ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL GARCIA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 37816

Appeal From A Judgment of Conviction
Second Judicial District Court of the State of Nevada
The Honorable Jerome Polaha, District Judge

APPELLANT'S OPENING BRIEF

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I. The district court erred in refusing to allow Mr. Garcia to present evidence that the alleged victim and her father were being coached during their testimony.

II. The district court erred in giving a jury instruction to bolster the credibility of the alleged victim by giving the weight of law to an innocent explanation for her inconsistencies during testimony.

STATEMENT OF CASE

An Information was filed October 16, 2000, alleging one count of sexual assault on a child under the age of fourteen and two counts of lewdness with a child under the age of fourteen. APP.[1], p. 1.

This case proceeded to trial on February 13, 2001. TT.[2], p. 1. On March 29, 2001, the district court sentenced Mr. Garcia to imprisonment in the Nevada State Prison for life with the possibility of parole after twenty years has been served for count I, life with the possibility of parole after ten years has been served for count II, consecutive to count I, and for life with the possibility of parole after ten years has been served for count III, consecutive to count II, with credit for two hundred thirty-four (234) days time served, and an order to pay various fines, restitution, and fees totaling two thousand five hundred and seventy (2,570.00) dollars. Sent., pp. 10-11. A Notice of Appeal was filed on April 30, 2001. APP., p. 35.

STATEMENT OF FACTS

On February 13, 2001, this matter proceeded to trial. TT., p. 1. Jerry Lee Straits testified that he was an investigator in the forensics section of the Washoe County Sheriff's Office. TT., p. 8-9. Mr. Straits went to 4136 Neil Road on February 8. TT., p. 9-10. It was a

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[1] "APP." stands for the Joint Appendix which is being filed with this Opening Brief.
[2] "TT." stands for the Transcript of Proceedings: Jury Trial, from February 13, 2001. "TT2." stands for the Transcript of Proceedings: Jury Trial, Volume II, from February 14, 2001. "Sent." stands for the Transcript of Proceedings: Sentencing from March 29, 2001. None of these transcripts have been included in the Joint Appendix pursuant to NRAP (30(b)(1).

small, two-bedroom apartment. TT., p. 15. The bedroom had windows overlooking the back yard and there was no obstruction, other than mini-blinds, to seeing through the window. TT., p. 16-17. Mr. Straits was five feet six and a half inches tall and the window was a little high for him to see through from the back yard. TT., p. 18.

Anna Karen G. Testified that she was eleven years old. TT., p. 19. She preferred to be called Karen. TT., p. 20. She lived in the house on Neil Road. TT., p. 22. Her father had a friend she knew as "Chino". TT., p. 24. Chino had lived with Karen and her family. TT., p. 59. Karen went into her bedroom to draw a picture. TT., p. 27. There were two beds in that room. TT., p. 27. She sat on her bed, facing her sister's bed. TT., p. 28. Chino came into the room. TT., p 28. He sat down on the other bed. TT., p. 29. Karen was wearing black shorts and a white shirt with blue designs on it. TT., p. 30. Chino got on his knees on the floor. TT., p. 31. He grabbed Karen's legs and tried to pull her underwear and shorts down below her knees. TT., p. 31, 49. Karen tried to push him away. TT., p. 32. She grabbed her shorts and tried to pull them up. TT., p. 32. Chino then grabbed her legs with his knees and pulled them together. TT., p. 32. Then he tried to put his hand inside her private spot. TT., p. 32. Karen identified a cup and pen and described the pen's relationship to the cup in terms of being on top, under, then inside the cup. TT., p. 32-33. Karen said that Chino used his pointer finger to touch her private spot and that the finger actually went inside her. TT., p. 36. When he did that, it hurt. TT., p. 36. Karen said "Ough(sic)" and Chino stopped. TT., p. 37. Chino's finger was inside her for about three seconds. TT., p. 37. Karen got up and pulled her shorts up and tried to leave the room. TT., p. 37. Chino got up and Karen sat on her sister's bed and fell back and Chino shut the door part of the way closed. TT., p. 37-38. Chino got on top of Karen and tried to kiss her. TT., p. 38. Karen kept moving her head so that Chino could not kiss her. TT., p. 39. He gave up. TT., p. 39. When Karen tried to leave again, Chino closed the door part way and unzipped his zipper. TT., p. 39. Chino took his private spot out. TT., p. 39. She said that he wanted to force her to touch it. TT., p. 40. He asked her if she wanted to touch it and if she liked it. TT., p. 40. She said that she did not touch it and it looked like a sausage. TT., p. 40. She had never

