IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN DALE FARMER, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 65935

APPELLANT'S AMENDED OPENING BRIEF

(Appeal from Judgment of Conviction)

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Appellant,	)	
	)	
vs.	)	
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Respondent.	)	
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JURISDICTIONAL STATEMENT

Appellant Steve Farmer brings this appeal from a final judgment under Nevada Rule of Appellate Procedure 4(b). The State filed the Judgment of Conviction on June 2, 2014. (Appellant's Appendix, Volume III, pages 493-95).[1] Mr. Farmer filed a timely Notice of Appeal on June 20, 2014. (III:498-501).

ROUTING STATEMENT

Pursuant to **NRAP 17(a)(1)**, this proceeding invokes the original jurisdiction of the Supreme Court and is not presumptively assigned to the Court of Appeals pursuant to **NRAP 17(b)(1)** because the jury convicted Mr. Farmer of four (4) Category A felonies. (III:493).

[1] Hereafter, all parenthetical cites will refer to Appellant's Appendix by volume and page numbers.

ISSUES PRESENTED FOR REVIEW

I. The trial court erred by granting the State's joinder motion and denying Mr. Farmer's severance motion.

II. The trial court violated the Fifth, Sixth, and Fourteenth Amendments and Nevada's constitution by unreasonably restricting cross-examination.

III. The trial court violated the Fifth, Sixth, and Fourteenth Amendments and Nevada's Constitution by admitting MP's deposition at trial where Mr. Farmer had been denied an opportunity for effective cross examination.

IV. The State violated the Fifth, Sixth, and Fourteenth Amendments and Nevada's Constitution by committing repeated acts of misconduct during the trial.

V. The trial court erred in admitting prejudicial and irrelevant evidence without offering any curative instructions and excluding relevant defense evidence.

VI. The State's witnesses improperly vouched for one another.

VII. The trial court denied Mr. Farmer's constitutional right to a speedy trial.

VIII. The sentence imposed amounts to cruel and unusual punishment.

IX. Cumulative error warrants reversal.

STATEMENT OF THE CASE

On May 20, 2008, prosecutors charged Appellant Steven Farmer with three counts of sexual assault and two counts of open or gross lewdness. (I:1-2). On June 17, 2008, over defense objection, the State filed an Amended Criminal Complaint charging Mr. Farmer with five additional counts,

including four counts of open or gross lewdness and one count of indecent exposure.(I:7). Following a preliminary hearing on July 1, 2008, Mr. Farmer was bound over to District Court on all charges in Case No. C245739. (I:7-11). Mr. Farmer pled "not guilty" and invoked his speedy trial rights. (IV:563-65).

On November 18, 2008, the State convened a Grand Jury to hear additional charges against Mr. Farmer. (I:193-122). On November 19, 2008, Mr. Farmer was indicted on two additional counts of sexual assault, three counts of open or gross lewdness and one count of indecent exposure in Case No. C249693. (I:86-89). Mr. Farmer again pled "not guilty" and invoked his speedy trial rights. (IV:578-80).

On March 8, 2010, the State filed a motion to consolidate the two cases against Mr. Farmer. (II:225-45). Although defense counsel opposed the motion and affirmatively moved to sever counts involving different accusers (II:254-88), the court granted the State's motion and severed just one count involving one accuser. (III:321-22). The State filed an Amended Information consolidating the two cases in the lower-filed case number, C245739, on July 8, 2010. (II:289-293).

Mr. Farmer's sixteen-day jury trial began on February 3, 2014. (III:540). On February 28, 2014, the jury found Mr. Farmer guilty of eight

counts of open or gross lewdness, one count of indecent exposure, and four counts of sexual assault. (III:483-85). On May 28, 2014, the court sentenced Mr. Farmer to twelve months in CCDC on counts 1,2,4,8,9,11,13,14 & 15,[2] to run concurrently with one another. (III:494). Mr. Farmer received three consecutive ten-to-life sentences on counts 5, 6 and 10, and a concurrent ten-to-life sentence on count 12. (III:494).

After the Court entered the Judgment of Conviction on June 2, 2014, Mr. Farmer timely appealed on June 16, 2014. (III:493,496-97).

STATEMENT OF THE FACTS

RC was admitted to Centennial Hills Hospital on May 15, 2008 after having two seizures. (X:1829). After spending a night in the hospital, she accused Certified Nursing Assistant ("CNA") Steven Farmer of multiple counts of sexual assault, indecent exposure and open and gross lewdness. (X:1883).

RC initially raved about Mr. Farmer's attentiveness in the ER, and even obtained his personal cell phone number, which she later claimed she needed so she could write him a "letter of recommendation". (X:1870). After taking such good care of RC, Mr. Farmer allegedly began assaulting her in

[2] Counts 1,2,4,8,9,11,13 & 15 involved open or gross lewdness and Count 15 involved indecent exposure.(III:493).

the elevator around 3:00 a.m. on May 16, 2008, when he transported her from the ER to her room on the Seventh Floor of the hospital. (X:1872-73,1920).

RC claimed that in the elevator, Mr. Farmer's demeanor "changed". (X:1873). She claimed he adjusted her blankets, "rubbed the inside of [her] thigh" and told her to "relax". (X:1873). When they got to the room, RC claimed Mr. Farmer again told her to "relax", continued adjusting her blankets, and eventually began penetrating her vagina with his fingers. (X:1875). During the assault, Mr. Farmer allegedly told her to "look at" and "taste" his fat fingers. (X:1876). RC claimed Mr. Farmer said, "all I want to do is make you cum." (I:31).

When the penetration stopped, RC claimed Mr. Farmer started squeezing her breasts underneath her gown "really hard" and telling her how "beautiful" they were. (X:1877). RC claimed he rubbed her face with the back of his hands, then put his mouth on her vagina and alternated between licking it and penetrating it with his fingers. (X:1878-79). According to RC, the entire incident lasted approximately 15 minutes. (X:1924,1930).

After the alleged rape, at 4:45 a.m., Nurse Christine Murray and CNA Carine Brown visited RC's room and had a conversation with her. (XI:2073). RC did not appear scared or afraid, nor did she say **anything** about having just been raped. (XI:2076-78; XIII:2618,2620-21). Instead, RC said she

needed to go to the bathroom, asked if it was "just girls in the room", then began pulling off her clothes. (XIII:2618-19). Brown and Murray found her behavior odd and decided to "stay together" and "watch each other's back" with RC going forward.[3] (XIII:2619). Although Brown and Murray visited RC's room approximately six different times that night, RC never reported a rape during these visits. (XI:2074,2076).

RC claimed she used her cell phone to call the police during the rape but hung up because she was worried that Mr. Farmer could hear her dialing 911. (X:1952). Yet, RC's phone did not show **any** 911 calls placed until 7:54 a.m. (X:1952).[4] Although RC claimed she also used her cell phone to take pictures during the alleged assault, the only photographs taken showed time-

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[3] This was not the first time RC acted strangely during her hospital stay. According to Nurse Karen Goodhart who initially treated RC in the ER, RC seemed "just a little off". (X:2012,2017). When Goodhart attempted to put RC on a bed pan, RC "threw the sheets back" and exposed herself with the door open, prompting Goodhart to say, "woah, let me close the door." (X:2017). At another point, a male ER nurse named Ray refused to go into RC's room to treat her. (X:2017). RC started crying because Ray would not come back and asked, "have I been a bad patient?" to find out why Ray would not see her. (X:2018). According to Goodhart, RC exhibited drug-seeking-behaviors from the time she arrived at the hospital. Although RC had taken "enough meds to kill a horse" Goodhart noted that "she sucked it up like candy" and it did not really seem to faze her. (X:2011). Despite her drowsiness, RC always "seemed to wake up quickly when it was for more pain medication." (X:2012).

[4] The LVMPD records also indicated that a 21-second 911 call was placed at approximately 7:55 a.m. and that there was no conversation during the call. (XIII:2429-30).

stamps of 4:47 a.m. and 4:50 a.m. – **after** Murray and Brown first visited her. (X:1951).

At the time RC accused Mr. Farmer, she had already filed for bankruptcy twice, was unemployed, and had walked away from a home that was in foreclosure. (X:1970-71). Although RC denied contacting the media, nine calls were placed from her cell phone to Channel 8 News within days of the alleged assault, between May 17, 2008 and May 18, 2008. (X:1898-1900). In fact, just one day after she was released from the hospital, RC contacted attorney Neil Hyman, who came to represent her in the civil lawsuit she filed against Centennial Hills. (X:1898). Though RC claimed she just wanted the media to "leave her alone", she subsequently went on television with her attorney asking for other people to come forward. (X:1906-07). While her lawsuit was pending, RC took out an $80,000 loan against the future settlement of her lawsuit. (X:1971). RC eventually received a monetary settlement as a result of her claims against Mr. Farmer. (X:1897).

Shortly after RC came forward, the LVMPD prepared a "media release" indicating that there had been a sexual assault at Centennial Hills Hospital, providing the name and description of the accused, and directing anyone with information to contact Crime Stoppers. (XIII:2448;2459).

As a result of the media release and the ensuing television coverage, a number of Mr. Farmer's former patients came forward with claims that they previously had not seen fit to report:

On May 30, 2008, one of Mr. Farmer's co-workers, Nurse Margaret Wolfe, identified DH as a potential victim. (XIII:2452-53). DH had visited the Centennial Hills ER on May 16, 2008 for issues related to asthma. (XII:2372). According to DH, Mr. Farmer opened the curtain to her room in the ER, introduced himself as "Steven Farmer", told her he was there to "check things out", then opened her gown and pressed on a couple of the EKG leads on her abdomen and lower chest area. (XII:2377-78). DH assumed he was making sure the leads were attached correctly. (XII:2389). As he finished examining the leads, his arm brushed against her right breast. (XII:2380,2389). The entire time, DH had a clear line of sight to the nursing station where Nurse Wolfe stood watching. (XII:2387). DH never complained about the incident and testified that "never in a million years" did she expect the LVMPD to ask her about her stay at Centennial Hills. (XII:2386,2392).

LS contacted the LVMPD on May 31, 2008. (XIII:2455). LS claimed that more than a month earlier, on April 26, 2008, Mr. Farmer had come into LS's room in the ER, introduced himself to LS and her two aunts who were

sitting in the room with her, and while making small-talk, he held the railings at the foot of her bed and began to slowly move his groin in a circular motion against her feet. (XII:2273-78).[5] Although LS and her aunts thought the incident was odd, none of them complained until after the story hit the news. (XII:2248-49,2269-70,2283,2297-98).

On June 4, 2008, Timothy Lehan called Crime Stoppers on behalf of his girlfriend HS. (XIII:2459). Lehan claimed that on May 16, 2008, while HS was in the ER recovering from a seizure, Mr. Farmer offered to help untangle HS's EKG cables and then exposed HS's breasts, which Lehan did not believe was necessary. (IX:1750-52,1757-59;1761-62). HS told police that on another occasion, while Mr. Farmer was transporting her from the emergency room to her hospital room, Mr. Farmer said he needed to remove the EKG patches from her chest and opened her gown to her waist and removed some of the leads. (IX:1713-17). During the process, Mr. Farmer's forearm allegedly "grazed" her bared breasts. (IX:1718). Neither Lehan nor HS even *discussed* the incidents with one another until after the story hit the news. (IX:1814).

