IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 67380

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This proceeding is appropriately retained by the Supreme Court pursuant to NRAP 17(a)(1) because it invokes the original jurisdiction of the Supreme Court.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT DID NOT ERR IN DENYING ALOTAIBI'S MOTION FOR NEW TRIAL AS STATUTORY SEXUAL SEDUCTION IS A LESSER-RELATED OFFENSE OF SEXUAL ASSAULT WITH A MINOR UNDER 14 YEARS OF AGE, THUS THE DISTRICT COURT WAS UNDER NO OBLIGATION TO GIVE THIS INSTRUCTION SUA SPONTE.

II. THE DISTRICT COURT DID NOT ERR IN DENYING ALOTAIBI'S MOTION FOR NEW TRIAL BECAUSE THE RECANTATION OF RASHED ALSHEHRI'S TRIAL TESTIMONY WAS NOT FALSE OR NEWLY DISCOVERED EVIDENCE UNDER CALLIER.

III. ALOTAIBI'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE NOT PROPERLY BEFORE THIS COURT; HOWEVER, IN THE EVENT THIS COURT WISHES TO REVIEW THESE CLAIMS UNDER THE EXCEPTION SET FORTH IN MAZZAN, ALOTAIBI RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING TRIAL.

STATEMENT OF THE CASE

On October 18, 2013, the State charged Appellant Mazen Alotaibi (hereinafter "Alotaibi") by way of a Second Amended Information as follows: Count 1- Burglary (Category B Felony- NRS 205.060); Count 2- First Degree Kidnapping (Category A Felony- NRS 200.310, 200.320); Count 3- Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony- NRS 200.364, 200.366); Count 4- Lewdness with a Child Under the Age of 14 (Category A Felony- NRS 201.230); Count 5- Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony- NRS 200.364, 200.366); Count 6- Lewdness with a Child Under the Age of 14 (Category A Felony- NRS 201.230); Count 7- Lewdness with a Child Under the Age of 14 (Category A Felony- NRS 201.230); Count 8- Lewdness with a Child Under the Age of 14 (Category A Felony- NRS 201.230); and Count 9- Coercion (Sexually Motivated) (Category B Felony- NRS 207.190, 207.193, 175.547). 1 Appellant's Appendix "AA" 10-13.

On October 10, 2013, Alotaibi's jury trial began, and on October 23, the jury returned a guilty verdict on Counts 1, 2, 3, 5, 7, 8 and 9. 4 AA 907-08, 952-55. As

for Count 9, the jury found Alotaibi guilty of Coercion, a misdemeanor. Alotaibi was found not guilty on Counts 4 and 6. Id.

On May 27, 2014, Alotaibi filed a Motion for New Trial and/or for an Evidentiary Hearing based upon (1) the recantation of State's witness Rashed Alshehri's testimony, and (2) the district court's failure to instruct the jury on statutory sexual seduction, which Alotaibi claimed was a lesser-included offense. Respondent's Appendix ("RA") 1-222. On July 16, 2014, the State filed its Opposition. RA 223-239. On September 12, 2014, the district court heard argument on Alotaibi's Motion, and declared it was going to issue a written decision. 4 AA 956-97. On November 18, 2014, the district court entered its Findings of Fact, Conclusions of Law and Order, denying Alotaibi's Motion. 5 AA 998-1012.

On January 28, 2015, Alotaibi was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: Count 1: a minimum term of 12 months and a maximum term of 48 months; Count 2: a definite term of 15 years with eligibility for parole beginning when a minimum of five years have been served, Count 2 to run concurrent with Count 1; Count 3: Life imprisonment with eligibility for parole beginning when a minimum of 35 years have been served, Count 3 to run concurrent with Count 2; Count 5: Life imprisonment with the eligibility for parole beginning when a minimum of 35 years have been served, Count 5 to run concurrent with Count 3; Count 7: Life imprisonment with eligibility for parole beginning when

a minimum of 10 years have been served, Count 7 to run concurrent with Count 5; Count 8: Life imprisonment with eligibility of parole beginning when a minimum of 10 years have been served, Count 8 to run concurrent with Count 7; and Count 9: credit for time served.[1] 5 AA 1023-24, 1027-28. Alotaibi received 758 days' credit for time served. Id. Alotaibi was also subject to a special sentence of lifetime supervision, which would commence upon his release from any term of probation, parole, or imprisonment. Id. at 1024. Also, pursuant to NRS 179D.460, Alotaibi would have to register as a sex offender within 48 hours of sentencing or release from custody. Id.

Alotaibi's Judgment of Conviction was filed on February 5, 2015. 5 AA 1026-27. Alotaibi filed his timely Notice of Appeal on that same date. Id. at 1029-30. Alotaibi filed his Opening Brief ("AOB") on October 26, 2015. The State responds as follows.

STATEMENT OF THE FACTS

A.J.D. ("A.J.") arrived in Las Vegas on December 30, 2012 with his grandmother to celebrate the New Year. 1 AA 83; 2 AA 273. They were staying at the Circus Circus Hotel and Casino. 2 AA 273.

[1] Alotaibi's sentence for Count 9 was imposed on February 2, 2015, where he received credit for time served on this misdemeanor Coercion count. See RA 240.

While at Circus Circus, A.J. ran into a friend from school who was also staying at the hotel with her family. 1 AA 84. On the morning of December 31, A.J. woke up around 6:30-7:00 AM, and decided to meet his friend for breakfast. Id. at 87-88. AJ asked his grandmother for permission to go and for some money. Id. A.J. then went to his friend's room on the 6th floor, but she was still asleep. Id. A.J. went downstairs and walked around the hotel to waste some time. Id. About twenty minutes later, A.J. took the elevator back up to the 6th floor and sat on the couch in front of the elevators waiting for his friend to wake up. Id. at 88-89. While sitting on that couch, A.J. came into contact with Alotaibi. Id. at 89.

Alotaibi and his two friends, Rashed Alshehri ("Alshehri") and Mohammed Jafaari ("Jafaari"), arrived in Las Vegas during the early morning hours on December 31, 2012. 3 AA 528. Upon arrival, they met up with some friends at the Palms Hotel and Casino where they consumed alcoholic beverages for the next couple of hours. Id. at 528-29, 741. After the Palms, the group went over to a strip club where they also were consuming alcohol. Id. at 531-32.

Alotaibi and his friends left the strip club and drove to the Circus Circus Hotel where they were staying. Id. at 534. Even though Alshehri testified that Alotaibi was drunk, he said that Alotaibi drove them all to Circus Circus competently with no problems except for maybe some speeding. Id. at 537-39.

They arrived at Circus Circus, and as the three men were exiting the elevator and proceeding toward their room on the 6th floor, they encountered A.J., who was still sitting on the couch waiting for his friend to wake up. Id. at 540; 1 AA 89.

Alotaibi exited the elevator and started talking to A.J. 1 AA 90. A.J. then asked Alotaibi if he had any marijuana, and Alotaibi confirmed that he did have some. Id. A.J. then followed Alotaibi into his hotel room thinking he was going to get some marijuana to smoke. Id. at 91. Once inside Alotaibi's hotel room, A.J. saw three other males sitting inside smoking marijuana, and A.J. could not understand the language the men were speaking. Id. Alotaibi and A.J. then went downstairs to smoke. Id. at 91-92.