seen a man's private part before and the end of it had a little dot. TT., p. 40. Karen said that Chino took his private part out and grabbed it, then grabbed her hand and wanted her to touch it. TT., p. 41.

Karen testified that Chino tried to lick her private spot. TT., p. 42. She thought it happened before he put his finger inside her. TT., p. 42. It was when her shorts and underwear were pulled down.. TT., p. 43. Chino "tried to go like this, and he tried to put his head in and started licking it." TT., p. 43. Chino's hands were on her thighs and he was "trying to push them like that." TT., p. 44. Karen was saying no. TT., p. 44. The licking lasted either one second or nine (the record is not clear) and felt "gross". TT., p. 45. Karen described the licking as feeling like water and kind of soft. TT., p. 45. After all of this happened, Chino left and went toward the living room. TT., p. 46. Karen stayed in her room and cried. TT., p. 47. Chino came back into her room and tried to pull her shorts down from the back. TT., p. 47. He pulled her shorts down, but she could not remember how far. TT., p. 49. They were still above her knees. TT., p. 49. She pulled her shorts back up. TT., p. 51. Chino pushed her head down and tried to pull her shorts and underwear down again. TT., p. 51. Karen tried to pull them up again, and during this struggle, Karen's father came into the room and Karen was able to pull her shorts back up again. TT., p. 52. Karen's father asked Chino what he was doing and Chino said he was just looking at the decorations on the walls of Karen's room. TT., p. 53. Karen's father asked what happened and Karen asked her father to tell Chino to leave. TT., p. 54. When Chino left, Karen told her father what happened. TT.,p. 54. When her mother got home from work, Karen told her mom. TT., p. 55. Karen's mother called the police. TT., p. 55. The police took her to an office and she talked to Judy Holladay. TT., p. 56. Karen did not tell Ms. Holladay about the licking part because it made her feel "yucky" inside to tell someone. TT., p. 56.

Karen testified that she was uncomfortable talking about any of the things she said happened, but she just wanted to leave out the part about the tongue. TT., p. 61-62. She admitted that on three previous occasions, once when she was under oath, she said that the first thing Chino did was shut the door, but that this time, she said Chino did a lot of things first, then

tried to shut the door. TT., p. 63. She also admitted that Chino's hand would have had to go under her body where she couldn't see it, to be inserted inside her, even though she had just testified that she saw his finger go inside her. TT., p. 65. She did not remember which hand Chino used. TT., p. 66. She said he used his ring finger, but she did not remember if it was the finger that actually had a ring on it. TT., p. 66. She then said that it was not even possible that he used the finger which had the ring on it. TT., p. 66. She testified that Chino did not move his finger while it was inside her. TT., p. 67. Chino had to pry her legs apart with his hands because she was squeezing them together. TT., p. 68. It took longer than a couple of seconds, but she could not estimate how long. TT., p. 68. Chino did not leave scratches, bruises or fingernail marks on her legs from trying to pry them apart. TT., p. 69. She testified that Chino did not grab her when she tried to leave the room, he merely closed the door a little bit. TT., p. 70. Karen could not remember ever telling Detective Holladay that she and her little sister went outside the room after the first time that Chino was inside her room. TT., p. 70. She did not remember testifying previously that Chino had held her by the legs when she was trying to leave the room. TT., p. 78. She was not sure how long Chino had lived with them, but it might have been for more than a year. TT., p. 72. Chino had never touched Karen before or done anything bad to her before. TT., p. 73. She identified Mr. Garcia as Chino. TT., p. 78.

