IN THE SUPREME COURT OF THE STATE OF NEVADA



JOSHUA CALEB SHUE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 67428

# RESPONDENT'S ANSWERING BRIEF

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

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**ROUTING STATEMENT:** This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(a)(13) because it raises as a principal issue a question of first impression involving the United States or Nevada constitution or common law. Additionally, this proceeding is presumptively retained by the Supreme Court pursuant to NRAP 17(b)(1) because it is a direct appeal from a Judgment of Conviction based on a jury trial that involves convictions of a Category A and B felonies.

## STATEMENT OF THE ISSUES

1. WHETHER NRS 200.710 AND NRS 200.730 ARE CONSTITUTIONAL.
2. WHETHER SHUE'S CONVICTIONS ARE NOT REDUNDANT.
3. WHETHER THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SETTLING JURY INSTRUCTIONS.
4. WHETHER THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT
5. WHETHER THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS.
6. WHETHER THE INDICTMENT PROVIDED ADEQUATE NOTICE
7. WHETHER AS A MATTER OF LAW THE IMAGES AMOUNTED TO A SEXUAL PORTRAYAL OR CONDUCT

8. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT SHUE'S CONVICTIONS.
9. WHETHER NO CUMULATIVE ERROR OCCURRED

## STATEMENT OF THE CASE

On March 13, 2013, Joshua C. Shue ("Shue") was charged by way of Indictment with one count of Child Abuse and Neglect (Category B Felony – NRS 200.508), twenty nine counts of Use of Child in Production (Category A Felony – NRS 200.710), ten counts of Possession of Visual Presentation Depicting Sexual Conduct of a Child (Category B Felony – NRS 200.700, NRS 200.780), and one count of Open and Gross Lewdness (Gross Misdemeanor – NRS 201.210). 1 Appellant's Appendix ("AA") 1-14.

On April 17, 2013, Shue filed a pre-trial Petition for Writ of Habeas Corpus. 1 AA 120-131. The State filed its Response on April 30, 2013. 1 AA 132-158. The Court denied Shue's Petition on May 2, 2013. 2 AA 392-401.

On December 3, 2013, Shue filed a Motion for Discovery. 1 AA 213-18. In his motion, Shue alleged that the State made payments to the victim, H.I. 2 AA 434-41. The State filed its Response on December 11, 2013. 1 AA 220-25. On May 19, 2014, the district court held an evidentiary hearing and found that no payments were made by the State to H.I. 2 AA 358-59.

On August 6, 2014, Shue filed a Motion to Dismiss Indictment Because of Violation Based on Inadequate Notice. 2 AA 254-56. The State filed its Opposition

on August 18, 2014. 2 AA 257-81. The court denied Shue's Motion on August 19, 2014. 3 AA 519-524.

Shue's jury trial commenced on August 25, 2014. 3 AA 538. On August 29, 2015, the jury returned a verdict of guilty on all charges. 2 AA 321-28. On January 15, 2015, Shue was sentenced to Nevada Department of Corrections as follows: Count 1 – minimum of 24 months and a maximum of 72 months; Count 2 – life with the possibility of parole after 5 years, consecutive to Count 1; Count 3, 6, 9, 12, 15, 18, 24, 27-38 – life with the possibility of parole after 5 years, concurrent; Count 4, 7, 10, 13, 16, 19, 21-22, 25 – life with the possibility of parole after 10 years, concurrent; Count 5, 8, 11 – minimum of 12 months and a maximum of 36 months, concurrent; Count 14, 17, 20, 23, 26, 40, 41 – minimum of 12 months and maximum of 72 months, concurrent; Count 39 – 364 days in the Clark County Detention Center. 8 AA 1513-19.

Judgment of Conviction was filed on January 21, 2015. 2 AA 330-34. Shue filed a Notice of Appeal on February 12, 2015. 2 AA 337-41. On July 20, 2015, Shue filed instant Opening Brief.

## STATEMENT OF THE FACTS

On the night of August 22, 2012, H.I. returned home to the apartment she shared with her mother Anita and her two brothers. 6 AA 1040. At that time, Shue was in a romantic relationship with H.I.'s mother. 6 AA 1038. Shue had a separate

resident but would stay at the apartment for extended periods. Id. Upon returning home that night, H.I. went to the kitchen to put some flowers into a vase. 6 AA 1041. As H.I. was putting the flowers into the vase Shue came behind her and took a picture underneath her skirt. 6 AA 1042. H.I. felt uncomfortable and asked Shue to delete the picture. 6 AA 1042-43. At some point, as H.I. was trying to go to sleep, Shue came up to her and kissed her on the mouth. 6 AA 1043. H.I. never gave Shue permission to kiss her and she felt uncomfortable and scared when he did. Id. The following day, H.I. reported the incident to police and talked to Detective Ryan Jaeger ("Detective Jaeger"). 6 AA 1044.

Detective Jaeger interviewed Shue on August 23, 2012. 6 AA 952. During the interview, Shue denied kissing H.I. on the lips but did say he kissed her on cheek. Id. Shue admitted to taking a picture with a camera under H.I.'s skirt. 5 AA 953. Shue also admitted to having romantic thoughts towards H.I. 5 AA 954. When Detective Jaeger talked to Shue about seizing his computer, Shue admitted that he had things on the computer that are not good and are not "on the up and up". 5 AA 973. Shue consented to Detective Jaeger looking at his cell phone but disclosed that he had reset his cell phone that afternoon. 5 AA 976-77. Following the interview, Detective Jaeger obtained a search warrant for both H.I.'s residence and Shue's residence. Id. Sergeant Raymond Spencer ("Sergeant Spencer") served the search warrant on Shue's residence on August 23, 2012. 5 AA 839-40. The search warrant

authorized seizure of any electronic storage or media found in Shue's bedroom. 5 AA 842-43. Ultimately, the police seized Shue's laptop, video camera, digital camera, and some disposable cameras. 5 AA 850-51.

Detective Vicente Ramirez ("Detective Ramirez") conducted a forensic analysis on the laptop and digital camera seized from Shue's bedroom. 5 AA 862-63. During the forensic analysis of the digital camera, Detective Ramirez found on the memory card a deleted "picture up a female's dress," which was later identified to be the picture Shue took underneath H.I's skirt. 5 AA 865, 6 AA 1084. During the forensic analysis of the laptop computer, Detective Ramirez found that the computer was registered to Shue. 5 AA 869. On the computer, Detective Ramirez discovered several images of photos showing young males, who appeared to be under the age of 16, either performing sexual activities or nude with an exposed penis and buttocks area. 5 AA 872, 913.[1] The same boy was depicted in several of the photos and was later determined to be 12 years old. 5 AA 948. Additionally, Detective Ramirez discovered two hidden file folders named "Yumm" and Hmmm." 5 AA 876-77. In those folders, Detective Ramirez uncovered numerous video files. 5 AA 874. The videos were of H.I. and her brother C.I. engaging in bathroom activities in the bathroom of their apartment. See, 6 AA 1045-83.

[1] The photos were admitted at trial as State's exhibits 3-11, and 75. 5 AA 872.

