IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA CALEB SHUE, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 67428

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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JOSHUA CALEB SHUE,	)	NO. 67428
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

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JURISDICTIONAL STATEMENT

Joshua Shue appeals from a final judgment under Nevada Rule of Appellate Procedure 4 (b) and jurisdiction granted by NRS 177.015. The State of Nevada filed the Judgment of Conviction on January 21, 2015. Appellant's Appendix Vol. II 330 ("AA II 330"). Appellant timely filed his Notice of Appeal on February 12, 2015. AA II 337.

ROUTING STATEMENT

Appellant's case is presumptively assigned to the Nevada Supreme Court because he was tried and convicted for 29 category A felonies and 11 category B felonies. Convictions involving category A and B felonies after jury trial are within the original jurisdiction of the Nevada Supreme Court and not the Court of Appeals. *See* NRAP 17(b)(1). Additionally, Appellant

principally raises a question of first impression concerning the constitutionality of NRS 200.710(2). *See* NRAP 17(a)(13).

ISSUES PRESENTED FOR REVIEW

I. NRS 200.700(4), 200.710(2), 200.730 are unconstitutional; II. Appellant's redundant convictions violate Due Process; III. The district court failed to instruct the jury on essential elements of the charged crimes and Appellant's theory of defense; IV. Prosecutorial misconduct violated Appellant's Due Process right to a fair trial; V. The district court's evidentiary decisions violated Appellant's Due Process right to a fair trial; VI. The Indictment failed to provide Appellant with adequate notice allowing the State to change its theory of prosecution; VII. As a matter of law Appellant did not create or possess child pornography; VIII. The State presented insufficient evidence of guilt; IX. Cumulative error warrants reversal.

STATEMENT OF THE CASE

On March 12, 2013, the State of Nevada presented evidence to the grand jury concerning images and videos discovered on Appellant's laptop computer. AA I 38-109. The grand jury returned an indictment charging Appellant with: one count of Child Abuse & Neglect; 29 counts of Use of Child in Production of Pornography; 10 counts of Possession of Visual

Presentation Depicting Sexual Conduct of a Child; and one count of Open and Gross Lewdness.[1] AA I 1-13.

On March 28, 2013, Appellant appeared in district court, entered a not guilty plea, and waived his right to a speedy trial. AA II 343. The court scheduled calendar call for October 3, 2013, and jury trial for October 7, 2013.[2] Id. at 343-44.

Appellant filed a pretrial petition for writ of habeas corpus arguing, among other things, that the grand jury was not properly instructed and as a matter of law the images at issue were not child pornography. AA I 128-30. The court heard argument and denied Appellant's petition. AA II 346-47.

Appellant also filed a Motion in Limine seeking to preclude the State from mentioning that the case began "as a sexual complaint." AA I 168. The court granted Appellant's motion. AA II 348. Appellant filed a Motion for Individual Voir Dire of jurors which was denied. AA I 173, AA II 349. Additionally, Appellant filed a Motion for Psychiatric Examination of the

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[1] Appellant was originally charged in the Las Vegas Justice Court with one gross misdemeanor count of capturing image of private area of another person in violation of NRS 200.604. AA I 18. The State filed two amended criminal complaints in the Justice Court which were dismissed after the grand jury indictment. Id.; AA II 342.

[2] The court later continued Appellant's trial. AA III 538.

alleged victim[3] (AA I 183); a Motion for Discovery (Id. at 213); and a Motion to Dismiss based upon inadequate notice.[4] AA II 254.

In his discovery motion, Appellant alleged the Clark County District Attorney's Office made payments to the alleged victim, H.I. Id. at 213. The court held a hearing regarding the allegations and ruled that the District Attorney did not make any payments to H.I. Id. at 358.

H.I. attempted suicide before trial. AA I 229. In response, the State sought a ruling prohibiting Appellant from questioning H.I. regarding her mental health status. Id. The court withheld ruling until trial. AA II 360. At trial, the court granted the State's motion. AA VI 1092.

Trial began on August 25, 2014, and ended on August 29, 2014. AA II 364, 373. The jury found Appellant guilty of all counts. Id. at 321-28. The court sentenced Appellant to life in prison with parole eligibility after 10 years.[5] AA VIII1497. The court filed the Judgment of Conviction on January 21, 2015. AA II 330.

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[3] The court denied Appellant's motion. AA II 351.

[4] Appellant argued the Indictment failed to allege dates for many of the charged offenses. Id. at 254. The court denied Appellant's motion. Id. at 361.

[5] Although Appellant was convicted of 41 counts, the court ran almost all the sentences concurrent to each other. Because the 29 counts of use of a child in production of pornography carried a sentence of 10 to life, and all the charges ran concurrent to these charges, Appellant's total sentence is 10 years to life. AA II 331-34.

On February 5, 2015, trial counsel moved to withdraw from Appellant's case and requested the district court appoint the Clark County Public Defender's Office to represent Appellant for appeal. AA VIII 1520. The court granted the request. AA VIII 1521. Appellant timely filed his Notice of Appeal on February 12, 2015. AA II 337.

STATEMENT OF FACTS

Between 2010 and 2012, H.I. lived in Las Vegas, Nevada with her mother Anita and her two younger brothers C.I. and F.I. AA VI 1036. Appellant and Anita were in a dating relationship. Id. at 1037. Although Appellant had a separate residence, he would occasionally stay for extended periods at Anita's apartment. Id. at 1038.

On August 22, 2012, H.I. returned home after a date with her boyfriend. Id. at 1040. H.I. encountered Appellant in the kitchen where Appellant allegedly took a photograph under her skirt with a small digital camera. Id. Later that evening H.I. alleged Appellant kissed her. Id. at 1043.

The next day, H.I. contacted police. Id. at 1044. Detective Ryan Jaeger interviewed H.I. and then met with and interviewed Appellant. AA V 950-51. According to Jaeger, Appellant admitted to kissing H.I. "on the cheek" but denied the kiss was romantic. Id. at 953. Jaeger also claimed Appellant admitted to taking the picture up H.I.'s skirt but that he was just

"playing around." Id. Jaeger claimed Appellant admitted he found H.I. attractive, but would never act on those feelings. Id. at 957. Jaeger also claimed Appellant denied taking any other photographs of H.I. Id. at 973. However, Appellant advised if police looked through his laptop computer they would find "some things that are not on the up and up." Id. at 973.

Jaeger drafted an affidavit for a search warrant for Appellant's house. Id. The warrant authorized seizure of any electronic media found within Appellant's bedroom.[6] Id. at 842. Police ultimately seized Appellant's laptop computer, video camera, digital camera, and some disposable cameras. Id. at 850.

Detective Vincente Ramirez forensically examined the laptop, digital camera, and Appellant's cell phone.[7] Id. at 863. Ramirez recovered a deleted, "picture up the female's dress" from the digital camera's memory card. Id. at 865. On the laptop, Ramirez located several photographic images of nude males. Id. at 872.

The images were admitted at trial as State's exhibits 3 – 11 and 75. AA V 872. Exhibit 3 pertained to count 40 in the Indictment and depicted one male performing oral sex on another male. Id. at 913; AA I 12. Exhibit

[6] Other persons resided in the house with Appellant. The warrant only authorized police to search Appellant's room. AA V 842.

[7] Ramirez did not recover anything of evidentiary value from Appellant's cell phone. Id. at 864.

4 depicted a different male "under the age of 16 nude in the shower exposing his penis and buttocks area." Id. at 872. Exhibit 6 depicted the same male in exhibit 4, "laying prone on the bed exposing his penis." Id. The record is unclear regarding the substance of Exhibits 10, 11, and 75. However, Ramirez alleged the same boy was depicted in Exhibits 4, 6, 10, 11, and 75. AA V 948. The boy was allegedly 12 years old at the time the photographs were taken. Id. Exhibits 4, 6, 10, 11, and 75 pertained to count 41 in the indictment. AA I 12.

Ramirez also recovered numerous video files located within two "hidden" folders on the laptop. Id. at 874, 877. The folders were labeled "Ymmm" and "Hmmm." Id. at 876. According to H.I., the videos were surreptitious recordings of her and her brother C.I. using the bathroom at their apartment.[8] *See* AA VI 1045-83.

Video 0058 depicted both H.I. and C.I. taking showers at separate times. Id. at 1046-49. H.I. believed C.I. was 12 years when the video was recorded and she was 15 years old. Id. at 1045, 1049. Video 0058 pertained to counts 3-5 of the Indictment. AA I 2-3. Video 0031 depicted H.I. preparing to take a shower. Id. at 1050-52. Later, C.I. is seen using the

[8] The State admitted all the videos as Exhibit 1 at trial. AA VI 1045.

toilet and showering as well. Id. H.I. was 16 years old in the video and C.I. was 13. Id. Video 0031 pertained to counts 6-8 of the Indictment. AA I 3-4.

