IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON RICHARD LOFTHOUSE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 70587

RESPONDENT'S ANSWERING BRIEF

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

WILLIAM M. WATERS
Deputy Public Defender
Nevada Bar #009456
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(2) because it is an appeal from a judgment of conviction based on a jury verdict that involves an offense that is a category A or B felony.

STATEMENT OF THE ISSUES

1. Whether Jason Lofthouse ("Appellant") committed kidnapping as a matter of law
2. Whether Appellant's prosecution under NRS 201.540 preempted his prosecution under 200.310(1)
3. Whether the district court's instructions were in error
4. Whether Appellant's general verdict was proper
5. Whether Appellant's convictions violated double jeopardy
6. Whether the district court properly handled a jury question
7. Whether the State committed prosecutorial misconduct
8. Whether Appellant's Confrontation Clause rights were violated

9. Whether the State's witnesses gave appropriate testimony
10. Whether Appellant's sentence was properly amended
11. Whether there was cumulative error

STATEMENT OF THE CASE

The State adopts Appellant's statement of the case pursuant to NRAP 28(b)(4).

STATEMENT OF THE FACTS

The State adopts Appellant's statement of the facts pursuant to NRAP 28(b)(5).

SUMMARY OF THE ARGUMENT

Appellant's claims fail, and the jury's guilty verdict should be affirmed. Appellant failed to show that he did not commit kidnapping as a matter of law. Appellant's prosecution under NRS 201.540 did not preempt his prosecution under NRS 200.310(1). The jury instructions during Appellant's trial were proper. Appellant's general verdict was appropriate. None of Appellant's convictions violated double jeopardy. The district court did not err in handling jury questions. The State did not commit prosecutorial misconduct. Appellant's Confrontation Clause rights were not violated. Detective Caldwell gave appropriate testimony. Appellant's sentence did not violate double jeopardy. There was no cumulative error. Accordingly, Appellant's claims are without merit and the Judgement of Conviction should be affirmed.

ARGUMENT

I.

APPELLANT COMMITTED KIDNAPPING AS A MATTER OF LAW.

Appellant advances the position that driving a minor, that was his student, to a hotel to engage in intercourse was not a crime upon the minor's person. AOB at 12. Appellant's claim is without merit and should be denied.

NRS 200.310(1) states, in pertinent part, that a person is guilty of kidnapping when they "willfully…lead[], take[], entice[], or carry away…any minor with the intent to…perpetrate upon the person of the minor any unlawful act." (Emphasis added) This Court in Lader v. Warden, 121 Nev. 682, 687 (2005), stated:

> "Statutory interpretation is a question of law subject to independent review. *When the language of a statute is clear, we will ascribe to the statute its plain meaning and not look beyond its language*. However, when the language of a statute is ambiguous, the intent of the Legislature is controlling. *In such instances, we will interpret the statute's language in accordance with reason and public policy.* We also keep in mind two maxims of statutory construction. When the scope of a criminal statute is at issue, ambiguity should be resolved in favor of the defendant. And when a specific statute is in conflict with a general one, the specific statute will take precedence."

(emphasis added).

In this case, Appellant, a 32 year-old high school teacher, began a sexual relationship with one of his 17 year-old students in 2015. AA Vol. V 1017, 1033, 1125-1128. Appellant would entice and take the student away from her home outside school hours and drive her to hotels from time to time to engage in sex with her. Id. at 1036-1038, 1049-1051.

A. NRS 200.310(1)'s Plain Language

Appellant's counsel asserts that only "crimes against the person" can be crimes that are perpetrated "upon the person." This assertion is flatly incorrect and is without merit. Appellant's counsel gleans his argument not from the language of NRS 200.310 itself, which is where statutory interpretation begins, but rather from the title of the chapter where the crime is codified. The language of NRS 200.310 specifically prohibits perpetrating upon the person of the minor any unlawful act. The word upon means, in or into complete or approximate contact with. Webster's Dictionary, 2093, Random House Value Publishing, Inc., 2nd Edition, 1996. The legislature's choice to prohibit perpetrating any unlawful act upon the person of a minor is not the same as prohibiting crimes against the person of a minor. Utilizing the plain definition of the word upon makes it clear that Appellant violated NRS 200.310(1) as a matter of law.

Appellant's counsel asserts that NRS 201.540 is not a crime against the person simply because the chapter it is codified in is titled "crimes against public decency and good morals." AOB at 14. This assertion, too, is incorrect. A closer inspection of this statute indicates that not only based on the plain language of NRS 201.540, but also the legislative history, that the purpose of the crime is to prevent "this type of activity…due to the influence these teachers have over the student." Senate Judiciary Committee Minutes, 69th Session March 19, 1997, Page 676.[1] Additionally, another senator explained that this kind of "[i]mproper sexual conduct and influence needs to be a crime[.]" Id. The plain language, and legislative history, of NRS 201.540 both make clear that the Nevada Legislature codified this law in order to protect students from teachers committing these types of crimes upon the student's person, and against their person.

Appellant's actions were criminal because the Nevada Legislature has codified the desire to protect students from improper sexual conduct by teachers upon the person of the students. To assert that NRS 200.310 can only be violated by committing a crime against the person of the victim of the crime is absurd. Those type of mental gymnastics would go against "reason and

[1]https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/SB122,1997.pdf

public policy," which this Court, in Lader v. Warden, explained is not how to interpret statutes. As a result, Appellant's claim is without merit and must be denied.

B. NRS 200.310(1)'s Legislative Intent Need Not Be Reached

The language of NRS 200.310 is not ambiguous, and therefore only the plain language of the statute needs to be analyzed in order to discern the type of conduct the Nevada Legislature intended to prohibit. Appellant's counsel is attempting to confuse this court by using the title of Chapter 200 interchangeably with the language of NRS 200.310(1). If the Nevada Legislature had intended kidnapping to only apply to "crimes against the person" of minors, then they would have used that phrase and not crimes upon the person.[2] As Appellant's counsel correctly points out, the phrase "upon the person" has been a part of the statute since the amendment in 1947, which indicates that the legislature intended this portion of the statute to stand as it is written.[3] If the Nevada Legislature had intended NRS 200.310(1) not to

[2] Appellant's lengthy, and unnecessary analysis of NRS 200.310 is due to a misguided theory that the plain language of the statute is ambiguous. However, the plain language is clear, and it is not necessary to perform further steps to interpret the kind of conduct the Nevada Legislature intended to prohibit with NRS 200.310. Additionally, it should be noted that as kidnapping is a modern statute, common law analysis is not helpful in the instant analysis.

[3] This section of the statute has remained unchanged through four amendments and remained the same even after NRS 201.540 was codified in 1997.

apply to a situation like the present one, where the prohibited conduct of NRS 201.540 could run a defendant afoul of NRS 200.310(1) as well, then they would have amended NRS 200.310(1) after they codified NRS 201.540. As a result, it is clear that the Nevada Legislature codified NRS 200.310(1) exactly as they intended and Appellant's claim fails.