At trial, H.I. testified that she had no idea anyone had videotaped her or her brother. 6 AA 1044. She was informed by the police about the existence of the videos. Id. H.I. was shown the videos at trial and she identified herself and her brother C.I. as the subjects of all the videos. See, 6 AA 1045-83. The videos depicted H.I. and C.I. in the bathroom of their apartment, the bathroom that was designated as mainly the kids' bathroom, and a hotel bathroom in California. Id. The videos were all made on different days. Id. Video 0058 depicted both H.I. and C.I. taking showers at separate times.[2] 1 AA 2-3, 6 AA 1046-49. In the video, H.I. was 15 years old and C.I. was 12 years old. 6 AA 1047, 1049. Video 0031 depicted H.I. preparing to take a shower.[3] 1 AA3-4, 6 AA 1050. Later in the video, C.I. is depicted using the toilet and showering. 6 AA 1051-52. In the video, H.I. was 16 years old and C.I. was 13 years old. Id. Video 005, 007, 006, 0057, 0089, and 00124, depicted H.I. and C.I. engaging in bathroom activities; showering, drying off, putting on lotion. 6 AA 1052-63.[4] In each video, H.I. was 16 years old and C.I. was 13 years old. Id. Video 0073, 0075, and 0002 depicted H.I. using the shower.[5] In both Video 0073 and 0075, H.I. was 16 years old. 6 AA 1067. H.I. was not sure

[2] Video 0058 related to count 3-5 of the Indictment. 1 AA 2-3.
[3] Video 0031 related to count 6-8 of the Indictment. 1 AA 3-4.
[4] Each video related to different counts of the Indictment; Video 005 counts 9-11, Video 007 counts 12-14, Video 006 counts 15-17, Video 0057 counts 18-20, Video 0089 counts 21-23, Video 00124 counts 24-26. 1 AA 4-9.
[5] Each video related to different counts of the Indictment; Video 0073 count 27, Video 0075 count 28, Video 0002 count 29. 1 AA 9-10.

how old she was in Video 002. 6 AA 1070. In Video 0002214847, H.I. was 15 years old and it depicted her shaving.[6] 6 AA 1072. In Video 0011214856, H.I. was 16 years old and it depicted her in the bathroom.[7] 6 AA 1074. In Video 0013214858, H.I. was 15 years old and it depicted her using the shower.[8] 6 AA 1076. In Video 0015214860, H.I. was 16 years old and it depicted her using a tampon.[9] 5 AA 1078. Video 0016 and 0044 depicted H.I. in the bathroom.[10] 6 AA 1078, 1082-83. H.I. was 16 years old. Id. Video 0025214870 depicted H.I. in the bathroom of a hotel in California.[11] 6 AA 1079. H.I. was 16 years old. Id. H.I. was not sure how old she was in Video 00272148720026 and 0027, which depicted her in the bathroom.[12] 6 AA 1079-80. In Video 0030214875, H.I. was 16 years old and it depicted H.I. using the shower.[13] 6 AA 1081-82. All the videos show full frontal nudity of the children's genitals. See, 6 AA 1045-83. Shue can be seen setting up and manipulating the camera in the bathroom in Video 0058, 0031, 0057, 0073, 0075, 0011214856, 0013214858, 0025214870, 00272148720026, 0030214875, and 0044. 6 AA 1046, 1049, 1058, 1066, 1068, 1073-74, 1079, 1081-82.

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[6] Video 0002214847 related to count 30 of the Indictment. 1 AA 10.
[7] Video 0011214586 related to count 31 of the Indictment. Id.
[8] Video 0013214858 related to count 32 of the Indictment. Id.
[9] Video 0015214860 related to count 33 of the Indictment. Id.
[10] Each video related to different counts of the Indictment; Video 0016 count 34, Video 0044 count 38. 1 AA 11, 12
[11] Video 0025214870 related to count 35 of the Indictment. 1 AA 11.
[12] Video 00272148720026 and 0027 related to count 37 of the Indictment. Id.
[13] Video 0030214875 related to count 37 of the Indictment.

## SUMMARY OF THE ARGUMENT

This Court should affirm Shue's Judgment of Conviction. First, NRS 200.710 and 200.730 are constitutional. Child pornography and obscenity fall outside the protection of the First Amendment. The statutes are not overbroad because the legitimate reach of the statutes outweighs its arguably impermissible applications. Additionally, the statutes are not vague because any person of ordinary intelligence has full and fair warning that portrayals of children that connect children to a sexual desire are prohibited by law.

Second, the convictions are not redundant because the use of each minor in the video is a separate illegal act. Each count names a different victim.

Third, the court did not abuse its discretion settling jury instructions. Shue's proposed defense instructions were incorrect statements of the law. Additionally, it was not plain error not to include an instruction defining prurient interest. Prurient interest has a well-defined meaning that relates to lust or lascivious desire.

Fourth, the State did not commit prosecutorial misconduct. The State properly argued that prurient interest in sex means it appeals to the lustful thoughts or desires of a person. The State did not call Anita a liar but made a proper argument on witness credibility and a permissible inference from evidence presented at trial.

Fifth, the district court did not abuse its discretion in its evidentiary rulings. Any evidence or questions regarding payments made to H.I. from County Services

Step Up Program were irrelevant. Additionally, Detective Ramirez testimony regarding the age of the male was not improper because it was given in the context of explaining his investigation procedures.

Sixth, the Indictment provided adequate notice. The Indictment gave adequate notice to Shue of the offense he was charged with, the essential facts constituting that offense, the State's theories of liability, and provided Shue adequate opportunity to prepare his defense.

Seventh, Shue's claim that he is entitled to reversal as a matter of law is nothing more than unsupported argument. Shue fails to cite to any legal authority for his claim. Furthermore, Shue's argument is essentially an insufficient evidence argument; that there was not sufficient evidence that the images depicted sexual conduct. However, the State only argued that the images depicted sexual portrayal.

Eighth, the State presented sufficient evidence to supports Shue's conviction. Shue's conduct was sexual in nature, committed in an open fashion, and was offensive to the victim, H.I. Shue knowingly used minors and knowingly possessed images depicting minors as subjects in a sexual portrayal. The minors depicted in the videos and the photographs were either under the age of 18 or 16. Additionally, Shue took pictures up H.I.'s skirt, kissed H.I. inappropriately on the mouth, and videotaped her in the bathroom while she was nude and engaging in bathroom

activities. Shue's conduct placed H.I. in a position where she might suffer mental suffering.

Finally, Shue's claim of cumulative error has no merit. Shue has not asserted any meritorious claims of error, the issue of guilt was not close and Shue was not convicted of grave crimes.

## ARGUMENT

### I

### NRS 200.710 AND NRS 200.730 ARE CONSTITUTIONAL

NRS 200.710 and NRS 200.730, which prohibit producing and possessing for any purpose any film, photograph or other visual presentation depicting a minor as a subject of a sexual portrayal, are constitutional. Sexual Portrayal is 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. Shue complains that these statutes are unconstitutional because they are: 1) content based restrictions upon speech, 2) overbroad; and 3) vague. Appellant's Opening Brief ("AOB") 14.

This Court reviews the constitutionality of a statute de novo. Berry v. State, 125 Nev. 265, 279, 212 P.3d 1085, 1095 (2009) (*citing* Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)). However, this Court starts with the presumption that a statute is constitutional. Id. This Court will not invalidate it unless the party challenging the statute makes a "clear showing of

invalidity." State v. Castaneda, 126 Nev. __, __, 245 P.3d 550, 552 (2010). Further, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Id. (quoting Hooper v. California, 155 U.S. 648, 657, 15 S. Ct. 207, 211 (1895)).

However, Shue failed to raise this claim below. That failure waives all but plain error. Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012). This Court reviews unpreserved constitutional errors for plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (Nev. 2015). Plain error is "so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). A defendant has the burden to demonstrate that the error affected his substantial rights, by causing actual prejudice or a miscarriage of justice. Martinorellan, 131 Nev. at __, 343 P.3d at 591. Thus, reversal for plain error is only warranted if the error is readily apparent and defendant demonstrates that the error is prejudicial to his substantial rights. Id. Here, there is no plain error because a casual inspection of NRS 200.710 and NRS 200.730 does not reveal the statutes unconstitutional. To the contrary, as it is apparent from Shue's 17 pages of argument, any claim that NRS 200.710 and NRS 200.730 are unconstitutional requires detailed and thorough analysis of case law and legislative history. Furthermore, Shue fails to demonstrate actual prejudice because NRS 200.710 and NRS 200.730 are constitutional.