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[5] LS's aunt, Ada Dotson testified that she saw Mr. Farmer hold onto LS's feet, but he was not "thrusting his hips", moving his hips from side to side, or "pushing his groin" onto LS's feet. (XII:2247). LS's other aunt, Ernestine Smith, claimed that Mr. Farmer held LS's feet to his "groin area" and moved her feet against his groin. (XII:2258).

Finally, MP called 311 on June 15, 2008. (XIII:2461). MP claimed that she was "assaulted" by Mr. Farmer during her week-long stay at Centennial Hills Hospital between May 13, 2008 and May 20, 2008 while she recovered from a seizure. (V:788-89). MP claimed that Mr. Farmer introduced himself as "Steve", then repeatedly "attacked" her. (V:789-91). MP claimed that more than once, Mr. Farmer removed her sheets and "lifted [her] gown up" in a "billow[ing]" manner, high enough so he could see her "entire body", which was bare under the gown. (V:794). MP claimed she "woke up" to Mr. Farmer "pinching" and "rubbing" her nipples under her clothes. (V:792). Yet, MP admitted that Mr. Farmer told her one of her leads had become disconnected. (V:791-92). MP claimed that Mr. Farmer lifted her right leg and put his thumb in her anus. (V:796). Yet, Mr. Farmer explained his actions by telling her she had "some feces". (V:795). Although MP initially told detectives she did not know if Mr. Farmer had penetrated her vagina, MP subsequently claimed under oath that she knew he put his finger in her vagina, "maybe up to the [second] knuckle." (V:797). MP admitted that Mr. Farmer told her he was checking her catheter at the time. (V:796-97).

MP was admittedly under the influence of a strong cocktail of medications including Prozac, benzodiazepines, Dilantin and morphine.

(V:808-09). MP admittedly could not move nor could she look down, so she did not actually see what Mr. Farmer was doing when he allegedly penetrated her rectum and vagina. (V:814-15). MP admitted she did not call the police, nor did she tell any other doctors or nurses what happened while she was at Centennial Hills. (V:823). Although MP claimed she told her two adult sons what happened, her sons did not report the assaults to the hospital staff, nor did they call the police either. (V:826;XIII:2556). Despite her mistrust of the hospital, she returned to Centennial Hills twice for treatment after the assault. (V:825;XIII:2578).

MP did not report the alleged assault until after one of her sons, a convicted felon, told her he saw on TV that other people were accusing Mr. Farmer of sexual assault. (V:801;XIII:2573). MP subsequently filed a lawsuit against Centennial Hills seeking monetary damages which was still pending during Mr. Farmer's trial. (V:833;XIII:2578).

Mr. Farmer was taken into police custody on May 16, 2008. (XIII:2403,2409). The State ultimately charged Mr. Farmer with eight counts of open or gross lewdness, two counts of indecent exposure, and five counts of sexual assault, based on the aforementioned incidents. (II:289-293). Although defense counsel opposed the joinder of all five victims in a single

case (II:254-88), the court found that joinder was permissible under the "common plan or scheme" doctrine. (IV:725-26).

Mr. Farmer sat in jail for nearly six years awaiting a trial that did not begin until February 3, 2014. (III:540). While Mr. Farmer awaited trial, MP committed suicide. (XIII:2572). Over defense objection, the court allowed the State to present MP's deposition as evidence at trial. (V:860-61). Mr. Farmer was ultimately convicted of all but two of the charges against him: the count of indecent exposure involving DH that was allegedly witnessed by her boyfriend, and one count of oral sexual assault alleged by RC.[6] (III:483-85).

SUMMARY OF THE ARGUMENT

In May of 2008, RC falsely accused Steve Farmer of rape. After Mr. Farmer was branded a rapist by the media, four additional patients came forward because they now believed that the intimate care they had received from him at the hospital was sexually motivated. Although Mr. Farmer's five accusers had factually distinct allegations, the trial court improperly joined all

[6] Although RC was examined by a Sexual Assault Nurse Examiner (SANE) who combed RC's pubic hair for debris including hair, saliva and skin cells (XI:2187-88), no saliva or hairs were found in RC's pubic hair to submit for DNA analysis. (XII:2327). This finding was significant because Mr. Farmer had a full beard and one would expect him to have left *some* DNA evidence had he engaged in cunnilingus with RC. (XIV:2176). However, the only DNA evidence connecting Mr. Farmer to RC was some "touch" DNA on her face –nothing on her vagina, breasts, inner thighs, or labia. (XII:2321-30).

counts in a single trial as part of a "common scheme or plan". The State ultimately used those unrelated counts to unfairly cross-corroborate each other and poison the jury against Mr. Farmer.

Throughout trial, the court permitted the State to elicit irrelevant and unduly prejudicial victim impact testimony from Mr. Farmer's accusers about their tragic personal lives, but prevented Mr. Farmer from effectively cross-examining them or presenting evidence to counter their claims. Although Mr. Farmer had not had a constitutionally adequate opportunity to cross-examine MP at her pre-trial deposition, the court nevertheless presented her videotaped deposition to the jury as evidence at trial. The State's witnesses improperly vouched for one another and the Prosecutor's closing arguments were riddled with misconduct. The trial court denied Mr. Farmer his right to a speedy trial and ultimately imposed a sentence amounting to cruel and unusual punishment. Accordingly, Mr. Farmer is entitled to have his convictions vacated, his case remanded, and new trials set.

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING THE STATE'S JOINDER MOTION AND DENYING THE DEFENSE'S SEVERANCE MOTION.

NRS 173.115 permits the joinder of offenses when they are "(1) Based on the same act or transaction; or (2) Based on two or more acts or

transactions connected together or constituting parts of a common scheme or plan." However, **NRS 174.165** authorizes severance of counts if "it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses... in an indictment or information..."

Prior to trial, Mr. Farmer filed a motion to sever the counts involving his separate accusers so they could be tried separately.(II:269-88). Specifically, Mr. Farmer asked the court to sever the counts involving RC, from the counts involving DH and HS, from the count involving LS, from a count involving Mr. Farmer's ex-girlfriend FR. (II:269;IV:718-19).

Although the court severed the one count involving Mr. Farmer's ex-girlfriend, it denied the remainder of his severance motion. (III:321-22). In addition, over defense objection,[7] the court granted the State's motion to consolidate the MP case (C249693) with the case involving RC, LS, HS and DH (C245739). (III:321-22).

The court ruled that the five accusers' claims could be joined in a single case because it deemed the claims to be part of "common plan or scheme". (IV:725-26). Yet, the court's ruling was an abuse of discretion that cannot be deemed harmless because it violated Mr. Farmer's constitutional right to due process and a fair trial. See **Byars v. State**, 130 Nev. Adv. Op.

[7] (III:254-68).

85, --, 336 P.3d 939, 950 (2014) (citing **Weber v. State**, 121 Nev. 554, 570–71 (2005)) ("A district court has discretion to join or sever charges, and we review for harmless error a district court's misjoinder of charges.")

A. Joinder was not permissible under the "common scheme or plan" doctrine.

To join multiple offenses in the same case as part of a common scheme or plan, the offenses charged must "constitute an 'integral part of an overarching plan explicitly conceived and executed by the defendant.'" **Ledbetter v. State**, 122 Nev. 252, 260-261 (2006) (quoting **Rosky v. State**, 121 Nev. 184, 196 (2005)) (other internal quotations and citations omitted). "'The test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime.'" **Id**.

The court must engage in a "fact-specific analysis" to determine whether a "common plan or scheme" exists under **NRS 173.115(2)**. **Weber**, 121 Nev. at 572. It is not enough for the crimes to have occurred close in time to one another or at a similar location. **Rosky**, 121 Nev. at 196. Rather, the court must find that the crimes were *planned in advance* as opposed to crimes of opportunity. **Id.**

Thus, in **Richmond v. State**, this Court ruled that a defendant did not engage in a common scheme or plan to sexually abuse his neighbors' children

where he was merely "taking advantage of whichever potential victims came his way". 118 Nev. 924, 934 (2002) (defendant's "crimes were not part of a single overarching plan, but independent crimes, which Richmond did not plan until each victim was within reach").

In the sexual assault context, it is absolutely essential that the court consider the degree of similarity between the crimes alleged when analyzing the existence of a "common scheme or plan". **Cipriano v. State**, 111 Nev. 534, 542 (1995).[8] In **Cipriano**, this Court ruled that the State had not shown a "common scheme or plan" because the evidence of sexual misconduct introduced by the State was not sufficiently similar to the crime charged. 111 Nev. at 542. Cipriano was accused of sexually molesting a woman by attempting to kiss her, then putting his hands down her pants, touching her vaginal area and breasts outside her clothing, and grabbing her buttocks. 111 Nev. at 537. This Court held that evidence that Cipriano had *also* molested his stepson's wife, holding her by the shoulders, trying to kiss her, making vulgar sexual comments, and running "his hand around the back seat of her car and attempt[ing] to touch her while she was riding in the front seat" was not sufficiently similar conduct to be part of a common scheme or plan. 111 Nev. at 542.

[8] **Cipriano** was overruled on other grounds by **State v. Sixth Judicial District Court**, 114 Nev. 739 (1998).

In this case, the district court determined that Mr. Farmer "was a CNA, had the access, used that access, and that position as a CNA to gain access" to patients which, *in and of itself*, was "enough to qualify as a common scheme and plan". (IV:726). Yet, the court's theory that Mr. Farmer used his job to gain access to victims is essentially the same theory that this Court rejected in **Richmond**. See **Richmond**,118 Nev. at 932 (no common scheme or plan where the defendant took "advantage of whichever potential victims came his way" and were not planned "until each victim was within reach.").

As defense counsel explained to the court, Mr. Farmer treated *thousands* of ER patients at Centennial Hills Hospital, but only five unrelated individuals had come forward. (II:278;IV:694).[9] The State could not show that Mr. Farmer took the job as a CNA in order to secure potential victims of abuse. (II:278). Because these were alleged crimes of opportunity that were merely made possible by Mr. Farmer's position, there was no common scheme or plan under Nevada law. (II:278;IV:694).

Furthermore, although it is well-settled that "there must be some similarity to the sexual conduct" for joinder under the "common scheme or

[9] The State's claim that Mr. Farmer was targeting "vulnerable" victims is ridiculous. Every single ER patient Mr. Farmer treated was there for an "emergency" and was, by definition, "vulnerable".

plan" doctrine,[10] the district court completely ignored that factor in ruling that the charges could be combined. The district court actually ruled that it "didn't matter" **how** Mr. Farmer allegedly abused his patients, or what "guise" he used to abuse them. (IV:727). All that mattered was that the abuse occurred "as a result of the position of employment in the hospital." (IV:727). This ruling was erroneous where the allegations of sexual misconduct differed so vastly from accuser to accuser. (II:279-80).

RC was the **only** accuser who claimed that Mr. Farmer engaged in an overt sexual assault with clear sexual intentions. RC testified that Mr. Farmer rubbed her inner thigh in a sexual manner, penetrated her vagina with his fingers and his mouth, told her to "look at" and "taste" his fat fingers, told her he wanted to make her "cum", squeezed her breasts while telling her how "beautiful" they were, and rubbed her face. (I:31;X:1873-77). There could be no mistaking the clear sexual nature of these allegations.

By contrast, the remaining accusers (DH, HS, LS and MP) described ambiguous conduct that could have been interpreted either sexually or non-sexually. None of the remaining accusers even came forward until after Mr. Farmer was branded a "rapist" in the media and they began to reevaluate his actions as "sexual" in nature. (XIV:2722-23).

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[10] See **Cipriano**, 111 Nev. at 542.