Jorge Palma testified that he lived at 4136 Neil road with his fiancée and her two girls. TT2., p. 4. Anna Karen was eleven years old and her sister Kayla was five. TT2., p. 4. They have lived there for two years. TT2., p. 4. He has known Raul Garcia for five years. TT2.,p. 5. Two and a half year ago, Mr. Garcia lived with Mr. Palma and his family for about eight months. TT2.,p. 6. When this incident occurred, Mr. Garcia was living in a different house with Mr. Palma's father. TT2.,p. 6. Mr. Garcia's nickname was Chino. TT2.,p. 7. Mr. Palma had never seen Mr. Garcia in the girls' room before, or ever playing with the girls before. TT2.,p. 7. On August 6, 2000, Mr. Palma's fiancée was working and Mr. Palma was caring for the girls. TT2.,p. 8-9. After running errands, Mr. Palma and Mr. Garcia went into the back yard. TT2.,p. 12. They were drinking beer. TT2.,p. 13. They talked for about thirty minutes, then Mr. Garcia

asked to use the bathroom. TT2.,p. 15-16. Mr. Garcia was gone about five minutes. TT2.,p. 16. Mr. Garcia came out and stood by the door, then turned and said he was going to put on some music. TT2.,p. 17. Mr. Palma heard the music and listened for one song. TT2.,p. 18. Then Mr. Palma got up and went to find the girls. TT2.,p. 19. He saw Mr. Garcia in the girls' room. TT2.,p. 20. As Mr. Palma walked into that room, he saw Karen pulling her shorts up. TT2.,p. 20. Mr. Palma asked Mr. Garcia "What are you doing to the girl?" TT2.,p. 25. Mr. Garcia looked nervous and said he was looking at the decorations. TT2.,p. 20. Karen was nervous and Mr. Palma grabbed her and asked what Mr. Garcia was doing to her. TT2.,p. 20. Karen was crying and was scared. TT2.,p. 27. Mr. Palma went into the yard because he was crying and upset. TT2.,p. 28. He did not see his fiancée when she came home, until she came out into the yard, crying and angry. TT2.,p. 28. She called the police. TT2.,p. 28.

Mr. Palma was suspicious that something was wrong before he even walked into the house. TT2.,p. 30. When he saw Mr. Garcia, Mr. Garcia's hands were down at his sides and a little bit forward and Mr. Palma said "What are you doing to the girl?" TT2.,p. 30. He was angry and his voice was angry when he questioned Mr. Garcia. TT2.,p. 31. The apartment was only twenty-six feet long. TT2.,p. 31.

Judy Holladay testified that she was a detective in the sex crimes/child abuse division at the Reno Police Department. TT2.,p. 41. On August 6, 2000, she interviewed Anna Karen about this case. TT2.,p. 43. The interview was a few minutes shy of half an hour. TT2.,p. 45. Detective Holladay arranged for a physical exam of Karen. TT2.,p. 46.

Mr. Garcia was canvassed regarding his right to testify on his own behalf. TT2.p. 49-50. Mr. Garcia declined to testify. TT2.,p. 50.

Patience Wenck testified that she examined Anna on August 8, but she did not independently recall the examination. TT2.,p. 53-54. She examined her thoroughly and found no bruises, scratches,, abrasions, or lesions of any kind. TT2.,p. 55-57. Anna's hymen was intact and there was no ripping or scarring of any kind. TT2.,p. 59. A fingernail could leave a tear or a scar on the hymen. TT2.,p. 60-61. The examination was normal and there was no indication of

abuse. TT2.,p. 62. Based upon what Anna had said, however, Ms. Wenck was not surprised that there were no physical findings. TT2.,p. 66. For a child in Anna's condition, digital penetration of her vagina would be painful. TT2.,p. 67. It was equally possible for an adult male's finger to penetrate Anna's vagina without causing damage to her hymen. TT2.,p. 68. Her physical findings were compatible both with the report Anna gave her and with no abuse having occurred. TT2.,p. 68.