As they were heading toward the elevator to go downstairs, Alotaibi started making sexual advances toward A.J. Id. at 93. Once inside the elevator, Alotaibi started to move onto A.J., and kiss him around his neck underneath his ear. Id. at 94. A.J. testified he did not know what to do. Id. After they smoked together outside, Alotaibi again started to make more sexual advances on A.J., and started touching A.J. around his body and kissing him on his face. Id. at 95. A.J. was trying to back off by stepping away and saying no. Id. When A.J. would step away from him, Alotaibi would bring A.J. closer to him. Id.

In the elevator heading back upstairs, Alotaibi told A.J. that he wants to have sex, and would have sex for money and weed. Id. at 95. Initially, A.J. did say yes,

but he testified that he never had any intentions of doing anything sexual with Alotaibi; he was only saying that to try to trick Alotaibi into giving him some weed and that was all. Id. at 96.

Once they were back inside Alotaibi's room, A.J. was trying to buy some weed. Id. at 95-96. Alotaibi told A.J. to go into the bathroom, and he followed him in. Id. at 97. Alotaibi put the weed on the counter, and told A.J. he will give him money and take care of him, and Alotaibi kept trying to touch and kiss A.J. Id. at 98. A.J. testified that he felt very awkward and uncomfortable. Id. A.J. told Alotaibi that he wanted to leave and attempted to get to the door. Id. However, Alotaibi placed himself between A.J. and the front door to prevent A.J. from leaving. Id. A.J. struggled and repeatedly attempted to leave, but was overpowered by Alotaibi, who began removing A.J.'s clothing. Id., Id. at 100. Alotaibi started touching A.J. around his body, and A.J. was trying to back away when Alotaibi started kissing him on his face and chest. Id. at 98-99. All A.J. wanted to do was leave, and he kept telling Alotaibi to stop. Id. Alotaibi then removed his own clothing and forced A.J. to bend over, forced A.J.'s head toward his private area, and put his penis inside A.J.'s mouth. Id., Id. at 100-01. A.J. testified it really hurt his throat and he was really creeped out. Id. at 101. There was never a point where A.J. felt like he could leave as Alotaibi was standing between him and the door to the bathroom. Id. at 100.

Afterward, A.J. was forced face down onto the bathroom floor. Id. at 101. A.J. testified that Alotaibi then took this green bottle from the hotel bathroom and put it onto his penis and A.J.'s buttocks. Id. Alotaibi then forced his penis into A.J.'s anus. Id. at 102. A.J. testified it was very painful and he screeched from the pain. Id. A.J. was then finally able to pull away, and he grabbed his clothes and ran out the room. Id. at 102-03.

Alshehri testified that he saw Alotaibi and A.J. go into the restroom of their hotel room. 3 AA 542-43. Alshehri knocked and said to open the door, and told Alotaibi to let the kid go. Id. at 545. However, Alotaibi did not open the door. Id.

After the incident, A.J. took the elevator downstairs to the casino level where he immediately went to hotel security and reported the entire incident, and he told security he was raped. 1 AA 104, 164-65. A.J. was embarrassed and ashamed of what had happened. Id. at 103. When A.J. spoke to hotel security, he told them that he only went with Alotaibi because he told him he had weed. Id. at 103-06. After security spoke with A.J., they contacted the Las Vegas Metropolitan Police Department ("LVMPD") and Emergency Medical Services. Id. at 173. A.J. described Alotaibi to security as a dark skinned Arabic male, wearing a jacket with a red shirt that had a crown on it. Id. Hotel security made contact with A.J.'s grandmother and took her to A.J. Id. at 167.

At trial, A.J. admitted that when he spoke to detectives, he told them a different story than what he told security at the hotel. Id. at 104-06. He only did so because he did not want his grandmother to know that he had smoked weed, and was embarrassed of what had happened. Id. at 104-05. A.J. told detectives that he had approached Alotaibi because he wanted weed, but said that Alotaibi pulled him inside his hotel room, and that he never actually smoked any weed. Id. at 102-07. A.J. testified he told this lie because he was scared and afraid, and did not want to get in trouble for smoking weed with his parents or grandmother. Id. at 105-06. A.J. said that he approached Alotaibi voluntarily because he wanted to smoke weed, and that was **all**. Id. at 108.

A.J. told security officers the room number where he was raped, and officers responded to the room, and waited right outside until someone exited the room. 2 AA 294. Once the first male left, officers went in and secured the rest of the room and detained everyone inside. Id. at 296, 305. The individuals inside the room did not have any problems complying with officer demands, or speaking, or understanding the officers; they did not have any issue walking, and they did not seem to be inebriated. Id. at 298-99, 307-08. Mr. Jose Haros, who had detained Alotaibi inside the bedroom, testified that Alotaibi did not smell like alcohol, he definitely "wasn't smashed beyond," and was walking fine and not slurring his words. Id. at 330.

Detective Robert Williams of the LVMPD served a valid search warrant on Alotaibi's hotel room. 2 AA 358. Crime scene analysts were focusing specifically on the bathroom area where A.J. told them he was raped. Id. at 372. Inside the bathroom, CSA's found towels, which the blue light revealed had some bodily fluids on them, and an open shampoo bottle on the counter, that was later confirmed as the lubricant that Alotaibi had used on his penis before sodomizing A.J. Id. at 360, 374.

A.J. was then transported to University Medical Center where he gave his statement and underwent a Sexual Abuse and Neglect Examination (SANE). 3 AA 684. The results of his examination revealed that A.J. had suffered blunt force trauma. Id. at 697. He had rectal trauma and tears, which were consistent with a penis being forced inside his anus. Id. at 700. He had contusions and swelling, he had a glistening wet appearance on the outside of his buttocks, which was consistent with a type of lubricant. Id. at 697-98. He also had a contusion inside his mouth on the soft pallet of his throat, which was consistent with blunt force trauma being applied to A.J.'s throat. Id. at 698. A.J. was in a lot of pain from his injuries. Id. at 703.

Detectives Pool and Christensen with the LVMPD conducted an interview with Alotaibi at LVMPD headquarters after he was arrested. 2 AA 447-48. During the interview, Alotaibi admitted to knowing A.J., and said that A.J. asked him for weed and that was it. Id.; RA 40. Alotaibi then said that he did not remember things that happened that night because he was too drunk, and he said that he never saw

A.J. after he asked for weed. RA 41-44, 46-47, 57, 61. Alotaibi said he did not touch or have sex with A.J. RA 46-48. Detectives continued to question Alotaibi, and when asked if he forced A.J. to have sex with him, Alotaibi answered that he did not know because he was too drunk. RA 61-62. Detective Christensen then left the interview, and it was just Detective Pool questioning Alotaibi. RA 62, 2 AA 450. After some more questioning, Alotaibi finally admitted that he brought A.J. into the bathroom of his hotel room. RA 69, 70, 75. Alotaibi then admitted that he did in fact put his penis into both A.J.'s anus and mouth for a short period of time. 2 AA at 481, 488; RA 80, 83-86, 91.

SUMMARY OF THE ARGUMENT

The State respectfully submits that the district court did not err in denying Alotaibi's Motion for New Trial. Statutory Sexual Seduction is at most a lesser-related offense, not lesser-included offense of Sexual Assault with a Minor Under 14 Years of Age. Regardless of the facts in this matter, a simple comparison of the elements of Sexual Assault with the elements of Statutory Sexual Seduction demonstrates that the offenses are legally separate from one another, and therefore Statutory Sexual Seduction cannot be considered a lesser-included offense. Thus, even though Alotaibi's counsel declined the district court's request to give the Statutory Sexual Seduction instruction, this Court has explained that instructions on lesser-related offenses are unnecessary—if not inappropriate—because "a

conviction on a crime that the State has not even attempted to prove is not a reliable result." Peck v. Nevada, 116 Nev. 845, 7 P.3d 473 (2000). Thus, this instruction was not mandatory for the district court to provide sua sponte, regardless of whether there was evidence of consent or not by A.J.