### A. NRS 200.710 and NRS 200.730 Are Not Unconstitutional Content-Based Restriction On Speech

Shue argues that prohibiting creating or possessing images of minors as the subject of a sexual portrayal in a performance is an unconstitutional content-based restriction upon speech. AOB 15. To support his argument Shue cites to R.A.V v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992) for the proposition that the First Amendment prohibits the government from criminalizing speech or expressive conduct because it disapproves of the ideas expressed. However, Shue fails to acknowledge that some areas of speech, consistent with the First Amendment, can be regulated because of their constitutionally proscribable content. Id. at 379, 112 S.Ct at 2541. Although First Amendment speech protections are far reaching, it has been long recognized that free speech is not an absolute right devoid of limitations and restrictions. Chalpinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 769 (1942). There are well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. Id.

There are two types of pornography that receive no First Amendment protection; obscenity and child pornography. See, N.Y. v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957). In Roth, the U.S. Supreme Court determined that obscenity is not within the area of constitutionally protected speech or press. 354 U.S. at 485, 77 S.Ct. at 1309. The

U.S. Supreme Court reexamined the obscenity standard in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15 (1973) and ruled obscenity is limited to works that when taken as whole appeal to the prurient interest in sex, portray sexual conduct in a patently offensive way and have no serious literary, artistic, political or scientific value.

In Ferber, the U.S. Supreme Court, in a unanimous decision, held that child pornography was far outside the First Amendment protection. 458 U.S. at 749 102 S.Ct. at 3350. Ferber upheld a statute proscribing the dissemination of child pornography regardless of whether the material was obscene under Miller. Id. at 761, 102 S.Ct at 3356. The Court found that child pornography could be censored without violating the First Amendment even if it did not meet the definition of obscene. Id. This was so because the government had a compelling interest in preventing sexual exploitation of children. Id. at 756-57, 102 S.Ct at 3354 ("safeguarding the physical and psychological well-being of a minor is a compelling interest"). The U.S. Supreme Court pointed out that it had approved of legislation aimed at protecting the physical and emotional well-being of youth even when the laws operated in the sensitive area of a constitutionally protected right. Id. at 757, 102 S.Ct at 3354.

Shue erroneously argues that sexual portrayal of a minor falls inside the protection of the First Amendment because sexual portrayal is not limited to works

that visually depict sexual conduct involving children. AOB 18. However, The U.S. Supreme Court in Ferber specifically ruled that states are entitled to greater leeway in regulating pornographic depictions of children than images of adults, emphasizing the state's compelling interest in protecting children who may be exploited or abused in the production of child pornography. Id. at 756, 102 S.Ct at 3354. The language defining sexual portrayal states that the image must appeal to the prurient interest in sex. NRS 200.700. The intent of the language was to target those images that might not explicitly portray a minor engaging in sexual conduct but are nonetheless pornographic depictions of minors because of the obscene nature of the image.[14] See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 14, 1995). Therefore, sexual portrayal of minors as defined by NRS 200.700 is a proper regulation of pornographic depictions of children as it achieves the States' compelling interest of protecting children. Furthermore, sexual portrayal of children is outside the protection of the First Amendment because the language includes the element of obscenity, which the U.S. Supreme Court has held to be an unprotected class of speech. Miller, 413 U.S. at 16, 93 S.Ct. at 2610.

[14] Nevada's obscenity statute, NRS 201.235, uses the words "prurient interest" and the phrase "lacks serious literary, artistic, political or scientific value" when defining obscenity and this same language is found in the definition of "sexual portrayal" in the child pornography statutes. NRS 200.700

Shue's citation to several non-binding cases to support the proposition that criminalization of an image of a child based solely upon the effect it has upon the viewer is unconstitutional is inapposite. AOB 17-18. In United States v. Villard, 700 F. Supp. 803, 804 (D.N.J. 1988) the defendant was convicted for transporting child pornography, four magazines and a videocassette. During trial, the State was unable to produce the original magazines but had a witness, a government informant, describe to the jury the images and played a surveillance tape of the informant and defendant discussing the magazines. Id. at 806-7. The Court held that witness testimony regarding the photograph in question, without more, was not a sufficient basis to conclude that the photograph contained explicit sexual conduct. Villard, 700 F. Supp. at 813. Similarly, the Court in Rhoden v. Morgan, 86 3 F. Supp. 612, 614 (M.D. Tenn. 1994) found that the jury has to base their determination whether the photograph contains explicit sexual conduct on the actual photograph not on the individual who viewed the photograph. The testimony and description of the photograph by a witness is not enough to establish that it contains explicit sexual conduct; the jury must have an opportunity to view the photograph. Id.

Furthermore, similar statutes have been found constitutional. In Commonwealth v. Provost, 418 Mass. 416, 420, 636 N.E.2d 1312, 1315 (1994) the defense argued that a statute that made it illegal to take photographs of partially nude children with lascivious intent was unconstitutional in that it criminalized the

depiction of pure nudity. The Court held that even though the pictures were not child pornography under Ferber, the statute was still constitutional and did not violate the First amendment. Id. The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. Id. at 420-21, 636 N.E. 2d at 1315. When '"speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.'" Id., *citing* Texas v. Johnson, 491 U.S. 397, 406, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989). Provost concluded that the compelling interest in protecting children from exploitation was both unrelated to the suppression of expression and sufficiently compelling. Id. at 421, 636 N.E. at 1315.

Shue argues that NRS 200.710(2) and NRS 200.730 are not the least restrictive means of promoting a compelling government interest. AOB 19. Even assuming arguendo, the statutes are a content-based restriction on speech; they are the least restrictive means of promoting a compelling government interest. The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. Ferber, 458 U.S. at 757, 102 S. Ct. at 3055. Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained. Cote H. v. Eighth Judicial Dist. Court, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008).

Shue claims that the compelling government interest appears to be; 1) protecting children from being filmed in public, 2) child pornography as the visual depiction of sexual abuse; 3) protecting children from being recorded. However, based on the legislative history the compelling government interest is to protect children from sexual exploitation and the psychological harm that comes from images that use minors as subject of sexually stimulating and pornographic portrayals. See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995). The concern of the Legislature was that the statute as written contained a gap that left children unprotected. Id. Children were being sexually exploited when they were the subject of images that had a pornographic purpose but the children were not engaging in sexual conduct. Id.

First, Shue contends that NRS 597.810 provides a civil remedy that would protect children from being filmed by pedophiles. This argument vastly under values the compelling interest the statute aims to achieve. A mere civil fine is a woefully inadequate response to the sexual exploitation of children. Further, NRS 597.810 provides a civil remedy only for any "commercial use" using a photograph or likeness of another person without first having obtained written consent. This provides no protection for those children whose images are never "commercially used."

Next, Shue alleges that the statutes prohibiting creating an image of a child simulating or engaging in "sexual conduct to produce a performance" satisfies the interest of protecting minors from having their sexual abuse documented. NRS 200.710(1). However, this argument is fatally flawed because children can be sexually exploited in ways that do not fall within the definition of sexual conduct. In part, the Legislature sought to amend the statutes to include sexual portrayal because of an incident where children were secretly filmed in a public place and then those videos were edited into other pornographic videos. Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995). The concern was that statutes prohibiting only images that depict children engaging in sexual conduct do not achieve the compelling interest of protecting children from sexual exploitation.

Lastly, Shue complains that NRS 200.604, which prohibits capturing the image of the private area of a person, satisfies the interest in protecting children from being filmed while nude. Shue ignores that NRS 200.604 requires the images to be captured without consent and taken in a place where the person has an expectation of privacy. This does not meet the compelling interest because it does not protect children in places where they might not have expectation of privacy. Because Shue's proposed alternatives fail to achieve the compelling government interest as

effectively as NRS 200.710(2) and NRS 200.730, the statutes are the least restrictive means. Ashcroft v. ACLU, 542 U.S. 656, 665, 124 S.Ct. 2783, 2791 (2004)

**B. NRS 200.710 and NRS 200.730 Are Not Unconstitutionally Overbroad**

Shue argues that NRS 200.710 and NRS 200.730 are overbroad because they allegedly make any legitimate image of minors child pornography, if the images appeal to a pedophile. AOB 25.