Appellant makes the argument that NRS 201.540 does not involve threats or physical force, which would remove the conduct from violating NRS 200.310(1), but as it was illustrated supra the Nevada Legislature intended for the statute to protect children from improper sexual conduct as a result of the teacher's influence and control over the child. Senate Judiciary Committee Minutes, 69th Session March 19, 1997, Page 676. The Nevada Legislature has seen fit to codify consent at the age of 16, but also to specify that consent cannot be given by a student when a student teacher relationship is involved. NRS 200.364, NRS 201.540. If the conduct that the Nevada Legislature was attempting to prohibit was improper sexual contact between students and teachers, then it follows that a violation of NRS 201.540 would not only be a crime "upon the person" of a student, but also a "crime against the person" of the minor.

Limiting the modern understanding of "crimes against the person" to include only threats of force or the use of force fails to take into account the

fact that individuals can be influenced in a way that results in a crime against them without the use or threat of physical force.

C. NRS 200.310(1) Is Not Unconstitutionally Vague

Appellant throws another argument against the wall in hopes that something will stick by claiming that NRS 200.310(1) is unconstitutionally vague. This claim is without merit and must be denied.

A statute's constitutionality is reviewed de novo, and the party making the claim bears the "burden of making a clear showing of invalidity." Berry v. State, 212 P.3d 1085, 1095 (2009). Additionally, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." State v. Castaneda, 126 Nev. 478, 481 (2010) (citing Hooper v. California, 155 U.S. 648, 657 (1895)). The cannon of constitutional avoidance has been accepted by this Court, where when there are two interpretations to a statute, the constitutional interpretation will be taken over the unconstitutional one. Id. A statute is vague and can be invalidated when (1) it "fails to provide a person of ordinary intelligence fair notice of what is prohibited"; or (2) if it "is so standardless that it authorizes or encourages seriously discriminatory enforcement." U.S v. Williams, 553 U.S. 285, 304 (2008).

"[M]athematical precision is not possible in drafting statutory language." City of Las Vegas v. Dist. Ct., 118 Nev. at 864, 59 P.3d at 481. Nonetheless, "the law must, at a minimum, delineate the boundaries of unlawful conduct. Some specific conduct must be deemed unlawful so individuals will know what is permissible behavior and what is not." Id. A law that leaves the determination of whether conduct is criminal to a purely subjective determination, such as what might "annoy" a minor or "manifest" an illegal "purpose," is "'vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" Id. at 865 (quoting Coates v. City of Cincinnati, 402 U.S. 611 (1971)).

Appellant takes the language of NRS 200.310 out of context and utilizes misguided reasoning in his argument that the statute is unconstitutional. Appellant's claim is without merit and should be denied.

The language of NRS 200.310(1) is broad, but not unconstitutionally vague. In Hernandez v. State, this Court held that NRS 200.310 is not unconstitutionally vague when the defendant is on notice that his conduct is criminal and that the statute as applied to the defendant is not vague. 118 Nev. 513, 524 (2002) (criticized on other grounds). Appellant has not claimed how NRS 200.310 failed to put him on notice that his conduct is unlawful; instead,

he makes an attenuated claim about other conduct that might run afoul of constitutional vagueness concerning NRS 200.310. Since Appellant has failed to show how NRS 200.310 is unconstitutionally vague in all of its applications, or as applied to Appellant specifically then he has not met his burden. As such, his claim must be denied.

II.
APPELLANT'S PROSECUTION UNDER NRS 201.540 DID NOT PREEMPT HIS PROSECUTION UNDER NRS 200.310(1)

Appellant alleges that his prosecution under NRS 201.540 preempts his prosecution under NRS 200.310 pursuant to California's preemption doctrine. Appellant's argument is without merit and should be denied.

Appellant claims that when NRS 201.540 and NRS 200.310(1) were coupled against him that he was subject to a preempted prosecution under NRS 200.310 because when a specific statute covers certain conduct and a general statute covers the same conduct, the specific statute takes precedent. AOB at 23, Lader, 121 Nev. 682, 687 (2005). However, Appellant has failed to take NRS 200.310(1) into the context that the Nevada Legislature clearly intended it to cover. In Lader, this Court found that the habitual criminal treatment of a felon whose conduct was already covered by another statute was not preempted. Id. at 689. In that case, this Court reasoned that to remove the habitual criminal treatment of felons that committed felonies that were not

enumerated in the statute would thwart the purpose of the statute. Id. The underlying purpose of NRS 200.310(1) would be thwarted the same way this Court in Lader explained if Appellant's argument were to be accepted.

The Nevada Legislature clearly intended NRS 200.310(1) to cover crimes that were not enumerated in the text of the statute, specifically by using the words "*any unlawful act*." (emphasis added) Kidnapping is an additional charge that goes along with the commission of other crimes due to the heinous nature of coupling the underlying crime with taking or enticing another person away from where they are supposed to be located. If Appellant had not violated NRS 201.540 then he would not have found himself in violation of NRS 200.310(1), because he would not have satisfied the language of NRS 200.310(1). Since the legislative intent was for NRS 200.310(1) to couple with other crimes, Appellant's claim is without merit and must be denied.

Additionally, Appellant fails to see the distinction between the specific nature of NRS 201.540 and the general nature of NRS 200.310(1) and the prohibited conduct those statutes seek to prevent. Appellant claims that a violation of NRS 201.540 would always result in a violation of 200.310(1) because "movement, detention, enticement always occurs in some form when a teacher and student engage in sexual conduct." AOB at 25-25. Appellant's claim is misguided. Taking the instant case as an example, Appellant would

not have been able to be prosecuted for violating NRS 200.310(1) if he had only engaged in sexual conduct at the school. Instead, Appellant removed his victim from her parent's home and took her to hotels for sex. AA Vol. V 1031, 1035, 1037, 1049. As a result, Appellant's claim that when an individual violates NRS 201.540 they will always be in violation of NRS 200.310(1) is misguided and must be denied.

Finally, Appellant failed to cite to any binding authority in support of his argument. The California preemption doctrine is not in effect in the State of Nevada, and as such his claim must fail.

III.
THE JURY INSTRUCTIONS WERE PROPER

District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019 (2008). District courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748 (2003). This Court reviews whether an instruction is an accurate statement of the law de novo. Cortinas, 124 Nev. at 1019. Further, instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner, 116 Nev. 1149, 1155–56 (2000).

A district court may refuse to give a jury instruction which is substantially covered by another instruction. Davis v. State, 321 P.3d 867, 874 (2014); Crawford, 121 Nev. at 754–55. Further, though a defendant is entitled to an instruction on his theory of defense so long as there is any evidence to support it, he is not entitled to demand a specific wording of an instruction. Crawford, 121 Nev. at 754. Importantly, a trial court may also refuse to give an instruction if it is less accurate than other instructions, or will confuse the jury. Sanchez-Dominguez v. State, 318 P.3d 1068, 1072 (2014).