Second, the district court did not err in denying Alotaibi's Motion for New Trial on the basis that the post-trial recantation of State's witness Rashed Alshehri's trial testimony was not "newly discovered" or "recanted" trial testimony under Callier v. Warden, 111 Nev. 976, 901 P.2d 619 (1995). This recantation testimony was not newly discovered evidence, as there was overwhelming evidence presented during trial demonstrating Alotaibi's level of intoxication. Thus, it really had no bearing if Alotaibi drove the car to Circus Circus or not, which was the only part of his testimony that was recanted.

Lastly, Alotaibi claims that his counsel was ineffective because (1) he "opposed" the instruction of Statutory Sexual Seduction, and (2) his counsel allegedly failed to interview or conduct a pre-trial investigation with Alshehri about whether or not Alotaibi drove the car to Circus Circus. This Court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal unless the district court held an evidentiary hearing or an evidentiary hearing would be unnecessary. This Court has found that it must be clear, on its face, from the record that counsel was ineffective per se in order for this Court to review

these claims if the district court did not hold an evidentiary hearing. Alotaibi cites to two cases in support of his request that this Court should review his ineffective assistance of counsel claims, Mazzan v. State, 100 Nev. 74, 675 P.2d 409 (1984), and Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994). Here, unlike in Mazzan and Jones (see infra), because counsel explained the strategy behind his decision not to request the Statutory Sexual Seduction instruction, he was not ineffective based on a facial reading of the record. Further, there was nothing in the trial record to support Alotaibi's contention that his counsel did not pre-trial Alshehri about whether or not Alotaibi drove the car to Circus Circus, thus he has failed to show deficiency or prejudice. Therefore, Alotaibi cannot demonstrate ineffective assistance of counsel based on the record itself, and this Court should deny his claims.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN DENYING ALOTAIBI'S MOTION FOR NEW TRIAL AS STATUTORY SEXUAL SEDUCTION IS A LESSER-RELATED OFFENSE OF SEXUAL ASSAULT WITH A MINOR UNDER 14 YEARS OF AGE, THUS THE DISTRICT COURT WAS UNDER NO OBLIGATION TO GIVE THIS INSTRUCTION SUA SPONTE.

During the settling of jury instructions, the district court had a discussion with counsel outside the presence of the jury about whether or not it would instruct the jury on Statutory Sexual Seduction. 3 AA 648-63. The district court indicated that after doing some research, it found that this offense was not a lesser-included offense of Sexual Assault with a Minor under 14 Years of Age, but a lesser-related, which

the State agreed with. Id. at 648-49. The district court indicated that, if requested by defense counsel, it was inclined to allow the Statutory Sexual Seduction instruction as it believed there was testimony of consent by the victim in this case. Id. at 649. The district court stated the reason it believed that Statutory Sexual Seduction was a lesser-related versus a lesser-included offense was because it included the additional element that the consenting person must be under the age of 16. Id. at 653. The State objected, stating that the defense was not entitled to this instruction as they are only entitled to lesser-included offense instructions. Id. at 649-54. Defense counsel told the district court that they were declining its invitation to provide the Statutory Sexual Seduction instruction. As long as the district court was going to give their Reasonable Consent and Reasonable Mistaken Belief of Consent defense instructions to the jury, that was sufficient for them to strategically argue their defenses. Id. at 655-57; 4 AA 825.

In his Motion for New Trial, Alotaibi claimed that he was deprived of this Statutory Sexual Seduction instruction because he argued it is a lesser-included offense of Sexual Assault with a Minor. RA 16-20. In its Opposition, the State argued that this issue should not be considered by the district court as the request for the instruction was voluntarily withdrawn by defense counsel. RA 238. On

November 18, 2014, the district court entered its Order denying the Motion.[2] 5 AA 1011.

On appeal, Alotaibi claims that it was error for the district court to deny his Motion for New Trial, and not provide the jury with the "lesser-included" offense instruction of Statutory Sexual Seduction for his two counts of Sexual Assault with a Minor Under the Age of 14. AOB 16. Alotaibi alleges that the district court should have provided this instruction sua sponte even though his counsel declined the district court's request because he alleges that Statutory Sexual Seduction is a lesser-included offense, and thus is mandatory for the court to give. AOB 15-24. However, this claim is without merit. First, district courts are not required to give jury instructions on lesser-related offenses sua sponte. Moreover, the district court offered to give this instruction, as it did find indicia of consent by the victim, but defense counsel strategically chose to decline the district court's request. 3 AA 649-57. Further, as stated below, Statutory Sexual Seduction is nothing more than a lesser-related offense of Sexual Assault with a Minor Under 14 Years of Age, therefore the district court was not required to give this instruction sua sponte, thus the district court did not err in denying Alotaibi's Motion for New Trial.

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[2] In its Findings of Facts, Conclusions of Law and Order on November 18, 2014, the district court denied Alotaibi's Motion; however, it did not address this issue in its decision.

A. Statutory Sexual Seduction is at Most a Lesser-Related Offense of Sexual Assault with a Minor under 14 Years of Age.

A district court has broad discretion with respect to jury instructions, and absent an abuse of discretion or judicial error, this Court will uphold a district court's decision regarding jury instructions. Brooks v. State, 124 Nev. 203, 204, 180 P.3d 657 (2008).

NRS 175.501 governs lesser-included offenses and reads: "The defendant may be found guilty . . . of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." NRS 175.501. This Court has held that a defendant is entitled to jury instructions on lesser-included offenses "if the evidence would permit a jury to rationally find him guilty of the lesser and acquit him of the greater." Rosas v. State, 122 Nev. 1258, 1264, 147 P.3d 1101, 1105-06 (2006) (quoting Keeble v. U.S., 412 U.S. 205, 208, 93 S. Ct. 1993, 1995 (1973)). Because this Court has recognized that a defendant is entitled to jury instructions supported by "any evidence, however slight," the relevant question then becomes whether the lesser included offense is "necessarily included" in the charged offense. NRS 175.501.

There are important differences between lesser-included offenses and lesser-related offenses. As the United States Supreme Court explained in Beck v. Alabama, the use of lesser-included offense instructions serves a valuable purpose, namely,

reducing the risk of an unwarranted conviction "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element." 447 U.S. 625, 637, 100 S. Ct. 2382, 2389 (1980), clarified by Hopkins v. Reeves, 524 U.S. 88, 118 S. Ct. 1895 (1998).

As emphasized, whether one offense is a lesser-included offense of another depends upon the elements of the relevant statute, much like the Blockburger[3] test that applies to Double Jeopardy claims. Under the strict application of Blockburger, an offense is lesser-included only where the defendant, in committing the greater offense, has also committed the lesser offense. See Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). By contrast, lesser-related offenses are simply other offenses. See Smith v. State, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004). As the United States Supreme Court explained in Hopkins, there is not a workable standard for identifying lesser-related offenses given that they do not depend upon the statutory elements of an offense. 524 U.S. at 97, 118 S. Ct. at 1901.

