IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN DALE FARMER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 65935

RESPONDENT'S AMENDED ANSWERING BRIEF

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

DEBORAH L. WESTBROOK
Deputy Public Defender
Nevada Bar #009285
309 South Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

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 ISSUE(S)

1. WHETHER THE DISTRICT COURT ERRED IN GRANTING THE STATE'S JOINDER MOTION AND DENYING THE DEFENSE'S MOTION FOR SEVERANCE.
2. WHETHER THE DISTRICT COURT UNREASONABLY RESTRICTED APPELLANT'S CROSS-EXAMINATION OF SEVERAL STATE WITNESSES.
3. WHETHER THE DISTRICT COURT ERRED IN ADMITTING M.P.'S DEPOSITION AT TRIAL.
4. WHETHER THE STATE COMMITTED PROSECUTORIAL MISCONDUCT.
5. WHETHER THE TRIAL COURT ERRED IN ADMITTING CERTAIN EVIDENCE AND EXCLUDING OTHER EVIDENCE.
6. WHETHER THE STATE'S WITNESSES VOUCHED FOR ONE ANOTHER.
7. WHETHER THE DISTRICT COURT DENIED DEFENDANT'S RIGHT TO A SPEEDY TRIAL.
8. WHETHER DEFENDANT'S SENTENCE AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT.
9. WHETHER CUMULATIVE ERROR OCCURRED.

STATEMENT OF THE CASE

On July 2, 2008, the State charged Steven Farmer ("Appellant") by way of Information in case C245739 with the follow: COUNTS 1 – 3, 5, 9, and 1 – Open or Gross Lewdness; COUNT 4 – Indecent Exposure; and COUNTS 6, 7, and 8 – Sexual Assault stemming from Appellant's care of several female patients as a Certified Nurse's Assistant ("CNA") at Centennial Hills Hospital. Volume I Appellant's Appendix ("I AA") 8-11. On November 19, 2008, after learning of an additional victim, M.P., the State charged Appellant by way of Grand Jury Indictment in case C249693 with the following: COUNTS 1 and 3 – Sexual Assault; COUNTS 2, 4 and 5 – Open or Gross Lewdness; and COUNT 6 – Indecent Exposure. Id. at 86-89.

On March 8, 2010, the State filed a Motion to Consolidate the charges in both cases. II AA 225-50. Appellant countered with a Motion to Sever the charges as they related to each individual victim, of which there were six. Id. at 269-88. The District granted the State's Motion to Consolidate and denied Appellant's Motion to Sever, except with respect to victim F.R. , the only victim as to whom the charges did not arise in the course of Appellant providing medical care. IV AA 710-35. Accordingly, on July 8, 2010, the State filed an Amended Information containing the same COUNTS 1 through 9 as contained in the Information filed in C245739, and adding the charges related to M.P.as COUNTS 10 through 15. II AA 289-93.

On March 17, 2010, the State filed a motion to conduct a videotaped deposition of victim M.P., due to M.P.'s severe seizure disorder and concerns that she may suffer a seizure while testifying at trial, as she had during Grand Jury proceedings. II AA 246-50. The court granted the motion, and a videotaped deposition of M.P. was conducted on January 20, 2012. V AA 784-835. Appellant's counsel cross-examined M.P. during the deposition. See Id.

Unfortunately, on July 13, 2013, prior to trial, M.P. passed away. III AA 411. Accordingly, on January 16, 2014, the State filed a motion to use M.P.'s videotaped deposition at trial. Id. at 409-13. Appellant opposed the motion. Id. at 414-18.

Appellant's jury trial began on February 3, 2014. V AA 866. On the eleventh day of trial, M.P.'s videotaped testimony was played for the jury, and transcribed copies of the deposition were also distributed to each juror. XIII 2584-88. On February 28, 2014, the jury found Appellant not guilty as to COUNTS 3 and 7, and guilty as to remaining counts. III AA 483-85.

On May 28, 2014, Appellant was sentenced to 12 months in the Clark County Detention Center on each of COUNTS 1, 2, 4, 8, 9, 11, 13, 14 and 15, respectively, to run concurrent to one another, and received one concurrent and three consecutive sentences of ten years to life imprisonment in the Nevada Department of Corrections with respect to COUNTS 5, 6, 10 and 12, respectively. Id. The Judgment of Conviction was filed on August 2, 2014. Id. The instant appeal followed.

STATEMENT OF THE FACTS

In March of 2008, M.P. suffered a traumatic brain injury and was left with a severe seizure disorder that prevented her from living a normal life. V AA 786. Soon thereafter, on May 13, 2008, M.P. was rushed to Centennial Hills Hospital in Las Vegas after suffering an unexpected seizure in the parking lot of a nearby grocery store. Id. at 788. M.P. remained at Centennial Hills for ten days. Id. at 788-89. M.P.'s frequent seizures left her unable to move or talk for up to 24 hours after they occurred, although she would remain alert and aware of what was going on around her. Id. at 787.

During her hospital stay, M.P. encountered Appellant, who was employed as a Certified Nursing Assistant at Centennial Hills. Id. at 789. One night, Appellant entered M.P.'s room and introduced himself, but because she had suffered a seizure the night before, M.P. was unable to respond. Id. at 790. However, M.P. could clearly understand what Appellant was saying. Id.

On one occasion. M.P. awoke to the feeling of somebody pinching her nipples, and opened her eyes to find Appellant standing over her and claiming that one of the leads attached to her heart monitor had become disconnected from her chest. Id. at 791. However, M.P. knew that had this in fact been the case, the machine would have made a noise as an alert, and M.P. heard no such alert. Id. at 791-92.

On another occasion, M.P. awoke to find Appellant pulling the sheets off of her and repeatedly lifting up her hospital gown high enough to view her entire nude body. Id. at 794-95. Appellant then walked around to the side of M.P.'s hospital bed, claimed there were "feces" on her, and lifted up her leg. Id. at 795. Rather than obtain wipes or pads to clean M.P. with, Appellant inserted his bare thumb into her anus. Id. M.P. could not move her head to view Appellant's hands, but she then immediately felt pressure inside her vagina as well, and knew Appellant had penetrated her vagina with at least one of his fingers. Id. at 796-97. Although the penetration was painful and humiliating, a shocked and incapacitated M.P. was unable to move or call for help. Id. at 797-98. As soon as M.P. regained the ability to speak, she informed her two sons of what Appellant had done to her. Id. at 800.

Tragically, in July of 2013, M.P. took her own life. See XV 2830-31. Thus, she was unavailable to testify at trial. However, as mentioned above, M.P.'s videotaped deposition, during which she testified to the facts set forth immediately above, was played for the jury. XIII 2584-88. One of M.P.'s sons also testified regarding his mother's condition and her account of Appellant's crimes against her. Id. at 2552-81.

Less than a week after Appellant assaulted M.P., on the evening of May 15, 2008, R.C. was also rushed to Centennial Hills after suffering two seizures. X AA 1829-30. Around 10:00 pm, R.C. had another seizure while in the emergency room.

Id. at 1831. Because emergency room physicians were quite worried about R.C.'s condition, R.C. was formally admitted to the hospital around 1:00 am. Id. 1831-33. Thereafter, Appellant transported R.C. from the emergency department to a different floor. Id. at 1872.

Though Appellant had been polite and attentive in the emergency room in the presence of other staff members, once alone in the elevator with R.C., his demeanor changed. Id. at 1868-69, 1872. Appellant repeatedly "adjusted" the blankets covering R.C. in her hospital bed, and rubbed her bare thigh as he did so. Id. at 1873. R.C. was clad in a hospital gown only, with no undergarments. Id. at 1869-70. Appellant told R.C. several times that she needed to "relax," and that the seizure medication she had been giving should be making her drowsy. Id.

When Appellant and R.C. left the elevator and arrived at a hospital room, Appellant continued to "adjust" R.C.'s blankets and told her it was "procedure" for him to relax her. Id. at 1875. Appellant then reached his hand under R.C.'s blanket and penetrated her vagina with his fingers, and told her to "sit back and relax," because it was "procedure." Id. R.C. became frightened, and "froze" as the penetration became more aggressive and painful. Id. at 1876. When Appellant finally stopped, he began touching and squeezing R.C.'s breasts underneath her gown, and telling her how "beautiful" she and her breasts were. Id. at 1876-78. Appellant then placed his mouth and tongue on R.C.'s vagina. Id. at 1878-79. When R.C. repeatedly

asked Appellant to stop, he stated it was "procedure" and "just to relax." Id. R.C. attempted to take pictures of Appellant's behavior with her cell phone as proof of what Appellant had done to her. Id. at 1880.

When Appellant left R.C.'s room, she called her husband, S.C., and begged him to come to the hospital because something had happened to her. Id. at 1882. Around 7:00 am, a female nurse came to R.C.'s room, and R.C. asked the nurse to "call the cops or to get someone in charge." Id. at 1884. R.C. then informed a responding staff member of what Appellant had done. Id. The staff member indicated she was not going to call the police, so S.C. called them when he arrived at the hospital. Id. at 1885. Detectives arrived shortly thereafter and interviewed R.C. Id. at 1886. R.C. was then taken to a Sexual Assault Nurse Examination. Id.

On the same day, H.S. was also rushed to the Centennial Hills emergency room after experiencing a seizure. IX AA 1707-9. Like he had done with R.C., Appellant transported H.S. from the emergency room to a private room on a different floor once she was formally admitted to the hospital. Id. at 1712. The EKG leads applied while in the emergency room were still attached to H.S.'s upper chest and below her breast line. Id. at 1714. While in the elevator alone with H.S., Appellant stated they should "take off the patches because the longer they're on, it will hurt more when they come off." Id. at 1714-15. Appellant then opened H.S.'s hospital gown, fully exposing her breasts, and brushed his arm against her breast

while removing some of the patches. Id. at 1717-18. H.S. became uncomfortable and immediately closed her gown. Id. at 1718.