The U.S. Supreme Court has held that a statute may be overbroad if in its reach it prohibits constitutionally protected conduct. Grayned v. Rockford, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302 (1972). In considering an overbreadth challenge, a court must decide, "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115, 92 S.Ct. at 2302. However, when a law regulates arguably expressive conduct, "the scope of the [law] does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908 (1973). A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." Id. The First Amendment overbreadth doctrine is "strong medicine"; it has been invoked by the courts with hesitation and "only as a last resort". " Ferber,

458 U.S. at 769, 102 S.Ct. 3350. Even if a portion of the law proscribes protected expression, an overbreadth challenge will fail if the "'remainder of the statute... covers a whole range of easily identifiable and constitutionally proscribable... conduct.'" Id. at 770 n. 25, 102 S.Ct. at 3351. States have a wider latitude in regulating child pornography than depictions of adults, and that the possible danger of infringing on serious literary, scientific, or educational works does not make a statute unconstitutionally overbroad. Id. at 773, 102 S.Ct. at 3363.

In this case, sexual portrayal is specifically defined as depictions of minors that appeal to prurient interest in sex. NRS 200.700. Furthermore, the statue explicitly includes language that exempts material that have serious literary, artistic, political or scientific value. Id. That language narrows the statute's reach to exclude protected conduct. Although some protected expression could possibly be reached by the statute, this tiny fraction of material could be protected by a case-by-case analysis. Ferber, 485 U.S.at 773-74, 102 S.Ct. at 3363 (whatever overbreadth may exist should be cured through case-by-case analysis). The legitimate reach of the statutes outweigh their arguably impermissible applications. Therefore, the statutes are not substantially overbroad.

### C. NRS 200.710(2), NRS 200.730 and NRS 200.740(4) Are Not Unconstitutionally Vague

Shue argues that NRS 200.700(4), NRS 200.710(2), NRS 200.730 are unconstitutionally void for vagueness. AOB 28.

"[T]he Due Process Clause of the Fourteenth Amendment prohibits the states from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Sheriff v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 636 (1983) (quoting United States v. Harris, 347 U.S. 612, 617, 74 S. Ct. 808 (1954)). A statute is void for vagueness, and therefore facially unconstitutional, if the statute both: 1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and 2) authorizes or encourages arbitrary and discriminatory enforcement." City of Las Vegas v. Dist. Ct., 118 Nev. 859, 862, 59 P.3d 477, 480 (2002). However, a statute gives sufficient notice of proscribed conduct when, viewing the context of the entire statute, the words used have a well-settled and ordinarily understood meaning. Nelson v. State, 123 Nev. 534, 540-41, 170 P.3d 517, 522 (2007). When a term or offense has not been defined by the Legislature, courts will generally look to the common law definitions of the related term or offense. Ranson v. State, 99 Nev. 766, 767, 670 P.2d 574, 575 (1983).

Shue argues that Nevada's definition of sexual portrayal fails to provide adequate notice of prohibited conduct. AOB 29. Shue does not argue that the statutes have divergent meaning such that it precludes reasonable notice of proscribed conduct. Shue contends that the average person would not understand what conduct was prohibited by the terms "sexual portrayal" and the definition lacks any objective standards. Id. However, the statutes at issue are not so imprecise that

vagueness permeates its text. Indeed, the term "prurient" has a common ordinary meaning relating to lust or lascivious desire. Webster's Encyclopedic Unabridged Dictionary (1996) p. 1558. Any person of ordinary intelligence has full and fair warning that portrayals of children that connect children to a sexual desire are prohibited by law. Therefore, Shue fails to meet his burden that the statues are unconstitutionally vague.

Additionally, Shue's argument that parents who takes an innocent, naked, photograph of their child could be prosecuted and convicted if the most sensitive member of La Vegas believes the image is sexually gratifying is without merit. AOB 29. First, Shue's various hypotheticals are irrelevant attempts to distract the Court from his conduct. The U.S. Supreme Court held that a facial-vagueness challenge is appropriate only if the statute implicates constitutionally protected conduct or "is impermissibly vague in all of its applications." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S. Ct. 1186, 1191 (1982). However, "[a] challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). Thus, a reviewing court must first, "examine the complainant's conduct before analyzing other hypothetical applications of the law." Hoffman Estates, 455 U.S. at 495, 102 S. Ct. at 1191. Second, the Legislature specially included the language of "appeals to the prurient

interest in sex" because it considers a community objective standard and does not encompass within it parents taking innocent pictures of their children. See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12 and June 14, 1995).

## II
## SHUE'S CONVICTIONS ARE SEPARATE ILLEGAL ACTS THAT ARE NOT REDUNDANT

This court reviews legal questions de novo. Thompson v. State, 125 Nev. 807, 811, 221 P.3d 708, 711 (2009). This Court has held that if the offenses at issue are indeed separate, the State may bring multiple charges based upon a single incident, so long as the convictions are not redundant. Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003). "'[W]here a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.'" Id. at 228, 30 P.3d 1103, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

The cases cited by Shue are inapplicable in this case, as they stand for the proposition that NRS 200.710 cannot be used to punish a defendant for multiple counts of production if the counts are dictated by the numbers of images taken of ***one child***, on one day, all at the same time. Wilson v. State, 121 Nev. 345, 358, 114 P.3d 285, 294 (2005); Casteel v. State, 122 Nev. 356, 362, 131 P.3d 1, 5 (2006) (emphasis added). In both Wilson and Castell, this Court reversed defendants'

convictions as redundant because they stemmed from photographs of one minor during the same sexual performance. Id. In this case, however, the convictions that Shue is alleging are redundant stem from videos of two minors. The convictions are not redundant as each count names a separate minor as a victim. It is the use of a child in a sexual performance that is prohibited under NRS 200.710. Wilson, 121 Nev. at 357, 114 P.3d at 294. In the videos that contain both H.I. and C.I., separate counts for each victim is appropriate considering each child was sexually exploited. Therefore, the convictions are not redundant because the use of each minor in the video is a separate illegal act. Salazar, 119 Nev. at 227, 70 P.3d at 751.

## III
## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SETTLING JURY INSTRUCTIONS

### A. Standard of Review

It is well established that the district court has broad discretion to settle jury instructions. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). As such, the standard of review for a decision to give, or not to give, a particular instruction is abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson, 117 Nev. at 120, 17 P.3d at 1000.

Although a defendant has the right to have his jury instructed on his theory of the case, as disclosed by the evidence, he is not entitled to instructions that are misleading, inaccurate or duplicitous. Crawford, 121 Nev. at 754, 121 P.3d at 589; Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). "[I]f a proffered instruction misstates the law or is adequately covered by other instructions, it need not be given." Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

**B. Proposed Defense Instruction B**

Instruction B reads:

> Photographic depiction of nudity alone is not pornography.
>
> In order to establish the crime of child pornography, photos must show something more obscene than "mere nudity". In evaluating whether the photos admitted in evidence constitute pornography, the jury should consider in totality the following factors:
>
> (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 or 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.

2 AA 265.

The court properly denied the instruction because it was not a correct statement of the law. Barron, 105 Nev. at 773, 783 P.2d at 448. The proposed instruction was based on a federal pornography statute rather than Nevada law, which defines child pornography differently. 8 AA 1355. The district court never indicated that it would have granted the proposed instruction if it was based on the Ninth Circuit precedent, rather, the district court had specific reservations about the language because the language was not based on Nevada law. 8 AA 1355. Furthermore, the jury instructions already included the correct and proper statement and definition of Nevada's child pornography law. 9 AA 1360; Barron, 105 Nev. at 773, 783 P.2d at, 448. Jury instructions 12-18 contained the proper definitions of children pornography in Nevada. 2 AA 305-11. Therefore, the court did not abuse its discretion denying Instruction B.