Videos 0005, 0007, 0006, 0057, 0089, 0124, basically depicted both H.I. and C.I. using the bathroom at separate times. Id. at 1052-63. In each video H.I. was approximately 16 years old and C.I. was around 13 years old. Id. File 0005 pertained to counts 9-11 of the Indictment. AA I 4. File 0007 pertained to counts 12-14 of the Indictment. Id. at 5. File 0006 pertained to counts 15-17 of the Indictment. Id. at 5-6. File 0057 pertained to counts 18-20 of the Indictment. Id. at 6-7. File 0089 pertained to counts 21-23 of the Indictment. Id. at 7-8. File 0124 pertained to counts 24-26 of the Indictment. Id. at 8-9.

Videos 0073, 0075, and 002, depicted H.I. using the shower. AA VI 1066-67. H.I. was 16 years old in the videos 0073 and 0075.[9] Id. at 1067. Video 0073 pertained to count 27 of the Indictment. AA I 9. Video 0075 pertained to count 28 of the Indictment. Id. Video 0002 pertained to count 29 of the Indictment. Id. at 9-10.

Video 0002214847 depicted H.I. shaving her legs. AA VI 1072. H.I. alleged she was 15 years old in the video. Id. Video 0002214847 pertained to count 30 of the Indictment. AA I 10. Video 0011214856 depicted H.I. in

[9] H.I. did not know how old she was in the video 0002. Id. at 1070.

the bathroom. AA VI 1072. H.I. was 16 years old in the video. Id. at 1074. File 0011214856 pertained to count 31 of the Indictment. AA I 10. Video 0013214858 depicted H.I. using the shower. AA VI 1076. H.I. claims she was 15 years old in the video. Id. File 0013214858 pertained to count 32 of the Indictment. AA I 10. Video 0015214860 depicted H.I. in the bathroom using a feminine hygiene product. AA VI 1078. H.I. was 16 years old in the video. Id. at 1077. File 0015214860 pertained to count 33 of the Indictment. AA I 10-11.

Videos 0016, 0026, 0044, 0027214872, and 0030214875, all depicted H.I. in the apartment bathroom. AA VI 1076-83. H.I. believed she was 16 years old in videos, however, was unsure how old she was in video 0026. Id. at 1080. File 0016 pertained to count 34 of the Indictment. AA I 11. Files 0026 and 0027214872 pertained to count 36 of the Indictment. Id. File 0044 pertained to count 38 of the Indictment. Id. at 12. File 0030214875 pertained to count 37 of the Indictment. Id. at 11-12.

Video 0025214870 depicted H.I. in the bathroom of a hotel in California. AA VI 1079. H.I. was 16 years old in the video. Id. File 0025214870 pertained to count 35 of the Indictment. AA I 11.

According to H.I., Appellant appeared briefly at the beginning of videos 0058, 0031, 0057, 0073, 0075, 0011214856, 0013214858,

0025214870, 0026, 0030214875, and 0044, manipulating the camera before H.I. or C.I. used the bathroom. *See* AA VI 1046, 1049, 1058, 1066, 1068, 1073-74, 1079, 1081-82.

H.I. would periodically spend the weekends at her maternal grandaunt, Frances Carreon's ("Carreon"), condo. Id. at 1141. Carreon noted during 2012, H.I. and Anita were not getting along. Id. While staying with Carreon H.I. never disclosed that Appellant had done anything inappropriate to her. Id. at 1146. Once, Carreon caught H.I. taking nude photographs of herself. Id. at 1150. Based upon her interactions with H.I., Carreon believed H.I.'s reputation for truthfulness was "bad." Id. at 1142.

Lastly, Carreon had seen H.I. with Appellant's laptop computer. Id. at 1152. Carreon did not believe Appellant took the videos of H.I. and C.I. Id. at 1148-49. Instead, Carreon believed H.I. made the videos and put them on Appellant's computer. Id. at 1148-49.

F.I., H.I.'s youngest brother, noted Appellant never did anything inappropriate towards him, H.I. or C.I. Id. at 1164. F.I. confirmed H.I. used Appellant's computer periodically and once witnessed H.I. taking nude photos of herself in her bedroom. Id., 1166-67. Like Carreon, F.I. believed H.I. was generally untruthful. Id. at 1165.

According to Anita, H.I. was adept at using cameras and computers. AA VII 1192. Anita also believed H.I. was jealous and resentful of Anita's relationship with Appellant. Id. at 1189. Anita did not believe H.I.'s allegations against Appellant. Id. at 1208-09. In fact, after Appellant's arrest Anita found a flash drive in H.I.'s bedroom containing the same images allegedly recovered from Appellant's laptop. Id. at 1201-02. Thereafter, Anita refused to cooperate with Jaeger. Id. In response, Jaeger threatened to remove Anita's children from the home unless Anita implicated Appellant in the charged crimes. Id. at 1208-09. Jaeger also pressured H.I. to cooperate after she expressed reluctance to testify at trial. Id.

C.I. advised Appellant never did anything improper to any of the children. Id. at 1248. C.I. confirmed that H.I. capably used computers, video cameras, and social media, and once witnessed H.I. downloading photos onto Appellant's computer. Id. at 1249-50, 1264. C.I. believed H.I.'s reputation for truthfulness was "[n]ot so good." Id. at 1251.

While dating Anita, Appellant maintained his separate residence in Henderson, NV. Id. at 1282. Around Christmas 2010, Appellant began spending more time with Anita and her children at their apartment. Id. Accordingly, Appellant helped Anita and her children financially. Id. at 1284.

Appellant got along well with H.I., C.I., and F.I. Id. However, Appellant noticed H.I. and Anita had a contentious relationship. Id. at 1281. Appellant believed H.I. was "resentful" of Anita and the resentment caused "conflict within the household." Id. Appellant described H.I. as a "troubled teen" whose could be dishonest at times. Id. at 1290.

Appellant purchased two laptop computers while dating Anita. Id. at 1285-86. The children used one and Appellant and Anita used the other. Id. at 1286. H.I. used the children's computer often to update social media sites. Id. at 1287. Appellant believed H.I. was extremely sophisticated with technology and computers. Id. at 1288.

Appellant denied making the videos of H.I. and C.I. in the bathroom and had not even seen the videos prior to trial. Id. at 1292. Likewise, Appellant denied downloading the images of the unknown males which were allegedly recovered from his laptop and had not seen the images prior to trial. Id. at 1291-92. However, Appellant periodically videotaped himself having sexual intercourse with Anita in the bathroom. Id. at 1294. Appellant believed portions of the videos at issue at trial were the part of videos he made with Anita. Id. Appellant believed H.I. edited the images of her and C.I. into the videos of Appellant and Anita and placed the edited videos on Appellant's laptop. Id. at 1293, 1294.

Appellant admitted taking the photograph under H.I.'s skirt. Id. at 1297-98. However, Appellant only did so to show H.I. she was dressed too risqué. Id. At H.I.'s request, Appellant immediately deleted the photo. Id. at 1298. Appellant denied ever kissing H.I. on the mouth. Id. at 1309, 1318.

SUMMARY OF THE ARGUMENT

Nevada child pornography laws prohibit using minors as the subject of a sexual portrayal in a performance and possessing images of a minor as the subject of a sexual portrayal in a performance. These laws violate the First Amendment of the United States Constitution because the definition of "sexual portrayal" does not require the images depict any sexual conduct. Therefore, the laws are: (1) content based restrictions upon speech and expression; (2) overbroad, and (3) vague. If the laws are constitutional, however, as a matter of law none of the videos or images depicted sexual conduct involving children.[10]

Additionally, the district court also committed numerous trial errors. First, the court refused to instruct the jury regarding essential elements of the charged crimes and Appellant's theory of defense. Moreover, the court's evidentiary decisions denied Appellant his constitutional right to a fair trial.

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[10] The image at issue in count 40 would qualify as child pornography provided the person in the photograph is less than 16 years of age and actually performing fellatio. AA I 12.

The court further violated Appellant's due process rights when it convicted and sentenced him for separate counts of creating child pornography based upon a single image.

The State also violated Appellant's right to a fair trial by first impermissibly arguing the incorrect legal definition regarding an essential element of the charged crimes. Additionally, the State's inadequate pleading allowed it to impermissibly change its theory of prosecution during trial. Lastly, for each and every charge the State failed to present any evidence whatsoever to support its allegations.

Each and every one of the aforementioned error mandates reversal. Thus, the cumulative effect of these errors certainly deprived Appellant of his Constitutional right to a fair trial.

ARGUMENT

I. Nevada laws prohibiting using a minor as the subject of a sexual portrayal in a performance are unconstitutional

NRS 200.710 and 200.730 prohibit producing and possessing images of minors as the subject of a "sexual portrayal" in a performance. These laws are unconstitutional because they are: (1) content based restrictions upon speech; (2) overbroad; and (3) vague. This Court reviews the constitutionality of a statute de novo. Silvar v. Eighth Judicial District Court, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

1. Nevada laws prohibiting using a minor as the subject of a sexual portrayal in a performance are content-based restrictions upon speech or expression.

