant intended to force him to go. 2 AA 486-87; 3 AA 705; 5 AA 1009. Further, Michael Joshua told Appellant that he did not want to go to the store with him, and recalled his grandmother, his legal guardian, stated that she did not want Michael Joshua to go with Appellant either. 2 AA 485-86. Moreover, Michael Joshua's grandfather, his other legal guardian, testified that Appellant did not have permission to take Michael Joshua to the store with him. 3 AA 712-13. He even testified that he was concerned that Appellant was impaired from cold medicine. 3 AA 698. Even with Michael Joshua's grandfather yelling, and trying to get Appellant's attention by hitting him, Appellant nonetheless ignored him, and instead, physically took Michael Joshua from the house and threw him into the passenger seat of his car. 3 AA 502, 706-07. He even tried slamming the car door shut on Michael Joshua, however Michael Joshua was able to use his legs to prevent the door from closing. 3 AA 504.

Finally, Appellant acknowledged that his mom, Michael Joshua's grandmother and legal guardian, called 9-11 during this incident and told the operator that Appellant was forcing Michael Joshua into the car and did not have legal authority to even be at the house. 5 AA 1020. Appellant further acknowledged that his mother called him while he was in custody and told him that she had custody of Michael Joshua and Appellant did not have permission to take Michael on the day this incident occurred. 5 AA 1022. Thus, once Appellant moved/took Michael Joshua with the intent to keep/confine him from his legal guardians, without permission to do so, the kidnapping was complete. As such Appellant's argument that he was unsuccessful in leaving is of no consequence. AOB 30. Accordingly, it is clear that the State presented sufficient evidence to demonstrate that Appellant took Michael Joshua from the house to his car, with the intent of keeping and confining him from his legal guardians while they allegedly went to the store.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Appellant's Judgment of Conviction.

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Dated this 20th day of July, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 5,534 words and does not exceed 30 pages.
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.

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Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 20, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

KAREN K. WONG, ESQ.
Counsel for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

/s/ E.Davis
Employee, Clark County
District Attorney's Office

SSO/Bryan Schwartz/ed