### C. Proposed Defense Instruction I

Instruction I reads:

> In order to find the Defendant guilty of possession of child pornography, the government must prove the following elements beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed pictures or video that the defendant knew contained visual depictions of minors engaged in sexually explicit conduct;
>
> Second, the defendant knew each of the visual depictions contained in the pictures or video sows a minor[s] that the defendant knew contained [a] visual depiction[s] of [a] minor[s] engaged in sexually explicit conduct;

> Third, the defendant knew that production of such [a] visual depiction[s] involved use of a minor in sexually explicit conduct; and
>
> "Visual depiction" includes undeveloped film and videotape, and data that has been stored on computer disk or data that has been stored by electronic means and that is capable of conversation into a visual image.
>
> A "minor" is any person under the age of 18 years.
>
> "Sexually explicit conduct" means actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.
>
> "Producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

2 AA 272.

First, the court properly held that the instruction did not correctly state the law in Nevada. The court explicitly found that under Nevada law the child does not have to be doing something sexually explicit for it to be pornography; that is not the definition of child pornography in Nevada. 8 AA 1371. The court also properly found that the instruction was misleading because it "placed the onus on the child to basically do something in order for the jury to find a defendant guilty, which is not the statute." Id.; Crawford, 121 Nev. at 754, 121 P.3d at 589.

Second, Shue attempts to isolate a specific part of the proposed instruction and incorrectly argues that denial of the whole instruction, which is the incorrect statement of the law, is reversible error. Jury instructions are to be judged as a whole, rather than by picking isolated phrases from them. Boyd v. United States,

271 U.S. 104, 107 (1926). As a whole, Instruction I is an incorrect statement of the law. Barron, 105 Nev. at 773, 783 P.2d at 448

Instruction I does not substantially mirror Nevada's definition of "sexual conduct"; it omits a substantial amount of conduct that is "sexual conduct" under Nevada law. NRS 200.700. Additionally, as discussed *infra* Section VIII, the State never argued that the videos or photographs depicted sexual conduct but rather that the images depicted the minors as the subject of a sexual portrayal, which the State proved beyond a reasonable doubt. 8 AA 1441-55. Therefore, the district court did not abuse its discretion denying Instruction I.

**D. Prurient Instruction**

Shue claims that by not defining the term "prurient interest" in the jury instructions, the State was able to impermissible argue the wrong definition of "prurient interest." AOB 40. Although Shue did not seek an instruction defining the term, he argues that the district court erred by not including such an instruction. Id. Generally, a defendant's failure to clearly object on the record to a jury instruction precludes appellate review. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). However, this Court has the discretion to review an instructional error absent an objection for plain error. Rossana v. State, 113 Nev. 375, 382, 934 P.2d 1045, 1049 (1997).

Here, the district court's instructions on the use of a child as a subject of a sexual portrayal included each of the requisite elements. 2 AA 308. Although the term "prurient interest" was not defined in the instructions, the term has an ordinarily understood meaning, and it is not readily apparent that the term requires further definition in order for a jury to find sufficient evidence to support this element. Doyle v. State, 112 Nev. 879, 899, 921 P.2d 901, 914 (1996) (holding that it was not plain error to fail to sua sponte define a "person" as a living person in a sexual assault case even though the definition of the term was unsettled at the time in Nevada and such an instruction would have been appropriate had it been sought), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). Any ordinary juror would understand the term "prurient" as relating to lust or lascivious desire. Webster's Encyclopedic Unabridged Dictionary (1996) p. 1558. Therefore, it was not plain error not to include an instruction defining "prurient interest."

**E. Proposed Defense Instruction E**

Instruction E reads:

> It is unlawful to capture the private image of another person without their consent when such persons had a reasonable expectation of privacy. If you find the Defendant did not commit the crime of use of a child in production of pornography or possession of visual presentation depicting sexual conduct of a child, you may find him guilty of the *lesser included offense of capturing the private image of another person without their consent.*

8 AA 268. (emphasis added)

She concedes he offered this instruction as a lesser-included offense. AOB 41. Shue admits that Capturing the Private Image of Another is not a lesser-included offense of Use of a Child in Production of Pornography or Possession of a Visual Presentation Depicting Sexual Conduct of a Child. Id. Instruction E was correctly denied as an incorrect statement of the law. Barron, 105 Nev. at 773, 783 P.2d at, 448. Instruction E specifically defined Capturing the Private Image of Another Person as a lesser-included offense, which it is not. The court properly found that Instruction E to be an incorrect statement of the law. 8 AA 1363-1364.

Shue's now argues that the instruction was a theory of defense instruction. Since, Shue never offered this argument below, this Court need not consider it. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied., 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Admittedly, a possible defense theory is that a defendant is not guilty of the offense charged but is guilty of a lesser-included offense. Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). In this case, Capturing the Private Image of Another Person is not a lesser-included offense, therefore, it is not a theory of defense. See, Wilson, 121 Nev. at 349, 114 P.3d at 288. This Court has held that a lesser included defense theory instruction is not only unnecessary but is erroneous

in cases where; (1) the evidence would not support a finding of guilt of the lesser offense or degree; (2) the defendant denies any complicity in the crime charged and thus lays no foundation for any intermediate verdict; or (3) where the elements of the defenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966).

In this case, the district court properly concluded that the element of Capturing the Private Image of Another Person and the charged offenses where different. 8 AA 1363. There is an additional element of consent in the offense of Capturing the Private Image of Another Person. Id. Additionally, at trial Shue's theory of defense was that Shue did not take those videos, had no idea that the camera was there, and did not know that the images were on his computer. 8 AA 1369-1370. Hence, he denied any complicity in the crime charged and layed no foundation for any intermediate verdict. Lisby, 82 Nev. at 187, 414 P.2d at 595. Therefore, the district court did not abuse its discretion denying Instruction E.

**E. Any Error Was Harmless**

Jury instruction errors are subject to a harmless-error analysis if they do not involve the type of errors, which vitiates all the jury's findings and produces 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. 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, it is clear that a rational jury would have found Shue guilty absent any error because the jury was properly instructed on crime of the Use of a Child in Production and Possession of Visual Presentation Depicting Sexual Conduct of a Child. Additionally, the jury was ultimately instructed on the definition of "prurient interest" during the State's closing. 8 AA 1449.[15] Therefore, any error if it existed was harmless.

## IV.
## THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

### A. Standard of Review

Shue claims that the State committed prosecutorial misconduct when it improperly defined prurient interest and improperly characterized a witness's

[15] In his brief Shue alleges that the State committed prosecutorial misconduct when it defined "prurient interest" incorrectly. The proper definition of "prurient interest" is discussed *infra*.

testimony as a lie. AOB 42-43. As Shue concedes, these claims were not properly preserved for appeal. Therefore, these claims are reviewed for plain error. Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002) (where a defendant fails to offer a contemporaneous objection, this Court will only review claims of prosecutorial misconduct for plain error).

This Court applies a two-step analysis to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). This Court first determines whether the prosecutor's conduct was improper, and second, whether the conduct warrants reversal. Id. "A prosecutor's comments should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quoting United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). Moreover, "this Court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Valdez, 124 Nev. at 1188, 196 P.3d at 476.

**The State Correctly Define "Prurient"**

Shue complains that the State improperly argued that prurient interest in sex means appeals to the lustful thoughts or desires of a person. AOB 43. Shue cites to Brockett v. Spokane Aracades, 472 U.S. 491, 105 S.Ct. 2794 for the proposition that a prurient interest in sex cannot be merely the lustful thought or desires of a person. In Brockett, a moral nuisance law defined prurient to mean, "that which incites

lasciviousness or lust" Id. at 494, 105 S.Ct. at 2797. Several individuals and corporations challenged the constitutionality of the statute by asserting that the definition of "prurient" was unconstitutionally overbroad. Id. Specifically, they argued that the definition reached material that aroused only normal and healthy interest in sex. Id. Court of Appeals held that by including "lust" in its definition, the state legislature had intended the statute to reach material that merely stimulated normal sexual responses. Id. at 495, 105 S.Ct. 2797.