The First Amendment prohibits the government from criminalizing speech or expressive conduct because it disapproves of the ideas expressed. *See* R.A.V. v. City of St. Paul, Minn, 505 U.S. 377, 382 (1992).[11] Therefore, "content based regulations are presumptively invalid." Id.

Creating and possessing nude images of children, without more, is protected by the First Amendment. N.Y. v. Ferber, 485 U.S. 747, 766, fn. 18 (1982)(*citing* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)). Accordingly, "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." Ferber, 485 U.S. at 756; *see also* U.S. v. Williams, 533 U.S. 285, 289 (2008)("[t]he broad authority to proscribe child pornography is not...unlimited."); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 251 (2002)("where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")).

[11] The First Amendment is applicable to the states via the due process clause of the 14th Amendment. Woloson v. Sheriff, 93 Nev. 283, 284, 564 P.2d 603 (1977).

In accordance with the First Amendment, State laws prohibiting child pornography must: (1) adequately define the prohibited conduct; (2) limit the prohibition to works that visually depict sexual conduct of children below a specified age; (3) suitably limit and describe "the category of sexual conduct proscribed;" and (4) require an element of "scienter on the part of the defendant." Ferber, 458 U.S. at 764-65.

NRS 200.710 and 200.730 are Nevada's statutory prohibitions against child pornography.[12] NRS 200.710(2) prohibits using a minor as the subject of a sexual portrayal in a performance and NRS 200.730(1) prohibits possessing an image depicting a minor as the subject of a sexual portrayal in a performance. NRS 200.700(4) defines sexual portrayal as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value."

The State charged Appellant with 29 counts of violating NRS 200.710(2) for allegedly surreptitiously filming H.I. and C.I. while they used the bathroom of their apartment. [13] *See* AA I 2-12. The State also charged Appellant with 10 counts of violating NRS 200.730 for possessing the videos

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[12] This Court has referred to NRS 200.710 as prohibiting the "production of child pornography." *See* Casteel v. State, 122 Nev. 356, 362, 131 P.3d 1, 5 (2006); Wilson v. State, 121 Nev. 345, 350, 114 P.3d 285, 289 (2005).

[13] For these 29 counts related to NRS 200.710(2), the State only alleged the videos depicted a **sexual portrayal**, not sexual conduct. AA I 1-13.

in which C.I. appeared, as well as still images of two other unknown individuals.[14] Id. at 3-12. None of the videos depicted anyone engaged in sexual conduct.

NRS 200.710(2) and 200.730's prohibition on creating or possessing images of minors as the subject for a sexual portrayal in a performance is an unconstitutional content based restriction because a sexual portrayal is not "limited to works that visually depict "**sexual conduct**" involving children."[15] Instead, NRS 200.710(2) and 200.730 criminalizes creating and possessing **any** image of children as long as the image appeals to some person's prurient interest in sex.[16]

Criminalization of an image of a child based solely upon the effect it has upon the viewer is unconstitutional. *See* U.S. v. Villard, 855 F.2d 117, 125 (3rd Cir. 1989)("[w]hen a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it.")(*citing* Faloona v. Hustler Magizine, Inc., 607 F.Supp. 1341 (N.D.

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[14] For these 10 possession counts the State alleged the images depicted a sexual portrayal **or** simulated sexual conduct. Id. at 3-12.

[15] Compare the definition of "sexual portrayal" in NRS 200.700(4) with the definition of "sexual conduct" in NRS 200.700(3).

[16] As proof, the legislature explicitly intended A.B. 405 to "go after" persons who are sexually gratified by images of bathing-suit-clad children. *See* Hearing on A.B. 405 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995).

Tex. 1985)); *see also* Jacobson v. U.S., 503 U.S. 540, 551-52 (1992); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973); Stanley v. Georgia, 394 U.S. 557, 565-566 (1969)); Rhoden v. Morgan, 863 F. Supp. 612, 619 (M.D. Tenn. 1994)("A determination that a photograph constitutes child pornography focuses on the photograph itself rather than on the effect such photograph has on an individual viewer."). Moreover, "pedophiles often find stimulation from the very same pictures that non-pedophiles consider innocuous, that we extol and value[.]" Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 259 (March 2001). Additionally, "certain pedophiles may prefer "innocent" pictures" because "[i]t may be the very innocence--the sexual naiveté--of the child subject that is sexually stimulating." Id. at 259-60; *see also* Amy Adler, Inverting the First Amendment, 149 U. Pa. L. Rev. 921, 961 (2001)("if the subjective viewpoint of the pedophile can turn any depictions of children into erotic pictures, then all representations of children could be child pornography.").

Nevada's child pornography laws criminalize creating and possessing any image of a child, nude or otherwise, even though the image does not depict clearly defined **sexual conduct**. Because the statutes expressly restrict speech or expression based solely upon its content, the statutes could only be

constitutional if they are least restrictive means of promoting a compelling government interest.

a. NRS 200.710(2) and 200.730 are not the least restrictive means of promoting a compelling government interest.

"If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000). The regulation must be "the least restrictive means to further the articulated interest." Sable Communications of Cal., Inc., v. FCC, 492 U.S. 115, 126 (1989).

When a person challenges a content-based restriction, "the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." Ashcroft v. ACLU, 542 U.S. 656, 665 (2004). Courts have uniformly held, "overinclusive content-based measures fail [strict] scrutiny." Seres v. Lerner, 120 Nev. 928, 102 P.3d 91 (2004); *see also* Playboy, 529 U.S. at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

In 1979 Nevada first codified its prohibition against using minors to create pornography. 1979 Nev. Stat. 437. The 1979 law limited child pornography to visual depictions of children engaged in actual or simulated "sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus,

beastiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another[.]" Id.

In 1995, the legislature amended Nevada's child pornography laws.[17] Initially, the legislature sought only minor amendments to NRS 200.710. 1995 Nev. Stat. 950-57.[18] After an incident where someone secretly filmed bathing-suit-clad children at various public locations around Las Vegas, the legislature sought to prohibit this conduct by banning using minors as the subjects of a "sexual portrayal."[19] Hearing on A.B. 405 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995). Legislators believed authorities could not prosecute the person who filmed the children because the videos did not depict "sexual conduct." Id.

"Sexual portrayal" was initially defined as "the lewd or lascivious depiction of the genitals or pubic area whether clothed or not." A.B. 405, 68th Leg. (Nev. 1995). However, based upon concerns that this definition was "ambiguous," the definition was amended to anything which "appeals to the

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[17] NRS 200.710 was also amended in 1983. 1983 Nev. Stat. 814-15. Nevertheless, the definition of "sexual conduct" remained unchanged. Id.

[18] For example, A.B. 405 sought to increase the penalty for possession of child pornography from a misdemeanor to a felony. 1995 Nev. Stat. 950-57.

[19] The videos were marketed for sale but none of the videos contained nude images of children. Id.

prurient interests of others[.]"[20] Hearing on A.B. 405 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., May 12, 1995). Later the legislature amended the definition to, "appeals to the prurient interest in sex."[21] Id.

In the state senate, senators correctly noted the "prurient interest" language was not applicable to child pornography. Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg., (Nev. June 14, 1995). In fact, child pornography need not appeal to the prurient interest as long as it is "...limited to works that visually depict sexual conduct by children below a specified age," and the category of sexual conduct is suitably limited and described. Id. (*citing* Ferber, 458 U.S. at 764).

However, Senator James expressed it was his desire was to allow "the community to determine what is acceptable and what is prohibited by law."[22]

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[20] The definition of sexual conduct as a "lewd or lascivious depiction of the genitals or pubic area" had been the subject of litigation one year earlier in U.S. v. Knox, 32 F.3d 733 (3rd Cir. 1994). According to Knox, for purposes of child pornography, the "lascivious exhibition of the genitals of pubic area," as part of the definition of "sexual conduct," could apply to "non-nude visual depictions[.]" Id. at 737.

[21] The legislature mistakenly assumed this was the definition of pornography. However, whether something appeals to the "prurient interest in sex" is part of the calculus for determining whether an image is "obscene" not merely pornographic. *See* Miller v. California, 413 U.S. 15, 24 (1973).

[22] This decision was unconstitutional because the U.S. Supreme Court has held, "...the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority." Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806, 2828 (2011).

Id. Thereafter, senators added "and which does not have serious literary, artistic, political or scientific value" to the definition of sexual portrayal. Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg., (Nev. June 14, 1995). Senators erroneously believed adding this would make child pornography subject to "community standards." Id. Although one senator advised, "the Legislature must proscribe conduct so that everyone knows what conduct is prohibited and what is not...it requires a 'very tight definition,'" the law passed with the "prurient interest" language. Id.; 1995 Nev. Stat. 950-57.

i. Protecting children from being filmed in public.