DH and HS accused Mr. Farmer of exposing their chests, adjusting their EKG leads, and brushing against their breasts, under the guise of performing his duties as a CNA. (IX:1713-18,1750-52,1757-59,1761-62; XII:2377-78;2389). MP accused Mr. Farmer of unnecessarily penetrating her anus with his thumb under the guise of cleaning up "feces", unnecessarily penetrating her vagina with his finger under the guise of checking her catheter, "pinching" and "rubbing" her nipples under the guise of reconnecting her EKG leads, and lifting her gown in order to view her bare body. (V:791-92,794-97). LS accused Mr. Farmer of entirely different conduct: holding onto the rails of her bed and pushing his groin against her feet while conversing with LS and her two aunts. (XII:2273-78).

Plainly, with the exception of DH and HS whose allegations *were* similar to one another, none of the sex crimes alleged was sufficiently similar in nature for the court to join them under a "common scheme or plan" theory. See **Cipriano**, 111 Nev. at 542.

In addition, while the Nevada Supreme Court has not addressed the "common scheme or plan" doctrine in the context of patient/healthcare-provider sex crimes, the courts that **have** addressed this precise issue have overwhelmingly rejected the analysis used by the district court in this case. For instance, in **State v. Hildreth**, 238 P.3d 444, 454 (Utah 2010), the Utah

Supreme Court determined that five women's allegations against a defendant chiropractor could not be joined under the common scheme or plan doctrine because "the incidents involved different body parts, different levels of undress and possibly unnecessary exposure, and different types of touching". In addition, the court expressly rejected the notion relied on by the district court in this case, that unrelated counts can be joined under the theory that a health care provider "exploited a position of trust" with his patients:

> [W]e cannot say that using a position of trust to gain access to a victim or physically isolating an individual in order to commit an assault are facts that are particularly unusual in the context of sexual assault cases...

238 P.3d at 454 n.9.[11]

Similarly, in **State v. Denton**, 149 S.W.3d 1 (Tenn. 2004), the Tennessee Supreme Court found that a defendant physician was entitled to severance of charges related to eleven patients because there was no "common scheme or plan" connecting them together. In this regard, the court noted that the allegations were not "factually unique or distinctive" in nature, and that the similarities were "simply that all of the incidents were sexual assaults by a physician against a patient". 149 S.W.3d at 14. The

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[11] This Court made a similar observation in **Tabish v. State** when it rejected the State's argument that "money and greed" could establish a "common scheme or plan". 119 Nev. 293, 302-03 (2003) ("money and greed could be alleged as connections between a great many crimes and thus do not alone sufficiently connect the incidents").

court refused to find that the acts were part of a "continuing plan or conspiracy" to achieve sexual gratification. **Id.** Moreover, as in this case, the State had offered no evidence "that the defendant had a working plan operating toward the future such as to make probable the crime with which the defendant is charged." **Id.**

Likewise, in **Com v. Jacobs**, 52 Mass.App.Ct. 38, 38-41 (Mass. App. 2001), a Massachusetts Court of Appeals ruled that there was no common scheme or plan for a chiropractor to sexually violate two patients (one by massaging her buttocks, another by touching her breasts) because there was no "clear pattern of conduct", no "similarity in the method by which the defendant committed the various offenses", and no evidence of a "distinctive" pattern. The Court distinguished a case involving a proper joinder of claims involving a gynecologist where the two victims "testified that he gave them clitoral massages while they lay on their backs with feet in stirrups – exactly the distinctive abusive treatment described by the complaining witness." **Id.** at 45 n.14. The Court also distinguished another properly joined physician/patient case where the five victims testified to virtually identical misconduct. **Id**. at 41-42 ("Alone with the woman in an examination room, the defendant asked her about her sexual practices and committed overt, unwanted sexual acts upon her, accompanied by explicit

lascivious language. . . . This practice, repeated numerous times, comprised a 'clear pattern of conduct.'").

Finally, in **State v. Sladek**, 835 S.W.2d 308, 312 (Mo. 1992), the Missouri Supreme Court rejected the argument that a defendant dentist had a "common scheme or plan" to "exercise his authority over female patients in order to take advantage of them sexually". Although the defendant was on trial for giving a patient nitrous oxide in order to rape her, the State sought to introduce evidence that he had also touched the breasts of three other patients. As in this case, the State claimed that the dentist "had a common plan or scheme to make patients the target of his misdeeds." 835 S.W.2d at 311. Ultimately, the court determined that whether or not the dentist "may have touched the breasts of three former patients would have no tendency to prove that he gave the victim in this case nitrous oxide in sufficient quantity to disable her and thereafter rape her." Id. Accordingly, the evidence was deemed inadmissible.

Here (with the exception of DH and HS who properly could have been tried together), the district court abused its discretion in allowing the charges involving Mr. Farmer's different accusers to be joined in one trial as a "common scheme or plan".

B. Joinder had a substantial and injurious effect on the jury's verdict, violating Mr. Farmer's constitutional rights to due process and a fair trial.

The misjoinder of charges warrants reversal when "the improperly joined charges had a substantial and injurious effect on the jury's verdict." **Weber**, 121 Nev. at 570-71. "Prejudice created by the district court's failure to sever the charges is more likely to warrant reversal in a close case because it may 'prevent the jury from making a reliable judgment about guilt or innocence.'" **Tabish**, 119 Nev. at 305 (quoting **Zafiro v. United States**, 506 U.S. 534, 539 (1993)).

When considering each victim's claims separately, the jury was presented with multiple "close cases". RC's credibility was significantly diminished by the discrepancies in the story she told about what happened,[12] her failure to complain to Nurse Murray and CNA Brown who saw her

[12] For instance, RC told Nurse Lorraine Westcott that Mr. Farmer had assaulted her between 7:00 and 7:30 a.m. on May 16, 2008 (XI:2104), but testified at trial that the entire assault happened around 3:00 a.m. (X:1872-73,1920). RC told Nurse Westcott that Mr. Farmer had only "tried" to penetrate her vagina but then "someone walked in, and he left" (XI:2106); however, at trial she claimed that he repeatedly penetrated her when she was alone in her room. (X:1876). RC's claims that she took photographs and called police during the assault were belied by the physical evidence. (X:1951-52;XIII:2429-30). Finally, RC initially told police there was another person in the elevator with them the *entire time*, but at trial she claimed that person got off a few floors early, conveniently creating a window of opportunity for the assault. Compare (X:1921-22,1939) with (X:1873).

immediately after the alleged assault,[13] her preexisting financial situation,[14] the nine calls made to Channel 8 News from her cell phone (which she denied making),[15] her immediate retention of an attorney upon release from the hospital,[16] her lawsuit and need to obtain an "advance" on the settlement proceeds,[17] and her claim that she just wanted the media to "leave her alone" while going on TV with her attorney.[18] Equally concerning was the fact that RC's other caregivers at Centennial Hills seemed to recognize her potential to make false allegations, with Nurse Ray refusing to tend to her in the ER, and Nurse Murray and CNA Brown agreeing they would "stick together" when treating her, based on her bizarre behavior.[19]

As for MP's claims, there were no witnesses to the alleged assaults, and she did not come forward until she had learned of Mr. Farmer's case in the news, a month after the fact. (V:801;XIII:2573). Despite her alleged mistrust of the hospital, she returned to Centennial Hills twice for treatment after the assault. (V:825;XIII:2578). MP subsequently filed a lawsuit against Centennial Hills seeking monetary damages which was still pending during

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[13] (XI:2073-76).
[14] (X:1970-71).
[15] (X:1898-1900).
[16] (X:1898).
[17] (X:1971).
[18] (X:1906-07).
[19] (X:2012-18;XIII:2619).

Mr. Farmer's trial. (V:833;XIII:2578). Finally, the conduct described by MP was ambiguous in nature and not overtly sexual in the manner described by RC.

While there was arguably more corroborative evidence on the misdemeanor lewdness and indecent exposure counts involving LS, DH, and HS (which occurred out in the open and in front of other witnesses), their allegations were completely irrelevant to the sexual assault claims brought by RC and MP. As defense counsel pointed out in her severance motion, sexual assault is a general intent crime, so there was no need to present evidence of intent. (II:281). Furthermore, as this Court held in **Braunstein v. State**, 118 Nev. 68, 73 (2002), evidence that a defendant has a propensity for sexual aberration is irrelevant to that defendant's intent.

As to RC's claims, Mr. Farmer's only possible defenses were "it didn't happen" or "if it happened, it was consensual".[20] Therefore, evidence of different sexual offenses committed against MP, DH, HS and LS was irrelevant to whether Mr. Farmer raped RC and unduly prejudicial. See, e.g., **Sladek**, 835 S.W.2d at 311 (remanding for new trial where court improperly admitted evidence that dentist touched three other patients' breasts to prove

[20] At trial, Mr. Farmer argued that RC falsely accused him of rape. (XIV:2691). He did **not** argue that RC was "mistaken" about what happened, or that "it happened but I didn't intend anything sexual by it".

that he raped a fourth patient); **Jacobs**, 52 Mass.App.Ct. at 49 (other crimes evidence not relevant where defendant simply denied the sexual conduct happened and did not argue it was accidental or inadvertent).

Although evidence that Mr. Farmer may have taken liberties with MP, HS, DH, and LS under the guise of providing them medical treatment was completely irrelevant to RC's allegations of overt sexual misconduct, the State used that evidence in rebuttal closing to unfairly bolster RC's credibility by suggesting that the jury would have to find that **all** of the alleged victims were lying or mistaken about what happened in order to find for the defense:

- "I'm sure that 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." (XIV:2738).

- "if you look at each female on their own, and then compare them to one another, you'll see similarities in his conduct." (XIV:2739)

- "so, so far, if you are listening to the Defense's theory, you can't trust – or you – [HS] is mistaken and so is Tim Lehan." (XIV:2746)

- "So, so far [HS] is mistaken, Tim's mistaken, [RC's] just flat out lying, Detective Cody, Saunders and Linda Ebbert are lying, so far." (XIV:2770).

- "So, so far we have the people I've listed before, but now we need to add to the list [LS], Ernestine and Ada. So, so far we're at nine people." (XIV:2773).

- "So now we have to add to the list, DH's mistaken, and now Margaret Wolfe is also mistaken. So now we're up to 11 people who are all mistaken about the conduct that they witnessed that the Defendant did, which leads us to [MP]." (XIV:2776).

- "So, so far, now were down to 11. Nope, now we're at 12. [HS], Tim, [RC], Detective Cody, Detective Saunders, Linda Ebbert, [LS], Ernestine Smith, Ada, [DH], Margaret, [MP]. All of them, they all walked through that door and told you what he did to them. How many people have to walk back in through that door, how many more, and tell you, this is what he did? **This is what he does.** They're all telling you the exact same thing. When everybody's telling you, you're dead, it's time to lie down. (XIV:2781) (emphasis added).

The State's rebuttal closing demonstrates that the State intended to join these cases to unfairly cross-corroborate each other with inadmissible propensity evidence that "this is what he does". The cases were not cross-admissible to establish propensity;[21] yet, that is precisely how the State argued the evidence in closing. (See XV:2832-45).

As in **Tabish**, 119 Nev. at 304-305, the weak limiting instruction[22] that was given was inadequate to prevent the improper "spillover" effect of inappropriate joinder, particularly in light of the State's improper closing

[21] **NRS 48.045(2)** provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

[22] The jury was merely instructed that "[e]ach charge and the evidence pertaining to it should be considered separately." (III:457).

argument. The misjoinder of claims violated Mr. Farmer's right to due process and a fair trial and requires reversal of all counts.