Juan Garcia testified that he was Mr. Garcia's cousin. TT2.,p. 71. He had known Mr. Garcia for about forty years. TT2.,p. 72. Mr. Garcia lived with his family for about three years. TT2.,p. 73. At that time, Mr. Juan Garcia's daughter was between four and seven years old. TT2.,p. 73, 77. Mr. Raul Garcia sometimes took care of the children when he lived at Mr. Juan Garcia's house. TT2.,p. 75. Mr. Raul Garcia had an excellent reputation in the community for good morals. TT2.,p. 75. Mr. Juan Garcia knew generally what the allegations were against Mr. Raul Garcia. TT2,.p. 78. Mr. Juan Garcia also knew Anna Karen's grandfather well, but not her father. TT2.,p. 78. Mr. Juan Garcia never wen to the house where Mr. Raul Garcia lived with Anna Karen and her family. TT2.,p. 81.

Jorge Rios testified that he, too, was Mr. Garcia's cousin. TT2.,p. 83. About six years before, Mr. Garcia had lived in Mr. Rios' home. TT2.,p. 83. Later, Mr. Rios got married and had a five year old daughter. TT2.,p. 84. Mr. Rios' eleven year old niece sometimes played with Mr. Rios younger daughter. TT2.,p. 84. Mr. Garcia had met this niece, but was closer to Mr. Rios' daughter. TT2.,p. 85. Mr. Rios testified that Mr. Garcia's reputation in the Hispanic community was pretty good for good morals. TT2.,p. 85. There were many people who were willing to say that Mr. Garcia was a good person. TT2.,p. 85. Mr. Rios did not personally know the family making the accusations in this case. TT2.,p. 86.

Alfredo Garcia testified that he was not related to Mr. Raul Garcia, but was his friend. TT2.,p. 90. He has known Mr. Raul Garcia for about ten years. TT2.,P. 91. Mr. Alfredo Garcia had one son and one eight year old daughter. TT2.,p. 91. Mr. Raul Garcia had lived with Mr. Alfredo Garcia. TT2.,p. 92. At that time, Mr. Alfredo Garcia's daughter was about seven years

old. TT2.,p. 92. Mr. Alfredo Garcia also had two step-daughters who were about thirteen and sixteen years old. TT2.,p. 92. Mr. Alfredo Garcia had had girls at his house who were between nine and eleven years old. TT2.,p. 93. Mr. Raul Garcia had been there at the same time as those girls. TT2.,p. 93. Mr. Alfredo Garcia knew Jorge Rios but not Juan Garcia. TT2.,p. 93. Mr. Raul Garcia had a good reputation in the Hispanic community for good morals. TT2.,p. 94. He knew Jorge Palma a little bit, but not much. TT2.,p. 95.

Jury instructions were settled. TT2.,p. 99. Defense counsel objected to instruction number twenty. TT2.,p. 101. The case revolved around the credibility of Karen and instruction twenty was duplicative and misleading and the preferred instruction was number eighteen. TT2.,p. 102.

An offer of proof was made outside the presence of the jury. TT2.,p. 102. Earl Walling testified that he was the bailiff in Department Three and worked for the Washoe County Sheriff's Office. TT2.,p. 104. He was the bailiff during the course of this case. TT2.,p. 104-105. He was present during Jorge Palma's testimony. TT2.,p. 105. While Mr. Palma testified, the bailiff looked at Anna Karen's mother. TT2.,p. 105. The bailiff saw that Anna Karen's mother was nodding her head when questions were being asked of Mr. Palma. TT2.,p. 106. When the mother nodded her head yes, the bailiff saw a corresponding answer from Mr. Palma. TT2.,p. 106. The nods of yes or no corresponded to the answers given by Mr. Palma. TT2.,p. 106. The bailiff looked once for one or two questions. TT2.,p. 106. Then he looked again and saw it happen again, so " . . finally I said 'Well, this shouldn't be right,' so I just looked at her and when I looked at her she stopped." TT2.,p. 106. After that, the bailiff went back to writing and when he looked again he did not see her nodding. TT2.,p. 106. The bailiff probably saw the nodding four or five times total. TT2.,p. 107. The mother gave the nod prior to Mr. Palma's answer every time. TT2.,p. 108.