Furthermore, "[w]hile the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, the defendant is not entitled to an instruction which incorrectly states the law." Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). When trial counsel fails to object to a jury instruction on the record that issue is precluded from appellate review. Green v. State, 119 Nev. 542, 545 (2003). The only review available in that instance is "plain error review." Id. In conducting plain error review, this Court must examine (1) whether there was "error," (2) whether the error was "plain" or clear, and (3) whether the error affected the defendant's substantial rights. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

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A. Instruction 17

Appellant claims that jury instruction number 17 was improper for failing to specify that Appellant was required to *know* that the victim, his student, was not a minor. Appellant's claim is without merit and should be denied.

Appellant's reliance on Garcia v. Sixth Jud. Dist. Ct., 117 Nev. 697 (2001) is misguided as that case dealt with a statute that is entirely different than NRS 200.310(1). In that case, the statute in question dealt with knowingly selling alcohol to a person under 21 years of age. In that statute, the word knowingly is placed before both "sells…alcohol" and "under 21 years of age." The intent listed in NRS 200.310(1) modifies the final section of the statute, where to be guilty the person must intend to perpetrate any unlawful act. Since the construction of the statutes is different, it cannot be said that the same intent requirements apply to both of them equally. As such, Appellant's claim is without merit and must be denied.

Appellant's claim that Jury Instruction 17 was improper was not objected to at trial and is reviewable only for plain error. The first prong of the plain error analysis is not satisfied in this instance, as Jury Instruction 17 was not given in error. Although NRS 200.310(1) is a specific intent statute, the intent required is that Appellant has the intent to "perpetrate upon the

person of the minor any unlawful act." Appellant makes a misguided argument that the specific intent applies to every section of the relevant piece of the statute. Only with a twisted reading of the statute would it be possible to say that the intent requirement shifts to require that the violator to *know* that the victim was a minor.

In fact, one of the unpublished cases cited by Appellant illustrates this understanding of the statute. In Anderson v. State, the court determined that the jury was allowed to infer intent from the actions of the defendant, and the intent that was allowed to be inferred was the intent to perpetuate an unlawful act on the person of the minor, and not that the defendant needed to know that the individual that he was perpetuating the unlawful on act was a minor. 2016 Nev. App. Unpub. Lexis 109, 5 (March 16, 2016). It cannot be said that the instruction was given in error because Instruction 17 states that to find Appellant guilty of first-degree kidnapping that there is no requirement "that the [Appellant] knew that the minor was under the age of 18." AA Vol. I 255. As such, Appellant's argument fails the first prong of the plain error analysis and must be denied.

As to the second prong of the plain error analysis, assuming arguendo that the instruction was given in error then it would be plain error. However,

since the instruction was not given in error Appellate review would not even get to this point.

Additionally, even assuming arguendo that the instruction was given in error it would not have affected Appellant's substantial rights due to the overwhelming weight of evidence in this case that Appellant knew, or should have known, that the student that he was teaching was a minor. In Doyle v. State, this Court was able to conclude that sufficient circumstantial evidence existed to convict the defendant of first-degree kidnapping. 112 Nev. 879, 892 (1996) (overruled on other grounds). In this case, the jury heard that Appellant was a teacher at the high school his victim attended. AA Vol. V 1019, Vol. VI 1247. They were able to hear that Appellant was, in fact, one of his victim's teachers. AA Vol. V 1019.

Finally, the jurors were able to hear about the extensive sexual relationship this teacher had with his student, which included numerous acts performed at the school and acts where he took her to a hotel to perform the sex acts. AA Vol. V 1028, 1030, 1031, 1035, 1037-1039, 1044, 1049, 1051. It cannot be said even assuming arguendo, that if the instruction was given in error that the instruction prejudiced Appellant in light of the overwhelming circumstantial evidence that the jury would have been able to utilize to infer that Appellant knew his victim was a minor. Additionally, as this Court in

Garcia v. Sixth Jud. Dist. Ct., 117 Nev. 697, 702 (2001) explained, constructive knowledge "may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry[.]" (citing NRS 193.017) As a result, Appellant's claim should be denied because he either knew or should have known that his student was a minor.

B. Appellant's Proposed Instruction

Appellant claims that he was prejudiced by the district court's denial of his proposed instruction on incidental kidnapping. His claim is without merit and must be denied.

As discussed supra, Appellant was appropriately found guilty of first-degree kidnapping. Additionally, the undisputed facts show that Appellant was guilty of sexual conduct between school employee and pupil (NRS 201.540). There is no requirement in NRS 201.540 for asportation of the victim. In fact, all that was necessary to find Appellant guilty of 201.540 was for the jury to find that he was over 21, was employed by the school, engaged in sexual conduct with a student that was over 16 but had not graduated, and that the student was attending the school where Appellant was employed. Asportation is well above and beyond what is necessary to find an individual guilty of violating NRS 201.540.

A separate charge for first-degree kidnapping will lie if the movement of the victim is not incidental to the associated offence and there is a substantially increased risk of harm beyond what is present in the associated offense. Wright v. State, 94 Nev. 415 (1978); Hampton v. Sheriff, Clark County, 95 Nev. 213 (1979); Jefferson v. State, 95 Nev. 577 (1979); Sheriff, Clark County v. Medberry, 96 Nev. 202 (1980); Turner v. State, 98 Nev. 243 (1982). When the case clearly illustrates that movement increased the risk of harm to the victim the trier of fact need not decide whether the movement was incidental to the associated offense. Sheriff, Clark County v. Medberry, 96 Nev. 202 (1980).

The facts surrounding the asportation in the instant case are similar to the ones surrounding the asportation in Isler v. Sherrif, Clark County, 92 Nev. 248, 250 (1976) where after the commission of the underlying felony the defendant drove the victim a mere half mile away and let the victim go. In that case, the victim was only transported one time, and only a distance of a half mile, but this Court found that even such a brief period of asportation was sufficient to satisfy the requirement that the defendant was not subject to dual liability.

In the instant case, Appellant was guilty of violating NRS 201.540 the instant that sexual conduct was initiated with his student. AA Vol. V 1028,

1030. However, just like the defendant in Isler, Appellant went above and beyond what was necessary to violate NRS 201.540 and also violated NRS 200.310(1) when he transported his victim away from her parents and increased the risk of harm to her. AA Vol. V 1035, 1037. It cannot be said that the violation of NRS 200.310(1) was merely incidental to the violation of NRS 201.540, and Appellant was not subject to dual liability. As such, Appellant's claim must be denied.

C. Appellant's Proposed Jury Instruction

Appellant claims that the district court committed reversible error by denying his proposed jury instruction. Appellant's claim is without merit and must be denied.

"District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. __, 195 P.3d 315, 319 (2008). Those decisions are reviewed for an abuse of discretion or judicial error. Id. This Court held in Williams v. State, 99 Nev. 530, 531 (1980) that when a defense theory of the case is supported by evidence, which if believed would support a corresponding jury verdict, that it is reversible error to not instruct the jury on the defense theory of the case.

In this case, Appellant does not cite to any evidence, which even if believed, would rise to the level required by Williams to necessitate a defense theory of the case instruction. In fact, the evidence presented at trial indicated unequivocally that

Appellant had, in fact, increased the risk of harm to his victim when he enticed her from her parent's home to various hotels to engage in sexual intercourse. AA Vol. V 1035, 1037. It cannot be said that the district court abused its discretion in denying Appellant's proposed jury instruction because the evidence presented did not support Appellant's theory of the case. As a result, Appellant's claim must be denied.