II. THE TRIAL COURT VIOLATED THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND NEVADA'S CONSTITUTION BY UNREASONABLY RESTRICTING CROSS-EXAMINATION.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him..." **U.S.C.A. VI, XIV;** see also **Pointer v. Texas**, 380 U.S. 400, 403 (1965) (holding that the Confrontation Clause applies to the States through the Fourteenth Amendment).

The right to discredit a witness through cross-examination is of constitutional dimension and courts should hesitate to circumscribe that right. **Davis v. Alaska**, 415 U.S. 308, 316 (1974). A cross-examiner may properly "delve into the witness' story to test the witness' perceptions and memory, [and] . . . has traditionally been allowed to impeach, i.e., discredit the witness." **Id.** at 316. Cross-examination should not be restricted unless the inquiries are "'repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness.'" **Lobato v. State**, 120 Nev. 512, 520 (2004) (quoting **Bushnell v. State**, 95 Nev. 570, 573 (1979)). The bias of a witness is always relevant to a witness's credibility. **Ransey v. State**, 100 Nev. 277, 279 (1984). When a court prohibits a criminal defendant from

"engaging in otherwise appropriate cross-examination", it violates the Confrontation Clause. **Delaware v. Van Arsdall**, 475 U.S. 673, 680 (citing **Davis**, 415 U.S. at 318).

This Court undertakes a *de novo* review of allegations that a defendant was denied an effective opportunity for cross-examination in violation of the Confrontation Clause. **Chavez v. State**, 125 Nev. 328, 338-339 (2009). In this case, the court violated Mr. Farmer's federal and state Confrontation Clause and due process rights by improperly limiting his cross-examination of four key witnesses for the State: RC and husband Scott, MP and Margaret Wolfe. **U.S.C.A. V, VI, XIV and Nev. Const. Art. 1, Sect. 8.**

A. Limitations on Cross Examination of RC and husband Scott.

At trial, defense counsel argued that Mr. Farmer was a professional, attentive and likeable CNA at Centennial Hills Hospital, who became swept up in a flurry of false allegations after RC falsely accused him of sexual assault in May of 2008. (IX:1681). The defense theory was that RC concocted a sexual assault, then immediately telephoned the media and retained attorney Hyman as soon as she got out of the hospital so she and her husband Scott, who were in a financial crisis, could pursue monetary damages from Centennial Hills. (IX:1687).

A day after calendar call, and less than a week before trial, the State filed a Motion in Limine to Limit Cross Examination of RC and Scott, seeking to prohibit **all** cross examination on three topics that the State deemed "irrelevant": (1) domestic violence and/or child abuse occurring during the relationship, the marriage and divorce of RC and Scott; (2) reference to pornographic movies created by RC and Scott; and (3) reference to infidelity in the relationship between RC and Scott. (III:442-47). Although defense counsel argued that the motion in limine was untimely under **EDCR 3.28**[23] and that the evidence was relevant as to the witness' credibility (VI:1002-03), the court disagreed, granting the State's motion. (VI:1016).

At trial, the State presented evidence which rendered all of the excluded areas of cross-examination both relevant and necessary to the defense. First, the State bolstered RC's credibility by having her testify that she attempted suicide "at one point" because of the alleged assault. (X:1893;XI:2037). Yet, defense counsel could not meaningfully challenge

[23] **EDCR 3.28** provides that "[a]ll motions in limine to exclude or admit evidence **must** be in writing and noticed for hearing not later than calendar call, or if no calendar call was set by the court, no later than 7 days before trial." On January 28, 2014, a day after calendar call, the State filed its untimely motion in limine. (III:442-47,538). The Court abused its discretion by even considering the State's untimely-filed motion, where the State was admittedly aware *the week before calendar call* of the need for the motion, but failed to timely file it. (III:445).

this testimony, since the court had already ruled that Mr. Farmer could not ask her about alternative factors that may have caused her suicide attempt, such as the loss of custody of her children or her arrest for child abuse. (XI:2038). Although defense counsel moved for a mistrial as a result of this prejudice (XI:2039), the court denied the motion. (XI:2046).

When Scott testified that the "effects of the assault" contributed to the couple's divorce in 2013, defense counsel was similarly constrained by the court's ruling on the motion in limine. (XI: 2124-25). Defense counsel could not meaningfully challenge Scott's testimony without asking if RC's marital infidelity, her arrest for child abuse or her participation in pornographic movies contributed to the divorce. (XI:2134). Yet, without any information about the other significant problems in the couple's marriage, the jury was free to conclude that the alleged assault by Mr. Farmer drove RC to attempt suicide and destroyed her marriage five years later. (XI:2038). By granting the State's untimely motion in limine, denying the requested mistrial and refusing to allow defense counsel to impeach RC and Scott's testimony about the impact of the alleged assault, the court deprived Mr. Farmer of his constitutional right of cross-examination. See **Davis**, 415 U.S. at 316.

The Court further restricted Mr. Farmer's ability to present his theory of the case by closing off an additional area of cross-examination. At trial,

RC minimized the significance of her phone calls to attorney Neal Hyman, which she made at the first possible opportunity after leaving the hospital. On direct examination, RC testified, "I contacted Neal Hyman. He was a friend of mine and I kind of told him what was going on and how – you know, how do I get the media to leave me alone." (X:1890-91). When defense counsel attempted to cross-examine RC about the fact that Hyman wasn't just a "friend", but her former attorney who had helped her seek monetary damages from a prior employer, the court precluded the line of inquiry as "not relevant". (X:1903-04). Yet, evidence that RC had previously retained Hyman as her attorney **was** relevant because it directly impeached her claim that Hyman was just a "friend". See **Davis**, 415 U.S. at 316-17 (the "partiality of a witness" is "always relevant"); accord, **Ransey**, 100 Nev. at 279 (when the "purpose [of cross-examination] is to expose bias . . . [the] examiner must be permitted to elicit any facts which might color a witness' testimony"). The court's ruling was constitutional error.

Finally, the court precluded defense counsel from fully cross-examining RC about her interactions with the night-shift nurses who visited her room repeatedly after the assault allegedly occurred, and to whom RC failed to complain. On cross-examination, defense counsel confronted RC with her hospital records, which showed that Nurse Murray and CNA Brown,

checked on her repeatedly in the middle of the night after the alleged assault. (X:1953-58). Defense counsel attempted to go through the records, one by one, and ask RC if she remembered them coming into her room and talking to her at 4:45 a.m., 5:30 a.m. and 5:40 a.m. (X:1953-56). When RC testified that the only nurse she remembered coming in was a *different* nurse to whom she "reported" the alleged assault the following morning (X:1954), the court precluded defense counsel from asking any further questions about visits or assessments by the night nurses on grounds that the question had been "asked and answered". (X:1956). When defense counsel objected to the court's unfair limitation of his right of cross-examination and his right to a fair trial and moved for a mistrial, the court responded "That's denied" and ordered defense counsel to "Step back." (X:1958). The court's ruling unfairly restricted Mr. Farmer's ability to "test [RC's] perceptions and memory", violating his Sixth Amendment right of cross-examination. **Davis,** 415 U.S. at 316.

B. Limitations on Cross Examination of MP.

The court repeatedly restricted defense counsel's cross-examination of MP at her deposition on January 20, 2012. During direct examination, MP testified extensively about the nature and effects of her seizure disorder, including the types of incidents that trigger a seizure, and the effects of a

seizure on her ability to perceive what was going on around her and interact with her environment. (V:786-87). MP testified that during the alleged assault, she could "feel" a variety of things, including Mr. Farmer's "thumb" in her anus (which "hurt") and his finger in her vagina, "maybe up to the [second] knuckle". (V:796-97). On cross examination, MP admitted she could not actually *see* what was going on below her waist (V:814-15), so her ability to feel and perceive became key issues for the defense.

Defense counsel attempted to impeach MP by cross-examining her ability to accurately perceive what was happening, given that she had just had a seizure and was under the influence of a cocktail of strong drugs including morphine, Dilantin, Prozac, and benzodiazepines. (V:809-10). Although MP admitted that these medications were in her system at the time of the alleged assault, she claimed that they had no effect whatsoever on her awareness. (V:809-10). Yet, when defense counsel sought to challenge that claim, the court shut down the entire line of questioning, ruling that MP needed to be qualified as an "expert" in order to offer any opinion about the combined effects of her medications. (V:809-10). Where MP had already given extensive testimony about her own medical condition and her ability to perceive, defense counsel should have been allowed some leeway to explore this area. The court's ruling that "expert" testimony was required was

erroneous and unreasonably limited Mr. Farmer's cross-examination on a key issue in the case. See **Lobato**, 120 Nev. at 520 (cross-examination should not be restricted unless the inquiries are "'repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness.'"); **Davis**, 415 U.S. at 316.

The court compounded this error by precluding defense counsel from impeaching MP's claim that she could "feel" what was happening below her waist with information that **she** had provided to doctors at Centennial Hills about her limited ability to feel pain or discomfort. (V:817). Defense counsel asked MP, "Are you aware of the fact that your doctor noted that you have a very limited ability to feel pain or discomfort during that time that you were there?" (V:817). The court sustained the State's objection on grounds that the question "lacked foundation" and "assumes facts not in evidence." (V:817). However, these were not proper bases to limit cross-examination – defense counsel was certainly permitted to ask MP if she was "aware" of the contents of her own doctor's report. The question, "are you aware", is foundational in nature and assumes nothing. Ultimately, the court's erroneous ruling precluded Mr. Farmer from testing MP's claim that she could feel what was happening below the waist, in violation of Mr. Farmer's

Sixth Amendment right of confrontation. See **Lobato**, 120 Nev. at 520; **Davis**, 415 U.S. at 316.

During MP's deposition, the court improperly sustained two additional objections on grounds that the questions "lacked foundation" and "assumed facts not in evidence", unreasonably limiting the scope of cross-examination.(V:812-13, 833). Although the court announced at the beginning of the deposition that the case was "State of Nevada versus Steven Dale Farmer", the court would not allow defense counsel to ask MP if Mr. Farmer had given his "correct name" when he introduced himself as Steve or Steven, because the question allegedly "assumes facts not in evidence." (V:811-12). A key part of Mr. Farmer's defense was the fact that he gave his accusers his true name, which made no sense if he intended to sexually abuse them. Yet, the Court would not allow defense counsel to impeach MP's allegations of sexual assault by having her acknowledge that Mr. Farmer gave her his true name when they first met. There was no reason to limit the cross-examination in this manner, particularly where Mr. Farmer's name *was* in evidence, and where MP already told the Grand Jury in 2008 that she was then aware of his first and last name. (I:102-03).

Finally, the court unreasonably limited Mr. Farmer's cross-examination regarding MP's motive to fabricate claims in the criminal case to improve her

likelihood of success in her civil lawsuit against Centennial Hills. After MP attempted to minimize her involvement in the lawsuit, claiming that it was merely her *attorney* who was suing Centennial Hills, defense counsel asked MP if she was "aware that a conviction in this criminal case will help the lawsuit?" (V:833). Although this "yes or no" question sought to gauge MP's awareness of the significance of a conviction in the criminal case, the court precluded defense counsel from even *asking* it on the grounds that it lacked "foundation" and assumed "facts not in evidence".(V:833). Again, the question, "are you aware", is foundational in nature and assumes nothing. The court's error in precluding this question unreasonably limited Mr. Farmer's cross-examination of MP as to her bias and motive to fabricate.