Only a few weeks before these incidents, on April 26, 2008, L.S. was also rushed to the Centennial Hills emergency room due to a suicide attempt. XII AA 2273. During L.S.'s stay at Centennial Hills, Appellant was partially responsible for her care. See Id. at 2276. On one occasion, Appellant entered L.S.'s hospital room and as she lay in bed, and pressed his genital area against L.S.'s feet while moving in a circular motion. Id. at 2277-78.

On May 16, 2008, D.H. was taken to the Centennial Hills emergency room while suffering an asthma attack. Id. at 2372-73. As D.H. lay in a hospital bed wearing only underwear and a hospital gown and with EKG leads stuck to her chest, Appellant entered the room and opened her gown, exposing her breasts. Id. at 2373-77. Appellant began "checking" and pressing on the leads stuck to D.H.'s abdominal and chest area, despite the fact that D.H. had just been seen by a nurse and there was no indication that the EKG leads or the EKG machine itself needed any adjustment or was not working properly. Id. at 2378-79. Conveniently, Appellant ignored the EKG leads stuck to D.H.'s arm and ankle. Id. While pressing on the leads on D.H.'s chest, Appellant brushed his arm against D.H.'s breast. Id. at 2739-40.

SUMMARY OF THE ARGUMENT

The trial court correctly granted the State's motion to join the charges against Appellant related to various victims, because as the crimes occurred in a similar manner within a short period of time and with an identical modus operandi, they were part of a common scheme or plan. Joinder was also proper because each charge would be cross-admissible in a trial for any other charge to demonstrate motive, opportunity, intent, and lack of mistake or accident. The trial court did not unreasonably restrict the scope of cross-examination of several State witnesses, as the court was permitted to constrain Appellant's irrelevant and repetitive lines of questioning of R.C. and S.C., M.P., and Margaret Wolfe. Accordingly, M.P.'s recorded pre-trial deposition was properly admitted at trial, where M.P. was unavailable, because Appellant indeed had a prior opportunity for effective cross-examination and therefore Confrontation Clause concerns were not implicated.

The State did not commit prosecutorial misconduct because it did not vouch for the credibility of witnesses during closing argument, but merely reiterated the testimony of certain witnesses and did not place the prestige of the government behind those witnesses by expressing personal opinions as to credibility. Further, the State did not disparage the defense by permissibly explaining how the evidence presented undercut Appellant's theory of defense. Any possible misstatement of the evidence did not amount to misconduct where the jury was repeatedly admonished

and instructed to base their deliberations on the evidence as they interpreted and remembered it. The State's pointing out that Appellant appeared to change his theory of the case at the last minute, for the first time during closing argument, did not amount to shifting the burden of proof as the State did not comment that Appellant had failed to produce evidence or call a witness.

The court did not err in admitting certain evidence, as each piece of evidence at issue was relevant and did not create unfair prejudice. Victim impact evidence regarding how Appellant's assault affected R.C. and H.S. was relevant to witness credibility, and therefore admissible. Therefore, no "curative" instruction was necessary, and failure to provide one was not error. Moreover, because Appellant stipulated that M.P.'s diary would not be admitted, he should be precluded from arguing that it was error for the court not to admit the diary. Further, brief testimony on Appellant's HIPAA violation was not impermissible bad act evidence as it was relevant to show that Appellant attempted to cover up his assault on R.C.

The State's witnesses did not improperly vouch for one another, because none offered an opinion or even an implication regarding the credibility of other witnesses. Appellant's speedy trial right was not violated because, under Barker v. Wingo, any delay in trial was directly attributable to Appellant. Because Appellant was properly sentenced within statutory limits, his sentence is not cruel or unusual. Finally, as Appellant fails to establish any error, no cumulative error occurred.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY GRANTED THE STATE'S JOINDER MOTION AND CORRECTLY DNIED APPELLANT'S MOTION FOR SEVERANCE

Appellant first alleges the District Court erred when it denied his pre-trial Motion to Sever the charges against him and granted the State's Motion to Consolidate the two cases against him. Appellant's Opening Brief ("AOB"), p. 14.

Prior to trial, the State filed a Motion to Consolidate case C249693 regarding M.P., and case C245739 regarding the other victims. 2 AA 225-45. The State argued all charges could be joined as a "common scheme or plan" and as "connected together" within the meaning of NRS 174.113. Id. Appellant countered with a Motion to Sever the charges as to each victim. 2 AA 269-288. The District Court granted the State's Motion and denied Appellant's Motion, except with respect to victim F.R. , who was allegedly assaulted by Appellant in a much different context than his role as a CNA. IV AA 710-35. The court correctly found that the charges arose from a common scheme or plan in that that Appellant "was a CNA, had the access, used that access, and used that position as a CNA to gain access [to the victims]" and that accordingly, they could be joined. Id. at 726-7.

A. Joinder of the Charges Was Proper Under the Common Scheme or Plan Doctrine.

The decision to join or sever charges is within the trial court's discretion, and "an appellant carries the heavy burden of showing that the court abused that

discretion." Weber v. State, 121 Nev. 554, 119 P.3d 107, 119 (2005). Pursuant to NRS 173.115, "[t]wo or more offenses may be charged in the same indictment or information" where they are "based on the same transaction" or are "[b]ased on two or more transactions connected together or constituting parts of a common scheme or plan." This Court has described a scheme as "a design or plan formed to accomplish some purpose; a system," and a plan as "a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. Method of putting into effect an intention or proposal." Weber, 121 Nev. at 572, 119 P.3d at 120. This Court has further recognized that while "purposeful design is central to a scheme or plan," it is not required that "every scheme or plan must exhibit rigid consistency or coherency." Id. at 572, 120.

This Court has found that severance is generally disfavored, and that a court must consider "not only the possible prejudice to the defendant, but also the possible prejudice to the State resulting from expensive, duplicitous trials." Rodriguez v. State, 117 Nev. 800, 808, 32 P.3d 773, 779 (2001).

In Griego v. State, 111 Nev. 444, 893 P.2d 995 (1995), this Court found joinder was proper where a defendant sexually assaulted three young boys in separate incidents, which the defendant argued were not part of a common scheme or plan. The Court stated:

> [The incidents] constituted transactions which constituted part of a common scheme under NRS 173.115 for the

> following reasons: the count involving Robert C. took place during the same time period as the other counts; the victims were all young boys; the victims were all friends of the Griego children; and Griego allegedly assaulted all three boys in Griego's home.

Griego, 111 Nev. at 449, 893 P.2d at 999.

Similarly, in Willett v. State, 94 Nev. 620, 584 P.2d 684 (1978), the defendant engaged in oral sex with a minor male victim while volunteering at a children's home. Id. The trial court allowed evidence that on a separate occasion in the same month, the defendant visited a different home for boys and performed oral sex with a different minor boy, because the evidence demonstrated a common scheme or plan in that both incidents were close in time, and the circumstances and modus operandi were similar. Id.

In Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996), this Court upheld the joinder of two automobile burglaries committed 17 days apart, at different locations with different victims. The Court further approved of the joinder of a store burglary that occurred on the same day as the second automobile burglary. Id. at The Court reasoned that "the district court certainly could determine that the two vehicle burglaries evidenced a common scheme or plan. Both of the offenses involved vehicles in casino parking garages and occurred only 17 days apart." Id. at 268, 606.

In the instant matter, the District Court did not abuse its discretion in denying Appellant's motion to sever. The facts of this case are highly similar to those present

in Griego and Willett. Here, Appellant was charged with separate instances of conduct against multiple victims who were all under his care as a CNA at Centennial Hills Hospital within a short period of time. See III AA 448-52. As explained in the Statement of Facts, supra, each offense occurred at the same location, almost always upon a patient who had just suffered a seizure and was therefore somewhat incapacitated, by the same general methods, and under the guise of patient "care." Moreover, after the Court severed the charged as to F.R., each charge contained in the Second Amended Information arose from incidents occurring within a short window of time between April and May, 2008. See Id.

This Court made clear in both Willett and Tillemma that a common scheme or plan warranting joinder may exist even where crimes were committed weeks apart, in different locations, perpetrated against different victims, where the defendant's modus operandi is consistent. Here, it is undeniable that not only were the crimes committed in the same location within a short period of time, by the same means and in nearly identical fashion, but the Appellant's modus operandi was consistent in each crime. Accordingly, the District Court did not abuse its discretion by finding that a common scheme or plan existed for purposes of NRS 174.113.

B. Joinder Was Proper Under the "Connected Together" Doctrine.

The charges were also properly joined as "connected together" under NRS 174.113. Two crimes are connected together if "evidence of either crime would be

admissible in a separate trial regarding the other crime." Weber, 121 Nev. at 573, 119 P.3d at 120. Because each offense is considered a "prior act", the "connected together" cross-admissibility analysis is conducted pursuant to NRS 48.045(2), which states that evidence of uncharged acts is inadmissible to prove criminal propensity, but may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Thus, if each joined charge would be admissible pursuant to these provisions in a trial for any other charge, joinder is proper.

This Court has recognized the value of evidence of other crimes and has upheld its admissibility in sex cases. In McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1985), the defendant appealed his conviction for Infamous Crime Against Nature. In its case in chief, the State was permitted to present evidence that the Defendant and his 13 year old victim had engaged in oral sex both prior to and subsequent to the incident relating to the defendant's arrest. In affirming the defendant's conviction, this Court found there was no abuse of discretion because the evidence tended to prove absence of mistake or accident, and "the acts were similar, were committed within a period immediately preceding and following the instant offense." Id. at 190.

In Griego, supra, this Court found that multiple charges for separate assaults were "connected together" because the district court could have admitted the

evidence from the counts involving one of the victims in a separate trial on the counts involving the other victims. Specifically, the Court found that evidence of the offenses was cross-admissible because "several of the assaults took place in Griego's home, [and] the district court could have allowed the evidence to show that Griego had an opportunity to assault the children." Griego, 111 Nev. at 449, 893 P.2d at 999.

In Findlay v. State, 94 Nev. 212, 577 P.2d 867 (1978) (overruled on other grounds by Braunstein v. State, 40 P.3d 413 (2000)), this Court affirmed the introduction of evidence that the defendant had committed similar acts of lewdness with a child nine years earlier, in order to prove the defendant's lewd intent in sexually abusing a five year old girl in the case for which he was on trial. This Court stated, "[i]ntent, by reason of the words of the [lewdness with a minor] statute, is an element of the crime and directly placed in issue by the not guilty plea of the accused." Id. at 214, 868.