Defense counsel then stated that he was given a message that Alfredo Garcia's wife had also been in court and had seen Anna Karen's mother doing the same thing during Anna Karen's testimony. TT2.,p. 112-113. Mr. Alfredo Garcia told defense counsel that his wife had told him

this information. TT2.,p. 113. At the time, defense counsel thought that it might not be considered credible because of the relationship between the parties, but changed his mind after the bailiff told counsel the same thing. TT2.,p. 113. Defense counsel noted that this case revolved around the credibility of Anna Karen. TT2.,p. 113. Even if the court thought the evidence was slight that Anna Karen's mother was coaching her, such evidence could affect the jury's determination of Anna Karen's credibility. TT2.,p. 113. Counsel asked for leave to call the bailiff as a witness and Mr. Rios' wife, as well. TT2.,p. 114.

The prosecutor argued that Anna Karen's credibility was not the only issue because Jorge Palma said that he saw her with her shorts down and Mr. Garcia near her. TT2.,p. 125. The prosecutor also argued that Detective John Ferguson, District Attorney's Office Investigator Mike McCloud and Marcelo Guzman were also present and they did not happen to see this nodding occur. TT2.,p. 125. He also expressed a lack of confidence in the bailiff because the bailiff had the gall to tell defense counsel about this problem rather than the prosecutor or the court. TT2.,p. 125-126. The prosecutor then claimed that this was all a ruse on the part of the defense because the defense requested a break earlier in the day when one of its witnesses was not yet present and then claimed that the bailiff's observations were nothing more than a specious suggestion and stated that, because the deputy used the term "nod", he could not have meant a "no" answer, even thought he deputy testified under oath that the nods corresponded to the yes or no answer that Mr. Palma subsequently gave. TT2.,p. 126. The prosecutor rambled that it was also in violation of NRS 48.035 because there could not be an effect on credibility if the communication was not verbal, it would mislead the jury because it was specious, and it was a waste of time (apparently because the prosecutor said so). TT2.,p. 127.

Roberta Garcia testified that she was Alfredo Garcia' s wife. TT2.,p. 129. She was inside the courtroom from 3:00 to 5:00. TT2.,p. 130. She did not know Anna Karen's mother, but described her. TT2.,p. 130. Ms. Garcia watched the testimony of the young girl who was dressed in pink. TT2.,p. 131. Ms. Garcia saw the mother nod her head affirmatively and shake her head negatively. TT2.,p. 131. Ms. Garcia was not paying a lot of attention to it and so

could not say how long this went on. TT2.,p. 132. The lady only did that when the girl was answering that she did not remember. TT2.,p. 132. She was approximately nine feet and four inches away from the nodding woman. TT2.p. 133-134.

Defense counsel reiterated that there was nothing more significant than evidence that a witness has been coached or their testimony influenced by someone who hasn't testified. TT2.,p. 135.

The court agreed with the prosecutor because " . . .one of the jobs of counsel – and this goes for both the plaintiff and defendant regardless of the type of case – is to look at the witness and when you ask questions and hopefully when you are looking to watch them, how they respond, when the other party is asking them questions and, I don't know, common sense would dictate that if she is not looking at the questioner but rather someplace else, somebody is going to notice that." TT2.,p. 137. The court said that the two witnesses called by defense counsel "did not make the -- make any problem obvious." TT2.,p. 137. The court found the questions that it reviewed from the transcript were not material because they were repetitive. TT2.,p. 138. The court refused to allow the jury to hear this evidence directly regarding the credibility of these two key witnesses. TT2.,p. 138.

ARGUMENT

1. The district court erred in refusing to allow Mr. Garcia to present evidence that Anna Karen and Mr. Palma were being coached during their testimony.

> Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Although generally admissible, relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice, if it confuses the issues, or if it amounts to the needless presentation of cumulative evidence. NRS 48.025; NRS 48.035. District courts are vested with considerable discretion in determining the relevance and admissibility of evidence. Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), cert. denied, 520 U.S. 1126, 117 S.Ct. 1267, 137 L.Ed.2d 346 (1997).

Castillo v. State, 114 Nev. 271, 956 P.2d 103, 107-108 (1998).

"A defendant must be able to expose facts from which the jury can draw inferences regarding the reliability of a witness." *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974). See also *Crew v. State*, 100 Nev.38 , 45, 675 P.2d 986 (1984).