Based upon the legislative intent, NRS 200.710(2)'s "compelling interest" appears to be protecting children from being filmed by a pedophile in public. However, the State cannot constitutionally promote this interest by merely labeling this behavior "child pornography."

First, "[a]udio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments.'" ACLU v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012)(*quoting* Burstyn v. Wilson, 343 U.S. 495, 502 (1952)). Second, people generally do not have a reasonable expectation of privacy in

public places. *See* Young v. State, 109 Nev. 205, 211, 849 P.2d 336, 340 (1993).

Finally, NRS 597.810 provides a civil remedy, including injunctive relief, when a person uses the photograph or likeness of another person "without first having obtained written consent for the use[.]"[23] State can pass laws protecting privacy rights. However, states cannot criminalize filming children doing innocent things in public places by calling the behavior child pornography.

ii. Child pornography as the visual depiction of sexual abuse.

Child pornography is "intrinsically related" to the crime of child sexual abuse. Ashcroft, 535 U.S. at 249-50. States can prohibit actual child pornography because preventing child sex abuse is "a government objective of surpassing importance." Ferber, 458 U.S. 757. However, where images are "neither obscene nor the product of sexual abuse, [the images do] not fall outside the protection of the First Amendment." Ashcroft, 535 U.S. at 251(*citing* Ferber, 458 U.S. at 764-65).

If NRS 200.710(2)'s compelling interest is protecting minors from having their sexual abuse documented, then NRS 200.710(1), which prohibits

[23] There would be no constitutional impediment for a private business, such as a waterpark, to prohibit anyone from filming children on its premises to protect the children's privacy.

creating an image of a child simulating or engaging in "**sexual conduct** to produce a performance," satisfies this interest. Unlike sexual portrayal's definition in NRS 200.700(4), sexual conduct's definition in NRS 200.700(3) is clearly defined and "limited to works that visually depict sexual conduct of children below a specified age." *See* Ferber, 458 U.S. at 764-65. NRS 200.710(1) proves that NRS 200.710(2) is not the least restrictive means to satisfy the State's compelling interest preventing the visual documentation of child sex abuse.

iii. Protecting children from being recorded nude.

NRS 200.604 prohibits capturing the image of the private area of a person. NRS 200.604(8)(d) defines "private area" as "the naked or undergarment clad genitals, pubic area, buttocks or female breast of a person." [24] If NRS 200.710(2)'s "compelling interest" is protecting minors from being filmed while nude, then NRS 200.604 already prohibits such conduct. Thus, NRS 200.604 proves that NRS 200.710(2) is not the "less

[24] *See*, L. Steven Graz and Patrick J. Pfaltzgraff, Child Pornography and Child Nudity: Why and How States may Constitutionally Regulate the Production, Possession, and Distribution of Nude Visual Depictions of Children, 71 Temple L.R. 609, 611 (Fall 1998) ("a well-drafted statute which restricts nude visual depictions of children for the purpose of protecting the privacy rights of both the child and parent would probably be held constitutional.")

restrictive" means of promoting the State's interest in protecting children from being filmed while nude.

2. Nevada child pornography laws are overbroad.

"[T]he 'overbreadth doctrine provides that a law is void on its face if it sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protective First Amendment rights[.]'" Silvar, 122 Nev. at 297, 129 P.3d at 688 (*quoting* City of Las Vegas v. District Court, 118 Nev. 859, 863 fn.14, 59 P.3d 477, 480 fn. 14 (2002)(*overruled on other grounds by* State v. Castaneda, 245 P.3d 550, 553 fn. 1, 126 Nev. Adv. Op. 45 (2010)). In an overbroad analysis, the "court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982).

NRS 200.710(2) and NRS 200.730's purpose is to prohibit anyone from creating visual images of children clothed or otherwise if those images appeal to a pedophile. *See* Hearing on A.B. 405 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995). To satisfy this purpose, the legislature defined "sexual portrayal" as, "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." NRS 200.700(4).

The phrase "prurient interest in sex" is commonly associated with the United States Supreme Court decision in Miller v. California. In Miller, the Court enunciated a test to determine whether a visual image is obscene. An image is obscene if the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest in sex, depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law and, taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller, 413 U.S. at 24. The Miller Court limited the obscenity test to materials depicting or describing patently offensive **'hard core' sexual conduct**[.]" Id. at 27 (emphasis added). By requiring the work to be judged by the average person applying contemporary community standards, works could not be obscene merely by offending the most sensitive members of the community. Id. at 33.

NRS 200.710(2) and 200.730's fatal law is they purport to ban creating and possessing child pornography by adopting a partial test for obscenity. This was completely unnecessary as states can ban clearly defined child pornography even if the image is not obscene. *See* Ferber, 458 U.S. at 764-65. Moreover, because sexual portrayal's definition does not contain Miller's requirement that the images be judged **on the whole** by a **reasonable person** applying **contemporary community standards**, the law could

criminalize any image of a child, even a brief image within a longer work, if the single image offends the most sensitive member of the community. Especially, when that person does not believe any nude images have literary, artistic, political or scientific value.

Indeed, NRS 200.710(2) and 200.730 potentially criminalizes all manner of visual images of minors including, for example: child modeling websites; television shows like "Dance Moms;" photographic artwork like that of David Hamilton and Jacques Sturges;[25] countless movies including The Tin Drum, American Beauty, Kids, and Adrian Lyne's 1997 adaptation of Lolita;[26] advertisements including those for Calvin Klein or Abercrombie and Fitch; Brittney Spears music videos; any clothing catalog containing images of minors modeling underwear or bathing suits; and even a television news segment regarding a local swimming pool if the segment showed bathing-suit clad children. Almost any legitimate images would be considered child pornography under NRS 200.710(2) if the images appeal to a pedophile.

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[25] *See* Brain Cash, Images of Innocence or Guilt?: The Status of Laws Regulating Child Pornography on the Federal Level and in Alabama and an Evaluation of the Case against Barnes & Noble, 51 Ala. L. Rev. 793, 797 (Winter 2000).

[26] *See* Rosalind Bell, Reconciling the PROTECT ACT with the First Amendment, 87 N.Y.U. L. Rev. 1879 (December 2012).

3. NRS 200.710(2), 200.730, and 200.700(4) are unconstitutionally vague.

The "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." Williams, 553 U.S. at 304. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, **or** is so standardless that it authorizes or encourages seriously discriminatory enforcement." Id. (emphasis added). "Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, and must also provide explicit standards for those who apply the laws, to avoid arbitrary and discriminatory enforcement."[27] Sheriff v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 636-37 (1983) (*citing* Hoffman Estates, 455 U.S. at 498).

"By requiring notice of prohibited conduct in a statute, the first prong offers citizens the opportunity to conform their own conduct to that law. However, the second prong is more important because absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections.'" Silvar, 122 Nev. at 293, 129 P.3d at 685 (*quoting* Kolender

[27] "[T]he vagueness tests are independent and alternative, not conjunctive." Castaneda, 245 Nev. at 553, fn. 1.

v. Lawson, 461 U.S. 352, 358 (1983)). When a challenged statute "involves criminal penalties or constitutionally protected rights," this court will review the statute to determine whether "vagueness permeates the text." Flamingo Paradise Gaming, LLC, v. Chanos, 125 Nev. 502, 512, 217 P.3d 546, 553 (2009). "[T]his standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid if void in most circumstances." Id. at 513, 217 P.3d at 554.

Nevada's definition of sexual portrayal fails to provide adequate notice of prohibited conduct. The statute focuses not on whether the image of the minor contains sexual conduct, but instead the potential effect the image has on a viewer. Therefore, a reasonable person must guess at what images appeal to some person's morbid interest in sex.

Additionally, the definition lacks any objective standards to guide law enforcement. Criminalizing creating and possessing an image of a minor as the subject of a vaguely defined "sexual portrayal," allows police and prosecutors to prosecute a pedophile for merely possessing any image of a child although the child is not engaged in sexual conduct. Moreover, any parent who takes an innocent, naked, photograph of his or her child could be prosecuted and convicted if the most sensitive members of Las Vegas believe the image is sexually gratifying and lacks any artistic value.

Appellant also asserts the statutes are vague as applied to him. *See* Pitmon v. State, ___ P.3d ___, ___, 131 Nev. Adv. Op. 16 (Nev. App. 2015) ("A statute may be challenged as unconstitutional either because it is vague on its face, or because it is vague as applied only to the particular challenger.") Here, based upon taking the photograph under H.I.'s skirt, police initially arrested Appellant for violating NRS 200.604, capturing image of private area of another person. AA I 18. However, given the vague definition of sexual portrayal and the fact police noticed lubrication and condoms in a desk drawer near Appellant's laptop, the prosecutor pursued her own predilections and re-charged Appellant with multiple counts of violating NRS 200.710(2) ostensibly because the videos appealed to Appellant's prurient interest in sex. The prosecutor's actions prove NRS 200.710(2) is vague as applied to him.