The Court of Appeals was of the view that neither Roth, nor later cases should be read to include within the definition of obscenity those materials that appeal to only normal sexual appetites. Id. at 496, 105 S.Ct. 2798. The Court of Appeals was aware that Roth indicated that material appealing to the prurient interest was "material having a tendency to excite lustful thought", but felt that Roth did not intend to characterize as obscene material that provoked only normal , healthy sexual desires. Id. However, The U.S. Supreme Court reversed holding that by using the words "lustful thoughts" Roth was referring to sexual responses over and beyond those that would be characterized as normal. Id. at 598, 105 S.Ct. 2799. The U.S. Supreme Court concluded that the statute could be invalidated only in so far as the word "lust" is taken to include normal interest in sex. Id. at 504-05, 105 S.Ct. at 2802. The U.S. Supreme Court's conclusion is bolstered by a number of cases defining obscenity in terms of "lust" or "lustful." See, Parmelee v. United States,

72 App. D. C. 203, 210, 113 F.2d 729, 736 (1940) (material is protected if "the erotic matter is not introduced to promote lust"); United States v. One Book Called "Ulysses," 5 F.Supp 182, 184 (SDNY 1933) (meaning of the word "obscene" is "[tending] to stir the sex impulses or to lead to sexually impure and lustful thoughts"); Missouri v. Becker, 364 Mo. 1079, 1085, 272 S. W. 2d 283, 286 (1954) (materials are obscene if they "incite lascivious thoughts, arouse lustful desire"); Adams Theatre Co. v. Keenan, 12 N. J. 267, 272, 96 A. 2d 519, 521 (1953) (question is whether "dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire'"); Commonwealth v. Isenstadt, 318 Mass. 543, 549-550, 62 N. E. 2d 840, 844 (1945) (material is obscene if it has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire"); Therefore, the State did not commit prosecutorial misconduct because it provided the proper definition of prurient interest. Under the plain error standard, the definition provided by the State is not plain error because a casual inspection of the record would show that prurient interest was correctly defined.

**B. The State Did Not Call Anita a Liar**

The State did not call Anita a liar. During its rebuttal closing, the State argued:

> The credibility or believability of a witness should be determined by his or her manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to

> which he testified, the reasonableness to his statements and the strength or weakness of the recollections.
>
> And it says, if you believe that a witness had lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony. Well, I'm going to provide some information that would suggest that Anita lied during her testimony, and I'm going to ask you not disregard it. I'm going to ask you to take it back in the deliberation room and remember it when you're determining who was credible on the witness stand and who wasn't, and the same applies to the defendant.

8 AA 1469

In context, the State was not calling Anita a lair, but was merely commenting on the evidence presented at trial. Generally, it is impermissible for the State to assert a personal opinion or belief and assert that a witness is lying. Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988). However, a prosecutor's argument regarding witness credibility is not similarly limited. Pascua v. State, 122 Nev. 1001, 145 P.3d 1031 (2006); Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). A witness's credibility is a proper subject for argument. Rowland, 118 Nev. at 39, 39 P.3d at 119. Arguments concerning witness credibility are improper when they impermissibly vouch for or against a witness and inappropriately invoke the prestige of the district attorney's office. Rowland, 118 Nev. at 39; 39 P.3d at 114. A prosecutor's use of the words "lying" or "truth" does not automatically mean that prosecutorial misconduct has occurred. Id. A prosecutor may demonstrate to a jury through reference from the record that a defense witness's testimony is palpable

untrue. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990). The line between appropriate argument on the credibility of a witness and improper prosecutorial argument is occasionally difficult to define. Rowland, 118 Nev. at 40, 39 P.3d at 119. This Court relies primarily on the trial supervision and good judgment of the district judges and looks to them to determine when appropriate argument on witness credibility becomes improper vouching for a witness or the inappropriate use of the prosecutor's power. Id. In this case, the State's argument in rebuttal closing did not rise to plain error.

Unlike Witherow, which Shue cites in support of his claim, the State never directly called Anita a liar or stated that she is lying. 104 Nev. at 724, 765 P.2d at 1155 (the prosecutor stated that a witness had lied on the stand). In this case, there was no witness vouching, expression of personal opinion, or claim of superior knowledge. The State was making a proper argument on witness credibility and making a permissible inference from evidence presented at trial. This Court has long recognized that "[d]uring closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues." Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997). Therefore, the State did not commit prosecutorial misconduct. In reviewing the State's argument under the plain error standard, any error is not plain because a casual inspection of the record would show

that the State was not calling Anita a liar or inserting personal beliefs , but was making a proper argument on witness credibility.

**Shue Cannot Show Prejudice.**

Lastly, even assuming *arguendo*, that the State's comments were improper, Shue cannot show prejudice. To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process. Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). This Court must consider such statements in context, as a criminal conviction is not to be lightly overturned, Id.

Additionally, this Court has held that "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing the evidence of guilt is." Rowland, 118 Nev. at 38, 39 P.3d at 119. If the issue of guilt is not close and the State's case is strong, misconduct will not be considered prejudicial. Id. In this case, the evidence against Shue was overwhelming. Substantial evidence was admitted against Shue such that any alleged prosecutorial misconduct was harmless. As discussed *infra* Section VIII, overwhelming evidence established Shue's guilt. Thus, because the issue of guilt was not close, any alleged prosecutorial misconduct was harmless.

## V.
## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS

### A. The District Court Correctly Denied Irrelevant "Evidence" of Payments Made to H.I. from County Services Step Up Program

The district court "retains wide discretion to limit cross-examination based on considerations such as harassment, prejudice, confusion of the issues, and relevancy." Kaczmarek, 120 Nev. at 335, 91 P.3d at 31. In Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986) the U.S. Supreme Court indicated that while the trial court must not curtail a defendant's ability to cross-examine a witness, the right is not without limits. The U.S. Supreme Court recognized that the Constitution does not guarantee perfection or even close to it; "as we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Id.

Additionally, this Court has held that "the scope and extent of cross-examination is largely within the sound discretion of the trial court and in the absence of abuse of discretion a reversal will not be granted." Azbill v. State, 88 Nev. 240, 246, 495 P.2d 1064, 1068 (1972) (*citing* Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748 (1968)). This Court has recognized that the district court has less discretion to curtail cross-examination where potential bias is at issue. Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004). However, the district court retains wide discretion to restrict cross-examination regarding bias to bar those inquires which are repetitive, irrelevant, vague, speculative, or designed merely to

harass annoy or humiliate. Id., Accord, Bushnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979).

Shue desired to question H.I. regarding payment and assistance she received from the Clark County Family Services Step Up program. AOB 45. The district court held an evidentiary hearing and found that this evidence was irrelevant because H.I. was not receiving these payments from the State. 3 AA 501-02. The district court had a clear basis to limit cross-examination in regards to any payments, as those questions were totally unrelated to the case or the State. 3 AA 502. H.I. had a right to those payments as someone who has been in the foster care system. Id. Any funds she received had nothing to do with her testimony in this case. Id.

The court properly concluded that such testimony was not relevant and properly restricted Shue's cross-examination. Lobato, 120 Nev. at 520, 96 P.3d at 771. Shue has failed to demonstrate that the court abused its discretion by limiting irrelevant cross-examination questions of H.I.

**B. The District Court Correctly Allowed "Evidence" of the Age of the Person in State's Exhibit 3.**

NRS 200.740 in pertinent parts states:

> For the purpose of NRS 200.710 to 200.737, inclusive, to determine whether a person was a minor, the court or jury may;
> …..
> 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
>
> …..

Shue argues that it was improper for Detective Ramirez to opine regarding the age of the male in State's Exhibit 3 because he was neither a medical expert nor a witness to the performance. AOB 47. Shue's argument mischaracterizes Detective Ramirez's testimony. AOB 48. When Detective Ramirez testified to the age of the male, he did so in the context of explaining to the jury how and why he collects or "bookmarks" evidence found on the computers he searches.

> Q: …, what's the next thing that you do?
>
> A: That's when I start conducting my searches. At this time, I started conducting image searches, and if I find any images that are relevant to the case, I go ahead and tart what they call bookmarking. I start tagging them to show the detective later for – he can actually review it and see if it's relevant to his case.