IV.
APPELLANT'S GENERAL VERDICT WAS PROPER

"[A] jury may return a general guilty verdict on an indictment charging several acts in the alternative even if one of the possible bases of conviction is unsupported by sufficient evidence." Rhyne v. State, 118 Nev. 1, 10, 38 P.3d 163, 169 (2002). "When alternate theories of criminal liability are presented to a jury and all of the theories are legally valid, a general verdict can be affirmed even if sufficient evidence supports only one of the theories." Bolden v. State, 121 Nev. 908, 913 (2005).

Appellant correctly states that the State charged him with first-degree kidnapping under three different theories of liability, but Appellant then erroneously says that the State "abandoned the first two theories during trial and proceeded only on the theory [Appellant] intended to commit an unlawful act on [his victim's] person." AOB 36; AA I 214, 216; AA Vol. VI 1321, 1346. Appellant's claim is a mischaracterization of what the State actually did during trial. Appellant's claim is based on argument the state posed during closing statements, where the state was

explaining to the jury the theory that best fit Appellant's actions. Nowhere in the remarks cited did the State say that the other theories were being abandoned. AA Vol. VI 1320-1323, 1345-1347. Appellant's claim is premised on a mischaracterization of the State's closing argument and must be denied.

Appellant next claims that none of the theories of liability were supported by sufficient evidence. This claim is inaccurate and should be denied. As was argued supra in **Section I**, Appellant committed the necessary acts to be charged with and found guilty of first-degree kidnapping. The uncontroverted evidence presented at trial indicated unequivocally that Appellant had, in fact, increased the risk of harm to his victim when he enticed her from her parent's home to various hotels to engage in sexual intercourse. AA Vol. V 1035, 1037. When, as here, the State presented sufficient evidence at trial to support at least one of the theories of liability, and the remainder of the theories are legally valid, then a guilty verdict resulting from a general verdict form should stand. Bolden v. State, 121 Nev. 908, 913 (2005). As such, Appellant's claim is without merit and must be denied.

V.
APPELLANT'S CONVICTIONS DID NOT VIOLATE DOUBLE JEOPARDY

Appellant next claims that his United States and Nevada constitutional rights were violated when he was charged with ten counts of sexual conduct between a teacher and a student because he was placed in double jeopardy for violating the statute multiple times. Appellant's argument is without merit and must be denied.

"[D]etermining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law." Castaneda, 132 Nev., Adv. Op. 44, 373 P.3d 108, 110 (2016). (internal quotation marks omitted). [**7] "[W]e review questions of statutory interpretation de novo." State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). "[W]hen a statute is clear on its face," we must afford the statute its plain meaning. *Id.* (internal quotation marks omitted).

NRS 201.520 defines sexual conduct in, pertinent part, as "Ordinary sexual intercourse, fellatio, cunnilingus or other oral-genital contact, physical contact by a person with the unclothed genitals or pubic area of another person for the purpose of arousing or gratifying the sexual desire of either person, and penetration, however slight, by a person of an object into the genital or anal opening of the body of another person for the purpose of arousing or gratifying the sexual desire of either person."

The instant case is similar to the situation faced in Shue v. State where the defendant was charged for each minor that was involved in activity that violated NRS 200.710(2). 407 P.3d 332, 337 (Nev. 2017). In Shue, this Court was tasked with determining if the NRS 200.710 could result in multiple violations for a single instance of prohibited conduct. Id. In that case, this Court reasoned that the statute's use of the singular term illustrated that the statute was to apply to each violation, and not per each series of prohibited conduct. Id. The same reasoning applies in the instant case, where the statute specifically prohibits "sexual conduct." The phrase

"sexual conduct is defined in Chapter 15 of the Nevada Revised Statutes as was listed supra. Each of the instances is in the singular form, and the statute uses the connecting word "or," which illustrates that each instance of conduct is a separate chargeable instance of sexual conduct.

Appellant makes a misguided argument that the phrase "engag[ing]" constitutes uninterrupted continuity of action. Appellant's argument fails to take into account the complexity of the English language and takes a myopic view of the word "engage" as it is used in the context of NRS 201.540. Although the term "engage" can be used to mean "engagement" in an activity that lasts for an extended period of time, it can also mean to "engage" in a single activity by doing one thing or *taking part in* one event. Black's Law Dictionary 608 (9th Ed. 2009). As a result, Appellant's argument that the word "engage" means a continued course of conduct is without merit and must be denied.

In this case, Appellant was charged with ten instances of sexual conduct with his student. AA Vol. I 213-217. Additionally, each instance of sexual conduct was proven at trial through evidence and witness testimony. AA Vol. V 1028, 1033, 1038-1039, 1044, and 1049. Since each instance of sexual conduct stands alone as a separate incident then it was proper for Appellant to be charged with, and ultimately convicted of, violating NRS 201.540 for each instance of sexual conduct that transpired between him and his student.

VI.
THE DISTRICT COURT PROPERLY HANDLED JURY QUESTIONS

Appellant asserts that the district court erred regarding a jury note during deliberations because the district court referred the jurors back to the instructions given by the court and their own experience. AA Vol. VI 1403-1404. This argument is without merit and should be denied.

"A district court has wide discretion in the manner and extent to which it answers the jury's questions during deliberation." Tellis v. State, 84 Nev. 587, 591 (1968). This Court held in Dawes v. State that the district court has broad discretion in determining "whether terms in an instruction should be further defined." 110 Nev. 1141, 1145 (1994) (citing Pena v. Ludwig, 766 S.W.2d 298, 305 (Tex. Ct. App. 1989)). Additionally, the Dawes court explained that words used in an instruction that are used in their ordinary sense do not require a further defining instruction. Id. at 1146 (citing See State v. Smith, 160 Ariz. 507, 774 P.2d 811 (Ariz. 1989) ("knowingly" need not be defined); State v. Barnett, 142 Ariz. 592, 691 P.2d 683, 685-86 (Ariz. 1984) (failure to define "intentionally" not error); 75B Am. Jur. 2d *Trial* at § 1237 (collecting numerous cases holding that "gross and willful misconduct," "knowingly," "corroboration," "deliberately" and "conspiracy" need no definition)).

In this case, the jury requested a further definition of the word enticement. AA Vol. VI 1400. The district court judge explained to counsel that it would instruct

the jurors to refer to the jury instructions, which were properly given (see argument supra), and that the jurors should rely on their own experience, and that the closing arguments were not to be taken as defining terms. Id. at 1400-1401. Neither party objected to the district court's answer to the juror's question. Id. at 1401-1403. Additionally, the district court noted that the dictionary definition of enticement "comported in large part with what [he] perceived the common definition to be, which is why [he] assumed counsel did not object[;]' when counsel for the State used the dictionary definition of enticement during their closing arguments. AA Vol. VI 1346-1347, 1402-1403.