An important thing to remember is that MP's deposition was being taken with the understanding that it could someday be presented to the jury at trial. By sustaining numerous objections on the improper basis that the cross-examination questions lacked "foundation" and assumed "facts not in evidence", the Court precluded defense counsel from **ever** confronting MP about information or documents that could have been admitted at trial through other witnesses, simply because those witnesses were not present at the deposition. As such, these rulings rendered the deposition utterly useless to the defense from a cross-examination perspective and violated Mr.

Farmer's right of confrontation when MP's testimony was subsequently presented at trial.

C. Limitations on Cross Examination of Margaret Wolfe.

Margaret Wolfe was an Emergency Room nurse at Centennial Hills who testified extensively about standard hospital procedures in dealing with female patients to preserve their modesty while caring for them. (XII:2346-47). Wolfe testified that Mr. Farmer violated such protocols when he went into DH's room in the ER and appeared to check her leads after exposing her chest. (XII:2337-2343). The State presented Wolfe's testimony to counter the defense argument that Mr. Farmer was merely doing his job when he checked his female patients' leads and inadvertently exposed and/or brushed against their breasts. (XIV:2741,2744-45). Defense counsel sought to cross examine Wolfe about the fact that she had subsequently been fired by Centennial Hills Hospital for her own failure to adhere to hospital policies and procedures. (XII:2347-48).[24] As defense counsel explained to the court, "if she's offering an opinion as to whether or not Mr. Farmer follows protocols, it's relevant if the person herself cannot follow standard simple hospital protocols, that her opinion is diminished in credibility and quality."

[24] Wolfe was terminated by Centennial Hills in 2009 for bringing her daughter to the ER, putting her in an ER room bed, and administering an IV without admitting her daughter as a patient or otherwise notifying supervisors or personnel what she was doing. (XII:2348;XV:2827-28).

(XII:2349). However, the court erroneously deemed this line of questioning irrelevant and prevented defense counsel from cross examining Wolfe about her termination from Centennial Hills. (XII:2349). Then, when defense counsel requested a mistrial based on the court's denial of Mr. Farmer's Sixth Amendment right of cross-examination and his Due Process right to a Fair Trial, the court denied the mistrial. (XII:2352-53).

Defense counsel had a right to challenge Wolfe's opinions regarding Mr. Farmer's violation of hospital protocol. Wolfe testified that she "always" followed standard procedures in dealing with female patients; thus, it was certainly relevant that she was later fired for a policy violation. (XII:2347-2353). Moreover, the jury had a right to know that Wolfe may have been biased against Centennial Hills as a result of being terminated. See **Davis**, 415 U.S. at 316-17 (the "partiality of a witness" is "always relevant"); accord **Ransey**, 100 Nev. at 279. Wolfe's termination occurred before she testified at trial and before she offered opinions about the proper standard of care. Indeed, where the State was accusing adverse witnesses of bias simply because they remained employed by Centennial Hills (XIV:2754), yet claiming that Wolfe had no reason to testify falsely against Mr. Farmer (XIV:2774), defense counsel certainly had a right to point out to the jury that

Wolfe had been terminated by Centennial Hills as this went directly to her bias as a witness.

D. The court's rulings were not harmless beyond a reasonable doubt.

If the Court finds a violation of the Confrontation Clause, reversal is required unless "the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" **Medina v. State**,122 Nev. 346, 355 (2006). When analyzing "harmless error", this Court considers "'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, ... and, of course, the overall strength of the prosecution's case.'" **Medina**, 122 Nev. at 355 (quoting **Van Arsdall**, 475 U.S. at 684)).

MP and RC were essential witnesses to the prosecution -- both accused Mr. Farmer of rape and, since there were no witnesses to the alleged sexual assaults, neither woman's testimony could be deemed "cumulative". As a testament to the importance of these witnesses, Mr. Farmer is currently serving three consecutive 10-to-life sentences solely on the basis of their accusations. Mr. Farmer's defense was that these women fabricated their claims and had a financial motive for doing so as both subsequently filed

civil lawsuits against Centennial Hills Hospital. Yet, the court severely restricted Mr. Farmer's ability to challenge the credibility of these key witnesses as to their biases and their direct examination testimony. This serious error was compounded further by the court's limitation on the cross-examination of RC's husband Scott and Nurse Wolfe.

Not only did the court's rulings violate Mr. Farmer's Confrontation Clause rights, they deprived him of the right to present a full defense. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." **Chambers v. Mississippi**, 410 U.S. 284, 294 (1973). Mr. Farmer had the right "to defend against the State's accusations", and the right to a meaningful opportunity to present a complete defense. **Crane v. Kentucky**, 476 U.S. 683, 690 (1986). The court's refusal to allow the defense to explore the areas of inquiry set forth above violated Mr. Farmer's fair trial and due process rights and was not harmless beyond a reasonable doubt. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8.**

III. THE TRIAL COURT VIOLATED THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND NEVADA'S CONSTITUTION BY ADMITTING MP'S DEPOSITION AT TRIAL WHERE DEFENSE COUNSEL HAD BEEN DENIED AN OPPORTUNITY FOR EFFECTIVE CROSS EXAMINATION.

A. Factual and Procedural Background.

On August 20, 2010, the State filed a Motion for Videotaped Testimony of MP in order to accommodate her seizure disorder and spare her from testifying before the jury. (II:294-300). Defense counsel opposed the motion on Sixth Amendment grounds, arguing that "videotaped testimony given prior to trial will not allow Mr. Farmer the opportunity to effectively cross-examine his accuser" as to information discovered after her deposition and during trial. (II:303,305-06). The court granted the State's motion, but ruled that the deposition could only be presented to the jury if MP were truly "unavailable" at trial. (II:308-09).

MP's deposition was taken on January 20, 2012. (V:785-835). During the deposition, the court unreasonably restricted Mr. Farmer's cross-examination of MP regarding her ability to perceive the events in question and her motives to fabricate. See Argument Section II (B), supra. MP even had a seizure in the middle of defense counsel's cross-examination. (V:824;State's Exhibit 25 at 11:28:00). Although MP's deposition was videotaped, her responses were largely inaudible. (XIII:2526).

In early 2013, defense counsel obtained thirty (30) additional deposition transcripts from RC's and MP's civil lawsuits, along with "numerous interrogatories and answers, as well as additional pleadings" that

defense counsel did not have at the time of MP's original deposition. (III:382). Then, on July 13, 2013, MP committed suicide. (XIII:2514).

Shortly before trial, on January 16, 2014, the State filed a Motion to Use Videotaped Testimony of Victim, [MP] at Trial because [MP's] death rendered her "unavailable". (III:409-13). Defense counsel opposed the motion because Mr. Farmer had not had an "adequate opportunity to confront and cross-examine MP at the time of her deposition."(III:414-18). Nevertheless, the Court ruled that MP's deposition would be admitted. (V:861).

After the Court's ruling, defense counsel obtained still more information that it did not possess at the time of MP's deposition. During the first week of trial, defense counsel obtained a copy of a redacted portion of MP's diary which had been produced in her civil case and which the Court determined to be MP's "dying declaration". (XIII:2509;2519-20;XV:2829-31). During the eleventh day of trial, MP's son Marshall testified that following the alleged assault, MP requested "no more male anything, nurses, doctors, anything" when previously she never had a problem with male physicians or nurses. (XIII:2506,2565,2568). Defense counsel had no prior notice that Marshall would make such an allegation since MP's deposition did not address any fear of male healthcare professionals, and Marshall never

gave a recorded statement to police nor testified about the case prior to appearing at Mr. Farmer's trial. (V:784-836;XIII:2578).

B. Standard of Review.

In **Crawford v. Washington**, the United States Supreme Court held that the Sixth Amendment's Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. 36, 53-54 (2004). Prior deposition testimony falls within the "core class" of testimonial statements covered by the Sixth Amendment. **U.S. v. Solorio**, 669 F.3d 943, 952 (9th Cir. 2012) (citing **Crawford**, 541 U.S. at 51-52).

When the State seeks to introduce an unavailable witness' deposition testimony at trial, "the primary issue before this court is whether [the defendant] had an opportunity for an **effective** cross examination" during the deposition. See **Chavez**, 125 Nev. at 338 (emphasis added).

The Court determines the adequacy of that 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 [judge] allowed the defendant a thorough opportunity to cross-examine the witness." **Chavez**, 125 Nev. at 338-39.

Although this Court "generally review[s] a district court's evidentiary rulings for an abuse of discretion", this Court utilizes *de novo* review to determine "whether a defendant's Confrontation Clause rights were violated" by the improper admission of testimonial hearsay at trial. **Chavez**, 125 Nev. at 339.

In this case, defense counsel did not have a constitutionally-adequate opportunity to cross-examine MP. As set forth in Section II (B), supra, the district court unreasonably restricted cross-examination at MP's deposition.[25] Then, in the two years that elapsed between MP's deposition and trial, defense counsel obtained additional information about MP's case that it did not have at the time of her deposition, including scores of deposition transcripts, interrogatory answers and pleadings, and MP's own diary with her "dying declaration". (III:382;XIII:2509;2519-20;XV:2829-31). Defense counsel was not able to ask MP about any of these matters.

Although the jury heard that MP "took her own life" -- and based on the State's Opening, it could certainly infer that Mr. Farmer's actions had driven her to that point (IX:1661-62) -- defense counsel was unable to

[25] The deposition, itself, was highly prejudicial to Mr. Farmer, as MP could be seen having a seizure in the middle of cross-examination, which invoked unnecessary sympathy and undermined the defense. (V:824; State's Exhibit 25 at 11:28:00).

question MP about the reason for her suicide or her mental state. Further, during trial, MP's son Marshall disclosed that after the alleged assault, MP requested "no more male anything, nurses, doctors, anything" when previously she never had a problem with male physicians or nurses, suggesting that she must have been raped or she would not have reacted this way after the fact. (XIII:2506,2565,2568). Yet, Mr. Farmer never had an opportunity to challenge Marshall's hearsay claim by cross-examining MP about it.

Although MP's allegations alone subjected Mr. Farmer to two concurrent 10-to-life sentences, he **never** had an opportunity to cross-examine MP about any of these matters at the time of her deposition. The State cannot show that the court's error in admitting MP's deposition was harmless beyond a reasonable doubt. **Medina**, 122 Nev. at 355.

IV. THE STATE VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND THE NEVADA CONSTITUTION BY COMMITTING REPEATED ACTS OF MISCONDUCT DURING THE TRIAL.

"When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." **Valdez v. State**, 124 Nev. 1172, 1187 (2008) (footnotes omitted). Even where a

defendant fails to object to prosecutorial misconduct, this Court will reverse a conviction when the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" **Valdez**, 124 Nev. at 1189 (quoting **Darden v. Wainwright**, 477 U.S. 168, 181 (1986)).

A. Vouching for Witnesses in Closing.

"A prosecutor may not vouch for the credibility of a witness or accuse a witness of lying". **Anderson v. State**, 121 Nev. 511, 516 (2005). Vouching occurs "when the prosecution places 'the prestige of the government behind the witness' by providing 'personal assurances of [the] witness's veracity.'" **Browning v. State**, 120 Nev. 347, 359 (quotation omitted) (alternation in original).