The State alleged Appellant violated NRS 200.710(2) solely under a theory that H.I. and C.I. were subjects of a **sexual portrayal** in a performance. Because NRS 200.710(2) is an unconstitutional restriction on protected expression and unconstitutionally vague and overbroad, Appellant respectfully requests this Court reverse his convictions for counts 2, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 19, 21, 22, 24, 25, and 27 – 38.

For counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41, the State alleged alternatively that Appellant possessed images of minors as the subject of a sexual portrayal **or** simulated sexual conduct. However, because the State only alleged Appellant filmed H.I. and C.I. as the subjects of a **sexual portrayal** -- and the jury agreed, it is very likely the jury convicted Appellant for possessing child pornography only under a sexual portrayal theory as well. Accordingly, this Court should reverse Appellant's convictions on counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41.

II. Appellant's redundant convictions violated his due process rights.

If Nevada's child pornography laws are constitutional, Appellant nevertheless contends many of his convictions are redundant. The State charged Appellant in counts 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 19, 21, 22, 24, and 25 with "Use of Child in Production." AA I 2-8. However, counts 3 and 4 were based upon the single video entitled "PICT0058." Id. at 2. Counts 6 and 7 applied to the single video "PICT0031." Id. at 3. Counts 9 and 10 applied to the single video "PICT0005." Id. at 4. Counts 12 and 13 applied to the single video "PICT0007." Id. at 5. Counts 15 and 16 applied to the single video "PICT0006." Id. at 5-6. Counts 18 and 19 applied to the single video "PICT0057." Id. at 6-7. Counts 21 and 22 applied to the single

video "PICT0089." Id. at 7. And finally, counts 24 and 25 applied to the single video "PICT00124." Id. at 8.

NRS 200.710(1)-(2) prohibits using a minor to produce a **performance** depicting sexual conduct or a sexual portrayal (emphasis added). In Wilson v. State, 114 Nev. 345, 358, 114 P.3d 285, 294 (2005), this Court reversed redundant producing convictions where the defendant took multiple photographs of a minor during a single incident. In reversing three of the redundant convictions this Court noted "the crux of the prohibited conduct is the use of a minor in a sexual performance and not how the performance is otherwise recorded or documented." Id. at 357, 114 P.3d at 293. Likewise, in Casteel v. State, 122 Nev. 356, 362, 131 P.3d 1, 5 (2006), this Court reversed 8 of 12 convictions for violating NRS 200.710 when the defendant created 8 photographs of a minor during the same sexual performance.

NRS 200.710 prohibits creating a "performance." Here, the State alleged Appellant hid a camera in the bathroom and thereby captured images of H.I. and C.I. disrobing, showering, and drying off. If each video represents one "performance" then Appellant's convictions for two counts per video are redundant and Appellant respectfully requests this Court reverse the convictions.

III. The district court committed reversible error by failing to instruct the jury on essential elements of the crime and by refusing Appellant's theory of defense instructions.

If NRS 200.700(4), 200.710(3), and 200.730 are constitutional, Appellant is nevertheless entitled to a new trial because the district court failed to properly instruct the jury. The district court is responsible for ensuring that the jury is fully and correctly instructed. Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005). On appeal, this Court generally reviews the district court's decision regarding jury instructions under an abuse of discretion or judicial error standard. Hoagland v. State, 126 Nev. Adv. Op. 37, 240 P.3d 1043, 1045 (2010).

1. The district court failed to instruct the jury on essential elements of the offenses.

"[F]ailing to instruct the jury about essential elements of a crime constitutes constitutional error in that the jury may convict the defendant without finding the defendant guilty of a necessary element of a crime." Rossana v. State, 113 Nev. 375, 383, 934 P.2d 1045, 1049 (1997). When instructing jurors, the district courts should be mindful that, "[j]urors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law." Crawford, 121 Nev. at 754, 121 P.3d at 588. Rather, jurors should be advised of relevant legal principles through

"accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." Id.

Omission of a jury instruction defining an essential element is reviewed for harmless error. Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 449 (2000). Under this standard, this Court asks, "[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" Id. (*quoting* Neder v. U.S., 527 U.S. 1, 18 (1999)). If it is not clear beyond a reasonable doubt the jury would have found the defendant guilty absent the error, this Court should reverse. Id.

a. Appellant's proposed instruction 'B'

The State charged Appellant in counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41 with possessing images of children as the subject of a sexual portrayal **or** engaging in sexual conduct. AA I 3-13. Accordingly, for these charges "sexual conduct" and "sexual portrayal" were elements of the offense for which the State had to prove beyond a reasonable doubt.

NRS 200.700(3) defines "sexual conduct" as: "sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another." Sexual portrayal is

defined as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." NRS 200.700(4).

Here, the videos of H.I., C.I., and the pictures of the unknown male,[28] did not depict sexual intercourse, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another. Therefore, the only way the videos could depict "sexual conduct" would be if the images depicted a "lewd exhibition for the genitals."

At trial Appellant offered proposed jury instruction 'B' which stated that "[p]hotographic depiction of nudity alone is not pornography." AA I 265. Appellant's instruction was a correct statement of law. *See e.g.*, Ferber, 458 U.S. at 765, fn. 18. Furthermore, instruction 'B' listed six (6) factors concerning whether a nude image of a minor contains a "lewd exhibition of the genitals" and is therefore child pornography. AA II 265; U.S. v. Dost, 636 F.Supp. 828, 832 (S.D. Ca. 1986). The factors are: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive (i.e., a location generally associated with

[28] Exhibits 4-11, 75.

sexual activity); (3) whether the child is depicted in an unnatural pose of inappropriate attire considering her age; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or willingness to engage in sexual activity; and (6) whether the image is intended or designed to elicit a sexual response in the viewer.[29] *Compare* AA II 265 with Dost, 636 F.Supp. at 832. Appellant cited U.S. v. Amirault, 173 F.3d 28, 31 (1st Cir.,1999) in support. AA II 265.

The State opposed Appellant's instruction by arguing Wilson v. State provides the sole definition of child pornography and is different than Instruction 'B.' AA VIII 1355. However, Wilson did not involve the definition "sexual conduct" or the distinction between mere nudity and what constitutes a "lewd exhibition of the genitals." Instead, Wilson merely held that: (1) possession of child pornography is not a lesser included offense of use of minor in a sexual performance; and (2) the defendant could not be convicted of multiple counts of use of minor in a sexual performance based upon taking four photographs of a child in a single performance. Wilson, 121 Nev. at 355-59, 114 P.3d at 292-295.

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[29] *See* Alder, Amy, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 240 (March 2001)(explaining that when interpreting the phrase lewd or lascivious exhibition of the genitals, almost all district and circuit courts have followed the Dost factors).

The district court acknowledged Appellant was correct that mere nudity is not child pornography. AA VIII 1354-55. However, the court refused Appellant's instruction because it was, "not the Ninth Circuit" or from a Nevada case. AA VIII 1354-55.

The district court's decision was clearly erroneous. First, the United States' Supreme Court has held that mere child nudity is not child pornography and its' decision is supreme law concerning constitutional questions. *See generally* Ferber, 458 U.S. at 765, fn. 18; U.S. Const. Art. 6. Second, the district court noted it would have given Appellant's instruction if the instruction had come from the Ninth Circuit. AA VIII 1354. Dost is a Federal district court case from the California, which is in the Ninth Circuit. Moreover, the Ninth Circuit Court of Appeals later expressly adopted the Dost test. *See* Shoemaker v. Taylor, 730 F.3d 778, 785 (9th Cir. 2013). If the district court would have given the instruction based upon Ninth Circuit precedent, and the Ninth Circuit has approved the instruction, then it was clearly erroneous for the court to deny Appellant's instruction.

The district court's refusal to instruct the jury was reversible error. It cannot be said, beyond a reasonable doubt, that the jury would have convicted Appellant had it been properly instructed on how to determine if the images lewdly exhibited genitals. *See* Osbourne v. Ohio, 495 U.S. 103,

125-26 (1990)(reversal warranted when the trial court failed to instruct jury regarding the term "lewdness" in the context of child pornography). In fact, the jury would have acquitted Appellant had it been given Instruction 'B" because the images did not depict a lewd exhibition of the genitals.

b. Appellant's proposed instruction 'I'

Appellant's proposed instruction 'I' defined "sexually explicit conduct" as "actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person." AA II 272. Appellant's cited 9th Circuit Federal Jury Instruction 8.185 in support. The court declined to give Appellant's instruction claiming "the child doesn't have to be doing something sexually explicit. That's not the definition of pornography." AA VIII 1371.

The court's decision was an abuse of discretion and clearly erroneous. First, an image must be sexually explicit to be child pornography. Ferber, 458 U.S. at 764. Second, because the State pled counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41 alternately -- as depicting either a "sexual portrayal" or "sexual conduct," sexual conduct was an element of the crime the State had to prove beyond a reasonable doubt.

Here, other than the image in count 41, none of the videos or images depicted sexual intercourse, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another. Therefore, the videos and images could only be child pornography if they depicted a lewd exhibition of the genitals.