Here, the district court did not abuse its discretion when it declined to answer the jury's question, because counsel did not propose an alternative answer to the jury's question, and the instructions the district court gave to the jury prior to their deliberations were proper. Jefferies v. State, 397 P.3d 21, 28 (Nev. 2017). Additionally, pursuant to the holding in Dawes the district court was not required to specifically define the term enticement because it was being used in its ordinary meaning, which ran parallel to the dictionary definition. AA Vol. VI 1402-1403. The district court's decision to view the word enticement as having a common meaning is bolstered by the fact that Appellant pointed out in his Opening Brief, where the Nevada Legislature declined to define entice in NRS 200.310, but it has been defined elsewhere in the Nevada Revised Statutes. AOB 48. The fact that the

Nevada Legislature chose not to define the word "entice" illustrates that they intended the word to be used in its common meaning, which is precisely what the district court judge decided. As a result, Appellant's argument is without merit and must be denied.

Appellant next argues that the district court erred when it failed to answer the jury's question under both Gonzalez and Jefferies. Appellant's claim is without merit and must be denied.

In the instant case, the district court did, in fact, answer the jury's question. The answer was not with an additional instruction, rather the district court referred the jury back to the proper instructions, and reminded them that they were to utilize their own experience in deciding this case. AA Vol. VI 1400-1401. The district court's response was an answer to the jury's question; it was just not a new instruction. Answering the jury's question kept the district court's conduct proper, and ensured that they would define entice with the common definition of enticement as the Nevada Legislature had intended. Additionally, since the district court used proper jury instructions (see argument supra), then its conduct was in compliance with the Jefferies holding as well. It cannot be said that the district court failed to comply with the case law that was in place at the time of its ruling, or after. As such, Appellant's claim must be denied.

Finally, Appellant claims that because he, a 32 year-old, and his 17 year-old high school student were engaged in a "consensual" relationship that he could not have ""lured," "induced," or wrongfully solicited" the victim to violate NRS 200.310(1). AOB 51. However (as discussed supra), this argument is without merit and does not add to the instant issue, which is that the district court properly responded to the jury's question.

VII.
THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

The standard of review for prosecutorial misconduct rests upon Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

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). First, this Court

determines whether the prosecutor's conduct was improper, and then second, whether the conduct warrants reversal. Id. With respect to the second step, this Court will not reverse if the misconduct was harmless error. Id. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89, 196 P.3d at 476.

Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d 476-77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. at 1189, 196 P.3d at 476-77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

A. The Prosecutor Did Not Commit Misconduct During Voir Dire

This Court held in Johnson v. State that:

> The purpose of "jury voir dire is to discover whether a juror 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court.'" And its scope rests within the sound discretion of the district court, whose decision will be given considerable deference by this court.

112 Nev. 1344, 1354-1355 (2005). "A prosecutor may not "blatantly attempt to inflame the jury." Valdez v. State, 112 Nev. 1172, 1191 (2008). When trial counsel fails to object at trial that generally precludes appellate review. Rose v. State, 123 Nev. 194, 208 (2007).

Appellant claims that the prosecution for the state discussed instructions and asked questions which were arguments during voir dire. Appellant's claim is without merit and must be denied. In this case, the prosecutor was attempting to ensure that the jury would be able to decide the case based on the requirements of NRS 200.310(1). AA Vol. VI 714-715, 717, 723-725, 730-731. In making that determination, the prosecution had to ensure that the potential jurors would be able to fulfill their duty and determine Appellant's guilt or innocence based on a correct understanding of the requirements of NRS 200.310(1). Id. The prosecutor asked potential jurors who they believed was responsible for preventing relationships between teachers and students. Id. at 720-721. The prosecution never asked any of the potential jurors that were also teachers to explain any sort of law to the other jurors, rather the prosecution asked the jurors their opinion of the law as it stands in Nevada. Id. at 721-723.

The prosecution asked a potential juror questions about the continuing classes they take as educators in Clark County regarding sexual boundaries but never asked the potential juror to explain the policies and procedures to other potential jurors.

Id. at 717-719.[4] The prosecution for the State used words like "we," "our," and "us" when referencing society as a whole, and the prosecutor and potential juror's community. Id. 718. Finally, the prosecution for the State asked the potential jurors that indicated that they had children general questions about their expectations with regard to the level of protection the school should offer children while they attend school. Id. at 733.

Appellant's claim of prosecutorial misconduct during voir dire fails because he has failed to highlight any conduct that was improper. This case is much like the situation faced in Johnson v. State where the State was merely inquiring into the potential juror's ability to carry out their responsibilities as jurors with respect to NRS 200.310. 112 Nev. 1344, 1355 (2005). Additionally, the use of terms like "us," "our," "we," and "your kids" were not inappropriate, because just like in Valdez v. State, 124 Nev. 1172, 1191 (2008), the prosecutor was using words that described the things that were being talked about during voir dire.

Appellant's trial counsel failed to object to any of the questions mentioned supra. As a result, his claim is only reviewable for plain error. Since the prosecution did not comment on a constitutional right or infect the trial with unfairness, then this claim is not reviewed under the constitutional standard. None of the questions asked

[4] It should be brought to this Court's attention that Appellant makes numerous inaccurate statements of the facts in this section on page 54 of his Opening Brief.

by the state were in error as it was illustrated supra. As such, Appellant's claim must be denied.

B. The Prosecutor Did Not Commit Misconduct During Opening Statements

Generally, a prosecutor has a duty to refrain from making statements in opening arguments that cannot be proved at trial. Riley v. State, 107 Nev. 205, 212, 808 P.2d 551, 555 (1991). 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). First, this Court determines whether the prosecutor's conduct was improper, and second, whether the conduct warrants reversal. Id. With respect to the second step, this Court will not reverse if the misconduct was harmless error. Id. at 1188, 196 P.3d at 476.

Importantly, a defendant is entitled to a fair trial, not a perfect one, and therefore "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044 (1985). Accord, Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001). "[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error." Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004) (citing King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000)). In determining prejudice, this Court considers whether a comment had: 1) a prejudicial impact on the verdict when considered in the context

of the trial as a whole; or 2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208-09, 163 P.3d at 418.

In this case, the prosecution put forth a theory of their case in opening statements. AA Vol. IV 883-884. Additionally, the prosecution was properly illustrating evidence that they expected to prove at trial, but the district court sustained Appellant's objections to two comments. Id. at 894, 888-889. Each time the court sustained Appellant's objections the jury was admonished to disregard the State's comment. Id.

Appellant claims that the State improperly argued, but what actually happened was the State was putting forward their theory of the case, and outlining what they expected to prove at trial. It is proper for a prosecutor to outline her theory of the case and propose facts she intends to prove. Garner v. State, 78 Nev. 366, 371 (1962) (citing State v. Olivieri, 49 Nev. 75 (1925)). None of instances during opening statements that Appellant claims were improper were of a constitutional nature. The State's theory of the case was not objected to at trial, so only the second and third comments are reviewable by this Court. In light of the overwhelming weight of evidence concerning Appellant's guilt presented at trial, it cannot be said that prosecutorial statements during opening arguments had any impact on the verdict when considered in the context of the trial as a whole. Appellant admits in his

Opening Brief that he did violate NRS 201.540.[5] As a result, it cannot be said that the jury's verdict had anything to do with the statements made by the prosecution during their opening argument, and Appellant's claim should be denied.