In this case, the Prosecutor repeatedly assured the jury that its witnesses were telling the truth simply because they came to court and subjected themselves to interrogation. Although there was no testimony about whether the State had subpoenaed the accusers or whether they testified of their own free will, the Prosecutor assured the jury it was the latter, implying personal knowledge about their reasons for testifying:

- As to HS, the Prosecutor commented, "Does it make sense for them to come in here and tell you that these things happened? . . . A lot of things can get brought up about your personal life. Six years later, she's still walking through that door and taking the stand and tell[ing] you what he did to her. **She still made that decision.**" (XIV:2745).

- As to LS, the Prosecutor commented, "She had to come in here and tell people that six years ago she tried to take her life, she tried to kill herself . . . She had to testify in a public trial, but yet, **she's still here six years later willing to come in and do these things because they happened to her, and because she wants people to know about it.**" (XIV:2773).

- As to DH, the Prosecutor commented, "So why? Why would [DH] come here and make this up? She has no motive . . . she was embarrassed when she was in here testifying. **She's going through this because this happened to her and she wants to come in here and discuss what happened.**" (XIV:2775-76).

- As to RC, the Prosecutor commented, "So why come in here and have to go through this process if the only reason she did all this was for the money? . . . she had pictures of her own vagina splashed across a screen . . . She admitted that she fell apart, she was a bad wife, she was a bad mom. . . These are all the things that she had to comment in here and take that stand and tell you about herself. **If she was doing this all for money, and she's already been paid, then why have to go through this process?**" (XIV:2767).

- Finally, as to MP, the Prosecutor described how difficult it was for her to appear in court and insinuated she must be telling the truth to subject herself to examination: "Consider the fact that Marshal told you when she left the grand jury, she had a seizure. She didn't even leave this building without having a seizure. The ambulance had to come and get her. Is that something that this woman wants to do? **Yet she still came back for that video deposition and testified.**" (XIV:2779).

By implying, without any evidentiary basis, that each of Mr. Farmer's accusers had voluntarily appeared in court as opposed to being subpoenaed, the State improperly vouched for each of them.

The Prosecutor made a number of additional "vouching" arguments throughout her rebuttal closing as well:

- "If this didn't happen to [HS], then why is she behaving like that? Because she's scared. Because she's scared to be in another hospital being treated by males, **because this happened to her**." (XIV:2745-46).

- "But if you don't want to take [DH's] word for it, what about Margaret Wolfe? She has no issues with Steven Farmer. It's not like she had this personal vendetta and she wants to cause him any issues in his life." (XIV:2774).

- "And so the Defense is saying, basically, that Lora Cody made that up. This is an individual who has been a detective with the Las Vegas Metropolitan Police Department for 12 years. Right now she's on Internet crimes against children. She's not even on sexual assault anymore. This wasn't even her case. She was helping Detective Saunders. Her job was to pass out business cards at the hospital and do a ping on Steven Farmer's phone, and she's going to come in here and lie and risk everything, risk her job, her career, her livelihood for who? Who is Steven Farmer to Lora Cody that she would be . . . willing to risk all that for him? **She told you, because it happened, and she saw it happen.**" (XIV:2758).

- "Linda Ebbert, this is someone who has been a – or has been a registered nurse for 50 years, 50 years. She's done over 4,000 sexual assault nurse examinations. She wrote the manual on how to do them. She made the computer software program. And now she's going to come in here and she's going to tell you **– she's going to make these things up? For what? For what? Why would Linda Ebbert come in here and make that up?** (XIV:2768-69).

Although defense counsel did not object to the aforementioned comments, given the sheer number of times the State vouched for its witnesses in

rebuttal closing, there is no way that the jury's deliberations were not tainted by the State's comments.

B. Disparaging the Defense.

"Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct." **McGuire v. State**, 100 Nev. 153, 157 (1984). It is prosecutorial misconduct for the State to "ridicule or belittle the defendant or the case". **Earl v. State**, 111 Nev. 1304, 1311 (1995). Prosecutors may not undermine the defense by making inappropriate and unfair characterizations. **Riley v. State**, 107 Nev. 205, 212 (1991).

During rebuttal closing the Prosecutor repeatedly disparaged the defense and accused defense counsel of misleading the jury. The Prosecutor began by commenting, "I'm sure that 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." (XIV:2738). Not only did this comment ridicule Mr. Farmer, it implied that the defense was trying to "fool" the jury, and asked the jury to consider Mr. Farmer's propensity to commit sex crimes as a basis to convict.[26]

Next, the Prosecutor insinuated that defense counsel tried to hoodwink the jury by "conveniently" leaving information out of his closing argument.

[26] The State repeated this impermissible "propensity" argument throughout the rebuttal closing. See page 27, supra.

(XIV:2749). Defense counsel had argued that RC could not have been sexually assaulted because Nurse Murray and CNA Brown checked on her at 4:45 a.m. and she never mentioned any assault at that time. (XIV:2700). Defense counsel argued that RC could not have been assaulted *after* 4:45 a.m. because Murray and Brown were continually checking on her after that. (XIV:2700). Although the time that RC arrived on the floor was completely irrelevant to the defense's argument, the State insinuated that defense counsel was playing "hide the ball" by failing to mention that RC had been transported to the floor almost an hour earlier, at 3:51 a.m. (XIV:2749). The State argued that the reason defense counsel did not mention 3:51 a.m. was because Mr. Farmer spent the next hour on the seventh floor "sexually assaulting [RC]" and "cannot explain those 49 minutes which is why they didn't talk about 3:51 in their timeline." (XIV:2752). However, the reason defense counsel did not mention "3:51" was because it was not relevant to the defense argument that RC failed to report any rape at 4:45 a.m.! By mischaracterizing the defense argument, the State smeared the defense and prejudiced the jury against Mr. Farmer. Although Mr. Farmer did not object, the error was plain and warrants reversal.

Next, the Prosecutor belittled the central defense theory that RC's false rape allegations were the "spark" that set off a "fire storm" of other claims by

patients who now interpreted Mr. Farmer's treatment as sexual in nature. (XIV:2692, 2720). In rebuttal, the State showed a sad-faced picture of RC, taken during her SANE exam, and sarcastically told the jury, "[w]hat you see right here is the master mind of the demise of Steven Farmer, the spark that started the entire fire . . . you'll have to judge whether or not you think she's this master mind that the Defense has made her out to be." (XIV:2746;XV:2834). Then, the State repeatedly denigrated the defense theory, arguing that to believe the defense the jury would have to deem RC a "master manipulator" and "master mind". (XIV:2767).

Capitalizing on this theme, the State denigrated Mr. Farmer's theory of confirmation bias – that the other four accusers reinterpreted Mr. Farmer's benign actions after learning he was accused of sexual assault. (XIV:2764). The Prosecutor sarcastically commented, "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 – and I have to think about those things, and **then I, poof, oh, you're right, Steven Farmer did that to me."** (XIV:2764).

To further disparage the defense argument that DH, HS and MP were mistaken about Mr. Farmer's intentions in checking their leads, the State sarcastically commented:

> Why are there so many issues with leads while the Defendant is treating people? I mean, how many issues can there be during his shift with leads? And we don't see any of the other nurses or doctors coming in her and talking about, God, there are – there's something wrong with these leads. I mean, are leads at Centennial Hills just faulty?
>
> I am surprised that more people don't die every single day because their leads have fallen off and doctor's don't know that anything's happening because one of their leads is gone. I mean, it's shocking how many people could have that many problems and only Steven Farmer has this issue.

(XIV:2774).

Although defense counsel did not object to the State's repeated disparaging and belittling of the defense, the State's comments rendered the trial fundamentally unfair and warrant reversal.

C. Misstating the Evidence.

It is prosecutorial misconduct for the State to make false or unsupported statements of fact to the jury during closing argument. See, e.g., **Witherow v. State**, 104 Nev. 721, 724 (1988); **Collier v. State**, 101 Nev. 473, 478 (1981).

In closing, the Prosecutor falsely told the jury that "all three of them [Ada Dotson, Ernestine Smith and LS] testified that the defendant then began to rub or push his groin in a circular motion against [LS's] feet as she was laying in the bed." (XIV:2665). The Prosecutor argued that "[t]he testimony of all three, [LS], Ernestine, and Ada, were consistent in the essential

elements" of the open and gross lewdness count pertaining to LS. (XVI:2666). However, Dotson actually testified that she did **not** see Mr. Farmer "thrusting his hips", moving his hips from side to side, or "pushing his groin" onto LS's feet. (XII:2247). While defense counsel did not object to the misconduct, it was plainly erroneous for the State to mischaracterize witness testimony in this manner to prove the "essential elements" of an open and gross lewdness charge.

The Prosecutor made an even more egregious argument in rebuttal closing by grossly mischaracterizing a conversation between Mr. Farmer and Nurse Michelle Simmons. (XIV:2761). Simmons worked for the staffing company that dispatched Mr. Farmer to Centennial Hills Hospital. (XIII:2536-38). Simmons testified that after she learned that allegations had been made about Mr. Farmer, she called him at home, told him there was a "serious allegation against him regarding sexual abuse" and asked for his side of the story. (XIII:2540). Mr. Farmer admitted that he had given his phone number to a patient. (XIII:2540-41). Simmons put Mr. Farmer on hold, spoke to someone from the LVMPD, and then got back on the line with Mr. Farmer. (XIII:2542). When Simmons gave Mr. Farmer the LVMPD's contact information because they wanted to speak with him, he told her he was "sorry" and that he assumed he was "suspended." (XIII:2542). Although that

was the sum total of Simmons' conversation with Mr. Farmer, the State argued in closing, "Someone calls you at your home and says, hey, you've been accused of raping someone and you say, I'm sorry? Someone calls you at your home, what are you going to say? I didn't rape anyone." (XIV:2762). Although defense counsel objected to the State's inflammatory mischaracterization, the Court erroneously overruled the objection. (XIV:2762).

The State also used an improper argument to minimize the fact that the photographs RC claimed to have taken during the assault did not match up with the time she claimed the assault occurred. Without supporting evidence, the State argued, "Number one, her phone could not – may have not been calibrated. You don't know – just like a digital camera. Sometimes you take the photo, and it's not like the time is exact on the digital camera." (XIV:2753). However, there was no indication in the record that RC's phone was not properly calibrated,[27] and "factual matters outside the record are irrelevant and not proper subjects for argument to the jury." **State v. Kassabian**, 69 Nev 146, 153-54 (1952).

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[27] To the contrary, Detective Saunders admitted he did not even investigate to determine if the camera and clock were synched on RC's phone. (XIII:2427).

D. Burden Shifting.

Due process requires the State to "prove every ingredient of an offense beyond a reasonable doubt" and prohibits the State from shifting the burden of proving any of those "ingredients" to the defense. **Patterson v. New York**, 432 U.S. 197, 215 (1977). It is generally improper for the State to comment on the defense's failure to call witnesses or present evidence at trial. **Whitney v. State**, 112 Nev. 499, 502 (1996). Such tactics constitute impermissible "burden shifting" where they "suggest[] to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence...." **Barron v. State**, 105 Nev. 767, 778 (1989) (internal citations omitted).

During rebuttal closing, the State argued that the defense had not proven that RC's false allegations of rape may have been, in part, an attention-seeking ploy. The State shifted the burden of proof, telling the jury, "For the very first time in four weeks, Mr. Maningo stood up here in his argument and told you well, if you're not going to bite off on financial distress, well, then she did it for her husband's attention. Never have heard about needing that for her husband's attention before." (XIV:2747). By suggesting that defense counsel had failed to present evidence to support an argument about a possible alternative motive to lie, the State improperly

shifted the burden of proof. Although defense counsel did not object, the error was of constitutional magnitude and warrants reversal.