Neither the State nor the court offered any instruction defining "sexual conduct." Instruction I substantially mirrored NRS 200.700(3)'s definition of "sexual conduct." The district court's refusal to instruct the jury was reversible error because the jury would have acquitted Appellant had it been properly instructed regarding the actual definition of sexual conduct. Therefore, Appellant respectfully requests this Court reverse his convictions.[30]

c. The court failed to define prurient.

The district also failed to define "prurient." For 39 of Appellant's charges the State alleged the images "appealed to the prurient interest in sex." According "prurient interest in sex" was an element of the crime which had

[30] Appellant contends instructions 'B' and 'I' were also theory of defense instructions because at trial Appellant consistently argued the images at issue depicted mere nudity and not sexual conduct. *See* AA VIII 1456-66.

to be proven beyond a reasonable doubt. Without a jury instruction defining prurient, the prosecutor impermissibly and incorrectly argued the jury could find Appellant guilty if the images appealed to the "lustful thoughts or lustful desires of a person." AA VIII 1449. This is an incorrect definition because a prurient interest in sex cannot be merely the "lustful thoughts or desires or a person." *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).[31]

Without a proper instruction defining prurient, the jury likely convicted Appellant because it believed Appellant found H.I. attractive. However, H.I. was 16 years old during the events pertinent to the instant case and 16 is the age of consent in Nevada. *See* NRS 200.368. Therefore, even if Appellant found H.I. attractive, Appellant and H.I. could legally agree to have sexual relations. Therefore, Appellant's alleged interest in H.I., while arguably inappropriate, would not be unlawful or "prurient." Had the jury been properly instructed that a "prurient interest in sex" is "a shameful or morbid interest in nudity, sex, or excretion,"[32] it would not have convicted Appellant.

2. The district court committed reversible error by refusing to instruct the jury regarding Appellant's theory of defense.

A defendant has a right to jury instructions on his "...theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence

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[31] The prosecutor's misconduct will be discussed in greater detail *infra.*
[32] *See* Roth v. U.S., 354 U.S. 476, 487 (1957).

may be." Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002). When a district court fails to instruct the jury on the defense theory when "...supported by some evidence which, if believed, would support a corresponding jury verdict, . . . [this omission] constitutes reversible error." Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983); *see also* Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995)(""failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible per se and can never be considered harmless error[.]")(*internal citations omitted*).

Appellant's Instruction 'E' defined the crime of Capturing the Private Image of Another Person. *See* NRS 200.604; AA II 268. Unfortunately, in support of the instruction Appellant argued capturing the private image of another person was a lesser-included offense of use of minor in producing pornography. AA VIII 1360. The court denied the instruction finding it was not a lesser-included offense. Id. at 1364.

Although Appellant incorrectly argued his instruction was a lesser-included offense instruction, the record discloses that one of Appellant's theories was that his alleged conduct did not amount to creating child pornography but instead amounted to capturing the private image of another person. If this Court is inclined to treat Appellant's instruction 'E' as a

theory of defense instruction, Appellant contends there was ample evidence to support this theory. Moreover, because the instruction would have supported a corresponding verdict the court's failure to instruct the jury was reversible error.

IV. The State committed prosecutorial misconduct.

This Court has held that it applies a two-step approach to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the Court determines if the prosecutor did something improper. Id. Second, if the prosecutor did something improper, then the Court must determine whether the improper behavior warrants reversal. Id. Generally, this Court will not reverse a conviction if the error was harmless. Id.

When prosecutorial misconduct was not objected to and preserved for appeal, this Court will can review for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477. This Court will reverse under plain error if the error affected Appellant's substantial rights by "causing 'actual prejudice or miscarriage of justice.'" Id., *quoting* Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

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1. The prosecutor incorrectly defined "prurient"

"[I]t is improper for an attorney to argue legal theories to a jury when the jury has not been instructed on those theories." Lloyd v. State, 94 Nev. 167, 169, 576 P.2d 740, 742 (1978). Additionally a "prosecutor should not misstate the law in closing argument." U.S. v. Artus, 591 F.2d 526, 528 (9th Cir. 1979).

NRS 200.700(4) defines a "sexual portrayal" as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Here, the court failed to provide the jury with an instruction defining "prurient." Nevertheless, during closing argument the prosecutor improperly argued that prurient "means appeals to the lustful thoughts or desires of a person." AA VIII1449. Appellant failed to object to the misconduct.

A prurient interest in sex cannot be merely the "lustful thoughts or desires or a person." *See* Brockett, 472 U.S. at 497. Instead, a prurient interest is "a shameful or morbid interest in nudity, sex, or excretion[.]" Roth 354 U.S. at 487. The prosecutor's argument was both a misstatement of law and a commentary on a legal theory without an appropriate instruction. Although Appellant failed to object, the error is clear from the record and affected Appellant's substantial right to a fair trial before a fully, and

correctly, informed jury. Appellant's conviction, based upon misconduct, represents a miscarriage of justice and warrants reversal.

2. Calling Anita a liar

"The characterization of testimony as a lie is improper argument." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988). During the State's rebuttal argument, the prosecutor stated, "I'm going to give you some information that would suggest that Anita lied to you during her testimony[.]" AA VIII 1469. The prosecutor's argument amounted to an impermissible opinion on the veracity of a key defense witness whose testimony could have determined guilt or innocence. Although Appellant failed to object, the misconduct is plain from the record and affected his substantial right to have a jury consider his guilt or innocence absent the personal opinion of the State.

V. The district court's evidentiary decisions denied Appellant his Constitutional right to a fair trial.

The district court has wide discretion concerning the admissibility of evidence and its rulings are reviewed for an abuse of discretion and harmless error. Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983); NRS 178.598. However, "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." California v. Trombetta, 467 U.S. 479, 485 (1984).

1. Appellant's Constitutional right to confront his accuser

"Generally, the permissible extent of cross-examination is largely within the sound discretion of the trial court." Bushnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1039 (1979). The court's discretion is significantly limited, however, when the defendant seeks to establish a witness's bias. Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 711 (2004). "[W]here bias [motive] is the object to be shown..."an examiner must be permitted to elicit any facts which might color a witness's testimony." Id.

a. Payments

Appellant testified Anita and H.I. had a contentious relationship. AA VII 1281. Additionally, H.I. was jealous of Anita and Appellant's relationship. Id. After Appellant's arrest, Child Protective Services removed Anita's children from her home. AA III 494. H.I. opted out of CPS placement and was allowed to live independently. Id. Thereafter, Clark County Family Services Step Up program gave H.I. money to pay her rent. Id. at 491-92.

Appellant desired to question H.I. concerning these payments at trial. Id. at 468. After an evidentiary hearing the court ruled Appellant could not because the payments were not from police or prosecutors and therefore, "unrelated to this." Id. at 502. At trial Appellant renewed his request, which

was again denied. AA VI 1086. The court's decision was a prejudicial abuse of discretion and clearly erroneous.

Appellant denied filming H.I. or C.I. AA VII 1292-93. Based upon his interactions with H.I., Appellant believed she took the videos herself and placed them onto Appellant's laptop computer. Id. at 1294. In support of his theory, Appellant's elicited evidence that H.I. took naked pictures of herself with her phone. AA VI 1103. After Appellant's arrest, H.I. was able to leave Anita's home and live on her own. AA III 494. However, H.I. could only afford to live on her own with the rental assistance from the Step Up program. Id. at 491-92. Accordingly, the payments were intrinsically related to Appellant's defense theory that H.I. manufactured the allegations against Appellant to become emancipated from Anita.

Questions concerning payments from the Step Up program had a tendency to prove that H.I. had a motive to "frame" Appellant for a crime he did not commit so she could become emancipated from her mother. Appellant had a constitutional right to question H.I. concerning these payments and the district court's refusal to allow the questions constitutes reversible error.

2. Age of the person in State's Exhibit 3.

Detective Ramirez, a non-expert, opined regarding the age of an individual depicted in State's Exhibit 3. AA V 913. Appellant objected asserting "Anyone on the jury can make an estimate on the age as well as this officer." Id. at 914. Id. The court overruled Appellant's objection. Id. Ramirez then testified "the male that's standing appears to be under age 16." Id. at 915.

NRS 200.740 states:

> For the purposes of NRS 200.710 to 200.737, inclusive, to determine whether a person was a minor, the court or jury may:
>
> 1. Inspect the person in question;
>
> 2. View the performance;
>
> 3. Consider the opinion of a witness to the performance regarding the person's age;
>
> 4. Consider the opinion of a medical expert who viewed the performance; or
>
> *3. Use any other method authorized by the rules of evidence at common law.*

The State did not notice Ramirez as an expert witness. Moreover, Ramirez was not a "witness to the performance" because he was not present when the videos were created. This, it was improper for Ramirez to testify regarding the age of the individual in the photograph.