Here, Alotaibi's claim that Statutory Sexual Seduction amounted to a lesser-included offense of Sexual Assault with a Minor Under 14 Years of Age, and was thus mandatory for the district court to give sua sponte, is without merit. AOB 16.

[3] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932).

The two statutes at issue here are NRS 200.366(1) and NRS 200.364(6). Under NRS 200.366, sexual assault is defined as: (1) the "sexual penetration" (2) of "another person" or beast, either by subjecting the other person to penetration, by forcing the other person to penetrate themselves or another, or penetrate a beast, (3) which is "against the will of the victim or under conditions . . . the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct." Statutory sexual seduction is defined under two subsections. Under subsection NRS 200.364(6)(a), statutory sexual seduction is defined as: (1) ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio (2) committed by a person 18 years of age or older (3) with a person under the age of 16. Or, under subsection NRS 200.364(6)(b), statutory sexual seduction is defined as: (1) "any other penetration" (2) committed by a person 18 years of age or order (3) with a person under the age of 16 (4) with the intent of "arousing, appealing to, or gratifying the lust or passions or sexual desires" of either person. Sexual Assault is a general intent crime whereas Statutory Sexual Seduction is a strict liability crime. Winnerford H. v. State, 112 Nev. 520, 526, 915 P.2d 291, 294 (1996); Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 369 (2002), citing Jenkins v. State, 110 Nev. 865, 870-71, 877 P.2d 1063, 1066-67 (1994), overruled on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005).

It is clear in comparing the two statutes that the elements of Statutory Sexual Seduction are not "necessarily included" in the elements of Sexual Assault. This Court in Slobodian v. State, 98 Nev. 52, 639 P.2d 561 (1982), found that Statutory Sexual Seduction was in fact not a lesser-included crime to sexual assault, because it held that sexual assault can be committed without necessarily committing statutory sexual seduction, as such it is at best a lesser-related offense.

Moreover, Sexual Assault can be committed in the following ways without committing Statutory Sexual Seduction: first, digital or other objects of penetration of a minor can be done without the intent of arousing, appealing to, or gratifying a lust or passions or desires of either persons. This specific intent is not required for Sexual Assault, but it is required for Statutory Sexual Seduction. See NRS 200.364(6)(b). Second, forcing another person to make a sexual penetration on himself or herself, or another, or on a beast is an element of Sexual Assault. Because statutory sexual seduction only involves sexual penetration between the defendant and the victim, the elements of NRS 200.364(4) would not be satisfied while the elements of NRS 200.366(1) would be satisfied.

Third, a juvenile that has been certified as an adult, under the language of NRS 200.364(4), has not committed statutory seduction by sexually penetrating another minor under 16 because the defendant must be "18 or older." But see Robinson v. State, 110 Nev. 1137, 881 P.2d 667 (1994) (holding that the defendant was entitled

to a statutory sexual seduction instruction because he was tried as an adult and thus, "is no longer a child in the eyes of the criminal law."). And finally, when the defendant assaults a victim over 16, the elements of statutory sexual seduction are clearly not satisfied. Age is an element of statutory sexual assault but is merely a sentencing enhancement for sexual assault. Compare NRS 200.364(6) with NRS 200.366. In other contexts, this Court has concluded that sentencing enhancements are not elements of the underlying offense. See e.g., Williams v. State, 99 Nev. 797, 798, 671 P.2d 635, 636 (1983) (holding that the deadly weapon enhancement of NRS 193.165 is not a "necessary element" of murder or attempted murder because both offenses can be committed without use of a deadly weapon); Cardova v. State, 116 Nev. 664, 668, 6 P.3d 481, 483 (2000) (holding that the deadly weapon enhancement is not a "necessary element" of felony murder); LaChance v. State, 130 Nev. __, __, 321 P.3d 919, 927 (2014) (holding that the weight of narcotics is not an element of possession because it "does not affect guilt" and is only considered at sentencing); Domingues v. State, 112 Nev. 683, 692, 917 P.2d 1364, 1371 (1996) (holding that the deadly weapon enhancement is "merely an additional penalty"). It would frustrate legislative intent to make the victim's youth a sentencing enhancement only to hold that statutory sexual seduction is a necessary lesser-included to sexual assault with a victim under 14, but not to sexual assault with victims over 14.

Because there is "no basis for determining the offenses for which [lesser-related] instructions are warranted," Hopkins, 524 U.S. at 97, 118 S. Ct. at 1901, this Court wisely "extinguish[ed] the use of lesser-related offense instructions as an attempt to rectify what ha[d] become an abyss of confusion for district courts in determining what instructions they are required to give." Barton, 117 Nev. at 694, 30 P.3d at 1108 (discussing Peck v. Nevada, 116 Nev. 845, 7 P.3d 470 (2000), overruled on other grounds by Rosas, 122 Nev. at 1269, 147 P.3d at 1109). Indeed, in Peck, this Court explained that a jury verdict is a nullity if it purports to convict a defendant for an offense that was not charged in an information, and as such, instructions on lesser-related offenses are unnecessary—if not inappropriate—because "a conviction on a crime that the State has not even attempted to prove is not a reliable result." Peck, 116 Nev. at 845, 7 P.3d at 473.

Furthermore, Alotaibi cites to Robinson, 110 Nev. at 1137, 881 P.2d at 667, in support of his argument that Statutory Sexual Seduction is a lesser-included of Sexual Assault of a Minor Under 14 Years of Age. In Robinson, the defendant was charged with statutory sexual assault of a fourteen-year-old female. Id. At his trial, Robinson requested an instruction on a lesser-included offense, statutory sexual

seduction. The trial court refused to give the instruction.[4] Id. at 1138, 881 P.2d at 668.

Alotaibi claims that in Robinson, this Court decided that Statutory Sexual Seduction was a lesser-included offense of Sexual Assault. AOB 18. However, that argument is incorrect. This Court held that Statutory Sexual Seduction was a lesser-included offense of Statutory Sexual Assault, but never decided the issue as to the crime of Sexual Assault with a Minor Under 14 Years of Age. Moreover, this Court in Robinson was summarily commenting that Statutory Sexual Seduction is a lesser-included of Statutory Sexual Assault without any analysis. Also, the trial court in Robinson refused to give the Statutory Sexual Seduction instruction, whereas here the district court offered to give the instruction, but the defense strategically chose not to accept the court's invitation. 3 AA 655-57. Defense counsel discussed this with Alotaibi, who did not have any objections to counsel's actions at the time. 3 AA 668. Because this was a lesser-related offense, Alotaibi was not entitled to this instruction sua sponte, and the district court did not err in denying Alotaibi's Motion for New Trial.

Further, Alotaibi's argument that there was evidence of consent by the victim is irrelevant to this issue. AOB 22-24. Even though the State argued throughout trial

[4] There is no published authority discussing the elements of statutory sexual assault *vis à* sexual assault as defined in NRS 200.366, and the former crime no longer exists.

that there was no consent, the district court found that there was some testimony of consent by A.J. 3 AA 649. Even with any evidence of consent that may have been presented at trial, the district court was still not required to give this lesser-related instruction sua sponte.

Lastly, in the event that this Court finds the district court erred in not giving the Statutory Sexual Seduction instruction because it finds that Statutory Sexual Seduction is a lesser-included offense to Sexual Assault with a Minor Under 14 Years of Age, any error by the district court was harmless.[5] Jury instruction errors are subject to a harmless-error analysis on appeal if they do not involve the type of errors that vitiate all the jury's findings and produce consequences that are necessarily unquantifiable and indeterminate. Cortinas v. State, 124 Nev. 1013, 1015, 195 P.3d 315, 316 (2008); Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 1834 (1999) (cases involving improper instructions on a single element of the offense are reviewed under harmless-error analysis). Where a jury-instruction error is not structural in form and effect, this Court reviews for harmless error improper instructions omitting, misdescribing, or presuming an element of an offense.