In the instant matter, all charges were connected together in that each would be admissible in a trial for any other charge. Specifically, each charge is cross-admissible to illustrate motive, opportunity, intent, and lack of mistake or accident. Indeed, each charge is relevant to prove that Appellant's intent and motive in touching the victims in a manner above and beyond that necessary to provide medical care was sexual gratification or arousal. Thus, the charges would also be

admissible to prove that the touchings were not accidental or a mistake, as Appellant had previously touched other patients in the same manner. Finally, similar to Griego, the charges would be cross-admissible to demonstrate that Appellant, who was often alone with vulnerable or incapacitated patients, had the opportunity to commit the crimes. Therefore, the charges were connected together and were properly joined.

C. Defendant Was Not Unfairly Prejudiced by Joinder of the Charges and Reversal is Not Required.

In the event this Court finds joinder of the charges was improper, reversal is nonetheless not required because Appellant suffered no unfair prejudice. Error resulting from misjoinder requires reversal only where it has "substantial and injurious effect or influence in determining the jury's verdict." Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

In order to establish that joinder resulted in unfair prejudice, a defendant must make "more than a mere showing that severance might have made acquittal more likely," and instead carries the "heavy burden" of demonstrating an abuse of discretion by the district court. Weber, 121 Nev. at 575-76, 119 P.3d at 121. Essentially, a defendant must demonstrate that "the jury improperly accumulated evidence against him, that it used the proof of one count improperly to convict him of another count, or that the joinder prevented him from testifying on any charges." Floyd v. State, 118 Nev. 156, 165, 42 P.3d 249, 255 (2002). This Court has held that "[w]hen some potential prejudice is present, it can usually be adequately addressed

by a limiting instruction to the jury." Tabish v. State, 119 Nev. 193, 304, 72 P.3d 584, 591 (2003).

In Weber, this Court found that Weber failed to demonstrate prejudice resulting from joinder because the following jury instruction was given:

> Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other . . . offense charged.

Weber at 575, 122. The Court noted that Weber had given "no reason to abandon the customary presumption that his jury had followed this instruction." Id. In Mitchell, this Court found that the jury's acquittal of the defendant on certain sexual assault charges contained in an information indicated that the trial court's erroneous failure to sever the charges had no substantial or injurious effect on the verdict. 105 Nev. at 739, 782 P.2d at 1342.

Here, importantly, a jury instruction *identical* to that in Weber, was given. III AA 457. Accordingly, Appellant's contention that the instruction given was "weak" and "inadequate" is blatantly contrary to this Court's standing precedent. See AOB, p. 28. Furthermore, Appellant has offered nothing to trump this Court's customary presumption that the jury followed such an instruction, as despite his lengthy tirade regarding the State's closing argument, he fails to demonstrate that the jury's verdict on any count was influenced by its finding on any other count. Indeed, as in Mitchell,

the opposite is demonstrated by the fact that the jury considered each count separately in that it found Appellant not guilty of Counts 3 and 7. Id. at 483-485. Accordingly, Appellant has failed to establish unfair prejudice, and his conviction should be affirmed.

II
THE DISTRICT COURT DID NOT UNREASONABLY RESTRICT CROSS-EXAMINATION

Appellant next alleges the District Court erred in unreasonably restricting the scope of Appellant's cross-examination of several State witnesses. AOB, p. 28.

The Confrontation Clause of the Sixth Amendment "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Chavez v. State, 125 Nev. 328, 338, 213 P.3d 476, 483 (2009) (emphasis in original). Accordingly, "trial judges retain wide latitude to restrict cross-examination to explore potential bias based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Leonard v. State, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001) (internal citations and quotations omitted).

Pursuant to NRS 48.025, irrelevant evidence is inadmissible. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would

be without the evidence." NRS 48.015. The determination regarding whether evidence is relevant and admissible lies within the sound discretion of the trial court, and will not be disturbed on appeal absent a clear abuse of that discretion. Crowley v. State, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004).

A. The Court Did Not Unreasonably Restrict Cross-Examination of R.C. and S.C.

Appellant first contends the District Court erred in unreasonably restricting the cross-examination of victim R.C. and her ex-husband S.C. when the court did not allow Appellant to question either witness regarding several irrelevant topics related to their divorce. AOB, p. 30.

Prior to trial, on January 28, 2014, the State filed a motion to limit cross-examination of R.C. and S.C. III AA 442-47. The State explained it had recently learned, upon reviewing Appellant's discovery provided on January 23, 2014, that the defense may attempt to question R.C. and S.C. regarding domestic violence and/or child abuse issues that may have occurred in their marriage, pornographic movies that may have been created by either witness, and any possible infidelity in the relationship. Id. at 446-47. Defense counsel had gleaned information related to these topics from a review of filings in R.C. and S.C.'s divorce case which, obviously, was unrelated to the instant matter. Id.

At a hearing on the motion, Appellant's counsel argued that the accusations contained in court documents filed in R.C. and S.C.'s divorce proceedings were

relevant to attacking R.C. and S.C.'s credibility in *this* case, because the various accusations by R.C. and S.C. against one another of child abuse, infidelity, etc. as contained in the divorce filings were "false." When asked how the defense knew the allegations were "false," defense counsel replied "[w]ell, we…we don't." VI AA 1007. The State acknowledged that Appellant's theory of the case was that R.C. and S.C. fabricated the allegations against Appellant in this matter in order to file a civil suit against Centennial Hills Hospital from which they could recover financially. Id. at 1005. The State explained that, while it had no opposition whatsoever to Appellant inquiring about R.C. and S.C.'s financial situation on cross-examination, questions regarding domestic violence, child abuse, pornographic films, or infidelity as contained in the divorce filings unrelated to this case were wholly irrelevant to that subject, and not a proper method of attacking a witness's character for truthfulness. Id. The court found the areas of inquiry were irrelevant and granted the State's motion, but specified that if the issues did come up at trial, they could be addressed again at that time. Id. at 1015.

The District Court's exclusion of the evidence gathered from R.C. and S.C.'s divorce proceedings did not constitute an abuse of discretion, as it was wholly irrelevant and therefore inadmissible. First, Appellant's contention that his counsel was prevented from "meaningfully challenging" R.C.'s testimony that she attempted suicide because of Appellant's assault against her is absurd. See AOB, p. 31. Plainly,

R.C. and S.C.'s divorce filings would have no tendency to make the existence of that particular fact any more or less true. R.C. testified that Appellant's assault made her feel like she "wanted to die." X AA 1893. In no way would cross-examination regarding her marriage determine whether or not *Appellant's assault* actually made R.C. feel that way, as possible child abuse or infidelity is unrelated to the impact sexual assault in particular had on R.C.'s wellbeing. Indeed, whether R.C. abused her children or filmed pornographic videos does not tend to make her assertion that she wanted to die as a result of Appellant's abuse any less true. Rather, cross-examinations on these subjects would have amounted to an irrelevant and improper character assassination. Accordingly, Appellant was not prejudiced by being precluded from such questioning.

The same is true with regard to Appellant's argument that he was unduly constrained in cross-examination of S.C., who testified that the assault was "***one of*** the contributing factors" to R.C. and S.C.'s divorce. XI AA 2124-25 (emphasis added). Plainly, whether or not there was abuse or infidelity in R.C. and S.C.'s marriage is irrelevant to whether Appellant's assault on R.C. was **one** contributing factor to divorce. Had S.C. testified that it was the *only* contributing factor, and the divorce filings clearly belied that statement, then Appellant would have had more leeway to impeach S.C.'s credibility with the contents of the divorce filings. However, S.C. clearly indicated the assault on R.C. was merely one factor of several.

Thus, Appellant was properly precluded from discussing the contents of the divorce filings on cross-examination.

Appellant next appears to suggest that the fact that R.C. was a party to an unrelated civil lawsuit at some point prior to the events at issue,[1] and was represented by Neil Hyman, Esq., indicates R.C. was a "biased" witness in the instant matter. AOB, p. 33. Accordingly, Appellant argues the defense should not have been precluded from cross-examining R.C. regarding the details of the lawsuit when, at trial, she referred to Mr. Hyman as a "friend' rather than as a former attorney. Id. However, Appellant fails to set forth any reasoning for this claim. Insofar as Appellant claims R.C.'s participation in a civil lawsuit against a former employer was relevant to the instant matter, the State contends that the only possible reason to introduce such evidence would be to impugn R.C.'s character and make her appear overly litigious, which is clearly prohibited. Plainly, the fact that R.C. has in the past been involved in a lawsuit is not relevant to whether Appellant sexually assaulted R.C.

As mentioned, Appellant takes issue with R.C. calling Mr. Hyman a "friend," contending this statement warranted allowing the defense to impeach R.C. by showing that Mr. Hyman was not actually a friend, but her former attorney. AOB,

[1] The previous lawsuit at issue was a wrongful termination lawsuit instituted by R.C. against a former employer, who terminated R.C.'s employment after she fell and had a seizure at work. X AA 1903-4.

p. 33. However, R.C. testified that she had been acquainted with Mr. Hyman "long before" she sought his professional services in the former civil lawsuit. X AA 1906. Thus, it is plain that the relationship between R.C. and Mr. Hyman could have indeed originated as friendship, to which the attorney-client relationship was incidental. Accordingly, an innocuous statement that Mr. Hyman was a "friend" in no way reflects on R.C.'s credibility. Thus, the District Court did not err in precluding the irrelevant questioning.

Appellant next argues the District Court restricted cross-examination of R.C. regarding her recollection of various visits to her hospital room by night nurses after the assault. AOB, p. 33. However, the record makes clear that the court correctly found these questions were asked and answered:

> [Defense]: …Now, you said that the first nurse who came in, that's who – that's who you said everything to?
>
> [R.C.]: Yes.
>
> …
>
> [Defense]: Okay. Okay. You don't remember – you don't remember not one, but two nurses, Christine Murray and Carine Brown coming in at 4:45?
>
> [R.C.]: Nope. **I don't remember** them unless I was sleeping and they didn't wake me because **I don't remember** them coming in at all.
>
> [Defense]: Okay. Okay. And you don't remember that obviously at 4:45 speaking with Christine

Murray and telling her that your headache is still not gone; correct?