This aforementioned error was not harmless. The age of the person in the photograph was an essential element of the charged crime. Given Ramirez's status as a police officer, the jury likely gave significant consideration to Ramirez's improper opinion. Because it cannot be said Appellant would have nevertheless been conviction absent this error, Appellant requests this Court reverse his conviction.

VI. The Indictment failed to provide Appellant with adequate notice

"Under the Sixth Amendment to the United States Constitution, the State is required to inform the defendant of the nature and cause of the accusation against the defendant." West v. State, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003). "An indictment, standing alone, must contain: (1) each and every element of the crime charged and (2) the facts showing how the defendant allegedly committed each element of the crime charged." State v. Hancock, 114 Nev. 161, 164, 955 P.2d 183, 187 (1998). This requirement is necessary to "adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case." Sheriff, Clark County v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979).

According to NRS 200.508(4), child abuse / neglect can be either: (1) physical or mental injury of a nonaccidental nature; (2) sexual abuse; (3)

sexual exploitation; or (4) negligent treatment or maltreatment of a child under the age of 18 years. Here, the State charged Appellant with Child Abuse in count 1 of the Indictment and referenced NRS 200.508.[33] AA I 2. The State alleged Appellant placed H.I. in a situation where she either did or may have suffered unjustifiable physical pain or mental suffering by "taking pictures of the said [H.I.'s] genital area and/or by taking off her clothing and/or by inappropriately kissing the said [H.I.] on the mouth and/or videotaping [H.I.] in the nude while she showered and engaged in other bathroom activities." Id.

Appellant's Indictment only referenced NRS 200.508 generally and did not allege Appellant committed child abuse by sexual abuse or sexual exploitation under NRS 200.508(4). Id. at 1. Therefore, the Indictment alleged Appellant committed child abuse under a theory that he placed H.I. in a situation where she either did or could have suffered physical or mental harm.

However, at trial the State offered separate jury instructions defining both sexual abuse under NRS 432B.100 and sexual exploitation under NRS 432B.110. AA II 301-02. Because open and gross lewdness is defined as

[33] Pursuant to NRS 173.075(3), "The indictment or information must state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."

sexual abuse under NRS 432B.100(6) and the definition of sexual exploitation incudes "Filming, photographing or recording on videotape... the exhibition of a child's genitals," the State argued Appellant was guilty of Child Abuse if the jury believed Appellant kissed H.I. or filmed her. *See* AA VIII 1455. However, the Indictment, failed to provide Appellant notice that the State was proceeding under this theory. Appellant did not object to the aforementioned. Nevertheless, this Court can review for plain error. NRS 178.602.

Appellant had a substantial right to fair notice of the allegations against him in order to adequately prepare his defense. The State initially alleged Appellant committed child abuse only by placing H.I. in a situation where she either did or may have suffered physical pain or mental suffering. AA I 1-2. The State changed this theory at trial and alleged Appellant committed child abuse by sexual abuse or exploitation. AA II 301-02; AA VIII 1455. The record plainly demonstrates the State's impermissible conduct. Accordingly, Appellant requests this Court reverse his conviction for child abuse.

VII. <u>As a matter of law the images do not depict a sexual portrayal or sexual conduct.</u>

Appellant maintains he is entitled to reversal of counts 2 - 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 19, 21, 22, 24, 25, 27- 38, because NRS 200.710(2) is unconstitutional. However, if NRS 200.710(2) is constitutional, under NRS

200.710(2) an image is only a sexual portrayal if it appeals to a prurient, i.e., a morbid or unhealthy, interest **in sex**. While "sex" is not defined elsewhere in the section, "sex" is generally used as short-hand for "sexual intercourse." Therefore, to "appeal to the prurient interest **in sex**," the image must depict a sexual act. Here, none of the images depicted sexual intercourse. Therefore, as a matter of law Appellant could not be tried and convicted for using minors as the subject of a sexual portrayal in a performance.

For counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41, the State alleged Appellant violated NRS 200.730 by possessing images of C.I. and other unknown minors as the subjects of a sexual portrayal **or** engaging in sexual conduct.[34] Essentially, for these counts the State alleged alternate means of violating NRS 200.730, i.e., either sexual portrayal or sexual conduct.

If the jury found Appellant guilty under a theory that the images in counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41, depicted a sexual portrayal, Appellant is entitled to reversal based upon his argument *supra*. If, however, the jury convicted Appellant under the alternate theory that the images in counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41, depicted "sexual conduct," Appellant is entitled to reversal because as a matter of law the images did not

[34] The State did not charge Appellant for violating NRS 200.730 for allegedly possessing the video images of H.I. because the State could not prove H.I. was less than 16 years old in the videos. AA VIII 1451.

depict "sexual conduct." Whether the images at issue depict a sexual portrayal or simulated sexual conduct is a mixed question of law and fact for which this Court should apply *de novo* review.[35] *E.g.,* U.S. v. Amirault, 173 F.3d 28, 33 (1st Cir. 1999); *see also* Comm v. Rex, 469 Mass. 36, 42, 11 N.E.3d 1060, 1067 (2014)("the United States Supreme Court had emphasized ...that 'cases involving speech under the First Amendment require independent appellate review of the offending material to ensure that protected speech is not infringed.'")(*citing* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504-05 (1984).

NRS 200.700(3) defines sexual conduct as "sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another." Here, the images Appellant allegedly possessed, with the exception of State's Exhibit 3, did not depict sexual intercourse, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or bodily

[35] Appellant will file a separate motion in this court, pursuant to NRAP 30, directing the District Court Clerk's office to transmit the State's trial exhibits to this Court for review.

penetration.[36] Accordingly, the images could only depict "sexual conduct" if they contained a "lewd exhibition of the genitals."

As previously noted, the factors relevant to determining whether an image lewdly exhibits the genitals are: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive (i.e., a location generally associated with sexual activity); (3) whether the child is depicted in an unnatural pose of inappropriate attire considering her age; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the image is intended or designed to elicit a sexual response in the viewer. Dost, 636 F.Supp. at 832.

Importantly, the 6th factor does not turn on whether the defendant himself is sexually aroused by the image. *See* U.S. v. Wallenfang, 568 F.3d 649, 658 (8th Cir. 2009)("the relevant factual inquiry ... is not whether the pictures in issue appealed, or were intended to appeal, to [the defendant's] sexual interests but whether, on their face, they appear to be of a sexual character."); State v. Kerrigan, 168 Ohio App.3d 455, 860 N.E.2d 816 (2006)(" it is the character of the material or performance, not the purpose of

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[36] State's exhibit 3 allegedly depicted one male performing oral sex on another male and this image formed the basis for count 40 in the indictment. AA I 12.

the person possessing or viewing it, that determines whether it involves a lewd exhibition or a graphic focus on the genitals."); Villard, 885 F.2d at125 ("We must, therefore, look at the photograph, rather than the viewer.").

The State alleged videos 0058, 0031, 0005, 0007, 0006, 0057, 0089, 0124, all depicted C.I., "standing nude in the bathroom, said video displaying full frontal nudity." AA I 3-9. Video 0058 related to Count 5 of the indictment, video 0031 related to Count 8 of the indictment, video 0005 related to Count 11 of the Indictment, video 0007 related to Count 14 of the Indictment, video 0006 related to Count 17 of the Indictment, video 0057 related to Count 20 of the Indictment, video 0089 related to Count 23 of the Indictment, and video 0124 related to Count 26 of the Indictment. Id. Count 41 involved a still image depicting a "fully naked unidentified boy standing nude in the bathroom and bedroom, said pictures displaying full frontal nudity." Id. at 12-13.

The videos involving C.I. and H.I. were made while each used the bathroom. A bathroom is not a sexually suggestive location or a location generally associated with sexual activity. Additionally, H.I. and C.I. are not depicted unnaturally nor inappropriately "posed." In fact, neither is posed and instead each is behaving as anyone preparing to take a shower naturally would. None of the images depict sexual coyness or a willingness to engage

in sexual activity. Instead, H.I. and C.I. are completely unaware they are being filmed. Although each child is briefly nude in the videos, the children's genitals are not the focal point of the image.[37]

Indeed, the children are only nude in the videos very briefly while each enters and exits the shower. C.I.'s genitals are mostly obscured in the videos. When his penis is actually visible it is only visible for seconds. Similarly, while H.I.'s vagina is visible in the videos, it is only visible briefly, and then quickly covered, as she gets into and out of the shower.[38] The majority of the videos depict nothing but a closed shower curtain.

Regarding the photo under H.I.'s skirt, Appellant denied taking the photo for sexual gratification but instead, to make a point that H.I. was dressed too risqué. AA VII 1297-98. While H.I.'s genital or pubic area was the focus of the photo, the photo did not depict nudity and the pose wasn't unnatural. Finally, the photo was taken in the kitchen, and it did not depict sexual coyness or a willingness to engage in sexual activity.