V. THE TRIAL COURT ERRED IN ADMITTING PREJUDICIAL AND IRRELEVANT EVIDENCE WITHOUT OFFERING ANY CURATIVE INSTRUCTIONS AND IN EXCLUDING RELEVANT DEFENSE EVIDENCE.

Relevant evidence is "evidence having 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.** Relevant evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice". **NRS 48.035.** This Court reviews rulings on evidence and mistrial requests for abuse of discretion. **Jones v. State**, 113 Nev. 454, 467 (1997); **Rudin v. State**, 120 Nev. 121, 142 (2004).

In this case, the court abused its discretion by permitting the State to elicit irrelevant and unduly prejudicial victim impact testimony from HS and RC, then denying a requested mistrial and refusing to provide a curative instruction. The court further abused its discretion by refusing to admit MP's dying declaration into evidence to dispel any inference that MP committed suicide because of Mr. Farmer's actions. Finally, the Court abused its discretion in failing to strike or offer a limiting instruction after the jury was exposed to bad acts evidence.

A. Victim Impact Evidence Regarding HS.

During HS's direct examination, the State asked her "to talk a little bit about how this incident or defendant's actions back in May of 2008 affected you or impacted you." (IX:1728). Although defense counsel objected to this victim impact evidence, the court permitted HS to testify about her subsequent fear of male nurses and hospitals which were allegedly caused by Mr. Farmer, and her need to be "restrained" during a subsequent trip to Summerlin Hospital because of her intense fear of male nurses. (IX:1728-29). There was no testimony indicating when these incidents occurred.

Over defense objection, the court also permitted the State to ask HS if she **ever** had "any issues with emotionally trying to deal with this incident and trying to medicate those emotions, to which HS responded, "yes". (IX:1729). Again, there was no time-frame provided for this testimony.

The State subsequently sought permission from the court to ask HS's husband (Lehan) if he noticed an increase in her alcohol intake as a result of Mr. Farmer's actions. (IX:1771-72). Although the court initially agreed that the testimony was not relevant (IX:1777), upon hearing Lehan's anticipated testimony, the court ruled that the State could ask him if he noticed any change in her behavior "immediately" after the incident. (IX:1792,1800).

Lehan later testified that HS turned to alcohol and had problems sleeping after the incident. (IX:1806).

The court abused its discretion when it allowed the State to introduce irrelevant and unduly prejudicial victim impact evidence regarding HS. The defense never accused HS of fabricating claims about Mr. Farmer. (IX:1795). Rather, it was the defense theory that HS merely re-interpreted an innocent experience with Mr. Farmer after learning that he was accused of rape. Since the defense did not dispute that HS believed she had been taken advantage of by Mr. Farmer after hearing the news reports, there was no need to present testimony that her behavior changed after she came to that conclusion. (IX:1795). Yet, the State made sure to remind the jury of her behavior changes in closing argument. (XIV:2745) ("If this didn't happen to [HS], then why is she behaving like that?"). The court manifestly erred in permitting this victim impact evidence and reversal is required.

B. Victim Impact Evidence Regarding RC.

During RC's direct examination, the Prosecutor asked, "After this assault happens to you, how did you start dealing with your fear and anxiety?" (X:1893). In response, RC testified about how she started seeing a psychologist, taking Xanax and Soma, how she "wanted to die", and how she would have "nightmares". (X:1893). When the State inquired about the

nature of her "nightmares", defense counsel objected but the court overruled the objection and permitted her to continue. (X:1893). RC then began describing her nightmares and testified that "**at one point** I took a bottle of Xanax. I took 120 Xanax and I was on life support." (X:1893-94) (emphasis added). She went on to describe how she called Jean at the Rape Crisis center "all the time", "three and four times a week". (X:1894). Although defense counsel again objected, the court permitted her to testify that RC called Jean "immediately after" the incident, and that she was "still" in regular contact with Jean and had just called her "yesterday or the day before yesterday" – in 2014. (X:1895-96).

The following day, defense counsel requested a mistrial as a result of the State's highly prejudicial victim impact testimony (particularly RC's testimony that "at one point" she attempted suicide) because the jury already knew that MP committed suicide and RC's testimony created an inference that MP probably killed herself because of Mr. Farmer. (XI:2038). As defense counsel explained, the news media had already connected those dots and was reporting both suicide attempts as being causally related to Mr. Farmer, and it was likely the jury would make that connection as well. (XI:2038). Defense counsel further explained the prejudice from having to defend against victim impact claims that may have occurred years after the

alleged assaults, where the court's prior ruling on the State's motion in limine effectively prevented the defense from challenging those claims. (XI:2038).

Ultimately, the court ruled that the State could only ask about "behavior change[s] immediately after the incident" (XI:2045) and denied the defense motion for mistrial. (XI:2046). Yet, this ruling did not cure the damage that had been already been done by the State's prior questioning, which was not limited in such a manner. Moreover, the court ended up ignoring its own ruling and allowed RC's husband to testify to behavioral changes that occurred *well after* the alleged assault. Scott initially testified that he did **not** notice any immediate changes to RC's behavior. (XI:2124). Yet, over defense counsel's objection, the court permitted Scott to testify that after a month, she slowly began "abusing drugs and alcohol" and her "prescription medications", and that the effects of the assault contributed to their eventual divorce in 2013. (XI:2025).

The minimal probative value of RC's victim impact testimony was far outweighed by the danger of unfair prejudice to the defense. Initially, as RC's husband admitted, her behavior did not change until more than a **month** after the alleged assault. (XI:2124). Yet, there were numerous "stressful" events that occurred in the month following the alleged assault: the State subpoenaed RC to appear and give sworn testimony at a preliminary hearing

that was originally set for June 4, 2008, continued to June 17, 2008, and finally held on July 1, 2008. (I:6-7;XV:2822). The media was present at the preliminary hearing (I:6-7), and the State acknowledged in its closing argument that testifying in court, with all of the "cameras" and "news reporters" must have been "humiliating to a certain extent" for RC. (XIV:2766).

Moreover, RC's abuse of alcohol and medications, suicide attempt, marital discord and eventual divorce could just as likely have been caused by a guilty conscience for falsely accusing a man of rape and having to repeat those falsehoods under oath in court. Because the evidence of her behavior change cut both ways, it was confusing at best and should never have been admitted because it was unduly prejudicial. See, e.g., **Johnson v. State**, 40 So.3d 883 (Fla. 4th DCA 2010) ("the probative value of the victim's suicide attempts was only marginally probative" because it "tended to show that the victim was distraught *either* because she was lying or because she was telling the truth" and was prejudicial because it had "substantial likelihood of inflaming the jury and appealing to their emotions").

Yet, even though the victim impact evidence cut both ways and risked confusing the jury, the State repeatedly argued in closing that RC's behavior proved she was telling the truth:

- "Scott told you they didn't have sex anymore because she didn't want to, and he was too scared to try because of what had happened. She turned to pills and alcohol, and she became detached from her husband and children. So if her plan was to do this so she could get this attention, that plan isn't working out too well for [RC], considering that Scott told you that it was one of the contributing factors to their divorce. (XIV:2747).

- "She admitted that she fell apart, she was a bad wife, she was a bad mom. Admit to she became an addict. She turned to pills, she turned to alcohol. Admits that she has to go see a therapist. These are all the things she had to comment in here and take the stand and tell you about herself. If she was doing this all for money, and she's already been paid, then why have to go through this process?" (XIV:2767).

- "Like I've already said, she turned to pills and alcohol. Scott told you about very –you know, immediately after, she started sleeping a lot. She became disconnected from her husband and daughter. She stopped having sex with her husband. She started seeing a therapist." (XIV:2269-70).

The prejudice from RC's victim impact testimony was further compounded by the court's ruling that Mr. Farmer could not even cross-examine RC or her husband about other factors that could have caused her suicide attempt, alcohol and drug use, and marital discord. See Argument Section II (A), supra. Further, the Court did not seem to recognize the inherent prejudice caused by allowing testimony about RC's suicide attempt in a case where another accuser (MP) actually did commit suicide. The court erred by denying the mistrial and reversal is warranted. See **Rudin**, 120 Nev.

at 142 (mistrial appropriate where "prejudice occurs that prevents the defendant from receiving a fair trial").

C. Failure to offer any curative instruction.

After the court denied Mr. Farmer's request for a mistrial, defense counsel requested a curative instruction to limit the jury's consideration of the irrelevant and highly prejudicial victim impact testimony regarding HS and RC, and the suicide of MP. (XIV:2658). Specifically, defense counsel asked that the jury be instructed as follows:

> In determining the credibility of a witness you are not to consider any purported changes in their behavior in the weeks, months, and years after the alleged incident. For example, testimony concerning post allegation suicide attempts, depression, or turns to alcoholism shall not be considered by you in your deliberations as these purported changes in behavior are irrelevant in assessing a witnesses credibility or in determining whether the defendant committed the crimes charged.

(I:490).

The court rejected the instruction, in part, because it incorrectly believed it had "restricted [the testimony] greatly to the time immediately after the incident" and because "we didn't have any testimony about the years after the alleged incident because I restricted that." (XIV:2659). However, as set forth above, the testimony was **not** restricted temporally. It was unclear when RC actually attempted suicide or when HS had to be restrained by nurses at Summerlin Hospital. Further, RC testified she was still calling the

Rape Crisis Center days before trial and that she and Scott divorced in 2013 because of Mr. Farmer's actions. See Section V (A) and (B), supra. In addition, the jury knew that MP committed suicide in 2013. Where the court had previously ruled that behavior changes occurring long after the alleged assault were inadmissible, and where the evidence in question was irrelevant and highly prejudicial, it was error for the court to refuse the requested curative instruction in this case.

D. Refusal to Admit MP's Diary.

At trial, defense counsel obtained a copy of a portion of MP's diary which the court agreed contained her "dying declaration." (XIII:2509,2519-20). Defense counsel sought to admit MP's dying declaration as evidence at trial to dispel any inference that MP committed suicide because of Mr. Farmer's actions. (XIII:2510). MP's dying declaration did not mention anything about Mr. Farmer, but indicated that MP was sorry for the way she had treated her children over the years and stated that she was "not living" but merely "existing" and that she didn't "want to any longer". (XV:2829-31).

A portion of MP's dying declaration had been redacted by her own attorney before disclosing it to the defense. (XIII:2520;XV:2830). Although MP's legal representative was responsible for withholding part of her dying

declaration, the court ruled that defense counsel could not introduce the remainder of that declaration as evidence because it was not a "complete statement". (XIII:2542). This ruling was erroneous because **NRS 47.120** does not permit the court to exclude an entire statement where an opposing party has redacted a portion of that statement for his or her own legal benefit. By excluding MP's dying declaration, the court prevented Mr. Farmer from refuting the inference that MP killed herself because of him. The State set up that improper inference in its opening statement (IX:1661-62), and again referenced MP's suicide in rebuttal closing argument, asking the jury, "if this was all for money, then why would MP take her own life before she ever saw a penny of the money from this lawsuit? It doesn't make sense for MP to want to go through this". (XIV:2779-80). The court's ruling deprived Mr. Farmer of his due process and fair trial guarantees and his right to present a complete defense, requiring reversal.