C. The Prosecutor Did Not Obstruct Appellant's Access To His Victim

Appellant claims that the State interfered with his trial counsel's ability to contact his victim. Appellant's claim is flatly belied by the record and must be denied. Appellant, again, mischaracterizes the testimony that was given prior to trial starting. Prosecution for the State brought it to the district court's attention that Appellant's victim had been contacted by Appellant's attorney the night before the victim was to testify. AA Vol. V 1008. The State had no objection to Appellant's counsel speaking to Appellant's victim. Id. at 1008-1009. Rather, what the State wanted brought to the court's attention is that the victim stated that Appellant's counsel told her the possible prison sentence Appellant was facing. Id. at 1008. Appellant's counsel denied making any statement regarding Appellant's potential prison sentence if he were to be found guilty. Id. The district court accepted

[5] Appellant only admitted his guilt after it was already proven beyond any doubt at trial that he had in fact had sexual relations with his 17 year-old student, however, he never admitted his guilt as Appellant's counsel claims in his argument. AOB at 58. In fact, all Appellant's trail counsel did was acknowledge what any rational person at the trial already knew, and that was that Appellant could no longer deny his guilt with respect to his violation of NRS 201.540.

Appellant's counsel's representation that no inappropriate comments were made in relation to the potential prison sentence. Id. at 1010.[6]

In this case, Appellant's trial counsel's representation was taken by the district court as truthful, and the trial moved on after a brief discussion by counsel and the court. Id. at 1008-1011. As a result, Appellant's claim is not eligible for review on appeal as his claim is belied by the record, and his claim must be denied.

D. The Prosecutor Did Not Commit Misconduct During Rebuttal Argument

1. The Prosecution Did Not Offer Her Personal Opinion Or Invoke Superior Legal Knowledge

Appellant claims that the prosecutions use of the phrase "I think," was improper. Appellant's argument is without merit and must be denied. It is improper for the prosecutor to inject personal opinion into her discussion of the defendant's guilt. Aesoph v. State, 102 Nev. 316, 322-23 (1986). Prosecutors, however, must be able to comment on the evidence that was developed at trial. Jimenez v. State, 106 Nev. 769, 773 (1990).

In commenting on evidence developed at trial, a prosecutor's "occasional use of the first person does not constitute misconduct" so long as the prosecutor is not suggesting a "secret knowledge of facts not in evidence." State v. Luster, 279 Conn.

[6] Appellant claims that on page 1010 of Volume V of Appellant's Appendix that the district court threatened Appellant's trial counsel with sanctions, but that did not happen.

414, 902 A.2d 636, 651, 654 (Conn. 2006); see also United States v. Jones, 468 F.3d 704, 708 (10th Cir. 2006) (holding that "[t]he prosecutor's occasional use of the first person" in closing argument is not improper). In Luster, the defendant appealed a conviction for manslaughter after he shot and killed a man with whom he was fighting. 902 A.2d at 643-44. With regard to the fight that led to the shooting, the Luster prosecutor stated during closing, "Was [the victim] trying to cause serious physical injury? I *don't* think *so." Id.* at 654 (alteration in original). The Connecticut Supreme Court reasoned that the limited use of the pronoun "I" is appropriate because "the use of the word 'I' is part of our everyday parlance" and because the prosecutor "should not be put in the rhetorical straight jacket of always using the passive voice, or continually emphasizing that he is simply saying I submit to you that this is what the evidence shows." Id. (internal quotations omitted). As a result, the Luster court held that this was not an expression of opinion because "the prosecutor merely used a rhetorical device to suggest an inference that could be drawn from the evidence." Id. Thus, a prosecutor's occasional use of phrases such as "I think" is not improper if the prosecutor is commenting on the admitted evidence.

The situation in Luster is very similar to the situation in the instant case where Appellant claims the prosecution improperly stated her opinions during closing statements. This Court has followed the Luster reasoning in the past, and the same logic is true today, that to hamstring a prosecutor by using a "rhetorical straight

jacket of…saying I submit to you," would be unreasonable. Use of a phrase like "I think" is not an expression of opinion, but rather a suggestion of an inference that can be drawn from the evidence submitted. As a result, Appellant's claim fails and must be denied.

Additionally, Appellant claims since the prosecution explain their theory of the case as it applied to NRS 200.310(1), that the State has somehow committed prosecutorial misconduct; specifically, because the State explained that the final clause in NRS 200.310(1) was drafter with situations just like the instant case in mind. AA Vol. VI 1348, AOB 65. What Appellant has failed to understand in his analysis of the statute, is that the Nevada Legislature did, in fact, design the statute with situations like this one in mind. Appellant hangs his argument on the fact that NRS 201.540 was not enacted until 1997, and that since the activity covered in that statute was not criminal when NRS 200.310(1) was codified that somehow the Legislature did not intend for NRS 200.310(1) to cover situations like the instant case. A plain reading of NRS 200.310(1) clearly illustrates that the Legislature did in fact intend to cover situations like the instant case with their use of the phrase "any unlawful act." The Nevada Legislature had to have known that other laws would be created and that certain activities would become criminal that had never been criminal before. As a result, their use of an open-ended phrase covering all unlawful conduct clearly illustrates that the Nevada Legislature intended to cover

Appellant's criminal activity with NRS 200.310(1), and as a result, his claim must be denied.

2. The Prosecutor Did Not Disparage Appellant Or Inflame The Jury's Passions

Appellant claims that when prosecution for the state used the term "our kids" that she was suggesting that Appellant could target the juror's children. AOB 66. Appellant's claim is a mischaracterization of the rebuttal argument and must be denied.

Prosecution for the State explained to the jury that the Nevada Legislature drafted the portion of NRS 200.310(1) that Appellant violated to protect the children of the State of Nevada. AA Vol. VI 1348, 1350. Nowhere in the prosecution's explanation of the class of people that the statute protects did she say anything about the juror's children or her own children. The prosecution correctly explained that NRS 200.310(1) protects the children of Nevada, which is the state that all of the jurors, and the prosecutor, reside. As a result, Appellant's claim is clearly a mischaracterization of the rebuttal argument and should be dismissed.[7]

[7] Appellant cites McGuire v. State, 110 Nev. 153, 158-159 (1984) to illustrate the point that a prosecutor is not supposed to suggest a jury place its children in the victim's place, however in McGuire the prosecutor stated "[s]o any one of your daughters, if that happens, there's no problem." Prosecution for the State in the instant case used the phrase "our children" with respect to the class of people that the NRS 200.310(1) was enacted to protect. The above-mentioned statements are vastly different and not appropriate for comparison.

Appellant next claims that when the State's prosecutor explained what enticement means, and placed it in an understandable context that Appellant was both disparaged and that the statement was inflammatory. Appellant has taken the statement out of context, again, and his argument is without merit.