[R.C.]: No, **I don't remember** –

[Defense]: Okay.

[R.C.]: -- seeing any nurses…until the nurse that I reported it to.

[Defense]: You don't remember…at 4:45 when Christine Murray and – her nursing assistant Ms. Brown show up in your room, you wouldn't have been in the bathroom on your own, would you?

[R.C.]: **I don't remember** even seeing them, so, no, I – **I don't remember** seeing them or talking to them.

[Defense]: Okay. So if…they said that when they walked in they found you in the bathroom and you were just complaining about your headache, then you don't remember any of that?

[R.C.]: **I don't remember any of that**… **I don't remember**… going to the bathroom and **I don't remember** talking to them.

[Defense]: Okay. Do you remember your nurse Ms. Murray coming in at 5:30 in the morning?

[R.C.]: **The only nurse I remember coming in, and I don't remember her name, was the nurse I reported it to.**

[Defense]: Okay. So you do not remember another visit at 5:30?

[R.C.]: **No**.

…

[Defense]: Do you remember at 5:40 a.m. another visit from Christine Murray for a pain assessment…

X AA 1953-55.

At this point, the State objected on the grounds that the questions had been asked and answered. Id. at 1955. The court sustained the objection, finding R.C. had indeed repeatedly indicated she did not remember any interactions with a nurse other than the nurse to whom she reported the assault. Id. at 1956-58. Defense counsel requested a mistrial, which the court declined to grant. Id. at 1958. The court informed defense counsel he could lay a foundation to admit the hospital records demonstrating the various nurses visits to R.C.'s room. Id.

Plainly, the court did not err by sustaining the State's objection. As in clear from the above exchange, R.C. indicated nearly *ten* times that she did not recall seeing or speaking to any nurse other than the nurse she reported the assault to. As mentioned, the district court may appropriately curtail cross-examination where it becomes repetitive, as it did here. Leonard, 117 Nev. at 72, 17 P.3d at 409. Thus, the District Court acted properly.

B. The Court Did Not Unreasonably Restrict Cross-Examination of M.P.

Appellant argues the court erred in restricting cross-examination of M.P. during her deposition when, in response to a State objection, the court found that to answer questions regarding potential effects of certain prescription medications on M.P.'s ability to perceive, M.P. would have had to qualify as an expert, precluding

Appellant from impeaching M.P.'s credibility regarding her ability to feel whether Appellant was assaulting her. AOB, p. 35.

Pursuant to NRS 50.275, testimony requiring "scientific, technical or other specialized knowledge" is appropriate for an expert "qualified…by special knowledge, skill, experience, training or education." Conversely, a non-expert witness may testify as to their opinion where it is rationally based on the witness's perception, and is "helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265.

In Nevada, testimony regarding the possible effects of prescription medication upon an individual is reserved for qualified expert witnesses such as physicians. See Whisler v. State, 121 Nev. 401, 116 P.3d 59 (2005) (defendant testified he had taken prescription medication but "felt normal," while expert witness, a forensic toxicologist, testified as to possible effects of the medications); Holderer v. Aetna Cas. & Sur. Co., 114 Nev. 845, 963 P.2d 459 (1998) (expert witnesses testified as to effects of psychiatric medications on individual's reflex and reaction time). Other courts have agreed. See Delane v. State, 369 S.W.3d 412 (Tex. App. 1st Dist. 2012) (trial court abused its discretion by allowing police officer to testify as to the effects of prescription medication on arrestee, because officer was not qualified to give such expert testimony); Comm. v. DiPanfilo, 2010 PA Super 59, 993 A.2d 1262 (2010)

(where effects of prescription medication are in issue, expert testimony *must* be presented if testimony is presented at all).

During the deposition, defense counsel questioned M.P. regarding the three prescription medications she was taking at the time of the assault. V AA 808-10. Defense counsel asked if M.P. was aware that the side effects of one particular medication – Dilantin – can include "confusion" and "delirium," and M.P. stated she was not. Id. at 809. Defense counsel asked if M.P. knew morphine could cause "a change in someone's awareness," and she stated she was not. Id. When defense counsel inquired about the effects of the mixture of these medications, the State objected that the topic was appropriate for an expert rather than a lay witness such as M.P. Id. at 810. The court agreed. Id.

The court acted properly because the effects of combined prescription medications on an individual's perception was not within M.P.'s knowledge as a lay witness. Rather, side effects and combined effects of prescription medications such as "delirium," "confusion" and a "change in perception" are within the area of expertise of an educated and trained physician or other medical professional, not a patient who simply takes the medications as prescribed in order to prevent seizures. Furthermore, the jury in fact heard expert testimony from Centennial Hills emergency room physician Kevin Slaughter, who testified regarding the possible

effects of various seizure medications including Dilantin, Phenobarbital and Dilaudid (a "stronger form of morphine"). X AA 1829-40.

Moreover, Appellant misrepresents the nature of M.P.'s testimony by implying that M.P.'s seizure disorder completely prevented her from being able to perceive, even while not having a seizure, that Appellant was penetrating her body. See AOB, p. 36. In fact, M.P. testified that while she was typically unaware of what was happening *during* a seizure, she became fully alert and aware immediately afterwards but was simply unable to move her body for some time. Id. at 787, 806. M.P. also testified that while at Centennial Hills, she could perceive pain and discomfort normally. Id. at 817. Thus, Appellant has misleadingly inflated the alleged need to impeach M.P. regarding her ability to perceive the assault. Appellant further misuses this misrepresentation in claiming the court erroneously precluded him from inquiring whether M.P. was aware that a doctor "noted" she had a limited ability to feel pain and discomfort while at Centennial Hills.[2] AOB, p. 36; V AA 817. Appellant fails to provide any citation to the record to demonstrate that any such "note" was made, and when the court sustained the State's objection for lack of foundation and facts not in evidence, defense counsel could not produce anything

[2] This Court should note that Appellant provides no support that this assertion was true when it was spoken by defense counsel, or that it is true now. AOB, p. 36; V AA 817.

to support the allegation. Id. Accordingly, the court properly curtailed questioning on the unsupported allegation.

Appellant next argues the court erroneously sustained two other State objections. AOB, p. 36. First, appellant challenges the ruling on the State's objection to questions regarding whether Appellant gave M.P. his "true name." The State noted this was outside the scope of M.P.'s knowledge in that she only knew the name Appellant gave her, not what his "correct" name was. V AA 811-12. The decision to sustain the objection was of no consequence, because it was clear from M.P.'s repeated testimony that Appellant introduced himself as "Steven" or "Steve," which is his correct first name. V AA 787, 811. Thus, this "key part" of Appellant's defense- that he gave his victims his correct name - was fleshed out and made clear. Moreover, to state that allowing M.P. to answer the question yet another time would have "impeach[ed] her allegations of sexual assault" is laughable. AOB, p. 37.

Second, Appellant argues the court erroneously sustained the State's objection to a question as to whether M.P. was "aware that a conviction in this criminal case will help the [civil] lawsuit" by M.P. against Centennial Hills. AOB, p. 37. Plainly, this was a speculative question for which defense counsel had no foundation. Moreover, to the extent counsel sought to impeach M.P. with discussion of the civil lawsuit, thereby calling into question her motives in this matter, counsel succeeded:

> [Defense]: … you currently have a pending lawsuit against Centennial Hills Hospital

regarding these allegations against Mr. Farmer, correct?

[M.P.]: Yes.

…

[Defense]: And you're suing the hospital for money, right?

[M.P.]: Right.

V AA 832-33. Thus, Appellant's cross-examination was not unreasonably limited, and his claim to the contrary should be rejected.

C. The Court Did Not Unreasonably Restrict Cross-Examination of Margaret Wolfe.

Appellant argues the court erred in precluding defense counsel from questioning Margaret Wolfe regarding her termination from Centennial Hills Hospital after she allegedly testified that Appellant violated hospital "protocols" and "policies." AOB, p. 38.

Ms. Wolfe, who worked as a nurse at Centennial Hills, testified that on May 16, 2008, she observed Appellant enter Denise Hanna's room for no apparent reason and expose D.H.'s breasts by opening her gown and reaching toward her chest, even though Appellant was not assigned to care for Ms. Hanna. XII AA 2334-41. Ms. Wolfe further testified this made D.H. visibly uncomfortable, and concerned Ms. Wolfe so much that she reported the incident. Id. at 2341-2. Ms. Wolfe explained her preferred methods of treating female patients so as to preserve privacy and

comfort. Id. at 2346-7. Contrary to Appellant's assertion, D.H. never testified that Appellant violated "hospital protocols" or "policies." Rather, she merely discussed her own methods and did not comment on whether Appellant's actions violated *any* standards.[3] Id. On cross-examination, counsel sought to question Ms. Wolfe on her employment at Centennial Hills being terminated after she brought her daughter into the hospital and administered an IV without admitting her daughter as a patient. Id. at 2348. The court found this "policy" violation was unrelated to the alleged "policies" Appellant violated, and therefore was irrelevant to Ms. Wolfe's credibility. Id. at 2348-52.

Because Ms. Wolfe's termination for an unrelated infraction was irrelevant to her testimony and credibility, the court did not err. Appellant asserts it was relevant to demonstrate Ms. Wolfe's "bias" against Centennial Hills, but fails to realize that illustrating such a bias, if in fact it existed, would have harmed his case rather than helped it. Were Ms. Wolfe was biased *against* Centennial Hills, one would assume she would be more inclined to testify on Appellant's behalf. Thus, any possible bias Ms. Wolfe harbored toward Centennial Hills was irrelevant to whether Appellant provided appropriate patient care, as a dislike of the hospital would not explain how Ms. Wolfe's testimony might be colored *against* Defendant, whose employment was

[3] Specifically, Ms. Wolfe testified as to the methods she uses when placing EKG leads on the chest of a female patient like Ms. Hanna, in efforts to keep from exposing the patient and making the patient uncomfortable. XII AA 2346.

also terminated. Further, because the infraction for which Ms. Wolfe was terminated was vastly different from that which Appellant committed, Ms. Wolfe's termination was rendered further irrelevant and properly excluded from Appellant's cross-examination.