Count 41 involved "various pictures depicting a fully naked unidentified boy standing nude in the bathroom and bedroom, said pictures

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[37] Although the Nevada Revised Statutes do not define "genitals" in any title or section, genitals is generally defined as "the sexual organs; the testicles and penis of a male or the labia, clitoris, and vagina of a female." *See* <http://dictionary.reference.com/browse/genitals?s=t>, last accessed June 10, 2015.

[38] In Pict0013, H.I.'s vagina or pubic region is not visible at all.

displaying full frontal nudity." AA I 12-13. As the State concedes, the focus of the images related to count 41 is not merely the genital area. Instead, the image depicts the person's entire body. Moreover, the images do not suggest sexual coyness or a willingness to engage in sexual activity. Instead, the images depict mere nudity.

All of the images at issue do not depict a lewd exhibition of the genitals. Instead, the images are innocuous, non-sexual, depictions of children briefly naked as they enter and exit the shower. Objectively, the images are not designed to elicit a sexual response. The mere fact that a deviant may be sexually aroused by nude images of children does not mean any nude image of a child is therefore created with the intent to elicit a sexual response.[39]

In a case identical to Appellant's, the Arizona Court of Appeals reversed and entered a judgment of acquittal after the defendant's conviction for sexual exploitation of a minor. State v. Gates, 182 Ariz. 459, 897 P.2d 1345 (Ct. App. Div. 1, 1995). In Gates, the defendant made three surreptitious videos of children in his home. Id. at 461, 897 P.2d at 1347. Under Arizona law, the defendant could only be criminally charged if the

[39] The State did not present any evidence that Appellant actually watched the videos or viewed the images. In contrast, Appellant denied that he had downloaded the images pertaining to counts 40 and 41 or that he had ever seen the videos of H.I. or C.I. AA VII 1291-92, 1328.

videos depicted "sexual conduct." Id. at 462, 897 P.2d at 1348. Specifically, the videos had to depict a "lewd exhibition of the genitals, pubic or rectal areas of any person." Id. (*citing* A.R.S. § 13-3551(2)(f)).

The first video depicted a 14 year old girl changing clothing. Id. The second video depicted "several clothes-changing sessions involving three other girls under the age of fifteen" and a 10 year old girl as she took a shower. Id. The third video "was a montage of numerous photographic images of children from non-pornographic magazines, catalogs, and other visual or print media." Id. In this video, the camera zoomed in and lingered on the children's genital and pubic areas. Id.

At trial, the state presented evidence that the defendant secretly made the tapes, admitted to being sexually attracted to young girls, and while watching the videos "fantasized about the girls while masturbating." Id. at 461, 897 P.2d at 1347. In reversing, the appellate court first noted it could not find the images lewd merely by focusing on the defendant's intent in making the videos. Id. Rather the law required that the minors in the videos be engaging in sexual conduct regardless of the defendant's intent. Id.

The court recognized the significance of the Dost factors. Id. at 463-64, 897 P.2d at 1349-50. However, the court avoided the question of the necessity of a Dost jury instruction by reversing the conviction based upon

insufficiency of the evidence. Id. Ultimately, the court held the videos did not depict a lewd exhibition of the genitals and therefore did not depict sexual conduct.[40] Id. at 466, 897 P.2d at 1352; *see also* Lockwood v. State, 588 So.2d 57, 58 (4th Dist. Ct. App. FL, 1991)(conviction reversed where videotape of minor only depicted, "the innocent, normal everyday occurrence of a female child undressing, showering, performing acts of female hygiene and donning her clothes, none of which meets any of the detailed sexual acts contained in the statute[,]" including an "actual lewd exhibition of the genitals.")

Here, like Gates, exhibit 40 and the images of C.I. or H.I. did not depict any "sexual conduct" because the images did not depict a lewd exhibition of the genitals. Additionally, almost all the Dost factors militate in Appellant's favor. Based upon the aforementioned argument, as a matter of law the images are not child pornography and Appellant requests this Court reverse his convictions.

VIII. The State presented insufficient evidence of guilt

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of

[40] The court noted, "Although it is offensive that the children in this case were victimized as they were by Appellant, the dispositive fact in regard to the crime charged in this case is that none of the minors was filmed by Appellant while the minor was engaged in sexual conduct." Id.

every fact necessary to constitute the crime with which he is charged." Carl v. State, 100 Nev. 164, 165, 678 P.2d 669 (1984); Oriegel-Candido v. State, 114 Nev. 378, 382, 956 P.2d 1378, 1380 (1998). "The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." LaPierre v. State, 108 Nev. 528, 529, 836 P.2d 56, 57 (1992).

1. Use of Child as Subject of Sexual Portrayal in a Performance and Possession of visual presentation depicting sexual portrayal or sexual conduct of a child.

Based upon the argument contained within section VII *supra*, the images were not child pornography as a matter of law. Therefore, the State could not, and did not, present sufficient evidence of guilt.

2. Open and Gross Lewdness

The State charged Appellant with one count of Open and Gross Lewdness for allegedly "inappropriately kissing [H.I.] on the mouth." AA I 12. Nevada has not statutorily defined open, gross, or lewdness. However, this Court has noted the phrase "lewdness," in the context of Open and Gross Lewdness, pertains to sexual conduct. Berry v. State, 125 Nev. 265, 281, 212 P.3d 1085, 1096 (2009)(*abrogated on other grounds by* Castaneda, 245 P.3d

at 553). Additionally, "Gross" simply modifies lewdness thereby requiring the lewdness to be glaringly noticeable. Id.

H.I. testified that Appellant kissed her on the mouth and she felt "uncomfortable and scared" by the alleged kiss. AA VI 1043. However, H.I. also testified she didn't remember what kind of kiss it was. Id. Specifically, when asked whether the kiss was a "peck" or "a more involved kiss," H.I. testified "I do not recall what kind." Id. In contrast, Appellant denied kissing H.I. on the mouth. AA VII 1309, 1318.

Based upon the evidence presented a rational jury could not find beyond a reasonable doubt that Appellant kissed H.I. in an obviously sexual manner. H.I. did not remember the kiss and Appellant denied the kiss. Accordingly, the State presented insufficient evidence to support the Open and Gross Lewdness charge and Appellant respectfully requests this Court reverse his conviction.

3. Child abuse

The State charged Appellant for Child Abuse under a theory that Appellant's alleged actions placed H.I. in a situation where she either experienced physical pain or mental suffering or may have experienced physical pain or mental suffering. AA I 1-2. The State did not allege Appellant committed child abuse by sexual abuse or sexual exploitation.

Thus, the State was required to prove beyond a reasonable doubt that as a result of Appellant's alleged actions, H.I. either could have or did experience physical pain or mental suffering.

For purpose of NRS 200.508, NRS 432B.070 defines "mental injury" as, "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior." NRS 200.508(4)(e) defines "substantial mental harm" identically.

Here, the State failed to present any evidence whatsoever that H.I. experienced physical pain as a result of any of Appellant's alleged actions. Likewise, the State failed to present any evidence that H.I. experience mental suffering. Rather, the only evidence the State presented was that H.I. felt "uncomfortable" when Appellant took the photograph under her skirt. AA VI 1043. Likewise, when Appellant allegedly kissed H.I. on the mouth she felt, "uncomfortable and scared." Id. Regarding the videos, H.I. only testified she was embarrassed by video 0058. Id. at 1049.

The State failed to present any evidence that H.I.'s feelings of discomfort, embarrassment, or fear, affected or could have affected her "intellectual or psychological capacity or the emotional condition...as

evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior." Therefore, the State presented insufficient evidence of guilt and Appellant respectfully requests this Court reverse his conviction.

IX. Cumulative Error

"Although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial." Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000). When evaluating cumulative error this Court considers: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez, 124 Nev. at 1195, 196 P.3d at 481.

Creating child pornography is a serious offense as evidenced by its punishment of life in prison. *See* NRS 200.710. Given this seriousness, district courts should be vigilant in ensuring those facing this offense are afforded a trial which comports with basic concepts of fairness and due process.

Appellant adamantly denied creating the videos of H.I. and C.I. and downloading the images of the unknown males. Assuming, however, he did make the videos and possess the images, he was still not guilty as the images were not child pornography as a matter of law. Although Appellant's actions

may have subjected him to some offense, Appellant could not and should not have been convicted of creating and possessing child pornography.

Lastly, the court and the prosecutor committed numerous errors involving Appellant's fundamental right to a fair trial before a fully informed jury. Although each and every one of these errors individually warrants reversal, without question the cumulative effect of these errors warrants reversal.

CONCLUSION

Appellant was sentenced to life in prison for violating a facially unconstitutional law. The district court compounded this violation by denying Appellant his right to a properly instructed jury. Additionally, the district court's numerous erroneous evidentiary decisions contributed to Appellant's unjust conviction. Based upon the forgoing arguments, Appellant respectfully requests this Court reverse his convictions.

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 Times New Roman in 14 size font.

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of July, 2015.

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Employee, Clark County Public
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