[5] In Lisby v. State, this Court held that if "there is evidence which would absolve the defendant from guilt of the greater offense . . . but would support a finding of guilt of the lesser offense . . . [t]he instruction is mandatory, without request. 82 Nev. 183, 187, 414 P.2d 592, 594 (1966). On November 4, 2015, this Court ordered full briefing and oral argument on the issue regarding to what extent this Court should reconsider Lisby regarding whether or not a trial court has to give sua sponte instructions on lesser-included offenses. See Docket #65856.

Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 449 (2000). An error is harmless when it is clear that a rational jury would have found the defendant guilty absent the error. Neder, 527 U.S. at 18, 119 S. Ct. at 1838.

In this case, any instructional error was harmless because the district court offered to give the instruction, but Alotaibi's counsel withdrew his request for the "lesser-included" instruction. 3 AA 655-57. Even though Nevada has not addressed whether or not the district court is required to give lesser-included offense instructions sua sponte where the defense has withdrawn their request for the instruction, a few other jurisdictions have decided this issue.

In Kubat v. Thieret, the defendant was charged with aggravated kidnapping and presented an alibi defense. 867 F.2d 351 (7th Cir. 1989). The defendant argued on appeal that, among other things, his counsel was ineffective because they did not ask for unlawful restraint as a lesser-included charge for aggravated kidnapping. Id. at 365. The Seventh Circuit found that defendant's counsel acted reasonably in not requesting a lesser-included charge instruction because it would conflict with, and possibly weaken, the alibi defense. Id. at 364. For the same reason, the defendant was not entitled to a sua sponte jury instruction on unlawful restraint in the aggravated kidnapping case. Id. at 366.

Likewise, in Druery v. Thaler, the Fifth Circuit found that the defendant's counsel was reasonable in declining a lesser-included offense instruction, and that

the defendant had no grounds to claim that the court should have given a sua sponte instruction after his counsel rejected the option. 647 F.3d 535, 545 (5th Cir. 2011). The Fifth Circuit rejected the idea that district courts had a responsibility to sua sponte overrule a decision by counsel when that decision was not shown to be ineffective or unreasonable. Id; See also Issue III.

Therefore, because Alotaibi abandoned his request for the Statutory Sexual Seduction instruction, the district court had no duty to provide it sua sponte, even if the court found that this instruction was a lesser-included offense. Additionally, because the jury unanimously found Alotaibi guilty of Sexual Assault with a Minor under 14 Years of Age, they would never have considered a lesser-included instruction during their deliberations, since they found Alotaibi guilty of the greater offense. The State proved the charged offense, and it was the jury's duty to determine the degree of guilt from the evidence adduced at trial. Thus, it was clear that the jury would have found Alotaibi guilty regardless of any error in not providing the instruction. Neder, 527 U.S. at 18, 119 S. Ct. at 1838. As such, this Court should affirm Alotaibi's conviction.[6]

/ / /

[6] To the extent that consideration of a lesser-related offense were appropriate, the jury was given that opportunity when it was offered—and rejected—an alternative instruction for lewdness. Lewdness—not statutory sexual seduction—is the appropriate lesser-related crime.

II.
THE DISTRICT COURT DID NOT ERR IN DENYING ALOTAIBI'S MOTION FOR NEW TRIAL BECAUSE THE RECANTATION OF RASHED ALSHEHRI'S TRIAL TESTIMONY WAS NOT FALSE OR NEWLY DISCOVERED EVIDENCE UNDER CALLIER.

The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and will not be disturbed on appeal absent palpable abuse. Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996).

Subsequent to Alotaibi's trial, Rashed Alshehri, a State's witness, voluntarily came forward and signed a sworn affidavit admitting that he provided perjured testimony at trial. RA 180-83. At trial, Alshehri stated that Alotaibi drove a car to the Circus Circus Hotel and Casino and that Alotaibi was able to drive competently and was only maybe speeding a bit. 3 AA 535, 539. In this new affidavit, Alshehri stated that he lied at trial when he testified as to that fact and was now recanting that testimony. RA 180-83. Alshehri asserted in his affidavit that he was threatened with arrest by law enforcement prior to coming to Las Vegas for an interview in September 2013 and that he was under the impression he would be arrested if he did not travel to Las Vegas a few weeks later to speak to prosecutors. RA 181-82. Alshehri claimed in his affidavit that Alotaibi never drove a car to Circus Circus, and that once they arrived in Las Vegas, Alotaibi never drove again. RA 181. Alsherhi claimed that he testified falsely at the time of trial because he was still under

the belief that he could be arrested if he did not repeat what he had told the prosecutors in his pretrial meeting with them. RA 181-83.

Based upon this affidavit, on May 27, 2014, Alotaibi filed a Motion for New Trial and/or Evidentiary Hearing based upon the recanted trial testimony of Alshehri. Alotaibi argued in his Motion that this new testimony proved that Alotaibi was so intoxicated that he could not form the specific intent necessary to commit the specific intent offenses that he was charged with. RA 1-21. The State filed its Opposition on July 16, 2014, arguing that pursuant to Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), and Callier v. Warden, 111 Nev. 976, 901 P.2d 619 (1995), a new trial was not warranted on the basis of "newly discovered" or "recanted" trial testimony. RA 223-39. The State argued that even assuming Alshehri's trial testimony was false, a new trial was not warranted given the overwhelming evidence presented at trial of Alotaibi's level of intoxication. Id. On November 18, 2014, the district court denied Alotaibi's Motion under Callier because it found he did not demonstrate that the trial testimony of Alshehri was false, that this false testimony was not newly discovered, and that this recantation could have been discovered with the exercise of reasonable diligence. The district court therefore found that it was not probable that had the allegedly false testimony not been admitted, a different result would have occurred at trial. 5 AA 998-1012.

On appeal, Alotaibi claims that the district court erred in denying his Motion, and that he is entitled to a new trial based upon this recantation evidence because he alleges 1) the trial testimony was false, 2) the evidence is newly discovered, 3) the evidence could not have been produced even with the exercise of reasonable diligence, and 4) that if this false testimony had not been admitted at trial, the result probably would have been different. AOB 25-26. However, Alotaibi's claims are without merit.

A. Alotaibi Failed to Meet the Criteria for a New Trial Under Callier.

In Callier, this Court addressed the issue of the credibility of recanted trial testimony for the purposes of granting a motion for new-trial and for habeas-petition purposes and stated:

> "Although we have formulated a general standard to be used in assessing motions for a new trial based on newly discovered evidence, we have not yet articulated the precise standard under which witness recantations, either in the context of new trial motion or in a habeas petition, should be assessed."

Id. at 627, 901 P.2d 619.