D. Any Error Caused by the Court's Rulings With Respect to Cross-Examinations was Harmless.

Appellant was given a full opportunity to meaningfully confront the witnesses against him, yet harps on the court's refusal to allow him to engage in irrelevant, inappropriate questioning designed to accomplish nothing other than improperly attacking witness character where such character was not in issue. Appellant has failed to demonstrate that any of the court's appropriate restrictions, nor an accumulation of the restrictions, had any effect on the jury's verdict, and therefore has failed to establish prejudice.

III
THE DISTRICT COURT DID NOT ERR BY ADMITTING M.P.'S DEPOSITION

Appellant next argues the District Court erred in allowing M.P.'s deposition testimony to be played for the jury at trial, because Appellant was allegedly deprived of an opportunity for "effective" cross-examination during the deposition. AOB, p. 42.

As previously discussed, the deposition at issue was taken in lieu of trial testimony due to M.P.'s severe illness. V AA 784; III AA 412. M.P. gave sworn

testimony, and was cross-examined by Appellant's trial counsel, all of which was preserved by way of video recording. Id. at 785-835. M.P.'s unexpected death before trial rendered her unavailable. XIII AA 2572. Accordingly, the court allowed the State to introduce the deposition testimony at trial. II AA 308-309.

The Confrontation Clause bars admission of "testimonial" statements of a witness who does not appear at trial, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Only testimonial statements cause a declarant to be a "witness" for these purposes, and non-testimonial statements therefore do not implicate constitutional concerns. Davis v. Washington, 547 U.S. 813, 821, 126 S.C.t 2266, 2273 (2006). The term "testimonial" contemplates statements made in the course of law-enforcement interrogation, sworn testimony in prior judicial proceedings, or formal depositions under oath. Id. at 826, 2276. By contrast, it follows that "non-testimonial" statements are those which are not made for the purpose of gathering evidence for possible use in a later prosecution. See Medina v. State, 122 Nev. ___, ___, 131 P.3d 15, 20 (2006).

This Court has held that, when determining whether a statement is testimonial or non-testimonial, "it is necessary to look at the totality of circumstances surrounding the statement." Harkins v. State, 122 Nev. 974, 986, 143 P.3d 706, 714 (2006). In this regard, the Court has noted that a statement is testimonial if it "would

lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Flores v. State, 121 Nev. 706, 718, 120 P.3d 1170, 1178-78 (2005). Because non-testimonial statements are not subject to the Confrontation Clause, their admissibility is governed by the relevant jurisdiction's hearsay laws. Crawford, 541 U.S. at 60, 124 S.Ct. at 1374. As such, this Court "recognize[s] dying declarations as an exception to the Sixth Amendment Confrontation Right." Harkins, 122 Nev. at 982, 143 P.3d at 711.

With respect to the requirement of a prior opportunity for cross-examination in this context, this Court has held that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Chavez v. State, 125 Nev. 328, 338, 213 P.3d 476, 483 (2009) (emphasis in original). This Court has further stated:

> We will determine the adequacy of the opportunity on a case-by-case basis, taking into consideration such factors as the extent of discovery that was available to the defendant at the time of cross-examination and whether the magistrate judge allowed the defendant a thorough opportunity to cross-examine the witness.

Id. at 338-39, 484. This Court reviews confrontation clause violation claims *de novo*. Id. at 39, 484.

Here, Appellant's right to confrontation was not violated. Appellant fails to realize that, with the exception of the content of M.P.'s direct testimony at the deposition, none of the evidence or testimony he describes was testimonial in nature, or alternatively was not even introduced against him at trial. As previously explained in II (B), supra, the court did not unreasonably restrict Appellant's cross-examination of M.P. at the deposition. Thus, Appellant's right to the *opportunity* for effective cross-examination, which is all that is required by this Court, was not violated. Rather, as previously explained, counsel conducted a full cross-examination which included several attempts at impeaching M.P.'s credibility by challenging her ability to perceive Appellant's actions and her motives for accusing Appellant. This cross-examination was appropriately curtailed where it became irrelevant and repetitive, as is permitted by this Court. Accordingly, no Confrontation Clause violation occurred.

Furthermore, in considering "the discovery that was available to a defendant at the time of cross-examination," Appellant has not even *alleged* that the "information" he acquired after the deposition was unavailable at the time of the deposition. Rather, Appellant merely states his counsel "obtained additional information," and does not explain why such information was not obtained earlier. AOB, p. 43-646. Plainly, this does not equate to a deficient opportunity to cross-examine. Moreover, Appellant does not allege or indicate that any of this "new

information" was introduced at trial. With regard to the information pertaining to M.P.'s civil lawsuit against Centennial Hills in particular, the State has found no indication in the record that interrogatories and other pleadings were ever presented to the jury. Accordingly, as the evidence was never admitted against Appellant, there cannot possibly be a Confrontation Clause violation.

Appellant also notes that he was deprived of the opportunity to cross-examine M.P. regarding an excerpt from her diary, which he did not obtain until after trial had begun, and which the District Court allegedly admitted as a dying declaration. AOB, p. 46. First, Appellant apparently forgets that *he* attempted to introduce the diary, over the State's objection, as M.P.'s dying declaration. XIII AA 2509-24. Thus, if Appellant was in fact deprived of his right to cross-examine M.P. regarding the contents of the diary, he imposed that deprivation upon himself and is estopped from raising the issue here. See Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002) (where defendant invites error at the trial by making certain requests of the trial court, he is directly estopped from then raising that error on appeal).

Second, the diary was not actually admitted as evidence, but rather, the parties agreed to stipulate to a jury admonishment that the State was not setting forth the theory that M.P. committed suicide because of Appellant. XIII AA 2521-24. Further, Appellant stipulated before trial that the fact M.P. committed suicide would be admitted, therefore precluding him from now implying that the State's mere mention

of the suicide was improper. XIII AA 2511. Moreover, as Appellant argued at trial, the excerpt of the diary was intended by M.P. as a suicide note, and contained no mention of Appellant. See XIV AA 2829-31.Thus, plainly, it was not intended for use in a future prosecution and therefore was non-testimonial evidence. Appellant essentially admitted as much when he argued the statement was a dying declaration, which this Court has held is exempt from the ambit of Confrontation Clause concerns.

Additionally, Appellant makes a ludicrous claim that his right to confrontation was violated because he was not able to cross-examine the deceased M.P. regarding her reasons for committing suicide. AOB, p. 46. Plainly, committing suicide is not testimonial evidence, and therefore the Confrontation Clause is not implicated. Moreover, as explained above, the State and Appellant stipulated to a jury admonishment that the State was not setting forth the theory that M.P. committed suicide as a result of Appellant's conduct. Accordingly, Appellant was not entitled to an opportunity for cross-examination of a deceased person – which would have virtually, physically impossible – regarding the issue.

Similarly, M.P.'s son's testimony that his mother was afraid of male medical professionals following the assault was also not testimonial in nature, and does not implicate the Confrontation Clause. See AOB, p.47; XIII AA 2568. Surely, a statement made by an ill mother to her son for the purposes of medical treatment

was not made for possible use in criminal prosecution. See Medina v. State, 122 Nev. ___, ___, 131 P.3d 15, 20 (2006). Thus, Appellant was not entitled to a prior opportunity for cross-examination regarding this statement, and its admission did not implicate Confrontation Clause concerns. Accordingly, Appellant has failed to demonstrate any Confrontation Clause violation.

IV
NO PROSECUTORIAL MISCONDUCT WAS COMMITTED

Appellant next argues the State committed various instances of prosecutorial misconduct, each of which is addressed separately below. AOB, p. 47.

This Court employs a two-step analysis when considering prosecutorial misconduct claims. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the Court determines whether the prosecutor's conduct was improper. Id. Second, if the conduct was improper, the court determines whether it warrants reversal. Id. With respect to the second step, this Court will not reverse a conviction based on improper prosecutorial misconduct if it was harmless error, which in turn depends on whether the misconduct is of a constitutional dimension. Id. at 1188-89. Generally, error of a constitutional dimension requires impermissible comment on the exercise of a specific constitutional right, or repeated misconduct that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d at 476. If the error is not of a constitutional

dimension, the Court will reverse only if the error substantially affected the jury's verdict. Id.

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

A. The State Did Not Improperly Vouch for the Credibility of Witnesses.

Appellant first contends the State improperly vouched for the credibility of several witnesses during closing argument. AOB, p. 48. A prosecutor "vouches" for a witness by "plac[ing] the prestige of the government behind the witness by providing personal assurances of the witness's veracity." Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (citing United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992)) (internal quotations omitted). Where a prosecutor injects his "personal opinion" and "individual impressions" of a witness's credibility using

statements such as "*I think* [witness] was very candid," improper vouching occurs. Kerr, 981 F.2d at 1053.

Here, as is clear from the prosecutor's statements quoted by Appellant on pages 48-50 of his Opening Brief, no personal assurances of veracity or expressions of individual impressions were made. At no time did the prosecution state, or even imply, a personal belief as to witness credibility by using prohibited statements such as "*I think,*" etc., and therefore never "placed the prestige of the government" behind any witness. Rather, as plainly demonstrated by the quoted, the State simply reiterated the testimony of several witnesses and spoke of the circumstances surrounding those witnesses' accusations against Appellant. See AOB, p. 48-50. Importantly, Appellant did not object to any of the statements, further demonstrating that they were not even mildly objectionable. See Id. Thus, any reference to witness credibility by the State does not warrant reversal.