E. Admission of Bad Act Evidence.

NRS 48.045(2) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Improper references to a defendant's prior criminal acts must be excluded because they affect the presumption of innocence and violate defendant's right to due process. See **Sherman v.**

State, 114 Nev. 998, 1008 (1998). This Court requires a limiting instruction upon the admission of bad act evidence and in the jury instructions. See **Rhymes v. State**, 121 Nev. 17, 22-24 (2005).

At trial, Nurse Murray testified that Mr. Farmer broke the law and violated HIPAA by discussing RC's medical treatment in front of another patient. (XI:2055). Although defense counsel immediately objected, and court agreed the testimony was improper, no curative instruction was given and the jury was never instructed to disregard the testimony. (XI:2056-57;I:453-482).

The State subsequently displayed a photograph of RC taken by SANE Nurse Ebbert listing Phenobarbital as the "date rape drug" that she had been given, implying that Mr. Farmer had drugged her before raping her.[28] (XI:2159;XV:2824). The State acknowledged the problem with the picture and redacted the "date rape drug" reference before sending it back to the jury as State's Exhibit 23. (XI:2197-98;XV:2846). Unfortunately, the damage had already been done.

[28] Defense counsel had originally objected to the picture being shown in the State's Opening Power Point presentation (VIII:1352-53), but the Court stated that the photograph was "going to come in as evidence" and overruled the objection. (VIII:1355).

Where the jury was presented with bad acts evidence and the trial court failed to proffer instruction(s) limiting the jury's consideration of that evidence, reversal is warranted.

VI. THE STATE'S WITNESSES IMPROPERLY VOUCHED FOR ONE ANOTHER.

"A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness." **Perez v. State**, 313 P.3d 862, 870 (2013) (citing **Lickey v. State**, 108 Nev. 191, 196 (1992)). Vouching is improper when it "'len[ds] a stamp of undue legitimacy to the victim's testimony.'" **Lickey**, 108 Nev. at 196 (quoting **State v. Logue**, 372 N.W.2d 151 (S.D. 1985)). In this case, over defense objection, the court permitted SANE nurse Linda Ebbert to vouch for RC's credibility, telling the jury that because RC "maintained very good eye contact", it signaled that RC was "paying attention" and "interested" in Ebbert's questions, and therefore giving "good answers" during the SANE exam. (XI:2190). The court's ruling was error because the testimony revealed Ebbert's opinion that RC was telling the truth about the alleged rape. See **Felix v. State**, 109 Nev. 151, 203 (1993) (where psychologist testified that child victim was a "forthright-type

person" it was inadmissible "direct testimony on the credibility of the child victim" and reversible error).[29]

In addition, the court erroneously permitted the State to elicit misleading testimony from Detective Michael Saunders about which employees of Centennial Hills Hospital he deemed "cooperative" during his investigation, denigrating those witnesses who provided favorable testimony for Mr. Farmer and unfairly bolstering the testimony of the witnesses who testified against him. For instance, Nurse Westcott testified at trial that RC told her a different story than the story she later told police about her rape. See Footnote 10, supra. In response, the State had Detective Saunders characterize Nurse Westcott as "uncooperative" with his investigation, such that he had to threaten her with "obstruction" charges for failing to give him RC's medical records. (XIII:2436). By contrast, Nurse Murray offered testimony that was favorable to the State, so the State had Detective Saunders characterize her as a "cooperative" witness. (XIII:2436). Although defense counsel objected to the State presenting testimony about whether Centennial Hills employees were "cooperative", the Court improperly overruled the objection. (XIII:2438). This testimony was particularly misleading and inappropriate because the State knew from prior testimony that hospital

[29] **Felix** was superceded on other grounds by statute, as stated in **Evans v. State**, 117 Nev. 609 (2001).

employees were subject to HIPAA regulations which limited their ability to discuss patients and treatments with third parties. (XI:2055;XIII:2404).

Vouching may also occur through the presentation of cumulative testimony. As this Court recognized in **Felix**, 109 Nev. at 200, "it would be unfair to permit a victim to tell his or her version of an incident numerous times through the testimony of different witnesses because such testimony would be tantamount to allowing these other witnesses to vouch for the veracity of the victim." Despite this authority, the State used Detective Saunders to bolster the testimony of the State's prior witnesses by having him repeat their prior testimony, which only sounded more credible coming out of the mouth of a detective. (XIII:2424-67). Although defense counsel objected to the State rehashing the hearsay testimony of prior witnesses (XIII:2430-33), the State continued to do so throughout Detective Saunders' direct examination. (XIII:2444-45,2452-54,2456-61,2463-66,2467-68).

VII. THE TRIAL COURT DENIED DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ." **U.S.C.A. VI.** To determine if a defendant's speedy trial right has been violated, this Court conducts a "balancing test" which considers "the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to

the defendant." **Middleton v. State**, 114 Nev. 1089, 1110 (1998) (citing **Barker v. Wingo**, 407 U.S. 514, 530 (1972)). No single factor is "a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." **Barker**, 407 U.S. at 533. Plain error review applies to speedy trial errors not raised at the district court level. See **United States v. Sykes**, 658 F.3d 1140 (9th Cir. 2011).

To trigger a speedy trial analysis, the defendant "must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay. . ." **Doggett v. United States**, 505 U.S. 647, 651-52 & n.1 (1992). The length of delay in this case – nearly six years between the filing of the criminal complaint in 2008 and the trial in 2014 – is presumptively prejudicial. See **Doggett**, 505 U.S. at 652 and n.1 (holding that an "extraordinary 8 ½ year lag between Doggett's indictment and arrest clearly suffices to trigger speedy trial enquiry" and recognizing that lower courts find one year delays "presumptively prejudicial").

In both consolidated cases, Mr. Farmer initially invoked his right to a speedy trial (IV:563-65;580) but thereafter waived the 60-day rule. (IV:570,586). Although defense counsel **did** subsequently request many

continuances, Mr. Farmer should not be held personally responsible for the majority of those continuances for the reasons forth below:

- On January 20, 2009, defense counsel requested a continuance in the **RC** case (I:143-46), and the court reset the trial for June 22, 2009 (IV:625). This continuance may be attributable to Mr. Farmer.

- On May 19, 2009, the State requested a continuance in the **MP** case and the court set a status check for July 14, 2009. (IV:629-30). This continuance should be attributable to the State.

- On June 5, 2009, defense counsel requested a continuance in **RC**, in part, because the State had not complied with its discovery obligations (III:188-92) and jury trial was set for November 9, 2009. (IV:634). This continuance should be attributable the State.

- On October 28, 2009, the State filed a motion to continue the trial date in **RC** due to an unavailable witness and trial was reset for April 26, 2010 (IV:641-42). This continuance should be attributable to the State.

- On November 17, 2009, the parties jointly stipulated to continue the **MP** case for an April 26, 2009 Status Check. (IV:645). This continuance may be attributed in part to Mr. Farmer.

- Weeks before the **RC** trial, on March 8, 2010, the State filed a motion to consolidate the **RC** and **MP** cases and a motion to take **MP's** videotaped deposition. (IV:225-45). As a result, defense counsel was forced to request a continuance until November 29, 2010 which should be attributable to the State's strategy. (IV:653).

- On October 25, 2010, defense counsel advised the court that lead defense counsel Stacey Roundtree was "currently away from the office" and may not be "coming back" and obtained a continuance until April 18, 2011, which should **not** be attributable to Mr. Farmer as he bore no responsibility for defense counsel's departure.[30]

[30] Mr. Farmer's original lead trial counsel, Stacey Roundtree, was forced to resign because she was no longer permitted in the Clark County Jail

- On February 23, 2011, Mr. Farmer's new counsel filed a motion to continue the trial date as a result of prior defense counsel's departure from the office. (II:313). The subsequent resetting of trial to November 14, 2011 should not be attributable to Mr. Farmer. (V:763).

- On October 17, 2011, defense counsel requested a continuance because second chair Greg Coyer had left the office and the case had been reassigned to another public defender who needed additional time to get up to speed. (V:769). Counsel's staffing needs should not be attributable to Mr. Farmer as he bore no responsibility for his attorneys' decisions to leave the office.

- On February 6, 2012, due to evidentiary issues that affect the trial, the Court vacated the trial date and set it for September 4, 2012 (V:838).

- On July 11, 2012, defense counsel filed a motion to continue the trial date because substituted trial counsel Amy Feliciano was having surgery. (III:371). The Court rescheduled the trial date for March 4, 2013. (V:844). Again, defense counsel's staffing needs should not be attributable to Mr. Farmer as he had nothing to do with counsel's need for surgery.

- Finally, on February 14, 2013, defense counsel filed a motion to continue the trial date based on newly-discovered materials from the civil litigation. (III:382). The ensuing one-year continuance may be attributed to Mr. Farmer. (III:536;V853).

As a result of the continuances, Mr. Farmer remained incarcerated for nearly 6 years awaiting his trial and suffered demonstrable prejudice from the

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following allegations of misconduct that had nothing to do with this case. See http://www.reviewjournal.com/news/crime-courts/state-bar-monitoring-investigation-ex-public-defenders-jail-conduct (last visited 2/19/2015). The ensuing trial delays relating to the need to replace Ms. Roundtree should not be held against Mr. Farmer.

delay. See **Barker**, 407 U.S. at 534 ("Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety"). In that time, MP committed suicide, preventing Mr. Farmer from appropriately cross-examining her at trial, and giving rise to a potential inference by the jury that MP killed herself because of Mr. Farmer's actions. See **Barker**, 407 U.S. at 534 (recognizing potential prejudice where "witnesses died or otherwise became unavailable owing to the delay"). Further, where the State was originally considering dismissing the MP charges altogether if it got a conviction in the RC case (IV:639), the delay of trial gave the State additional time to consolidate the two cases, obtain MP's deposition, and bootstrap the two cases together to improve its chances at trial. The delay also enabled the State to present highly prejudicial victim impact evidence circa 2013 and 2014 that RC was divorced as a result of the alleged assault and was still calling the "Rape Crisis Center" days before trial. (X:1894-96;XI:2124-25). Based on the totality of the circumstances, Mr. Farmer's speedy trial rights were violated and his convictions should be overturned.

VIII. THE SENTENCE IMPOSED AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT.

The U.S. and Nevada Constitutions prohibit "cruel and unusual punishment." **U.S.C.A. VIII, XIV; Nev. Const. Art. 1, Sect. 8**. Whether a particular sentence amounts to 'cruel and unusual' punishment is determined

based on "evolving standards of decency that mark the progress of a maturing society." **Trop v. Dulles**, 356 U.S. 86, 101 (1958) (plurality). While legislatively enacted statutes are presumptively valid, a sentence is unconstitutional "if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends the fundamental notions of human dignity..." **Schmidt v. State**, 94 Nev. 665, 668 (1978).

The trial court sentenced Mr. Farmer to three consecutive terms of life in prison with a minimum mandatory sentence of 30 years before parole eligibility. Condemning a man to spend the rest of his natural life in prison – the same sentence a First Degree Murderer would receive – for conduct that did not cause substantial physical harm, offends fundamental notions of human dignity. This Court should strike Mr. Farmer's sentence(s) as cruel and unusual punishment under the Federal and State constitutions.

IX. CUMULATIVE ERROR WARRANTS REVERSAL.

To the extent this Court deems any of the aforementioned errors harmless, reversal is warranted because cumulative error deprived Mr. Farmer of his constitutional right to a fair trial. See **Big Pond v. State**, 101 Nev. 1, 3 (1985).

Proportionately spaced, has a typeface of 14 points or more and contains **17,327** words and **1,722** 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.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of June, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY */s/ Carrie M. Connolly*
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