In this case, defense counsel was informed by the bailiff for the court, Washoe County Sheriff's Deputy Earl Walling, that he saw the mother of the alleged victim nodding her head, affirmatively and negatively, after questions were asked of her husband and before her husband gave his answers. Her husband's answers always corresponded to the nodding done by the mother. The Deputy testified, during an offer of proof outside the presence of the jury, that he was writing something about an unrelated matter and he looked up and saw the mother engaging in this behavior. He looked back at his writing. Some time later, he looked up again and saw that she was still doing this. The deputy stared at the mother and she ceased her nodding. The wife of a defense witness also testified that she saw the mother (whom she did not know, but whom she described) engaging in the same behavior while the alleged victim testified. This witness did not know that she was witnessing anything particularly important at the time, so she did not focus her full attention on it.

The court, apparently expecting perfection from all trial counsel at all times, chastised counsel for not noticing this while it happened. The court then commented that: "I am up here at a vantage point and I am watching her and looking back. The two witnesses, they were looking like they were at a tennis match with their heads going back and forth that's one element of the – question that's presented. And I just think that the two witnesses that you called did not make the -- make any problem obvious." TT2.,p. 137. In addition, the court commented that his review of the transcript showed that the only material question was "Did you ever see the girls alone or in their bedroom?" because the other questions were just a repeat of former questions. TT2.,p. 138.

The court failed to review the questions answered by the alleged victim during the time while her mother was coaching her. The testimony of this witness was critical to the prosecution because there was no physical evidence to corroborate the testimony. The only corroboration came from Mr. Palma, the other witness who was coached by the girls mother during his

testimony. The person who witnessed the coaching of Anna Karen said that she recalled it happening during the time that Anna Karen said she did not remember. TT2.,p. 138. This occurred primarily during cross examination. Anna Karen answered most questions with a form of yes, no, lack of understanding, or inability to remember during cross examination. TT., p. 57-73. Cross-examination is the key to getting to the truth of a matter. If a witness is being coached by an audience member during cross-examination, it renders that truth-seeking method useless.

In addition, the court was in error about a critical point of Mr. Garcia's testimony. One of the questions to which he answered "yes" was "Were her shorts down that far?" TT2.,p. 24. This was not a follow up to something Mr. Garcia had just stated. Mr. Garcia had just stated that his daughter had her hands holding onto her shorts. He said nothing about the shorts being down. When the prosecutor asked if the shorts were "down that far", defense counsel objected to the leading nature of the question. TT2.,p. 24. This is the critical key to the father's corroboration of his daughter's testimony. This could have been one of the questions to which Mr. . Palma received the coaching from his wife. The court even overruled the objection stating "We are having a little difficulty in translation so I will allow that." TT2.,p. 24. There was a problem with translation. The court allowed a crucial question to be asked in a leading fashion. Then the court denied the jury the opportunity to hear the truth: Mr. Palma's wife had, during at least some parts of his testimony, nodded her head in the affirmative or the negative prior to Mr. Palma's giving the corresponding yes or no answer.

The bottom line in this case is that the credibility of the witnesses was the heart of the case. The evidence of a Washoe County Sheriff's Deputy and of another audience member that the alleged victim and the only witness with corroborating testimony were both coached by the alleged victim's mother was critical for the jury to hear. It mattered not that the court decided that he did not give that evidence much weight, even though he could see those witnesses heads swinging like they were at a tennis match. It also mattered not that the trial lawyers were so busy conducting the trial that they did not see the "coach" who was behind them in the audience engaging in the silent coaching. This matter would have taken ten or fifteen minutes to present

to the jury. It was clearly a matter of great importance because the prosecutor objected so vehemently that he accused the defense attorney of nefarious collusion with the Washoe County Sheriff's Deputy. TT2.,p. 125-126. He argued that "this suggestion by Deputy Walling is so specious it's not even evidence." TT2.,p. 126. The prosecutor claimed that there could be no concern about credibility because the coach did not have verbal communication with the witnesses. TT2.,p. 127. It would mislead the jury because it was specious. TT2.,p. 127. It was a waste of time, apparently just because he said so. TT2.,p. 127.