B. The State Did Not Improperly Disparage the Defense.

Next, Appellant complains the State wrongly "disparaged" the defense. AOB, p. 51. A prosecutor has a duty not to belittle the defendant or his case. Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995). Namely, a prosecutor should not disparage "legitimate defense tactics." Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989). However, this Court has held that it is proper for the prosecution "to state that…the defendant is not credible and then to show how the evidence

supports that conclusion." Id. Even where disparaging remarks are made, this Court generally will not reverse a conviction if there is substantial evidence against a defendant, and little evidence to support his theory of the case. Id.

Here, Appellant appears to advocate for a blanket rule that the State be precluded from commenting on the Defendant's credibility or case in *any* way, shape, or form. First, Appellant takes issue with the prosecutor's innocuous statement during rebuttal closing: "I'm sure you're all very familiar with the saying, 'fool me once, shame on you. Fool me twice, shame on me. Five times and Steven Farmer isn't fooling anyone." AOB, p. 51; XIV AA 2378. Arguably, just as defense attorneys often begin their opening statement or closing argument by referencing an old adage to remind the jury that "there's two sides to every story," this harmless adage is commonly used by prosecutors and plaintiff's attorneys in trial practice. The State is unclear as to how this comment constituted "ridicule" of Appellant or "asked the jury to consider Mr. Farmer's propensity to commit sex crimes," as Appellant fails to explain either conclusory allegation.

Importantly, the prosecution followed up the statement by explaining how the evidence demonstrated that Appellant abused his position as a CNA to covertly sexually assault several vulnerable patients under the guise of providing patient care. XIV AA 2738-41. Thus, the statement was plainly intended to demonstrate how Appellant's theory of the case was undercut by the evidence, as is permitted pursuant

to Barron, supra. The harmless statement simply did not rise to level of "ridicule," or constitute an allegation so prejudicial that it amounted to prosecutorial misconduct.

Appellant next contends the State "insinuated that defense counsel tried to hoodwink the jury by 'conveniently' leaving information out" of their discussion of the timeline of events as they relate to Appellant's assault on R.C. AOB, p. 52. Namely, in its rebuttal closing, the State noted that the defense failed to mention that at 3:51 am, R.C. was transported to the 7th floor of Centennial Hills hospital yet Appellant failed to notify other staff that this had occurred, thus allowing nearly an hour window in which Appellant could have assaulted R.C. before she was visited by other nurses at 4:45 am. XIV AA 2749-52. In closing, Appellant's counsel attacked R.C.'s credibility and version of events, yet failed to discuss what occurred at 3:51 am, and misleadingly stated that "at 4:45, she's on the seventh floor." Id. at 2699-703. Accordingly, the State sought to rebut the defense's argument by clarifying the true timeline of events, as is undeniably permissible in *rebuttal* closing. Surely, an accurate rebuttal and reiteration of specific evidence does not amount to prosecutorial misconduct.

Appellant argues the State impermissibly "belittled" Appellant's defense theory when, during rebuttal closing, the State responded to Appellant's contention that R.C.'s allegations were the "spark" that started a "fire storm" of allegations by

other victims. AOB, p. 53. Appellant claims such "belittling" occurred in the form of the State "sarcastically" telling the jury, while showing a photograph of R.C. from the shoulders up as she appeared during her SANE exam (XV AA 2834):

> And then you go to [R.C.]. According to the Defense, this is the master mind. What you see right here is the master mind of the demise of Steven Farmer, the spark that started the entire fire. You saw [R.C.]. You listened to her testimony, and you'll have to decide whether or not you think she's this master mind that the defense has made her out to be.

XIV AA 2746. Importantly, Appellant lodged no objection to this statement. See Id.

The record plainly demonstrates that the State was merely rebutting the defense's attack on R.C., and by default, their attack on the remaining victims who allegedly "misinterpreted" their interactions with Appellant. Indeed, this Court has found that where the State responds to issues raised by the defense in its closing argument, it does not commit prosecutorial misconduct. See Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997). Accordingly, it is unclear to the State how such a rebuttal, during the State's *rebuttal* closing, constituted improper "belittling" or "denigrating" of the defense. Moreover, it is curious that Appellant's counsel appears to be some sort of clairvoyant who, from a bare reading of the cold record, can discern that the State made the above statement "sarcastically."

Appellant further claims the State committed misconduct when it "denigrated" his theory of defense by stating, also in rebuttal closing:

> And then Mr. Maningo talked to you about this confirmation bias. Defense's theory is that, you know, it hits the news, and then other people see it, and then they think oh, if he did that to her, I've got to think back at what he did to me, and that – I have to think about those things, and then I, poof, oh, you're right, Steven Farmer did that to me.

XIV AA 2764. Appellant did not object, and now fails to disclose that the State immediately went on to explain how the evidence presented in this matter undercut the "confirmation bias" theory of defense, when it stated: "the media release, which was released to the public on May 16th, the only information they gave was the name of the Defendant…his physical description and a picture…they didn't give a time reference to when these things happened." Id. at 2765. The State discussed additional evidence and concluded, "[s]o the confirmation bias thing can't even apply to the people in this case." Id. at 2766. Plainly, the State was merely explaining how the evidence presented rebutted Appellant's defense theory, as this Court has explicitly held is proper pursuant to Barron. The same is true for the State's discussion of Appellant's "adjusting" the EKG leads of several other victims. See AOB, p. 54; XIV 2774. Thus, the State did not commit prosecutorial misconduct.

C. The Prosecution Did Not Misstate the Evidence in a Manner Amounting to Prosecutorial Misconduct.

Appellant argues the State mischaracterized evidence during its closing argument and rebuttal closing. AOB, p. 54. First, Appellant alleges the State erred by stating that "all three" witnesses – Ada Dotson, Ernestine Smith, and L.S.–

testified that Appellant pushed his groin against L.S.'s feet while she lay in a hospital bed, because Ms. Dotson did not so testify. Id. Appellant correctly points out that Ada Dotson did not in fact testify that she observed Appellant push his groin against L.S.'s feet. See XII AA 3335-44. However, Ms. Dotson did testify that she witnessed Appellant "holding onto" L.S.'s feet as L.S.lay in her hospital bed and Appellant stood at the foot of the bed, and that L.S. attempted to "scoot up" in the bed to get away from Appellant. Id.

Despite the minor inaccuracy, the prosecution's brief, one-sentence statement regarding Dotson's testimony cannot be deemed grounds for reversal, as it did not substantially affect the jury's verdict. Indeed, L.S. herself testified that Appellant stood at the foot of the bed, grabbed her feet, and moved his groin area in a circular motion against them. XII AA 2277-78. Ernestine Smith then also testified that she was present and witnessed Appellant hold L.S.'s feet against his "groin area" while moving his body against them. Id. at 2257-59. Moreover, before deliberating, the jury was instructed that "whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence *as you understand it and remember it*." III AA 482 (emphasis added). This Court presumes that the jury follows instructions they are given. See McConnell v. State, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004). Thus, in light of the other substantial witness testimony

and the jury instruction, it cannot be logically concluded that the prosecution's harmless misstatement amounted to prosecutorial misconduct worthy of reversal.

Appellant next alleges the state "mischaracterized" the nature of his phone conversation with Nurse Michelle Simmons. AOB, p. 55. Ms. Simmons testified that she called Appellant at home on May 16, 2008, and informed him she had received "a serious allegation against him regarding sexual abuse." XIII AA 2540. Appellant responded that he was "very sorry" and that he "assumed he was suspended" from employment. Id. at 2542. In closing, the prosecution stated:

> And then there's Michelle Simmons…she talks to Mr. Farmer…and she said there's been an allegation of very serious sexual abuse…and it's at the end of that conversation that he says I'm sorry, I'm just sorry. I assume I'm suspended. This is where that common sense has to kick in. Someone calls you at your home and says hey, you've been accused of raping someone, and you say I'm sorry?

XIV 2671-72. Defense counsel objected, and clarified that "[t]hat's not what the phone call was—what was discussed on the phone call. I believe that's a misstatement." Id. at 2572. The court noted that "the jury has been cautioned several times during trial, and I'll admonish you again, to rely on your own recollection of what the testimony was at – when you heard it on the witness stand, and you'll rely on that." Id. at 2672-73. Again, as discussed above, a written jury instruction was given instructing the jury to rely on their own recollection of the evidence regardless of "whatever counsel may say." III AA 482. Based on these considerations, it is plain

that the prosecution's comment did not substantially affect the jury's verdict, and therefore did not amount to prosecutorial misconduct.

The same is true for Appellant's claim that the State used an "improper" argument regarding the photographs R.C. claimed to have taken on her cell phone during the assault when it stated that "her phone…*may have* not been calibrated." XIV AA 2753. Plainly, the prosecution did not unequivocally state that R.C.'s phone was not calibrated, and made clear that the State was merely speculating. This, in combination with the considerations discussed in regard to the above claims, demonstrates that the comment did not amount to reversible prosecutorial misconduct, and Appellant's claims should be rejected.

D. The State Did Not Improperly Shift the Burden of Proof.

Finally, Appellant claims the State shifted the burden of proof when it allegedly "suggested defense counsel had failed to present evidence" that R.C.'s allegations against Appellant may have been a ploy for attention. AOB, p.57. This claim is notably meritless and misguided. As Appellant notes, the State may not shift the burden to the defense to prove any "ingredient" of an offense. Patterson v. New York, 432 U.S. 197, 215 (1977). The State does so when it comments on a defendant's failure to call a witness or present evidence. Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996).

Here, Appellant takes issue with a single statement by the prosecution during rebuttal closing: "[f]or the very first time in four weeks, [defense counsel] stood up here in his closing argument and told you well, if you're not going to bite off on financial distress, well, then [R.C.] did it for her husband's attention." AOB, p. 57; XIV AA 2747. To begin with, R.C.'s wanting to get her husband's attention is not an "ingredient" of any of the offenses charged in this matter. Second, the State absolutely did not suggest Appellant had failed to call a witness or present evidence. Rather, the State noted that the defense appeared to change its theory of the case at the last minute, as is clear from the State noting that the defense's closing argument was the first time the defense had set forth the theory. Plainly, this does not amount to burden-shifting, and Appellant's claim should be rejected.