Prosecution for the State was explaining to the jury during rebuttal argument how Appellant's inappropriate communication with his student is what enticed her to engage in the sexual relationship with Appellant. AA Vol. VI 1347. Specifically, the prosecutor was explaining what enticement was in a practical context and gave examples of what kind of conduct could potentially be enticement. Id. However, nowhere in the prosecution's rebuttal argument did she say Appellant's conduct was comparable to using a van to lure away children, rather she explained that NRS 200.310(1) prevents enticing children, which would include taking children in a van with promises of candy and also Appellant's conduct. As a result, the comment cannot be said to have been inflammatory toward Appellant, and his claim must be denied.

3. The Prosecution Did Not Argue An Uninstructed Legal Theory

Appellant claims that during rebuttal arguments the prosecution argued an uninstructed legal theory when she defined enticement to the jury. Appellant's claim is without merit and should be denied.

The prosecutor for the State defined enticement after Appellant's counsel suggested that in order to entice his victim away he would have had to have had dominion over her. AA Vol. VI 1333, 1347. The prosecution did not change their legal theory, or argue a theory that had not been placed in the instructions, rather she defined a word, which carries its plain meaning as it's used in NRS 201.540. Id. The prosecutor only defined entice after Appellant's counsel stated that in order to be in violation of the statute Appellant would have to have had "control or dominion over" his victim. Id. at 1333. Additionally, as Appellant has pointed out in his Opening Brief the district court did not provide an instruction for the word "entice." AOB 68. As such, by defining a word that carries its plain meaning in a statute with the plain meaning of the word there cannot be said to have been error.

Additionally, the district court judge cured any potential error that could have been caused by the prosecution when the court responded to the jury question regarding the meaning of the word "entice." (see argument Section VI)

E. There Was No Plain Error In This Case

Appellant claims that all of the allegations of prosecutorial misconduct listed supra constitute plain error. As discussed supra, none of the instances Appellant has brought to this Court's attention were in error.

As an initial matter, Appellant did not object to what he now refers to as "blatant misconduct" from the State. AOB 71. That being the case, this issued is

reviewable only for plain error. See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) ("Failure to object during trial generally precludes appellate consideration of an issue. Despite such failure, this court has the discretion to address an error if it was plain and affected the defendant's substantial rights."). In conducting plain error review, this Court must examine (1) whether there was "error," (2) whether the error was "plain" or clear, and (3) whether the error affected the defendant's substantial rights. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

As discussed supra, none of the instances Appellant has brought to this Court's attention were in error. As such Appellant's claim fails, however, assuming arguendo this Court disagrees Appellant's claim would still fail plain error review because his rights were not affected. In this case, Appellant admitted to violating NRS 201.540, and he admitted that he fulfilled all of the requirements of NRS 200.310(1), only arguing over semantics because his 17 year-old victim was engaging in a "consensual" relationship with her high school teacher. AOB at 58. As such, since Appellant freely admitted all of the facts necessary to sustain his conviction it cannot be said that his rights were affected and his claim must be denied.

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VIII.
APPELLANT'S CONFRONTATION CLAUSE RIGHTS WERE NOT VIOLATED

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, 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. 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986). 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.

This Court "generally review[s] a district court's evidentiary rulings for an abuse of discretion. … However, whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo." Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (citations and quotation marks omitted). Where the issue is the scope of cross-examination this Court shows great deference to the decision of a trial judge:

> We recognize that the district court has less discretion to curtail cross-examination where potential bias is at issue. See Jackson v. State, 104 Nev. 409, 412, 760 P.2d 131, 133 (1988); Bushnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979). Nevertheless, and

> consistent with the Confrontation Clause, trial judges "retain wide latitude" to restrict cross-examination to explore potential bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986); see also Davis v. Alaska, 415 U.S. 308, 316, 320, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974); Bushnell, 95 Nev. at 573, 599 P.2d at 1040 (recognizing that an inquiry into a witness's possible bias or motive to testify may be restricted when the inquiry was "repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness").

Leonard v. State, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001). Accord, Baltarzar-Monterrosa v. State, 122 Nev. 606, 619, 137 P.3d 1137, 1146 (2006) (impeachment for bias may be restricted to avoid "those inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness").

This Court reviews a district court's decision to exclude evidence for an abuse of discretion. See, e.g., Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008); McLellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

The district court prevented certain questions under the "Rape Shield" law, NRS 50.090. NRS 50.090 provides that--

> In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime, the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim.

This Court has delineated two exceptions to this general rule. In Miller v. State, 105 Nev. 497, 501, 779 P.2d 87, 89 (1989), this Court held that in a sexual assault case, NRS 50.090 does not bar the cross-examination of a complaining witness about prior *false* accusations. (emphasis added) Further, in Summit v. State, 101 Nev. 159, 163-64, 697 P.2d 1374, 1377 (1985), this Court held that prior sexual experiences of a child victim may be admissible to demonstrate that the child's prior sexual experiences could explain the source of the child's knowledge of the charged sexual activity and, in turn, demonstrate the child's ability to contrive a charge against the defendant. Prior to admitting such evidence, however, "the trial court

must undertake to balance the probative value of the evidence against its prejudicial effect." See NRS 48.035(1). "[T]he inquiry should particularly focus upon 'potential prejudice to the truthfinding process itself,' i.e., 'whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis.' " Id. at 163, 697 P.2d at 1377 (citation omitted).

"The trial court has sound discretion to admit or exclude evidence of a victim's prior false allegations or prior sexual experiences." Abbott v. State, 122 Nev. 715, 732, 138 P.3d 462, 473 (2006). "In the exercise of its sound discretion, the trial court should be mindful of the important policy considerations underlying the rape-shield statute, and accordingly should limit the admission of evidence of specific instances of the complainant's sexual conduct . . . without unduly infringing upon the defendant's constitutional right to confrontation." Summit, 101 Nev. at 164, 697 P.2d at 1377.

> "Such [rape shield] laws have generally been designed to reverse the common law rule applicable in rape cases, that use of evidence of a female complainant's general reputation for morality and chastity was admissible to infer consent and also to attack credibility generally. Thus, for example, it had been held: "It is a matter of common knowledge that the bad character of a man for chastity does not even in

> the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman." Such statutes as Nevada's have been described as "directed at the misuse of prior sexual conduct evidence based on this antiquated and obviously illogical premise." An additional purpose of such statutes is "'to protect rape victims from degrading and embarrassing disclosure of intimate details about their private lives.'" Finally, "[t]he restrictions placed on the admissibility of certain evidence by the rape-shield laws will, it was hoped, encourage rape victims to come forward and report the crimes and testify in court protected from unnecessary indignities and needless probing into their respective sexual histories."'

Lane v. Second Judicial Dist. Court, 104 Nev. 427, 443-44, 760 P.2d 1245, 1255-56 (1988) (quoting Summit) (internal citation omitted).