The Court went on to opine,

> We agree with the Ninth Circuit that the "probable acquittal" standard articulated in our test for newly discovered evidence should be used in recantation situations, whether in the context of a new trial motion or a post-conviction petition for a writ of habeas corpus. This conclusion is consistent with our previous cases dealing with recantation. We also conclude however, that the general "new trial" standard does not adequately

> emphasize the need for a finding that the recanting witness' trial testimony was false. Numerous courts have determined that recantations should be viewed with suspicion and that before granting a new trial, the trial court must be satisfied that the witness' trial testimony was false.
>
> A finding that the trial testimony was indeed false is essential in evaluating alleged perjury cases, and the trial court should first address this issue. In addition, the trial court must determine whether the evidence exposing the trial testimony as false was recently discovered and whether this evidence was available at trial through reasonable diligence. Finally, the trial court must determine whether the outcome at trial would probably have been different had the perjured testimony not been introduced at trial. In other words, in evaluating recantation cases, whether in the context of a new trial motion or a habeas petition, the trial court should apply the following standard:
>
> (1) the court is satisfied that the trial testimony of material witnesses was false;
>
> (2) the evidence showing that false testimony was introduced at trial is newly discovered;
>
> (3) the evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence; and
>
> (4) it is probable that had the false testimony not been admitted, a different result would have occurred at trial.
>
> **Only if each component is met should the trial court order a new trial.**

Callier, 111 Nev. 976, 986-990, 901 P.2d 619, 625-628 (emphasis added).

/ / /

1. The Trial Testimony of Alshehri was Not False.

Alotaibi contends that this Court should conclude that Alshehri's recantation is credible because Alshehri had no prior relationship with Alotaibi so there cannot be a possible ulterior motive for him to recant because he has not known Alotaibi very long. AOB 26. Alotaibi also claims this recantation is credible because Alshehri was afraid that if he did not testify as to exactly what he told the prosecution during his pretrial preparation, he would therefore be arrested. AOB 27. However, the State finds Alshehri's admission of the perjured testimony as to only the issue of who drove the car back to the hotel extremely suspect. Alshehri was not threatened in any way by law enforcement or the prosecutors in this case to testify in any certain manner. Nor was he ever told that if he said something on the stand different than what he said during his pretrial preparation, he would be arrested. Alshehri is an individual who never wavered during his trial testimony. He stated unequivocally on the stand that Alotaibi drove to the hotel, and Alshehri was even astute enough to remember that Alotaibi had lost the keys to the car but then found them and was able to drive. 3 AA 535. Then, all of the sudden, he came forward with an affidavit stating he lied during trial. RA 180-83. Therefore, either way, Alshehri is lying. Thus, it was utterly and completely impossible for the district court, and for this Court, to make a finding that Alshehri's testimony was false. As Callier states, "Numerous courts have determined that recantations should be viewed with suspicion and that before

granting a new trial, the trial court must be satisfied that the witness' trial testimony was false." 111 Nev. 976, 986-990, 901 P.2d 619, 625-628. There is no way this Court can make this finding after Alshehri's actions and testimony in this case, thus the district court did not err in its decision finding that the testimony was not false.

2. The Evidence Showing that Alshehri's Trial Testimony Was "False" is Not Newly Discovered.

Alotaibi is attempting to claim that this recantation evidence is newly discovered because Alshehri did not seek to recant his testimony until after the trial had concluded. AOB 27. However, this evidence is actually not new at all. What Alshehri is now stating in his affidavit is that Alotaibi was intoxicated and therefore, he did not drive to the hotel. The fact that Alotaibi was intoxicated was clearly presented at trial through the State's witnesses, defense witnesses, and even Alotaibi himself. 3 AA 529, 537; RA 65, 70-71. Thus, it really has no bearing as to who drove the car back to the casino. The fact of the matter is that the State presented sufficient evidence that Alotaibi was not falling down, was not slurring his words, and was not so intoxicated that he could not have possibly formed the specific intent necessary to commit his specific intent offenses. 2 AA 297-98, 307-08, 330-31. Also, Alotaibi gave a full confession to the police regarding him sexually assaulting A.J. See Alotaibi's Voluntary Statement, RA 24-92. The State also presented DNA evidence to support the crimes, as well as showed the jury pictures of the sexual assault nurse examination where A.J.'s anus was shown to be bruised and torn. 3 AA 707-16. In

fact, looking at the testimony and evidence presented by a multitude of witnesses, including Alotaibi himself, Alotaibi's intoxication level was discussed at length:

> Testimony of A.J.
>
> Q: Why did you ask the Defendant if he had marijuana?
>
> A: Because when he passed by I saw that he had pink eyes and he smelled like [marijuana].
>
> 1 AA 90
>
> . . .
>
> A: . . .And then we smoked two hits, and then he did two, and then he started advance onto me again.
>
> 1 AA 94.
>
> . . .
>
> Q: Smelly breath. But was it the smell of marijuana or was it the smell of alcohol?
>
> A: Mixed.
>
> Q. Mixed. Okay. And when you spoke to [Alotaibi], could you tell whether or not he might be drunk or he might be high?
>
> A: He was like - - he couldn't speak right.
>
> 1 AA 130.
>
> Testimony of Rashed Alshehri
>
> Q: Was Mazen drinking there (at the casino)?

A: Yeah.

Q: What was he drinking?

A: I guess he drink Hennessy.

3 AA 529

. . .

Q: And were you with Mazen the whole time you were at the strip club?

A: Not all the time.

Q: How much of the time were you with him?

A: Maybe like half of the time.

Q: During the time that you were with him, did you see him drink?

A: Yeah, I saw him drink.

Q: How many drinks did you see him drink?

A: I saw him, like he used to drink Hennessy shots and a black drink, but I'm not really – what is it.

Q: A shot and a black drink?

A: Yeah.

Q: Like two different cups?

A: Yes.

Q: And how many did you see him – how many shots of Hennessy did you see him drink?

A: I'm not too sure, but it's like more than three.

3 AA 532-33

. . .

Q: So you get to the parking lot and what happened then?

A: And then like Mazen started talking, like I drink, like he black out at that time.

Q: You think what?

A: He's like I think black out, you call it.

Q: He blacked out?

A: Yeah. Like he just trying to fight his friend Mohammed and he just talking about like something is stupid, you know. And we know he's like drunk.

Q: He's drunk?

A: Yeah.

Q: Who wanted to go to the room?

A: So I called my friend, Emad, to bring anyone who can like control him because we couldn't.

. . .

Q: And what did Mazen want to do?

A: Like he would like, he want to stay outside.

Q: Keep partying?

A: Yeah.

3 AA 537-38

. . .

Q: All right. Was he sleeping?

A: No, he's drunk. He doesn't know. I don't know, he start fighting us, you know.

Q: And when was it he got so drunk?

A: I think at the time, like he's completely changed.

Q: When did he completely change?

A: After we parking and he started fighting with Mohammed because Mohammed said give me the car, you are drunk. And he just left the key in the car and he said do what you like to do, just leave me alone, something like that . . .

3 AA 538

Q: . . . How many drinks do you think you had at the first casino when you guys came from Los Angeles to Las Vegas?

A: I didn't like - - we drink a lot. We drink something like, because it's like a holiday. We drank a lot.

3 AA 556

. . .

Q: And who was the one that lost [the keys], you, Mohammed, or Mazen?

A: He.

Q: Mazen did?

A: Because he was the hold the key of the car.

3 AA 560

. . .

Q: But when Mazen would walk, would he walk like he was falling down or did he walk like it was almost normal?

A: It's not normally.

Q: It's not normal? Okay. And you were able to recognize that, correct?

A: Exactly.

3 AA 560-61

. . .

Q: So why did you and Mohammed want to get food for Mazen?

A: Because we want him to like wake up because he just drunk, he want to fight us.

Q: So you were trying to sober him up?

A: Like we want to control him because we couldn't.

3 AA 561-62

. . .