V
THE DISTRICT COURT DID NOT ERR IN ADMITTING CERTAIN EVIDENCE

Appellant argues the District Court erroneously admitted various forms of prejudicial and "irrelevant" evidence, each of which is addressed separately below. AOB, p. 58.

Relevant evidence is generally admissible subject to other rules of evidence or constitutional limitations. NRS 48.014; 45.025. It is inadmissible where its probative value is "substantially outweighed" by the danger of unfair prejudice. NRS 48.035. This Court has stated that "because all evidence against a defendant will on

some level 'prejudice' (i.e. harm) the defense," evidence is only unfairly prejudicial where it appeals to "the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence." State v. Eighth Judicial Dist. Ct., 127 Nev. ___, ___, 267 P.3d 777, 781 (2011). A trial court has broad discretion to determine the admissibility of evidence, and this Court will not reverse such decisions absent manifest error. Baltazar-Monterrosa v. State, 122 Nev. 606, 613-14, 137 P.3d 1137, 1142 (2006).

A. The Court Did Not Err in Admitting Victim Impact Evidence Regarding H.S.

Appellant first contends the Court erred in allowing the State to question H.S. regarding how the assault affected her. AOB, p. 59. At trial, the State asked H.S. how Appellant's conduct "affected" and "impacted" her life after 2008. IX AA 1728. Appellant objected, and the State explained the question was relevant to H.S.'s credibility, i.e., determining whether she in fact was assaulted by Appellant. Id. at 1729. The court overruled the objection. Id. Regardless, the only explanation H.S. was permitted to give was that after Appellant assaulted her, she was afraid of male nurses. Id. The Court sustained two subsequent defense objections to the State's questioning before H.S. could offer a substantive response. Id.

The court did not err in allowing H.S. to state that she was afraid of male nurses, because such a fact was relevant to her credibility in that it tended to suggest Appellant did assault H.S. This Court's reasoning in Vega v. State, 2010 Nev. ___,

236 P.3d 632 (2010) is applicable here. In that case, the Court held the District Court did not err in allowing a sexual assault victim to testify that she attempted suicide twice as a result of the assault, because such testimony "was relevant as it had a tendency to establish that it is more probable than not that Vega had sexually assaulted the victim[.]" This reasoning is particularly applicable in light of the fact here, Appellant's theory of the case was, obviously, that H.S. had not been sexually assaulted and made inaccurate allegations. See XIV AA 2692, 2724. Accordingly, the State appropriately sought to show, by demonstrating the impact the sexual assault had on H.S.'s life, that an assault did occur. Thus, the testimony was relevant and admissible.

B. The Court Did Not Err in Admitting Victim Impact Evidence Regarding R.C.

Appellant makes a similar argument with respect to R.C.'s testimony regarding the impact the sexual assault had on her life. R.C. testified that as a result of the assault, she suffered anxiety which led her to consult with a psychiatrist, take anxiety medication, suffer nightmares, "disconnect" from her family, consult a local Rape Crisis Center, and eventually attempt suicide. X AA 1893-95. S.C. also testified as to R.C.'s behavioral changes following the assault. XI AA 2124. Given that Appellant's theory of the case was that R.C.'s accusations were not at all credible (XIV AA 2689-92), this testimony was directly relevant to R.C.'s credibility and the jury's determination of whether Appellant in fact sexually assaulted R.C.

Moreover, particularly with respect to R.C.'s testimony on her suicide attempt, Vega, supra, applies and authorizes such testimony as relevant and admissible. Appellant's contention that the testimony "created an inference that [M.P.] probably killed herself because of Mr. Farmer," is illogical because, as the State has previously explained, Appellant stipulated to a jury admonishment that eliminated any such inference. With respect to Appellant's claim that the court erred in precluding him from cross-examining R.C. and S.C. regarding this testimony, the State has already addressed this claim. Thus, the testimony was admissible and did not unfairly prejudice Appellant.

C. The Court Did Not Err in Not Offering a Curative Instruction, Because No Such Instruction Was Required.

Based on the alleged "errors" discussed above, Appellant attempted to persuade the court to proffer a jury instruction informing the jurors in part that they were "not to consider any purported changes in [witness's] behavior in the weeks, months, and years after the alleged incident." AOB, p. 65; III AA 490. As the State has demonstrated that the witness testimony regarding the effects of Appellant's sexual assaults was admissible and was not unfairly prejudicial as it did not create an inference that M.P. took her own life because of Appellant, no "curative" instruction was necessary.

D. The Court Did Not Err in "Refusing" to Admit M.P.'s Diary.

Appellant next argues the court erred by allegedly "refusing" to admit M.P.'s diary because a portion of it was redacted by M.P.'s attorney in her civil lawsuit against Centennial Hills. AOB, p. 67. Curiously, Appellant refers to the same diary he previously complained that he was not afforded the opportunity to cross-examine M.P. about, thus amounting to a Confrontation Clause violation. See AOB, p. 44. As this Court is aware, a true Confrontation Clause violation absolutely requires the *admission of evidence* against a Defendant. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Thus, Appellant now argues that the District Court erred in *not* admitting the very evidence which, if admitted, he previously asserted would have violated his constitutional right to confront M.P. The State notes that taking two such opposing and inconsistent positions within the same matter is generally improper.

As previously discussed, the defense moved to admit an excerpt of M.P.'s diary to show that her "suicide note" contained no mention of Appellant. XIII AA 2509-11. The defense argued the diary was admissible as a dying declaration, and the State objected. Id. Apparently, the defense obtained the diary from M.P.'s counsel in the civil suit against Centennial Hills. Id. at 2509. Accordingly, M.P.'s attorney in that case redacted portions of the diary in which M.P. had written about privileged attorney-client information related to that lawsuit. Id. at 2520; XV AA

2829-31. Because the significant redactions presented difficulty with laying foundation for the diary's admittance, the court suggested that rather than introducing the photocopied pages of the diary, the parties might stipulate to a jury admonishment that "the State is not advancing the premise that the suicide was the result of this sexual assault," which is what the defense sought to establish by introducing the portions of the diary. Id. at 2521. Defense counsel stated "we'll agree to that...the defense would certainly agree to the court's proposed stipulation… I think that's the cleanest way to go about it," thereby stipulating that the photocopied pages of the diary *would not be admitted*. Id. at 2521-23.

Plainly, Appellant has blatantly misrepresented the record to this Court in several respects. First, the District Court never "refused" to admit the diary. Rather, the court held a candid discussion with the parties, noted there were issues arising from the redactions and the best evidence rule, and began exploring possibilities for properly putting the diary's content before the jury. Before the court could "refuse" to admit the copies of the diary, the defense whole-heartedly stipulated to a jury admonishment rather than admission of the diary. Accordingly, Appellant should be precluded from raising this alleged "error" on appeal, as he waived any claim of error below. See Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002).

Moreover, Appellant's claim that admission of the diary was not precluded by NRS 47.120 because that rule "does not permit the court to exclude an entire

statement where an opposing party has redacted a portion of that statement for his own legal benefit," is illogical. To begin with, M.P.'s civil attorney, who was not a party to this case, cannot be deemed an "opposing party." As explained, that attorney, and not the State, was responsible for the redactions. Further, how the attorney stood to gain a "legal benefit" by protecting attorney-client privilege, as he is required to do by the Nevada Rules of Professional Conduct, remains a mystery to the State. Accordingly, no error arose from the diary not being admitted.

E. The Court Did Not Err in Admitting Evidence that Appellant Violated HIPAA Regulations.

Appellant claims the District Court erred in admitting evidence of "prior bad acts" in that at trial, Nurse Christine Murray briefly testified that Appellant's discussion of R.C.'s medical treatment in the presence of another patient violated HIPAA. AOB, p. 68; XI AA 20155. While during a bench conference the court advised the State to "lead [the witness] out of" that area of testimony and not inquire further about possible HIPAA violations, the court did not formally sustain the defense's objection to the testimony, nor did it agree that the evidence was inadmissible bad act evidence. Id. at 2055-57. Thus, it is unclear whether the State or the Court would have had any reason to request, or *sua sponte* provide, a curative instruction. This Court will not overturn a conviction based on a failure to provide a curative instruction on uncharged bad act evidence unless the error had a substantial

or injurious effect in determining the jury's verdict. Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1132 (2001).

To begin with, Ms. Murray's brief mention of Appellant's HIPAA violation did not constitute improper bad act evidence. NRS 48.045(2) provides that uncharged acts evidence, while inadmissible to prove criminal propensity, is admissible for non-propensity purposes. Here, the State explained that the HIPAA violation was relevant for a non-propensity purpose of demonstrating Appellant's attempt to "create a buffer" between the time Appellant assaulted R.C. and the time a different nurse went to check on R.C. XI AA 2066. Specifically, Ms. Murray testified that, while she was in a patient's room, Appellant came in and told her he had transported R.C. to the seventh floor, but that Ms. Murray "didn't have to worry about going to see her right away" because she was on several powerful medications and "wouldn't know if [Ms. Murray] was there or not." Id. at 2054. Ms. Murray stated that this sort of conversation in front of another patient violated HIPAA. Id. Thus, the testimony was relevant to show Appellant's motive and state of mind, i.e., that he knew such conversation was inappropriate but was desperately trying to create the "buffer" the State mentioned by engaging in such conversation in a fervent effort to avoid having his assault on R.C. discovered. Accordingly, the testimony was admissible for a non-propensity purpose.

Even if the failure to provide a curative instruction on the brief testimony was error, such error did not have a substantial or injurious effect on determining the jury's verdict and therefore does not warrant reversal. Indeed, two sentences of testimony regarding a minor HIPAA violation do not, standing alone, tend to suggest that Appellant has the propensity to sexually assault his patients. Plainly, mentioning that a patient is under the influence of prescription medication is a far cry from digitally penetrating or performing oral sex on vulnerable, incapacitated patients against their will, and the one does not tend to suggest a person has the propensity to commit the other. Thus, the lack of curative instruction cannot be said to have influenced the jury's verdict, and reversal is not warranted.