The prosecutor could not have been more wrong. The fact that the Deputy told the defense attorney about an issue which might be of concern to the defense attorney does not automatically make the Deputy a liar. It would be for the jury to decide whether they believed the Deputy's testimony. The nodding up and down and side to side by the coach is communication meant to convey an answer. It does not matter whether the person uses actual words to convey the answer, easily recognizable silent communication (as in this case) or some sort of prearranged signal (as in a baseball pitcher and catcher who clearly communicate with one another without using vocalizations). It is not the vocal aspect of communication which taints a coached person's testimony but the fact of the coaching itself, in whatever form it may occur.

The jury would not be misled by the testimony and the prosecutor could not make the determination that the Deputy's evidence seemed to be good but really wasn't. It is for the jury to determine whether the Deputy's observations were true or whether they were "specious". If this jury was capable of hearing the testimony of the State's witnesses in this case and determining what credibility and weight to give that evidence, it was surely capable of hearing two additional witnesses and deciding for itself whether their evidence would affect the jury's determination of credibility of other witnesses.

The third complaint by the prosecutor is that this would be a waste of time. Nonrepetitive, relevant evidence is not a waste of time. A jury trial is supposed to be a search for the truth. If an audience member was coaching key witnesses and that fact is hidden from the

jury then the jury can only find the truth by accident and not by any reliable means. This particular evidence of coaching was certainly relevant in a case where the testimony of the coached witnesses is the only evidence that any criminal activity took place. Clearly the prosecutor was concerned that the jury might conclude that the State's two witnesses were not reliable.

The court erred in concluding that the evidence would not be presented to the jury. The court rambled in a number of different directions, from chastising counsel for not seeing what the court apparently saw: tennis match style witnesses, to concluding that the evidence of coaching would not be relevant to a determination of credibility because the only yes or no answers given were to non material questions, to a conclusion that the two witnesses to the coaching did not "make any problem obvious". First, the fact that the witnesses were apparently dividing their attention between their questioner and someone else in a tennis match fashion only adds weight to the allegation of coaching and the trial judge should have done something about it when he first noticed it. Second, the trial court was mistaken in its conclusion that the questions which the father answered with a yes or no were not material and did not even consider the questions so answered by the alleged victim. The majority of the questions answered by the alleged victim n cross-examination were yes or no questions. She may have been coached throughout her entire cross-examination and yet the trial judge erroneously concluded that this was not material. Finally, the comment by the court that the witnesses did not "make any problem obvious" was completely irrelevant. Whether the witnesses should have brought this matter to the court's attention immediately, rather then letting defense counsel know about it, does not change the fact that the witnessed behavior occurred. Indeed, the court was apparently aware of the behavior from its own observations and did nothing to stop the "tennis match" testimony, but instead allowed the witnesses to continue looking to an audience member for assistance in answering.

The trial court erred in refusing to allow the defense to present the testimony of these two witnesses to the jury. The jury was not able to reliably determine the credibility of the two

key State's witnesses because the jury was not given the relevant evidence to do so. Therefore, Mr. Garcia's conviction must be reversed and the matter remanded for a fair trial.

II. The district court erred in giving a jury instruction to bolster the credibility of the alleged victim by giving the weight of law to an innocent explanation for her inconsistencies during.

"A jury instruction that omits or materially misdescribes an essential element of an offense as defined by state law relieves the state of its obligation to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant' federal due process rights." *Smith v. Horn*, 120 F.3d 400, 415 (3d Cir. 1997)(*cert. denied* 522 U.S. 1109(1997).

A district court may refuse to give an otherwise required jury instruction which is substantially covered by other instructions. *Runion v. State*, 116 Nev.Ad.Op. 111, 13 P.3d 52, 58-59 (2000). A district court should not give instructions which may confuse the jury or which contain superfluous language. *Id.* "The district courts should tailor instructions to the facts and circumstances of a case, rather than simply relying on 'stock' instructions." *Id.* See also *Jackson v. State*, 117 Nev.Ad.Op. 12, 17 P.3d 998, 1003, fn. 6 (2001).