5 AA 868

> …
>
> Q: So it is fair to say that when you are bookmarking various photos or videos in all of your investigations, what are you looking for?
>
> A: I'm looking for any – any images of a child beings sexually exploited, under the age of 16.
>
> Q: And based – so if you in fact bookmarked these photos, you bookmarked them because they appear to you to be under the age of 16?
>
> A: Correct
>
> ….
>
> A: the male that's standing appears to be under the age 16.
>
> …
>
> Q: But specifically you bookmarked this pho—
>
> A: For the – for the male standing.

5 AA 914-15.

The jury was given the opportunity as permitted by per NRS 200.740, to view the performance and determine on their own whether the male was a minor. Additionally, State's Exhibit 3 was available for the jury to review. Therefore, the district court did not abuse its discretion allowing Detective Ramirez to testify regarding the age of the male because that testimony was given in the context of explaining his investigation.

**C. Any Error Was Harmless**

Any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. This Court has long held that errors in admitting evidence "will be deemed harmless" when the evidence of guilt is strong. Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416 (1992), Medina v. State, 122 Nev. 346, 143 P.3d 471, 476 (2006) ("confrontation clause errors are subject to … harmless error analysis"). 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).

Any potential error was harmless because it had no substantial effect in determining the verdict. First, H.I.'s credibility was not an issue. The jury was able to view the videos and see with their own eyes that it was H.I. and her brother C.I.

in the videos. 6 AA 1045-83. Additionally, the jury was able watch Shue setting up and adjusting what appeared to be a camera. Id. The State did not need to call H.I. as a witness. The State could have had the jury watch the videos without H.I's testimony. The jury would still be able to return a guilty verdict based on the videos alone. Second, Detective Ramirez's comment regarding the age of the male depicted in State's Exhibit 3 was harmless. The jury had the opportunity to view State Exhibit 3. By viewing the image, the jury could have estimated the age of the male depicted in State's Exhibit 3 and conclude on their own that he appeared to be under the age of 16. Therefore, any potential error was harmless.

## VI.
## THE INDICTMENT PROVIDED ADEQUATE NOTICE

### A. Waiver

First, Shue's claim that the indictment did not provide adequate notice is reviewed for plain error because he failed to properly preserve this issue for review by failing to make appropriate objections in district court. Martinorellan, 131 Nev. at __, 343 P.3d at 59.

Second, Shue did not challenge the sufficiency of the charging documents as not providing adequate notice of the State's theory of liability until this appeal and thus a reduced standard is applied.[16] Logan v. Warden, 86 Nev. 511, 513, 471 P.2d

[16] Shue challenged the Indictment in district court on the basis that the Indictment charged multiple counts for the same act. 1 AA 120-31.

249, 251 (1970); State v. Mackinnon, 41 Nev. 182, 186, 168 P. 330, 331 (1917) ("courts do not look upon attacks of this character upon an information with the same favor when made for the first time on appeal ……and when made for the first time on appeal, they will be ignored unless the information is fatally defective."). When a defendant challenges the adequacy of a charging document for the first time after a conviction, the charging document "will not be held insufficient to support the judgment unless it is so defective that by no construction, within reasonable limits of the language used, can it be said to charge the offense for which the defendant was convicted." Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 670 (1970) (internal citations omitted).

### B. The Indictment Provided Adequate Notice of State's Theories of Liability

Shue was charged by way of Indictment. 1 AA 1-14. Shue now challenges the Indictment's sufficiency, arguing that it failed to provide adequate notice of the State's theory of liability on Count 1 – Child Abuse and Neglect. AOB 50. This claim is without merit because the Indictment provided adequate notice of the charges and the prosecution's theories of liability. The purpose of a charging document is to put a defendant on notice of the crimes he is charged with and the theories of prosecution. Laney, 86 Nev. at 178, 466 P.2d at 669. Nevada law requires that an indictment contain a plain, concise and definite written statement of

the essential facts constituting the offense charged. NRS 173.075(1), Wilson, 121 Nev. at 349, 114 P.3d at 288.

Here, the Indictment reads:

> COUNT 1- CHILD ABUSE AND NEGLECT
>
> did willfully, unlawfully, feloniously and knowingly neglect, cause, or permit a child under the age of 18 years, to-wit: H.I. being approximately 17 years of age, to suffer unjustifiable physical pain, or mental suffering, or by permitting the said H.I. to be placed in a situation where she might have suffered unjustifiable physical pain or mental suffering, by the Defendant 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.

1 AA 2 (emphasis added)

The Indictment provided a plain, concise and definite written statement of the essential facts constituting the offense Shue was charged with. Wilson, 121 Nev. at 349, 114 P.3d 288. NRS 200.508(1) sets forth alternative means of committing the offense of Child Abuse or Neglect. The first alternative requires the State to prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to suffer unjustifiable physical pain or mental suffering (4) as a result of abuse or neglect. Clay v. Eighth Judicial Dist. Court of State,129 Nev. __, __, 305 P.3d 898, 902-03 (2013). The second alternative requires the State to prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to be placed in a

situation where the child may suffer physical pain or mental suffering (4) as the result of abuse or neglect Id.

On its face, the Indictment alleges the two alternative means of committing the offense of Child Abuse and Neglect; either Shue caused H.I. to suffer unjustifiable physical pain or mental suffering or caused H.I. to be placed in a situation where she may suffer physical pain or mental suffering. 1 AA 2. The fourth element of both alternatives, "abuse or neglect," is specifically defined by NRS 200.508(4)(a). Based on NRS 200.508(4)(a) and the statutes referenced therein, NRS 200.508(1) criminalizes five different kinds of abuse or neglect: (1) non-accidental physical injury, (2) non-accidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment. The Indictment specifically alleged that Shue did "willfully, unlawfully, feloniously and knowingly ***neglect***, cause…" 1 AA 2. As a result, the Indictment gave adequate notice to Shue of the offense he was charged with, the essential facts constituting that offense and the State's theories of liability. Therefore, the Indictment is not so fatally defective to be held insufficient to support the judgment. Laney, 86 Nev. at 178, 466 P.2d at 670. Additionally, in reviewing the Indictment under the plain error standard, the error is not plain because a casual inspection of the Indictment would show that it provided fair notice and allowed Shue to adequately prepare his defense.

/ / /

## VII.
## AS A MATTER OF LAW THE IMAGES AMOUNTED TO A SEXUAL PORTRAYAL OR CONDUCT

Shue claims that he is entitled to reversal on counts 5,8,11,14,17,20,23,23,26 and 40 because as a matter of law the images did not depict sexual portrayal or sexual conduct. AOB 50-51. However, Shue's claim amounts to nothing more than unsupported argument because he totally fails to cite to any legal authority. Claims unsupported by legal citations will not be considered by this Court. See NRAP 28(a)(9)(A), (j); Edwards v. Emperor's Garden Rest., 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (2006); see also Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority.

First, in his argument, Shue does not cite to a single statute, case or authority that as a matter of law the images did not depict a sexual portrayal. To support his argument, Shue makes conclusory statements that while sex is not defined in any section it is generally used as a shorthand for sexual portrayal. AOB 51. On that basis, he erroneously argues that because none of the images depicted sexual portrayal as a matter of law he could not have been convicted for using minors as the subject of a sexual portrayal. Id. When interpreting a statute, the language of

the statute should be given its plain meaning unless doing so violates the act's spirit. McKay v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Since the language of NRS 200.700 is clear and unambiguous, this Court should give that language its ordinary meaning. The language states that the depiction of the person must be in a manner which appeals to the prurient interest *in sex*. NRS 200.700 (emphasis added). The ordinary meaning of sex is: 1) sexually motivated phenomena or behavior, or 2) sexual intercourse. Webster's Ninth New Collegiate Dictionary (1990) p. 1078. This means that the person must be depicted in a manner, which appeals to the prurient interest in a sexually motivated phenomenon. The true definition of sex is much broader than just sexual intercourse. Therefore, Shue's argument that as a matter of law the images could not be sexual portrayal is totally without merit.