Q: Were you and your friends smoking marijuana in the room?

A: Yeah. I think Emad said like we have - - I ask Emad to control him and he said like I want to give him some weed to sleep.

Q: Give who some weed?

A: Mazen.

Q: So the purpose in giving him the marijuana was to help put him to sleep?

A: Right.

3 AA 562

. . .

Q: But I want to make sure of one thing, Rashed. In your mind, there's no question that when you came back from the strip club, Mazen was very drunk.
A: Your question? He was very drunk.
Q: Very drunk.
A: But like - - yes.
Q: He was drunk enough that you were concerned we need to buy him food to help him out.
A: Right.
Q: Correct?
A: Exactly.

3 AA 568
Testimony of Jennifer Melendez
Q: . . .Did you see Mazen drinking?
A: Yes.
Q: And what was he drinking?
A: He does a lot of doubles with no mixers. Crown, any brown liquor.

3 AA 741
. . .

Q: When you looked at him, could you tell whether he had been drinking?
A: Yes. His eyes were bloodshot and he was just sitting there. He wasn't really doing anything.
Q: All right. Did he - - so, in your opinion, was he drunk?
A: Yes. Well, having a bunch of doubles.

3 AA 745

. . .

Q: All right. So, then they show up, and how many drinks do you have there once the defendant and his friend show up?

A: I probably had two.

Q: And how many did they have? How long were you there?

A: Oh, I don't know. They drink fast. So they had at least more than two or three.

4 AA 758

Transcript of Alotaibi's Voluntary Statement Played for the Jury

Q: Okay. And, uh, what did you guys – did you – did you go out on the town at all, or did you just hang out at your room?

A: . . . I don't' know what happen, maybe I just, I drink too much.

Q: Were you- what were you drinking? What kind of liquor?

A: Hennessy.

Q: Oh Hennessy? How much?

A: I don't know.

RA 31.

. . .

Q: Wow. So, how many drinks did you have?

A: Four, five, six.

Q: You drink Hennessey straight up?

A: Yeah, straight up.

RA 32.

. . .

Q: Okay. Last night were you smoking marijuana?
A: No.
Q: No?
A: I drink too much.

RA 33.

. . .

Q: You said he-you said he didn't come in the room though.
A: I- I was drunk, I don't know.

RA 44.

Therefore, there is nothing new about this evidence. While this new evidence provided by Alshehri does establish that Alotaibi was intoxicated along with everyone else's testimony, it does nothing to exonerate or exculpate Alotaibi with regard to sexually abusing A.J. in this case.

3. This Evidence Could Have Been Discovered and Produced for Trial Even with the Exercise of Reasonable Diligence.

The State fails to see how this evidence could not have been discovered and produced for trial. Alotaibi had the opportunity to pretrial Alshehri just as the State did. Alotaibi had Alshehri's contact information, and could have contacted him both before and during the trial. Alshehri even sat outside of the courtroom during trial, so Alotaibi's counsel could have easily sat down with him and discussed his testimony right then and there. Moreover, there is no proof that Alotaibi's counsel did not interview Alshehri pre-trial. Thus, Alotaibi cannot claim that he could not have obtained this information even if he had exercised the most minimal amount of due diligence. Alotaibi contends here that if this Court finds that this evidence could have been discovered with the exercise of reasonable diligence, the failure to do so was only attributable to ineffective assistance of his trial counsel, and this issue is addressed infra. AOB 27.

4. It is Not Probable that had Alshehri's Trial Testimony not been Admitted, a Different Result would have Occurred At a New Trial.

Alotaibi argues that his defense to the specific intent crimes that he was convicted of was that he was too intoxicated to form the requisite mental state required for each of those offenses, and that this recantation by Alshehri helped his defense to show that because he did not drive, he was so intoxicated that he could not form the requisite intent necessary. AOB 29-30.

This so called "new evidence" that Alotaibi is referring to would absolutely not indicate that a different result would be probable in a new trial if the jury heard

this information. The jury heard repeated testimony that Alotaibi was inebriated. This recantation does not have to do with how intoxicated Alotaibi was, rather it just states he did not drive. Even if the testimony about Alotaibi driving had not been admitted, it would not have made a difference.

As aforementioned, the jury heard testimony regarding Alotaibi's inebriated state, however, they also heard testimony contradicting that as well. Multiple security guards testified that Alotaibi was not drunk. 2 AA 298, 307-08, 330-31. They discussed that Alotaibi could walk, talk, and follow officer directions and commands. Id. Officer Haros discussed that he was the security officer who "patted down" Alotaibi. 2 AA 328. He said that Alotaibi never smelled of alcohol. Id. at 330-31. Officer Haros also testified that Alotaibi was walking fine, and that he did not seem to be extremely intoxicated as he was following the directions given and could answer his questions. Id., Id. at 334. Moreover, Ruth Leon, an investigator with the District Attorney's Office, testified that she was present at a pretrial conference with Rashed Alshehri. 3 AA 674. She said that Alshehri never used the term "blackout" when referring to Alotaibi's intoxication level. Id. Alshehri told her that Alotaibi was able to drive away, and that he drove "good." Id. at 676. Furthermore, upon arrest, Alotaibi was able to give his name, date of birth, where he was from, and did not seem to be inebriated. 2 AA 351-52. He was also

photographed and searched by a crime scene analyst, and he had no problems with that process either. 2 AA 377-78.

The facts are what they are. Alotaibi had in fact been drinking and smoking marijuana on this night. However, he was not so intoxicated that he did not understand the nature of his actions. The jury heard conflicting evidence on whether or not Alotaibi was drunk, but at the end of the day, they heard time and time again that he had been heavily drinking, even to the point where he "blacked out." 3 AA 535-37. Thus, even if Alshehri would have testified that Alotaibi did not drive, the jury still would have heard two inconsistent positions, and with this evidence, the jury still found that he was able to form the specific intent necessary to commit these crimes.

Thus, the district court correctly denied Alotaibi's Motion for New Trial as he does not meet the prongs set out under Callier. There would not be a different result on retrial if Alshehri had testified that somebody else drove the car to Circus Circus. Therefore, nothing more can come out of an evidentiary hearing on this issue. Even if this Court were to remand back to the district court and grant Alotaibi an evidentiary hearing on this issue only, Alshehri will do one of two things: recant his affidavit or admit that he lied during his trial testimony. Alshehri now faces a perjury charge either way. Alshehri can simply not be trusted with his testimony. This very small piece of inconsequential "new evidence" about who drove to Circus Circus is

not new and it is not false. Alotaibi cannot meet the prongs to even necessitate a hearing, thus the district court correctly denied Alotaibi's Motion.

In the event this Court finds any error in the district court's ruling, any error was harmless. Nevada law provides that any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. In order for error to be reversible, it must be prejudicial and not merely harmless. Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990). Nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

Here, the evidence overwhelmingly showed Alotaibi's guilt. The record is replete with testimony that Alotaibi was intoxicated. Thus, even if Alshehri had never said that Alotaibi had driven a car during trial, the evidence against Alotaibi negates the existence of a "substantial and injurious effect or influence" on the jury even without this information being given. Because the jury heard about Alotaibi's intoxication level and still found him guilty, any error would be harmless, and does not warrant a reversal of Alotaibi's conviction.

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III.
ALOTAIBI'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE NOT PROPERLY BEFORE THIS COURT; HOWEVER, IN THE EVENT THIS COURT WISHES TO REVIEW THESE CLAIMS UNDER THE EXCEPTION SET FORTH IN MAZZAN, ALOTAIBI RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING TRIAL.