The district court did not abuse its discretion in limiting Appellant's questions to his victim about her past sexual conduct for several reasons. First, the district court allowed Appellant to ask a question getting to the heart of the point he was trying to make on cross-examination. AOB 73-74. Additionally, the jury asked a question of Appellant's victim that enabled her to answer about how she liked the attention Appellant was giving her. AOB 76. AA Vol. V 1148. Second, consent was never an issue in this case, as the charges were based on Appellant's status at

the time he committed the crimes charged. As such, any questions regarding Appellant's victim's previous sexual history would have been irrelevant to the crime charged. Finally, Appellant has a narrow and misguided focus on the nature of enticement and seems to insinuate that because a 17 year-old had sex before that she could not be susceptible to an authority figure's persuasion. AOB 76-77. Any questions about Appellant's victim's prior sexual conduct would have been irrelevant and would have only served to harass or humiliate the witness. As such, the district court appropriately limited the scope of cross-examination with respect to Appellant's victims past sexual history.

Finally, Appellant claims that the State benefitted from the district court's ruling by improperly arguing that Appellant enticed his victim. Appellant's claim is misguided and mischaracterizes the State's argument. The State's use of the phrase "sexual inexperience" did not imply that Appellant's victim was inexperienced as compared to a normal 17 year-old. Appellant fails to recognize that as a 32 year-old man he was dealing with a sexually inexperienced individual, in comparison, because he was having a sexual relationship with a teenager. It cannot be said to be improper argument to call a 17 year-old inexperienced in comparison to a 32 year-

old, especially in the context of sexual experience.[8] As a result, Appellant's claim must be denied.

IX.
THE STATE'S WITNES GAVE APPROPRIATE TESTIMONY

District courts have considerable discretion with regard to determining the admissibility of evidence. Castillo v. State, 114 Nev. 271, 277 (1998) (citing Atkins v. State, 112 Nev. 1122, 1127 (1996)). In particular, a trial court has a large amount of discretion "regarding the admissibility and competency of opinion testimony, either expert or non-expert[.]" Watson v. State, 94 Nev. 261, 264 (1978) (citing State v. Crook, 565 P.2d 576 (Idaho 1977)).

Since defense counsel failed to object to this testimony at trial, this claim may only be reviewed for plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." NRS 178.602. The similarly worded federal rule has been interpreted to mean that an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an "error;" (2) the error is "clear or obvious, rather than subject to reasonable dispute;" (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the

[8] If Appellant's argument is taken to mean that his victim was promiscuous and that somehow her level of promiscuity implies that she could not be enticed by him, then the protections of NRS 50.090 and 48.069 he claims are inapplicable would be more entirely applicable as those statutes were put in place to protect from exactly this sort of argument.

outcome of the district court proceedings;" and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Marcus, No. 08-1341 (S.Ct. May 24, 2010) (2010 WL 2025203); Puckett v. United States, ___ U.S. ___, 129 S.Ct. 1423, 1428 (2009).

The United States Supreme Court has explained that the plain error doctrine is limited and "authorizes the Courts of Appeals to correct only 'particularly egregious errors…that seriously affect the fairness, integrity or public reputation of the judicial proceedings.'" United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 (1982)). The Court held that the plain error rule is to be used "sparingly" and only when there has been a fundamental error so basic and prejudicial that justice could not have been done, or when the error deprives the accused of a fundamental right. Young, 470 U.S. at 15.

Nevada precedent has similarly applied these same criteria. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002). To show that an error affected his substantial rights, an appellant must demonstrate "actual prejudice or a miscarriage of justice." Green, 119 Nev. at 545, 80 P.3d at 95. This has also been explained as "a prejudicial impact on the verdict when viewed in context of the trial as a whole." Rowland, 118 Nev. at 38.

Moreover, claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 17 P.3d 397, 415 (2001). Where counsel fails to object at trial, the party must demonstrate that "the misconduct amounted to plain error, so that absent the misconduct, the verdict would have been different." Id. In Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991), this Court held that it is not required to address the merits of allegations of improper closing arguments when an objection was not raised at trial. This Court held that as a general rule, "to entitle an Appellant to have improper remarks of counsel considered on appeal, objections must be made to them at the time, and the court must be required to rule upon the objection, to admonish counsel, and instruct the jury." State v. Hunter, 48 Nev. 358, 367, 232 P.778, 781 (1925); Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002). Similarly, in Pellegrini v. State, 104 Nev. 625, 628, 764 P.2d 484, 487 (1988), this Court held that it will not reverse a verdict on the basis of prosecutorial misconduct where the appellant fails to object, there is overwhelming evidence of guilt, and the offensive remarks did not contribute to the verdict.

In this case, Appellant claims that when Detective Caldwell testified about how he included relevant text messages in his report containing the messages between Appellant and his victim that Detective Caldwell improperly opined as to his opinion of Appellant's guilt. AOB 78. However, all Detective Caldwell was

discussing was how he gathered the information he included in his report, and nowhere in Appellant's Opening Brief does Appellant suggest that Detective Caldwell actually suggested Appellant was guilty. Rather, Appellant appropriately points out that what Detective Caldwell was testifying to was his criteria for determining what text messages went into his report. AA Vol. V 1165. As such, the testimony cannot be said to have been given in error since the detective did not opine as to guilt or innocence, but rather as to what constituted evidence.

Even assuming arguendo that the testimony was given in error, the error would not have affected the outcome of the proceedings because the evidence against Appellant was overwhelming. As such, Appellant's claim must be denied.

X.
APPELLANT'S SENTENCE DID NOT VIOLATE DOUBLE JEOPARDY

Appellant claims that the district court did not have jurisdiction to correct his sentence because the motion for remand did not address the aggregate sentence. Appellant's claim is without merit and should be denied.

NRS 176.565 states: Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission *may be corrected by the court at any time and after such notice, if any, as the court orders*.[9] (emphasis added) Here, the incorrect aggregation of the sentence was a clerical error

[9] A plain reading of Appellant's Opening Brief at page 80 indicates that a clerical error is the cause for the instant claim.

that was properly corrected by the district court pursuant to NRS 176.565. Correcting the clerical error made here did not raise the maximum period of incarceration in an impermissible way, rather it ensured that the Judgment of Conviction reflected the correct aggregate sentence based on the sentence imposed by this Court for each count Defendant was found guilty of. Therefore, the district court was not incorrect when it filed the Amended Judgment of Conviction, and adjusted the aggregate sentence to reflect the correct aggregate sentence of 72 to 228 months.

XI.
THERE WAS NO CUMULATIVE ERROR

Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994). In addressing such a claim, the relevant factors are: (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, 854-55 (2000).

As discussed supra, Appellant has not presented any meritorious claims of error. As such, there is nothing to cumulate and this claim fails. Moreover, the issue of guilt was not close – as discussed supra, there was significant evidence against Appellant. Further, even assuming arguendo that any alleged error had been

substantiated, such error would have been harmless given the overwhelming evidence of guilt in this case. As such, the claim of cumulative error is without merit.

Therefore, for all these reasons, Appellant's claims fail. Accordingly, the Judgment of Conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Judgement of Conviction be AFFIRMED.

Dated this 5th day of February, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 11,919 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of February, 2018.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 5th day of February, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

WILLIAM M. WATERS
Deputy Public Defenders

STEVEN S. OWENS
Chief Deputy District Attorney

BY */s/ J. Garcia*
Employee,
Clark County District Attorney's Office

SSO/Justin Wilson/jg