Second, Shue's claim that the images as a matter of law did not depict sexual conduct is without merit. AOB 52-58. To support his claim Shue cites to State v. Gates 182 Ariz. 459, 897 P.2d 1345 (Ct. App. 1994). AOB 56-58. However, Gates had nothing to do with reversing a conviction as a matter of law. Rather, the Arizona Court of Appeal found that there was insufficient evidence to sustain the conviction. Gates, 182 Ariz. at 464, 897 P.2d. at 350. In Gates, the defendant was found in possession of home videos that showed children changing clothes or taking a shower in what they thought was a private setting. Id. at 461, 897 P.2d at 1347. The Court

concluded that none of the minors in videotapes were engaged in sexual conduct, which was statutorily defined as the "lewd exhibition of the genitals, pubic or rectal areas of any person. Id. at 462, 897 P.2d at 1348.

Moreover, after Shue alleges that he is entitled to reversal as a matter of law, he makes a sufficiency of the evidence argument. Shue's essentially argues that based on the facts of the case there was not sufficient evidence to find that the images depicted sexual conduct. AOB 51-58. However, that argument is irrelevant because the State never argued that the images depicted sexual conduct. The State only argued that the images depicted sexual portrayal. 8 AA 1441-55. Therefore, Shue is not entitled to reversal as a matter of law.

## VIII.
## THERE WAS SUFFICIENT EVIDENCE TO SUPPORT SHUE'S CONVICTIONS

When reviewing a sufficiency of the evidence claim, the relevant inquiry is not whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (quotation and citation omitted). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of

evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (emphasis removed).

### A. There was sufficient evidence to support a conviction of Use of a Child in Production and Possession of Visual Presentation Depicting Sexual Conduct of a Child.

Shue claims that based on his argument that the images did not constitute child pornography as a matter of law the State failed to present sufficient evidence to convict him of Use of a Child in Production and Possession of Visual Presentation Depicting Sexual Conduct of a Child. AOB 59. However, as discussed *supra* Section VII, Shue's claim is without merit. Furthermore, the State provided sufficient evidence to find Shue guilty of both the Use of a Child in a Production and Possession of Visual Presentation Depicting Sexual Conduct of a Child.

The term "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. At trial, the State argued that Shue was guilty of knowingly possessing a visual presentation depicting a person under the age of 16 as the subject of a sexual portrayal and knowingly using, encouraging, enticing, coercing or permitting a minor to be the subject of a sexual portrayal of a performance. 8 AA 1441-55; NRS 200.710(2), NRS 200.730. Several of the videos showed Shue setting up the camera in the kids' bathroom, adjusting

the angle of the camera, and fixing the camera so it was specifically positioned to face the shower. 6 AA 1046, 1049, 1058, 1066, 1068, 1073-74, 1079, 1081-82. Additionally, the videos and the photographs were all found on Shue's personal computer, a computer registered in his name, and he admitted to Detective Jaeger that he had things on his computer that were not good or not "on the up and up". 5 AA 869, 973.

H.I. testified to her and C.I.'s age in the videos. 6 AA 1045-83. In all the videos, H.I. was under the age of 18 and C.I. under the age of 16. Id. [17] The photographs of the unidentified male minors were shown to the jury and they were able to conclude that the minors were under the age of 16. 5 AA 872. Furthermore, the videos of H.I and C.I. were found in two hidden file folders named "Yumm" and "Hmm." 5 AA 876-77. All the videos showed full frontal nudity of H.I's and C.I's genitals. See, 6 AA 1045-83. The photographs of the unidentified male minors depicted one of the minors receiving oral sex and the other fully nude with exposed penis and buttocks. 5 AA 872, 913.

Viewing the evidence most favorable to the prosecution, any rational trier of fact could have found that; Shue's conduct was done knowingly, the minors depicted in the videos and the photographs were either under the age of 18 or 16, and they

[17] The named victims the Possession of Visual Presentation Depicting Sexual Conduct of a Child were C.I. (Counts 5, 8, 11,14,17,20,23,26) and the two unidentified male minors (Counts 40 and 41). 1 AA 1-14.

were all depicted in a manner, which appeals to the prurient interest in sex and had no literary, artistic, political or scientific value. Therefore, there was sufficient evidence to find Shue guilty of Use of Child in Production and Possession of Visual Presentation Depicting Sexual Conduct of a Child.

**B. There was sufficient evidence to support a conviction of Open and Gross Lewdness**

Shue claims that based upon the evidence presented the jury could not find beyond a reasonable doubt that Shue kissed H.I. in an obviously sexual manner. AOB 60. Nevada has not statutorily defined open, gross, or lewdness. However, the terms gross and lewdness, although not statutorily defined, are common words with generally accepted meanings. Berry v. State, 125 Nev. 265, 269, 212 P.3d 1085, 1088 (2009)

The term "gross" is defined as being indecent, obscene or vulgar. Id. at 283, 212 P.3d at 1097. The term "lewdness" is defined as any act of a sexual nature, which the actor knows, is likely to be observed by the victim who would be offended by the act. Id. The word "open" is used to modify the term "lewdness." Ranson v. State, 99 Nev. 766, 767-68, 670 P.2d 574, 575 (1983), As such, it includes acts which are committed in a private place, but which are nevertheless committed in an "open" as opposed to a "secret" manner. Id. It includes an act done in an "open" fashion clearly intending that the act be offensive to the victim. Id.

In this case, the evidence showed that Shue kissed H.I. on the lips after taking a picture up her skirt. 6 AA 1042-43. At that time, Shue was involved in a romantic relationship with H.I.' mother. 6 AA 1038. H.I. testified that she never gave Shue permission to kiss her and she felt uncomfortable and scared when he did. 6 AA 1043. Additionally, Shue admitted to having romantic thoughts towards H.I. 5 AA 954. Viewing the evidence most favorable to the prosecution, any rational trier of fact could have found Shue's conduct was sexual in nature, committed in an open fashion, and was offensive to the victim. Therefore, there was sufficient evidence to find Shue guilty of Open and Gross Lewdness.

### C. There was sufficient evidence to support a conviction of Child Abuse or Neglect

Shue claims that the State did not allege that Shue committed child Abuse or Neglect by sexual abuse or sexual exploitation. AOB 60. However, as discussed *supra* Section VI, neglect as defined by NRS 200.508 criminalizes five different kinds of abuse or neglect: (1) non-accidental physical injury, (2) non-accidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment. The State argued that Shue committed child abuse or neglect by sexual abuse or sexual exploitation and as a result, H.I. was placed in a situation where she might suffer mental suffering. 8 AA 1454-55. The evidence showed that Shue committed acts that constituted sexual abuse and sexual exploitation; Shue took pictures up H.I.'s skirt, kissed H.I. inappropriately on the mouth, and

videotaped her in the bathroom while she was nude and engaging in bathroom activities. 6 AA 1042-43, 1045-83. Additionally, viewing the evidence most favorable to the prosecution, any rational trier of fact could have found that it obvious that H.I. was placed in a position where she might suffer mental suffering. Any person might suffer mental suffering having to learn that their privacy was violated in such a major way and having to watch themselves nude in front of total strangers. Therefore, there was sufficient evidence to find Shue guilty of Child Abuse and Neglect.

## IX.
## NO CUMULATIVE ERROR OCCURRED

Shue alleges that the cumulative effect of error deprived him of his right to a fair trial. AOB 62-63. This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). Shue needs to present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (*citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)).

First, Shue has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined

to be error, *not the cumulative effect of non-errors*.") (emphasis added). Second, as discussed *supra* Section VIII, there was more than sufficient evidence to support Shue's convictions and, therefore the issue of guilt is not close. Finally, Shue was not convicted of grave crimes. See Valdez, 124 Nev. at 1198, 196 P.3d at 482 (2008) (stating crimes of first degree murder and attempt murder are very grave crimes). In this case, Shue was convicted of much lesser offenses, and, therefore, the third factor does not weigh in Shue's favor. Therefore, Shue's claim of cumulative error has no merit and his conviction should be affirmed.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that Shue's Judgment of Conviction be AFFIRMED.

Dated this 4th day of November, 2015.

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,404 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 4th day of November, 2015.

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 4, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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