Appellant also claims the State improperly showed a photograph taken during R.C.'s SANE exam which apparently included some reference to the "date rape drug" phenobarbital.[4] AOB, p. 69. Appellant misleads this Court by claiming he objected to the photograph before the State's opening. See Id. Though Appellant did object to a *version* of the photograph early on, that version contained no reference to a "date rape drug," and Appellant objected merely on the grounds that in the photo, R.C. looked "quite down." VIII AA 1352. During SANE Nurse Linda Ebbert's testimony, the State apparently briefly showed a version of the photograph which

[4] Appellant has not included the challenged version of the photograph, thus it is somewhat unclear from the record how the photograph actually appeared to the jury.

listed phenobarbital, the medication R.C. was prescribed for seizures, as a "date rape drug" somewhere above the photograph. XI 2159-60. The State noted that multiple witnesses had already testified that R.C. was on phenobarbital due to seizures. Id. Further, just moments later upon cross-examination of Ms. Ebbert, defense counsel clarified that Ms. Ebbert had made a notation that R.C. was taking phenobarbital due to seizures. Id. at 2174-75. Finally, as Appellant correctly points out, the version of the photograph provided to the jury before deliberations contained no reference to any sort of medication, as the State had cured any possible defect in the photograph by that time. XV AA 2846. Thus, it cannot rationally be concluded that the reference to phenobarbital had any substantial or injurious effect on the jury's verdict, and reversal is not warranted.

VI
THE STATE'S WITNESSES DID NOT VOUCH FOR ONE ANOTHER

Appellant next alleges several State witnesses improperly vouched for the credibility of other witnesses. AOB, p. 69.

This Court has found that generally, vouching requires that a person "offer a specific opinion as to whether he believe[s] that the victim is telling the truth." Perez v. State, 129 Nev. ___, ___, 313 P.3d 862, 870 (2013). In Perez, this Court found that in sexual assault cases, a qualified expert witness is permitted to testify as to whether the victim's behavior is consistent with sexual abuse, if such testimony is relevant. Id.

Here, Appellant first contends SANE Nurse Linda Ebbert improperly vouched for R.C.'s credibility when she described R.C.'s demeanor during her SANE exam. Specifically, Appellant takes issue with the fact that Ms. Ebbert stated:

> …she maintained very good eye contact, which usually is a signal to me that they're paying attention, they're interested in what you're asking, and usually they give good answers. She didn't hesitate or anything during her answers.

XI AA 2190. Defense counsel objected to the testimony as improper vouching, and the court overruled the objection. Id. This was not error, because plainly Ms. Ebbert was merely describing R.C.'s demeanor during the SANE exam, which is not a direct comment on R.C.'s credibility. Nor does it suggest that Ms. Ebbert's opinion was that R.C. was being truthful, but rather, simply that she observed R.C. as being alert and engaged. Ms. Ebbert's comment regarding "good answers," in context, clearly meant that R.C. gave coherent responses rather than withholding information or providing non-responsive answers, and was not a comment on the truth of the content of R.C.'s answers. Moreover, per Perez, as an expert Ms. Ebbert was permitted to testify as to whether R.C.'s behavior was consistent with sexual assault.

Appellant next argues Detective Michael Saunders improperly vouched for several witnesses by giving "misleading" testimony as to which employees of Centennial Hills Hospital were "cooperative" during his investigation of Appellant. AOB, p. 70. Appellant mischaracterizes the Detective's testimony. The Detective testified that although he tried to obtain certain evidence from the hospital, including

a surveillance video recorded the night of the assault on R.C., he experienced some difficulties obtaining such evidence from employees. XIII AA 2436-38. Upon the defense's objection, the State explained that the testimony was relevant to possible witness bias and motive, and moreover, constituted appropriate discussion of the Detective's investigation. Id. at 2438. The court agreed. Id. This was proper, as Detective Saunders never stated or implied that he believed or disbelieved any of the employees, and at no point stated nor insinuated that cooperation or a lack thereof was reflective of a witness's credibility. See Id. at 2534-39. Further, Appellant cites no authority to support the proposition that law enforcement may not testify as to the cooperativeness or lack thereof of certain individuals during an investigation. Accordingly, the Detective's testimony was not improper.

Finally, Appellant contends the State vouched for R.C.'s credibility "through presentation of cumulative evidence" in that Detective Saunders described what he was told by certain witnesses during his investigation. AOB, p. 71. Such testimony did not amount to improper vouching, and the Detective was rightfully permitted to discuss what he learned during his investigation, as such knowledge informed his actions during said investigation. Moreover, defense counsel objected to the testimony on hearsay grounds, not on the grounds that it was alleged "vouching" testimony, further indicating that the testimony absolutely did not constitute vouching, and precluding Appellant from arguing a different theory of error on

appeal. XIII AA 2430-32. Plainly, a Detective is permitted to inform the jury as to what he learned during his investigation, as such testimony is highly relevant. Here, the testimony was just that, and did not amount to vouching.

VII
THE DISTRICT COURT DID NOT VIOLATE APPELLANT'S RIGHT TO A SPEEDY TRIAL

Appellant next argues his right to a speedy trial was violated. AOB, p.72. In determining whether such a violation has occurred, this Court adheres to the United States Supreme Court's four-part balancing test set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). See State v. Robles-Nieves, 129 Nev. ___, ___, 306 P.3d 399, 404 (2013). In conducting the balancing test, this Court considers "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." Id. The first factor is a "triggering mechanism," and there must be a delay long enough to be "presumptively prejudicial." Id. Under the second Barker factor, different reasons for delay are assigned different weights. Id. For example, "if the State deliberately delays the trial to hamper the defense, that would weigh heavily against the State, whereas delay due to overcrowded courts generally is weighed less heavily." Id.

In Furbay v. State, 116 Nev. 481, 998 P.2d 553 (2000), this Court found that a five and one half year delay between Furbay's arrest and trial did not violate his right to a speedy trial, even where Furbay invoked the right in open court and did

not waive it thereafter. This Court based its holding on the fact that the second Barker factor weighed "overwhelmingly in favor of the prosecution" in that of the nine total continuances requested, five were requested by the defense and all but one of the requests by the prosecution were made for good cause. Id. at 485, 555.

Here, evaluation of the Barker factors makes clear that Appellant's right to speedy trial was not violated. Although there was a delay of several years between Appellant's arrest in 2008 and his trial in 2014, it was directly attributable to Appellant and his counsel. Quite importantly, with regard to the second Barker factor, Appellant ultimately waived his right to a speedy trial in each case before the cases were consolidated. IV AA 570, 586.

As in Furbay, the third Barker factor weighs "overwhelmingly" in favor of the State. Appellant admits that of the ten trial continuances he cites in his Opening Brief, *eight* were requested by Appellant, versus the mere *two* requested by the State. See AOB, p. 75. Moreover, Appellant fails to mention the continuance requested by defense counsel on August 20, 2008, bringing the total number of continuances attributable to Appellant to *nine*. See IV AA 570. Moreover, also similar to Furbay, the mere two continuances requested by the State were based on good cause. On May 19, 2009, the State made its first request for a continuance based on difficulty securing the presence of M.P. due to her severe seizure disorder and the fact that M.P. had a seizure in the Grand Jury and was rushed to the emergency room because

she stopped breathing. IV AA 628. Defense counsel stated it had "no opposition" to the continuance based on counsel's own busy schedule. Id. at 629. The State's second and final request for continuance on October 28, 2009, was also based on difficulty securing a witness, as one of the victims was scheduled to have surgery four days before trial was set. Id. at 641. Importantly, Appellant admits the defense requested another *six* continuances after that. AOB, p. 74-75.

With respect to the final Barker factor, Appellant has failed to demonstrate that he was prejudiced by the delay. With respect to his claim that the delay prevented him from effectively cross-examining a deceased M.P., as previously demonstrated, this claim is without merit. Similarly meritless is Appellant's claim that the delay allowed the jury to infer that M.P. took her life as a result of Appellant's crimes, as again, the parties stipulated to a jury admonishment that the State was not setting forth such a theory. Accordingly, a Barker analysis plainly demonstrates that Appellant's right to a speedy trial was not violated.

VIII
APPELLANT'S SENTENCE IS NOT CRUEL OR UNUSUAL

Appellant next alleges, in conclusory fashion, that his sentence amounted to cruel and unusual punishment. AOB, p. 76.

A sentence does not constitute cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. Culverson v. State, 95

Nev. 433, 435, 596 P.2d 220, 221-22 (1979). The district court is afforded wide discretion when sentencing a defendant. Parrish v. State, 116 Nev. 982, 988-89, 12 P.3d 953, 957 (2000) (citing Randell v. State, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993). In the absence of a showing of an abuse of that discretion, this Court will not disturb a sentence on appeal. See Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 724 (1980).

Here, the district court did not abuse its discretion. Appellant was properly sentenced to three consecutive sentences of 30 years to life for his convictions on Counts 5, 6, and 10 for Sexual Assault in violation of NRS 200.364. That statute indeed provides for such sentencing. Moreover, Appellant abused his position as a trusted CNA to sexually assault multiple women suffering from serious medical conditions, who were therefore particularly vulnerable, under the guise of providing medical care. Surely, the nature of these crimes warrants the sentences imposed. Thus, Appellant's sentence was neither cruel nor unusual.

IX
NO CUMULATIVE ERROR OCCURRED

Finally, Appellant claims he was denied his right to a fair trial based on cumulative error. AOB, p. 77. 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). A defendant must demonstrate

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, there was more than sufficient evidence to secure Appellant's conviction on each offense charged. Thus, the issue of guilt is not close. Regarding the quantity and quality of error issue, Appellant fails to demonstrate any error, let alone cumulative error sufficient to warrant relief. With respect to the gravity of the crimes charged, as discussed immediately above, Appellant's crimes were quite serious. Thus, Appellant has failed to demonstrate cumulative error and his conviction should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM Appellant's conviction.

Dated this 2nd day of June, 2015, 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

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 is proportionately spaced, has a typeface of 14 points and contains 15,485 words and 1,368 lines of text.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of June, 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 SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 2, 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

DEBORAH L. WESTBROOK
Deputy Public Defender

STEVEN S. OWENS
Chief Deputy District Attorney

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

SSO/Meryl Francolini/ed