This Court has also held, in the case of specific eyewitness instructions, That such specific instructions need not be given and that they are duplicitous of the general instruction on witness credibility and burden of proof beyond a reasonable doubt. *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053 (1985).

In *Culverson v. State*, this Court noted the following:

> We note that Instruction 17 states that homicide is also justified under the situation mentioned in the instruction. The use of the word "also" implies that Instruction 17 is but one example of when self-defense justifies a homicide. Other instructions given to the jury do not require that the defendant be in actual danger before he uses self-defense as a justification for homicide. A careful reading of all the instructions could have led a juror to conclude that a person may use self-defense as a justification to homicide even if he is not in actual danger.
>
> A juror should not be expected to be a legal expert. Jury instructions should be clear and unambiguous. Instruction 17 may have misled the jury into concluding that Culverson was not

> justified in shooting Smith because Smith carried a pellet gun which could not have seriously harmed Culverson. Accordingly, we conclude that Jury Instruction 17 was erroneous and could have prejudiced the jury.

Culverson v. State, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990).

In this case, the court gave, without objection, instructions numbered seven, eighteen, nineteen, and twenty-six. APP., pp. 12, 23, 24, 31; TT2., p. 101. However, the court also gave instruction number twenty, over objection by defense counsel. APP., p. 25, TT2.,p. 101-102. Instruction number twenty read as follows:

> Inconsistencies or discrepancies in the testimony of a witness, may or may not cause the jury to discredit such testimony. An innocent misrecollection, like failure to recollect, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood."

APP., p. 25. This instruction was improperly given to the jury. The instruction was substantially covered by the other instructions: seven told the jury to decide what weight to give any particular piece of evidence; eighteen told the jury to determine the credibility of witnesses and gave guidelines for doing so; nineteen unnecessarily, (but without objection) specified that the jury should also determine the weight and credibility of testimony of an alleged victim of sexual assault and could find proof beyond a reasonable doubt in her testimony alone and without independent corroboration; twenty-six told the jury to use their common sense and judgment in considering the evidence. APP., pp. 12, 23, 24, 31.

The jury was amply informed about their duty to determine credibility and weight to be given to the testimony of any witness. They were instructed on how to make that determination. They were unnecessarily also told specifically to determine the weight and credibility to be given the complaining witness. The jury was then told that the State did not have to prove anything beyond the victim's testimony, if the jury believed her allegations beyond a reasonable doubt. This instruction was substantially covered by the other above mentioned instructions, in combination with the instruction on reasonable doubt, but was not objected to. However, the court then went an additional step further in reducing the State's burden in the minds of the

jurors: it gave instruction number twenty over the objection of defense counsel. Instruction twenty adds nothing essential to the instruction of the jury. They had already been told to use their common sense. If, as the instruction averred, an innocent misrecollection is not uncommon, then surely it was part and parcel of the jury's collective common sense. Instruction number eighteen had already told the jury to consider the strength or weakness of a witness' recollections, among several other factors. As in *Culverson*, these jurors should not have been expected to be legal experts, able to divine some legal reasoning for the inclusion of this needless and confusing instruction. Instruction number twenty was nothing more than a judicially approved excuse for any discrepancy in the testimony of the victim and gave the force of law to that excuse.

Instruction number twenty was superfluous. It distorted the law by excusing discrepancies in testimony as nothing more than innocent misrecollections" in a case where the only issue was credibility of the complaining witness and her father. The instruction compounded the error made when the trial judge refused to allow the jury to hear critical evidence regarding the credibility of these witnesses. Therefore, Mr. Garcia's conviction must be reversed and the matter remanded for a fair trial without improper instruction.

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CONCLUSION:

Based upon the foregoing, Mr. Garcia's conviction should be reversed and this matter remanded for a new trial because two of the witnesses may have been coached during their testimony and the jury was not allowed to hear evidence of this fact and because the jury was improperly instructed that innocent misrecollections were common and therefore likely to be the reason for discrepancies in a witness' testimony when the entire issue at trial was the credibility of the complaining witness and her father.

DATED this 25th of October, 2001.

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CERTIFICATE OF COMPLIANCE

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}, which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon 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 25th of October, 2001

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