Alotaibi alleges ineffective assistance of counsel in this appeal on the basis that (1) his trial counsel declined the invitation by the district court to request a lesser-related Statutory Sexual Seduction instruction, and that if this instruction had been given to the jury, Alotaibi would not have received the maximum sentence for his crimes; and (2) defense counsel's alleged failure to interview State's witness Rashed Alshehri prior to trial asking him about whether or not Alotaibi had driven a vehicle to the Circus Circus Hotel, thus helping show Alotaibi did not have the specific intent necessary to commit these crimes due to his intoxication level, was ineffective assistance of counsel. AOB 33-38. However, this Court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal unless the district court held an evidentiary hearing or an evidentiary hearing would be unnecessary. Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 535 (2001); see also Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981). Furthermore, NRS 34.770 provides that:

> [t]he judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

NRS 34.770 makes it clear why this Court has consistently held that it will not review claims of ineffective assistance of counsel on direct appeal if the district court did not have an evidentiary hearing on the issue. Instead, ineffective assistance claims must be raised in the context of a post-conviction petition for writ of habeas corpus at the district court level. Pellegrini, 117 Nev. at 883, 34 P.3d at 534. This bright-line rule is based on principles of fairness to habeas petitioners. Id.

In his appeal, Alotaibi cites to Archanian v. State, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006), in support of his contention that this Court should entertain his claims of ineffective assistance of counsel on direct appeal, since an evidentiary hearing would be unnecessary. AOB 34-35. Specifically, Alotaibi contends that this Court should consider his claims because there is no good reason not to consider them on direct appeal on the basis of the trial record. AOB 32-35. However, whether or not this Court will review ineffective assistance of counsel claims on direct appeal if an evidentiary hearing would be unnecessary is an exception to the general rule. Pellegrini, 117 Nev. at 883, 34 P.3d at 534. It must be clear, on its face, from the record that counsel was ineffective per se in order for this

Court to review these claims if the district court did not hold an evidentiary hearing. Mazzan v. State, 100 Nev. 74, 675 P.2d 409 (1984).

Alotaibi cites to two cases in support of his request that this Court should review his ineffective assistance of counsel claims. This Court in Mazzan v. State, 100 Nev. 74, 675 P.2d 409 (1984), held that an evidentiary hearing regarding defense counsel's motives or strategy was not necessary because the Court determined that no good reason for counsel's actions existed based on a reading of the record. During the penalty stage of the trial, Mazzan's counsel had the obligation to present any evidence of mitigating circumstances. Id. at 77, 675 P.2d at 412. Counsel chose, instead, to harshly berate the jury for returning its guilty verdict during the prior guilt phase. Id. Counsel did not present any witnesses nor argued any mitigating considerations on Mazzan's behalf; instead, he displayed an open disdain for the jury and essentially invited the jurors to condemn his client to death. Id. This Court found that Mazzan's counsel exceeded the parameters of effective advocacy when looking at the penalty hearing transcript. Id. at 79-80, 675 P.2d at 414-15. Because it was plainly apparent from the record that counsel acted inappropriately, this Court found that an evidentiary hearing as to defense counsel's performance was not necessary, and reviewed Mazzan's claims on appeal.

Additionally, in Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994), this Court found that it was clear from the record itself that defense counsel's actions fell below

an objective standard of reasonableness. During closing argument, Jones' counsel conceded that he thought "the evidence show[ed] beyond a reasonable doubt that the defendant did kill Pamela," but argued that the defendant was guilty of only second-degree murder, as he was incapable of forming the requisite intent and premeditation for first-degree murder. Id. The jury returned a verdict of first-degree murder with use of a deadly weapon. Id. at 736, 877 P.2d 1058. This Court found that it was explicitly clear from the record that Jones' counsel was per se ineffective, as he essentially asserted that his own client was being untruthful in his closing. Id.

Furthermore, in Mazzan, this Court stated that that case does not alter its policy as expressed in Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981), that the effectiveness of counsel should be determined in most instances through means of a post-conviction relief proceeding in district court. Mazzan, 100 Nev. at 80, 675 P.2d at 415. Unless it is plainly clear from a facial reading of the record that counsel was per se ineffective, this Court will not entertain ineffective assistance of counsel claims.

Mazzan and Jones are exceptions to this general rule because it was manifestly clear from the records that counsel was per se ineffective. Thus, it would have been unnecessary to remand to the district court to hold an evidentiary hearing to determine counsel's decisions and actions. However, if this Court believes that under Mazzan and Jones Alotaibi is entitled to have his ineffective assistance of counsel

claims reviewed on this appeal, the instant case is entirely distinguishable from Mazzan and Jones, as it was not apparently clear from a facial reading of the record that counsel was per se ineffective.

First, regarding Alotaibi's claim about defense counsel opposing the Statutory Sexual Seduction instruction (AOB 33), this was not ineffective assistance of counsel under Mazzan. Defense counsel did not "affirmatively oppose" this instruction as Alotaibi contends. AOB 33. During the settling of jury instructions, the district court explained to counsel that if the defense requested the Statutory Sexual Seduction instruction, which the court found to be a lesser-related instruction, it would provide it upon the defense's request. 3 AA 648-49. Counsel first requested the instruction, but later withdrew his request and declined the district court's invitation to give this instruction. 3 AA 655-57. Defense counsel explained on the record that as long as the district court gave the Reasonable Consent and/or Reasonable Mistaken Belief of Consent instructions to the jury, which were Alotaibi's defenses, and as long as he could argue these on Alotaibi's behalf, he did not need the Statutory Sexual Seduction instruction. 3 AA 655-57; 4 AA 825. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." Olausen v. State, 105 Nev. 110, 771 P.2d 583 (1989); Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). "Judicial review of a lawyer's representation is highly deferential, and a

defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998). Here, unlike in Mazzan and Jones, because counsel explained the strategy behind his decision, he was not facially ineffective based on a clear reading of the record. Further, this was never a lesser included instruction as Alotaibi contends, so counsel did not "anticipate an acquittal" and did not forgo a lesser-included offense instruction to the jury. AOB 33. Thus, counsel was not per se ineffective based on a facial reading of the record.

Second, regarding Alotaibi's claim about the alleged failure to interview Alshehri prior to trial about whether Alotaibi drove a vehicle was not ineffective assistance of counsel. AOB 38. Alotaibi claims it was "objectively unreasonable" for trial counsel not to interview Alshehri before trial about this issue because it was important to his intoxication defense; however, there is no record for this Court to review to see whether trial counsel did or did not interview Alshehri pre-trial. Thus, Alotaibi has failed to show either deficiency or prejudice. Alotaibi cannot conclude that it was unreasonable for counsel not to do this when there is no record of it either way. Alotaibi does not cite to anywhere in the record that shows his trial counsel did not interview Alshehri. Because there was no evidentiary hearing on this issue, Alotaibi's claim is not supported by a clear reading of the record. As such, the record as it stands now is insufficient to adequately explain defense counsel's actions.

Accordingly, the State submits that this claim would be more properly addressed in a post-conviction proceeding. As Alotaibi cannot demonstrate ineffective assistance of counsel based on the record before this Court under Mazzan, Alotaibi's second claim should not be considered at this time.

CONCLUSION

Based on the foregoing, the State respectfully requests that Alotaibi's Judgment of Conviction be AFFIRMED.

Dated this 5th day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 11,526 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 5th day of February, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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